IN THE SUPREME COURT OF THE STATE OF NEVADA

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WILLIAM P. CASTILLO, Petitioner, vs. E.K. McDANIEL, Warden, Ely State Prison, CATHERINE CORTEZ MASTO, Attorney General for Nevada, Respondents.	No. 56176

APPELLANT'S OPENING BRIEF

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

Eighth Judicial District Court, Clark County

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I. STATEMENT OF JURISDICTION

A) The Basis for the Supreme Court's Appellate Jurisdiction

This Court has jurisdiction over this appeal from a final order dismissing a post-conviction petition for relief under NRS 34.830.

B) Filing Dates Establishing the Timeliness of this Appeal

Mr. Castillo filed the underlying Petition for Writ of Habeas Corpus on September 18, 2009 which challenged his conviction and sentence. 1 AA 184. On May 12, 2010, the court below entered and Order which denied Mr. Castillo's claims. 21 AA 5127. Mr. Castillo timely filed a Notice of Appeal on June 4, 2010. 21 AA 5138.

C) Assertion That the Appeal Is from a Final Order or Judgment.

The court below entered an order dismissing Mr. Castillo's petition for writ of habeas corpus. Mr. Castillo hereby appeals the order of the court below.

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Throughout these proceedings, Mr. Castillo was indigent. The issues in his state habeas petition related to the fairness of his trial and the effectiveness of counsel appointed to represent him. Mr. Castillo raises the following issues:

A. Will Nevada Execute a Defendant Who had "A Mitigation Case That Bears No Relation to the Few Naked Pleas for Mercy Actually Put Before the Jury," But Which His Attorneys Never Discovered?

B. Will Nevada Execute Mr. Castillo Even Though, under Current Law, His Mitigating Circumstances Outweigh the Aggravating Circumstances?

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O. Does the Cumulative Effect of All These Errors Justify Relief?

III. STATEMENT OF THE CASE

Mr. Castillo is in the custody of the State of Nevada at Ely State Prison in Ely, Nevada, pursuant to a First Degree Murder conviction and death sentence.

A Petition for Writ of Habeas Corpus was filed on September 18, 2009, challenging Mr. Castillo's conviction and sentence. 1 AA 184. On May 12, 2010, the court below entered and order which denied relief on each of Mr. Castillo's claims. 21 AA 5127. Mr. Castillo hereby appeals the order of the court below.

IV. STATEMENT OF FACTS

The victim, Isabelle Berndt, contracted for the installation of a roof over the 1995 Thanksgiving holiday. 15 AA 3608-3609. Mr. Castillo and others were hired to assist with installing the roof by Harry Kumma, a roofer employed by Dean Roofing Company. 15 AA 3651-3656. While working at the victim's home, Mr. Castillo found a key and stated that he would later return. TT 8/29/96 A.M. at 84.

Early morning, on December 17, 1995, smoke was observed coming from the victim's home. 15 AA 3667. Attempts were made to enter the home but, due to the fire and smoke, they were futile. The victim was later found in her bed.

Ben Hoge, an arson investigator, determined the heaviest smoke and fire damage was in the living room. 15 AA 3717. The fire was started in the living room and in the victim's bedroom; it was not accidental. 15 AA 3718-3719, 3728. Hoge concluded the fire was started with accelerant.[1] 15 AA 3731. A bottle of lighter fluid was observed near the kitchen. 15 AA 3736.

Dr. Robert Bucklin concluded the victim suffered multiple crushing-type injuries, with lacerations to her head, crushing injuries of her jaw, and a fracture of her jaw.[2] 16 AA 3796-3800. Bucklin believed the injuries all occurred within the same general time period. 16 AA 3805. He concluded the victim died from an intra-cranial hemorrhage which resulted from blunt force trauma to her face and head.16 AA 3802. The injuries were consistent with being hit with a crow bar or a tire iron. 16 AA 3803.

A search of the home revealed that dresser drawers were open, closet doors were open and the contents of the bedroom appeared displaced. A jewelry box was open. A pillow, which partially covered the victim's face, matched a pillow in another room. 16 AA 3797, 3808-3812. The victim's daughter stated her mother owned a unique silverware

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[1] Fireman Cliff Mitchell examined the home using a dog trained to locate petroleum accelerates. The dog "alerted" in the living room and a crime lab verified that samples were positive for a petroleum product. 16 AA 3756-3770.

[2] The victim suffered no injuries from fire or smoke. 16 AA 3804.

set which was missing. 15 AA 3620. The victim's daughter further testified that other items were missing, including a video cassette recorder, a number of knitted Christmas booties and eight $50.00 United States Savings Bonds. 15 AA 3623; 3638-3639.

Tammy Jo Bryant, Mr. Castillo's girlfriend, testified they shared an apartment with Michelle Platou. 16 AA 3836-3837. Platou owned an automobile. 16 AA 3839. After six o'clock in the evening on December 16, Mr. Castillo and Platou left and did not return until three o'clock the following morning. 16 AA 3841. At that time, Mr. Castillo and Platou had a video cassette recorder, a box of silverware, and a bag of knitted booties. 16 AA 3842-3843. Shortly thereafter Mr. Castillo and Platou left again. 16 AA 3844.

The next morning Bryant learned that Mr. Castillo and Platou broke into a home. They heard a person, who they believed to be a man, snoring loudly. 16 AA 3861. Bryant learned that, when Platou bumped a wall, they panicked and Mr. Castillo hit the victim with a tire iron from Platou's vehicle. 16 AA 3846-3847. The second time Mr. Castillo and Platou left, they returned to the home to set it afire; because Platou believed she left fingerprints in the victim's home. 16 AA 3848. Bryant described Mr. Castillo as nervous and upset–he felt guilty over the events. 16 AA 3860-3862.

Kirk Rasmussen also worked on the victm's roof. 16 AA 3899-3900. Mr. Castillo rode with Rasmussen to work. 16 AA 3895. On December 18, Mr. Castillo was quiet and had a "weird look." 16 AA 3904. He told Rasmussen that he murdered an 86 year old lady. 16 AA 3905-3908. Mr. Castillo stated that he thought the victim was a man. 16 AA 3909-3910. Mr. Castillo went to the victim's home to steal property in order to obtain money.[3] 16 AA 3911. On the following morning, Mr. Castillo again spoke of the murder and a television news report. 16 AA 3918. That afternoon Rasmussen observed the victim's burnt home and went to police. 16 AA 3920.

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[3] Mr. Castillo offered to sell Charles McDonald a silverware set. 16 AA 3950-3951. When McDonald stated he did not have the money, Mr. Castillo offered to accept payments. 16 AA 3953.

Although police obtained a search warrant for Mr. Castillo's apartment, he consented to the search. 16 AA 3849; 16 AA 3965, 3986. Mr. Castillo was cooperative and pointed things out to police. 16 AA 3859. Silverware, a video cassette recorder and knitted booties were recovered. 16 AA 3849; 16 AA 3965. Police seized a bottle of lighter fluid and a notebook with notations about the value of a "VCR," camera and silverware. 16 AA 3852-3854.

Mr. Castillo was arrested and provided two tape recorded statements. 17 AA 4015-4018. In his second statement, Mr. Castillo admitted that he committed the offense. 17 AA 4021-4024.

V. SUMMARY OF THE ARGUMENT

The court below should have reversed Mr. Castillo's conviction and sentence. Mr. Castillo appeals to this Court to correct the errors of the court below, to recognize the meritorious claims and to reverse both his conviction and sentence.

In Claim A, Mr. Castillo contends that his representation at trial, and in his initial state post-conviction habeas proceedings, failed to adhere to the professional norms in existence at the time of his trial and post-conviction proceedings. Had an adequate investigation been conducted, available mitigation evidence been presented, and an adequate record maintained, at least one juror would have found Mr. Castillo guilty of a lesser offense or sentence.

In Claim B, Mr. Castillo demonstrates that two aggravating circumstances found by the jury are now invalid because the same conduct was used by prosecutors to obtain his conviction. Two aggravating circumstances remain and the jury found three mitigating circumstances. Mr. Castillo contends the Court cannot re-weigh the mitigating and aggravating circumstances and should remand his case for a new penalty hearing.

In Claim C, Mr. Castillo contends that prosecutors repeatedly used evidence of his tattoos, reflecting "white power," even though they presented no evidence this offense is connected to his abstract beliefs.

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In Claim D, Mr. Castillo contends prosecutors unfairly argued in his case in order to sway the jury unfairly. Among the instances of improper conduct is the prosecutor's argument explaining statutory mitigating circumstances for which Mr. Castillo offered no evidence.

In Claim E, Mr. Castillo argues that his jury was never required to find that he committed the offense deliberately. Mr. Castillo demonstrates there is some evidence his actions were not deliberate.

In Claim F, Mr. Castillo contends the victim impact evidence presented by prosecutors went beyond that previously sanctioned by the Court. The evidence was presented in such a manner as to deny Mr. Castillo the ability to rebut or confront it.

In Claim G, Mr. Castillo contends that his juvenile criminal record may not be used in the prosecutor's pursuit of the death penalty.

In Claim H, Mr. Castillo contends that the organic and psychological disorders he suffers contributed to this offense and diminished his moral culpability.

In Claim I, Mr. Castillo contends the deadly weapon enhancement entered in his case was unconstitutionally vague.

In Claim J, Mr. Castillo contends the reasonable doubt instruction the jury received was unconstitutional because it raised the standard by which the jury could acquit him.

In Claim K, Mr. Castillo contends that his constitutional right to confront witnesses was violated by the substantial evidence prosecutors presented in the penalty trial through a law enforcement officer and juvenile worker.

In Claim L, Mr. Castillo contends that it is inappropriate for popularly elected judges to try capital cases because no reasonable person could withstand the popular pressures which are pushed on the judiciary to be "tough on crime."

In Claim M, Mr. Castillo demonstrates that the Nevada lethal injection protocol is cruel and unusual punishment in that the protocol does not ensure he is unconscious before injection of further torturous lethal chemicals. Moreover, Mr. Castillo demonstrates that

Nevada does not follow its own protocol.

In Claim N, Mr. Castillo addresses the Nevada procedural default rules, demonstrates good cause to address his petition, and argues that the failure to address his claims will result in a fundamental miscarriage of justice.

In Claim O, Mr. Castillo contends the Court should consider each of the errors identified in his brief cumulatively.

VI. ARGUMENT

Standard of Review

The denial of a petition for writ of habeas corpus, whether on substantive or procedural grounds, is reviewed de novo. See State v. Haberstroh, 119 Nev. 173, 184, 69 P.3d 676, 683 (2003); Beardslee v. Woodford, 358 F.3d 560, 568 (9th Cir. 2004); Fields v. Calderon, 125 F.3d 757, 759-760 (9th Cir. 1997). Because the district court failed to conduct an evidentiary hearing below, its purported factual findings are not entitled to deference. See Somes v. State, 187 P.3d 152, 158 (Nev. 2008) (adequate record necessary for clear error review of factual findings); cf Stankewitz v. Woodford, 355 F.3d 706 (9th Cir. 2004) (where state court did not afford habeas petitioner hearing on allegations, federal court required to hold evidentiary hearing and resulting factual findings reviewed for clear error).

A. Will Nevada Execute a Defendant Who Had "A Mitigation Case That Bears No Relation to the Few Naked Pleas for Mercy Actually Put Before the Jury," but Which His Attorneys Never Discovered?[4]

"The Supreme Court has changed the law on ineffective assistance of counsel, and few ... seem to have noticed." Gregory J. O'Meara, The Name Is the Same, but the Facts Have Been Changed to Protect the Attorneys: Strickland, Judicial Discretion, and Appellate Decision-making, 42 Val. U. L. Rev. 687 (2008). Such is true in Nevada.

While Strickland v. Washington, 466 U.S. 668 (1984), announced the appellate rule through which claims of ineffective assistance of counsel will be evaluated, the Supreme Court expounded on this rule in three cases since the turn of the century: Williams v. Taylor,

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[4] Petition, Ground One. See 1 AA 200.

529 U.S. 362 (2000); Wiggins v. Smith, 539 U.S. 510 (2003); and, Rompilla v. Beard, 545 U.S. 374 (2005).[5] Many commentators believed, maybe for the first time, the constitutional command of effective counsel was veridical. See Christopher Seeds, Strategery's Refuge, 99 J. Crim. L. & Criminology 987 (2009) ("By popular account, the Supreme Court's recent decisions on effective assistance of counsel in capital sentencing– aggressive critiques of counsel's failures to investigate and present mitigating evidence – initiate[d] an era of improved oversight of the quality of legal representation in death penalty cases"). State and federal courts grappled with the application of Williams,[6] Wiggins[7] and Rompilla.[8] Yet this Court never analyzed the effect of the Supreme Court landmark cases, and cited to the cases in only two unpublished opinions. See Rodriguez v. State, 2009 WL 3711919, at 3, (Nev. Nov. 3, 2009) (citing Williams and Wiggins); Harkins v. State, 2010 WL 3385767 at 1 (Nev. June 9, 2010) (citing Wiggins). Interestingly, this Court cited Strickland on at least 257 occasions since Williams was decided.

In Strickland, the Supreme Court evaluated professional norms for defense attorneys which existed before 1980. Since that time, the professional norms have changed--standards were amended and additional standards were adopted for defense counsel

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[5] Additionally, the Supreme Court considered claims of ineffective assistance of counsel in Padilla v. Kentucky, 130 S.Ct. 1473 (2010), and Bobby v. Van Hook, 130 S.Ct. 13 (2009).

[6] A computer assisted search of the citation of Williams v. Taylor, 529 U.S. 362 (2000), revealed the case appeared in 25,654 documents, including opinions from every federal circuit, and state and federal courts in every state except Alaska, Nebraska, New Mexico, North Dakota, Rhode Island, South Dakota, and Wyoming. Of these states, Alaska, New Mexico, North Dakota, Rhode Island do not have the death penalty; Nebraska, South Dakota and Wyoming have fewer than twelve people on death row. See http://www.deathpenaltyinfo.org accessed on January 9, 2011.

[7] A computer assisted search of the citation of Wiggins v. Smith, 539 U.S. 510 (2003), revealed the case appeared in more than 5000 state and federal court opinions. This Court cited Wiggins in two unpublished opinions. Rodriguez v. State, 2009 WL 3711919, at 3, (Nev. Nov. 3, 2009); Harkins v. State, 2010 WL 3385767 at 1 (Nev. June 9, 2010)

[8] A computer assisted search of the citation of Rompilla v. Beard, 545 U.S. 374 (2005), revealed the case appeared in more than 1300 state and federal court opinions. This Court never cited Rompilla.

representing a defendant charged with a capital crime. See American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989); ABA Standards for Criminal Justice Prosecution Function and Defense Function (1993); American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003); Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (2008). It was not until Williams, Wiggins, and Rompilla that the Supreme Court addressed contemporary professional norms relating to defense attorneys in a death penalty case. It is imperative that this Court consider Mr. Castillo's claim in light of current cases and the professional norms which existed at the time of his trial–the same standards considered by the Supreme Court in their recent cases. Moreover, the similarities between the representation in these cases and the representation in Mr. Castillo's case illuminate the constitutional error in this case.

1. Constitutional Right to Effective Counsel

The constitutional right to counsel is a right to the effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). The Supreme Court held:

> ... That a person who happens to be a lawyer is present at trial alongside the accused ... is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

Strickland v. Washington, 466 U.S. 668, 685 (1984). Mr. Castillo was not only entitled to a fundamentally fair trial, but to counsel who would act to ensure the fairness of all proceedings. The Supreme Court adopted a two prong appellate test to evaluate counsel's representation. First, an attorney has a duty to "bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id. at 688; see Powell v. Alabama, 287 U.S. 45, 68-69 (1932). This prong is focused on the determination of whether counsel's representation was deficient. Strickland, 466 U.S. at 687. Prevailing norms of practice, such

as the standards adopted by the American Bar Association, guide the appellate court in evaluating counsel's representation. Id. at 688-89.

The second prong in Strickland focuses on the effect of deficient representation. The defendant must have suffered prejudice. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687. The Court will consider whether counsels' errors created a reasonable probability that, absent such errors, the result of the trial would be different. Id. at 694.

The constitutional right to effective counsel applies to both trial and appellate counsel. Evitts v. Lucey, 469 U.S. 387, 396 (1985) ("A first appeal as of right ... is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney"); Hernandez v. State, 117 Nev. 463, 467, 24 P.3d 767, 770 (2001). Likewise, the constitutional right to the effective assistance of counsel applies in state and federal courts. Leslie v. Warden, 118 Nev. 773, 775, 59 P.3d 440, 443 (2002); Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Moreover, this Court held that the right to effective assistance of counsel extends to state post-conviction habeas proceedings. Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997) ("We now hold that ... a petitioner who has counsel appointed by statutory mandate is entitled to effective assistance of that counsel.").

2. Williams, Wiggins, and Rompilla

In Williams, Wiggins and Rompilla, the Supreme Court applied the same two prong appellate test it adopted in Strickland. What changed was the "prevailing norms of practice" by which counsel's representation must be judged. The defendant in Strickland was arrested in 1976 and pled guilty to kidnaping and murder. Strickland, 466 U.S. at 671. Defense counsel spoke with the defendant's immediate family, sought no psychiatric examination, and completed almost no investigation. Id. 466 U.S. at 672. Instead, counsel argued his client "should be spared death because he had surrendered, confessed, and offered to testify against a co-defendant and because [he] was fundamentally a good person who had

briefly gone badly wrong in extremely stressful circumstances." Id. 466 U.S. at 673.

The Supreme Court held that "a court deciding an actual ineffectiveness claim 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. Id. 466 U.S. at 690. To evaluate counsel's conduct, the Court looked to "prevailing professional norms," citing the ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2nd ed. 1980) ("The Defense Function"). Id. 466 U.S. 688. The Court held "[c]ounsel's strategy choice was well within the range of professional reasonable judgments, and the decision not to seek more character or psychological evidence than was already in hand was likewise reasonable." Id. 466 U.S. at 699.

a. Williams v. Taylor

In Williams, the defendant was convicted of a murder which occurred in 1985. Id. 529 U.S. at 367. Trial counsel failed to investigate, prepare or present testimony which illustrated the defendant's deprived childhood, including neglect, abuse and incarcerated parents.[9] Id. 529 U.S. at 395. Although such an investigation would have also uncovered unfavorable evidence, this fact alone did not excuse counsels' failure to fulfill their obligation to investigate.[10] The Supreme Court again looked to the ABA Guidelines–the

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[9] ... The record establishes that counsel did not begin to prepare for that phase of the proceeding until a week before trial. ... They failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. ....

Williams, 529 U.S. at 395.

[10] Of course, not all of the additional evidence was favorable to Williams. The juvenile records revealed that he had been thrice committed to the juvenile system–for aiding and abetting larceny when he was 11 years old, for pulling a false fire alarm when he was 12, and for breaking and entering when he was 15. ...

Williams, 529 U.S. at 396.

same guidelines considered in Strickland– and held that such evidence "demonstrate[d] that trial counsel failed to meet their obligation to conduct a thorough investigation of the defendant's background." Id. 529 U.S. at 396.

b. Wiggins v. Smith

The defendant in Wiggins was convicted by the trial judge, but elected to be sentenced by a jury. Id. 539 U.S at 515. Defense counsel sought to "bifurcate" the proceedings by having the jury first determine whether the defendant was a "principal" under Maryland law and, if so, thereafter present mitigating evidence. Id. 539 U.S. at 515. The trial judge refused to bifurcate the proceedings and counsel were instructed to incorporate all arguments in the sentencing proceedings.[11] Although counsel informed the jury they would produce evidence of the defendant's difficult life, counsel ultimately did not do so. Instead, counsel made a general offer of proof of evidence they would present if the hearing was bifurcated.[12] Id. 539 U.S. at 515-516.

During post-conviction proceedings, counsel presented an "elaborate social history ... containing evidence of the severe physical and sexual abuse [the defendant] suffered at the hands of his mother and while in the care of a series of foster parents."[13]

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[11] Counsel informed the jury that "[y]ou're going to hear that Kevin Wiggins has had a difficult life. It has not been easy for him. But he's worked. He's tried to be a productive citizen, and he's reached the age of 27 with no conviction for prior crimes of violence and no convictions, period. ... I think that's an important thing for you to consider." Wiggins, 539 U.S. at 535.

[12] Counsel "explained that they would have introduced psychological reports and expert testimony demonstrating Wiggin's limited intellectual capacities and childlike emotional state on the one hand, and the absence of aggressive patterns in his behavior, his capacity for empathy, and his desire to function in the world on the other...." Wiggins, 539 U.S. at 516.

[13] The mitigating evidence first disclosed during post-conviction proceedings included:

> ... [The defendant's] mother, a chronic alcoholic, frequently left Wiggins and his siblings home alone for days, forcing them to beg for food and to eat paint chips and garbage. Mrs. Wiggins' abusive behavior included beating the children for breaking into the kitchen, which she often kept locked. She had sex with men while her children slept in the same bed and, on one occasion,

Wiggins, 539 U.S. at 516. The Maryland Supreme Court and the federal court of appeals held trial counsels' representation was effective; counsel were aware of at least some of the mitigating evidence but strategically chose to focus their defense on who was directly responsible for the murder. Id. 539 U.S. 518-519; see Wiggins v. State, 724 A.2d 1, 15 (Md. 1999); Wiggins v. Corcoran, 288 F.3d 629, 639-640 (4th Cir. 2002). These courts believed that counsel "likely knew further investigation would have resulted in more sordid details surfacing, ... [but] counsel's knowledge of the avenues of mitigation available to them was sufficient to make an informed strategic choice to challenge ... direct responsibility for the murder." Wiggins, 539 U.S. at 519 (citation and quotations omitted).

The Supreme Court disagreed. A strategical decision to focus on one defense, to the exclusion of another, will not excuse counsel's failure to investigate and uncover mitigating evidence. Wiggins, 539 U.S. at 522 (citing Williams, 529 U.S. at 390). The appropriate focus is on counsel's decision to stop an investigation. Id. 539 U.S. at 523-524. The scope of an investigation must be determined by the evidence which arises in that investigation. Id. 539 U.S. at 525 ("[A]ny reasonably competent attorney would have realized that pursuing these leads was necessary in making an informed choice among possible defenses ...."). A reviewing court, considering a claim of ineffective assistance of counsel, must look at the reasonableness of the investigation. Id. 539 U.S. at 527. If counsel abandons the investigation at an unreasonable juncture, strategic decisions regarding the defense pursued are uninformed. Id. 539 U.S. at 527, 533; see Strickland, 466 U.S. at 690-

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> forced petitioner's hand against a hot stove burner–an incident that led to petitioner's hospitalization. At the age of six, the State placed Wiggins in foster care. [The defendant's] first and second foster mothers abused him physically and, as [the defendant] explained ... the father in the second foster home repeatedly molested and raped him. At age 16, [the defendant] ran away from his foster home and began living on the streets. He returned intermittently to additional foster homes, including one in which the foster mother's son allegedly gang-raped him on more than one occasion. After leaving the foster care system, Wiggins entered a Job Corps program and was allegedly sexually assaulted by his supervisor.

Wiggins, 539 U.S. at 516-517 (citations omitted).

691 ([S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."). In Wiggins, counsels' "decision to end their investigation when they did was neither consistent with the professional standards that prevailed in 1989, nor reasonable in light of the evidence counsel uncovered in the social services records– evidence that would have led a reasonably competent attorney to investigate further." Id. 539 U.S. at 534.

c. Rompilla v. Beard

In Rompilla, the Supreme Court considered whether attorneys, who investigated but failed to find mitigating evidence, which was later uncovered, failed to meet the prevailing professional norms. Id. 545 U.S. at 379, 381. The defendant and his family denied that mitigation existed; the defendant was not interested in a mitigation investigation and, to some extent, obstructed counsel in their attempts to investigate. Id. 545 U.S. at 381. Counsel consulted at least three mental health experts. Id. The state and federal appellate courts held this investigation was sufficient, that there was "...no reason to believe [an additional] search would yield anything further." Id. 545 U.S. at 378-379; Commonwealth v. Rompilla, 72 A.2d 786 (Pa. 1998); Rompilla v. Horn, 355 F.3d 233, 252 (3rd Cir. 2004). The jury never heard evidence that the defendant was born to an alcoholic mother and that he suffered organic brain damage and extreme mental disturbance resulting from fetal alcohol syndrome. They never learned the defendant was likely unable to conform his conduct to the law and possibly suffered from mental impairment. Rompilla, 545 U.S. at 392-393.

In spite of counsels' failure to discover the mitigating evidence, such evidence was available. Indeed, the court's file for the defendant's prior conviction, as well as school, medical and prison records, all suggested the existence of additional mitigation, documenting the defendant's life, his mother's intoxication, the condition of his home and a low IQ score. Rompilla, 545 U.S. at 392-393. The court file was a public record–a conviction alleged as aggravating evidence by the prosecution. Id. 545 U.S. at 384, 389. Therefore, Rompilla is distinguished from those cases where the trial attorney simply failed to investigate his client's

background– Rompilla's counsel conducted a social history investigation and consulted multiple experts. The investigation simply did not involve specific records which would have led counsel to the available mitigating evidence.

Such an investigation was inadequate. The Supreme Court found that "it is difficult to see how counsel could have failed to realize that without examining the readily available file, they were seriously compromising their opportunity to respond to a case for aggravation." Id. 545 U.S. at 385. The need for such evidence was not only common sense: The ABA Guidelines specifically directed counsel to obtain and review such records. Id. 545 U.S. at 387. The Court held that, even in light of the investigation conducted, "[i]t flouts prudence to deny that a defense lawyer should try to look at a file he knows the prosecution will cull for aggravating evidence ...." Id. 545 U.S. at 389.

d. What Changed?

An appellate court must "apply the instructions contained in the Supreme Court's post-AEDPA ineffective assistance of counsel cases to inform and construe the meaning of Strickland as it applies to [the petitioner's] trial and post-conviction proceedings." Pinholster v. Ayers, 590 F.3d 651, 665 (9th Cir. 2009). First, and foremost, the Supreme Court emphasized that counsel's representation must be judged by the professional norms which prevailed at the time of trial. A cursory social history investigation which was acceptable in 1980, was unacceptable in 1990. In each case the Supreme Court consulted the ABA Guidelines to determine the prevailing professional norm. See Padilla, 130 S.Ct. at 1482 ("Although they are only guides, and not inexorable commands, these standards have been adapted to deal with the intersection of modern criminal prosecutions ....") (citations and quotation omitted).

Defense counsel are obligated to conduct a thorough investigation into the charges and the defendant's background. Williams, 529 U.S. at 396. Investigation is required even if it may unearth evidence which is unfavorable to the defendant. Williams, 529 U.S. at 396. Investigation is required even if counsel ultimately decides to present a defense which will not include that evidence. Williams, 529 U.S. at 396; Wiggins, 539 U.S.

at 522-523. Indeed, an investigation is required even if the defendant and his family are uncooperative or obstructive. Rompilla, 545 U.S. at 381.

A decision to forego or stop an investigation must itself be reasonable in light of the prevailing professional norm. Wiggins, 539 U.S. at 523. The scope of an investigation is controlled by the information obtained; the court must consider whether a reasonably competent attorney would further pursue the investigation. Wiggins, 539 U.S. at 525. Ultimately, a claim of ineffective assistance of counsel must be judged by the reasonableness of counsel's actions, not by their quantum. Rompilla, 545 U.S. at 389.

3. Mr. Castillo's Representation

a. The Aggravating Evidence

Prosecutors alleged six statutory aggravating circumstances, including: prior violent convictions, commission of a felony murder, commission of a crime to avoid lawful arrest, and commission of a crime to receive something of monetary value. See NRS 200.033(2)(b), (4), (5) & (6). The jury heard evidence of Mr. Castillo's juvenile criminal history; Mr. Castillo was referred to juvenile authorities on many occasions, beginning when he was eight years of age.[14] 17 AA 4187. Mr. Castillo repeatedly ran away from his home and state detention facilities. 17 AA 4210, 4218, 4225. Mr. Castillo was committed to the Nevada Youth Training Center on five occasions, beginning at age eleven. 17 AA 4237. Prosecutors argued that counseling was provided to Mr. Castillo and his parents and that Mr. Castillo was intelligent, with no known mental health problems. 17 AA 4179-4184.

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[14] These referrals included: emotional instability, being a runaway, vagrancy, violation of curfew, larceny, destruction of county property, carrying a weapon, threat to life, burglary, attempted murder, and, arson. 17 AA 4187-4190, 4192-4196. Mr. Castillo set fire to his own home, kicked a girl, broke a car window, and set fires at the Circus Circus Casino (at ten years of age). 17 AA 4202-4208. When he was eleven, Mr. Castillo poured industrial detergent into a vat of mashed potatoes at Clark County Juvenile Court Services. 17 AA 4214. The jury heard evidence of the underlying facts of many of these referrals. 18 AA 4271-4275, 4282.

The jury learned that Mr. Castillo committed criminal acts as an adult. Witnesses described a robbery/"purse snatching" for which Mr. Castillo was convicted.[15] 18 AA 4289-4298. Other witnesses described Mr. Castillo's scheme with an employee of the National Parks Service who reported a robbery, but provided proceeds to Mr. Castillo. 18 AA 4357, 4359-4363. There was another incident in Mr. Castillo's apartment complex when police were called because of an altercation between Mr. Castillo and another resident; she stated that he threatened to "get her," hit her, and attempted to force his way into her apartment. 18 AA 4373-4379.

The jury learned of disciplinary issues which arose during Mr. Castillo's previous incarcerations including an assault on an inmate who "snitched" the location of tattooing equipment,[16] and an assault in which Mr. Castillo allegedly hit another inmate with a chain and lock.[17] 18 AA 4334-4340. Mr. Castillo was disciplined when paper was found jammed into the lock of his cell door. 18 AA 4336. Finally, the jury heard evidence that Mr. Castillo admitted that he previously used methamphetamine and robbed people. 18 AA 4342-4343.

Finally, the jury heard victim-impact evidence. The victim's daughter described her mother's multi-generational teaching career and the effects of her death on family and friends. She described the victim's handmade gifts for children and was allowed to read from sympathy cards the family received after the victim's death. 18 AA 4432-4443. The victim's grandchildren described their relationship with the victim, the victim's relationship with her great-grandchildren, as well as the impact the victim (and her death) had on each of their lives. 18 AA 4401, 4412, 4429.

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[15] During his incarcerations, Mr. Castillo obtained his high school diploma and a certificate in welding. He attended classes in carpentry, auto body repair, small engine repair and data processing. 18 AA 4300.

[16] Mr. Castillo had no evidence of any altercation on his body and that equipment may not have been in his cell. 18 AA 4345-4350, 4355-4356.

[17] No lock was ever found and Mr. Castillo's threats could have been in response to the threats made upon him. Another inmate indicated that Mr. Castillo punched the inmate after he hit Mr. Castillo. 18 AA 4351.

b. Mitigation

` Mr. Castillo's attorneys presented five witnesses in his penalty trial, including a psychologist. Only one of these witnesses–Mr. Castillo's mother–was familiar with his background or social history.

Mr. Castillo's records demonstrated that Dr. Kirby Reed diagnosed him with a personality disorder at ten. 17 AA 4209. Mr. Castillo received services from Parole, Probation, mental health counseling, Children's Behavioral Services, foster home placement, Spring Mountain Youth Camp, and the Third Cottage Program. 17 AA 4222.

Mr. Castillo's mother, Barbara Sullivan, described the uncertainty he encountered as a child. 19 AA 4550. Mr. Castillo's biological father was abusive and had no relationship with his son. 19 AA 4558. Mr. Castillo's father had a significant criminal history involving violence and robbery.[18] 19 AA 4559. Mr. Castillo's father attempted to kill Sullivan three times; she was ultimately institutionalized. 19 AA 4570. The family lived with different relatives, moving when they were asked to leave. 19 AA 4552. Mr. Castillo was left with various relatives as his mother worked as a prostitute.[19] 19 AA 4563.

When Mr. Castillo was seven, Sullivan married Joe Castillo and the couple brought Mr. Castillo to Nevada. 19 AA 4565-4567. The couple had two more children. Sullivan never treated Mr. Castillo as she treated other children–she resented Mr. Castillo because of his father; she was unable to love him. 19 AA 4567-4569. Sullivan testified that she sought professional help for Mr. Castillo, which was unsuccessful. She believed Mr. Castillo slipped through the cracks. 19 AA 4572-4574.

Dr. Lewis Etcoff, a neuro-psychologist, reviewed records provided by Mr. Castillo's attorneys and described that parental dysfunction contributed to Mr. Castillo's early confusion and chaotic life. 18 AA 4450-4453. Mr. Castillo's father was "criminally

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[18] Mr. Castillo's four uncles had a similar history. 19 AA 4560. Mr. Castillo's grandfather was emotionally and physically abusive–he once shot Mr. Castillo's father. 19 AA 4561-4562.

[19] Mr. Castillo was once left with his Uncle "Max" who was mentally unstable and physically abused him. 19 AA 4571.

insane" and his mother suffered depression and mental illness, receiving electroconvulsive therapy. 18 AA 4453-4456. Dr. Etcoff did not believe Mr. Castillo's mother was equipped to be a parent. 18 AA 4462.

Dr. Etcoff related that Mr. Castillo was abused by his step-father– locked in a room and told to urinate in a pan, forced to eat chili peppers until he vomited, and beaten with a thick leather belt. 18 AA 4467-4468. Mr. Castillo was once left with an uncle who was an alcoholic and beat him such that he was unable to leave the home. 18 AA 4470.

Dr. Etcoff believed that Mr. Castillo suffered a reactive attachment disorder. He was unable to form normal human bonds; this mental illness leads to disturbance– emotionally, behaviorally, and mentally. 18 AA 4457. The only person in Mr. Castillo's life who provided affection was his grandmother. When, as a young child, his grandmother's dog received his grandmother's love, Mr. Castillo drowned the dog. 18 AA 4458. Dr. Etcoff believed that Mr. Castillo's delinquent behavior was directly related to his reactive attachment disorder. 18 AA 4461. When he was nine, Mr. Castillo was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). The co-existence of ADHD and a reactive attachment disorder increased the likelihood of problems between Mr. Castillo and authority figures. 18 AA 4464-4466. Dr. Etcoff concluded Mr. Castillo's illnesses developed into an inability to control inappropriate impulses and a lack of conscience. 18 AA 4471. Dr. Etcoff testified that the abuse and neglect Mr. Castillo suffered, coupled with the lack of appropriate psychological and psychiatric care, deprived Mr. Castillo of any chance in life. 18 AA 4475-4476. Finally, Dr. Etcoff testified that Mr. Castillo must be incarcerated– his mental illnesses created a danger of uncontrolled anger.[20] 18 AA 4495.

c. <u>Trial Counsels' Investigation Was Inadequate</u>

Trial counsel's investigation was essentially limited to an interview with his mother, reviewing a portion of Mr. Castillo's records, and Dr. Etcoff's cursory evaluation. No effort was made to investigate the extent of violence in Mr. Castillo's family, his early

[20] The danger of such anger will subside with age. 18 AA 4496.

foster-care placement, or the accuracy of his mother's ultimate testimony. Although Dr. Etcoff indicated a need to interview and investigate Mr. Castillo's mother and step-father, this was never accomplished. Moreover, although counsel retained Dr. Etcoff, a neuro-psychologist, they never requested a neuro-psychological evaluation. Ultimately, the perfunctory investigation, and Dr. Etcoff's limited evaluation, deprived Mr. Castillo's jury of any real understanding of his life.

An adequate social history investigation into Mr. Castillo's life demonstrated a multi-generational and repeating cycle of physical and emotional abuse, neglect, violence and mental illness in both his mother and father's families. Such an investigation documented the repeated violent, suicidal or homicidal acts which Mr. Castillo observed as a child, and its affect on his development. Moreover, such an investigation included a full neuro-psychological examination which revealed an organic brain disability.

In many respects, Mr. Castillo's childhood paralleled that of his mother. 1 aa 218. Both were neglected and unloved, physically and mentally abused, and both were abandoned to the very same charitable organization–German St. Vincent's Children's Catholic Charities.[21] 1 AA 219; 4 AA 814; 4 AA 854; 5 AA 1071, 1122. Yet neither Mr. Castillo or his mother were allowed to develop normally. Mr. Castillo's mother disappeared for weeks, abandoning Mr. Castillo to one relative or another. 4 AA 851; 858. On at least four occasions, she attempted to leave Mr. Castillo with Catholic Charities.[22] 1 AA 235-236; 7 AA 1712-1713, 1716. Foster care provided little more than a short break from the confusion–at the most crucial periods of his development, Mr. Castillo's mother returned him

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[21] Mr. Castillo's maternal grandfather was also abandoned to the foster care system. 1 AA 220; 5 AA 1122.

[22] Mr. Castillo's mother failed to follow through with her arrangements on the second occasion. After Mr. Castillo's mother abruptly removed him from foster care and prevailed in the litigation Catholic Charities instituted to prevent her from doing so, Catholic Charities refused to accept Mr. Castillo unless his mother would assign them custody. She refused. 1 AA 235-236; 7 AA 1724, 1727-1729, 1731-1733.

to uncertainty.[23] 1 AA 237-239; 4 AA 996-5 AA 1002. She successfully fought at least two court battles to protect her right to do so. 1 AA 236-237; 7 AA 1668-1669; 1707, 1732-1733. And she abandoned Mr. Castillo once again. On one occasion, Mr. Castillo's mother pinned a note to his clothes and left him on his grandparents' doorstep. 4 AA 823. Mr. Castillo's mother failed to provide him a safe and stable home–she had never known one herself.

Mr. Castillo and his mother were forced to cope whenever their mothers had sexual partners who were more important than their children. 1 AA 219; 4 AA 818; 5 AA 1122. Sexual partners who, in one form or another, abused the children in their home. 1 AA 221; 4 AA 816-818; 837-839. Perhaps the most discouraging aspect of counsels' investigation is that all of this evidence was supported by available records.

Any child born to Mr. Castillo's family was forced to observe, and experience, mental illness.[24] 1 AA 223. Mr. Castillo's grandfather was discharged from military service for mental illness and an attempted suicide. 1 AA 224; 5 AA 1051. His grandmother suffered several "nervous breakdowns," was admitted to the hospital, and was addicted to prescription medication. 1 AA 224; 4 AA 856. Mr. Castillo's mother attempted suicide on at least six occasions.[25] 1 AA 223; 4 AA 820; 7 AA 1720. His aunt, who also attempted suicide, suffered mental illness. 1 AA 224; 4 AA 854; 6 AA 1367; 8 AA 1906. Mr. Castillo's father was ultimately adjudged criminally insane.

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[23] Mr. Castillo made substantial progress during his two periods in foster care. 1 AA 237-239; 4 AA 996-998; 7 AA 1718-1719.

[24] It appears that almost every member of Mr. Castillo's family abused drugs. 7 AA 1712. His mother used cocaine and marijuana and his father took drugs. Mr. Castillo's father was addicted to heroin and experimented with LSD and marijuana. 1 AA 245; 4 AA 823; 859; 5 AA 1037, 1043, 1045; 7 AA 1707.

[25] Mental health treatment for Mr. Castillo's mother included hospitalization, therapy, medication and, ultimately, electroshock therapy. 1 AA 223; 8 AA 1770; 4 AA 820-821.

Any child born to Mr. Castillo's family was also forced to observe, and experience, violence.[26] 1 AA 225. Spousal abuse, if not accepted, was prevalent. 1 AA 226; 4 AA 820; 829-831; 832-835; 842; 5 AA 1028, 1040. Such abuse prevailed in at least three generations. 4 AA 820; 829-831; 833-835; 842. Mr. Castillo's father once locked his mother and wife in a room before setting it on fire.[27] 4 AA 819; 845; 5 AA 1036. Another attack on his mother was stopped when Mr. Castillo's grandfather shot his father.[28] 5 AA 1029; 6 AA 1344. Mr. Castillo saw his father in a "really bloody" bar fight. 4 AA 785. Mr. Castillo's father also threw him against a wall or across the room. 1 AA 240-241; 4 AA 801-802; 5 AA 1026, 1036-1041. Uncle Max used a "long willow stick" to beat Mr. Castillo, leaving him with marks on his legs and back and unable to leave the home. 1 AA 244-245; 4 AA 789; 823; 850. Violence was a family norm.

Mr. Castillo was forced to endure abuse even after he moved into the home shared by his mother and Joe Castillo. 1 AA 241-244. Although prosecutors characterized Mr. Castillo's mother and step-father as concerned parents who tried, 17 AA 4195-18 AA 4264, the jury never learned of the abuse and physical beatings which occurred in the home. Id.; 4 AA 859; 806. Mr. Castillo was beaten with belts and other objects, kicked in the ribs, forced to eat chili peppers, and locked in a room with pan to relieve himself.[29] 1 AA 241-

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[26] Mr. Castillo's mother began to "spank" him even before he was a year old. 7 AA 1710.

[27] Mr. Castillo's father and his brothers each had a significant criminal history. 1 AA 228; 4 AA 841, 846-847; 5 AA 1027; 7 AA 1597-1598. The criminal acts which Mr. Castillo's father participated included burglary, drugs, tampering with a motor vehicle, assault, kidnaping and rape. 1 AA 228-229; 4 AA 799; 843-844; 5 AA 1027, 1036-1037, 1040-1041, 6 AA 1297, 1305, 1339, 1348-1349. He used a knife or gun to make his threats real. 4 AA 833; 5 AA 1034. 1297, 1339-1340. Mr. Castillo's father, also known as "Animal," was a member a notorious local gang reputed to engage in murder, rape, robbery, extortion, assault and drug sales. 4 AA 843; 8 AA 1923.

[28] Ultimately, Mr. Castillo's father beat and injured almost every woman in his life. 4 AA 798; 814; 833. Mr. Castillo once told his foster parents that "I'm afraid my daddy might hurt my mommy." 1 AA 245; 7 AA 1719.

[29] Previous counsel failed to discover a child abuse report which documented physical injuries caused by Joe Castillo and evaluations by juvenile authorities which suggested Joe Castillo used excessive physical punishment and that Mr. Castillo asked

242; 4 AA 787; 852; 5 AA 1164-1194; 7 AA 1590-1592. He was treated much different than his siblings.[30] 1 AA 243; manually filed DVD containing video.

It should be no surprise that Mr. Castillo also endured neglect and violence in the various state facilities in which he was forced to reside. Mr. Castillo's family essentially abandoned him to such facilities, wanting to have little or nothing to do with him. 1 AA 249; 7 AA 1642-1643, 1645. Again, when Mr. Castillo seemed to do well, he was removed. 1 AA 250; 7 AA 1650-1651. Mr. Castillo was physically abused in the Nevada Youth Training Center by a counselor and forced to participate in "gladiator school" where juveniles were encouraged to fight each other.[31] 1 AA 247-249; 4 AA 863, 865; 8 AA 1838-1842.

d. <u>Inadequate Investigation led to Inadequate Expert Assistance</u>

Trial counsel retained a neuro-psychologist, Dr. Lewis Etcoff, to evaluate Mr. Castillo, review his records and present testimony. However, Dr. Etcoff's assistance, and ultimately his opinion, was limited by counsels' instructions– as well as the information available to him. Dr. Etcoff did not perform a neuro-psychological examination because no one requested that he do so. 2 AA 251; 4 AA 991-993. Dr. Etcoff was provided no records regarding Mr. Castillo's biological family–indeed, he had few records from the first eight years of Mr. Castillo's life. 2 AA 251; 4 AA 991-993; 6 AA 1390. Although he requested interviews with Mr. Castillo's mother and step-father, no such interviews were conducted. 2 AA 251; 4 AA 992. In many respects Dr. Etcoff was in the same position as Mr. Castillo's jury–there was sufficient evidence of his violent actions, the worst behaviors he ever exhibited, but no real understanding of the violence, neglect, abuse and abandonment which

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to be placed in a foster home. 1 AA 242; 7 AA 1659-1660; 1662.

[30] Although Mr. Castillo's mother essentially admitted this fact in her testimony, there existed compelling evidence in the family's videotape collection which demonstrated Mr. Castillo life with his mother and step-father. 1 AA 243; manually filed DVD containing video.

[31] Once again, previous counsel failed to obtain records relating to Mr. Castillo, the Nevada Child Welfare Services found the allegation of physical abuse by a counselor to be "substantiated." 1 AA 248; 8 AA 1838-1842.

brought a child to such circumstances. Although Dr. Etcoff may have had the training and experience to suspect such circumstances existed, to even suggest areas to investigate, he was ultimately left with the evidence provided him. 2 AA 252-253.

Much of what Dr. Etcoff could discern was provided by Mr. Castillo himself. An adequate investigation rebuts any biases inherent in self-reporting–biases which may exist in his interview with Mr. Castillo or, perhaps, in his mother's testimony. 2 AA 252-253; 4 AA 991-992. Dr. Etcoff's evaluation, opinion, and diagnosis, were as inadequate as the investigation which failed to provide the evidence he needed. 2 AA 252; 4 AA 992.

Two additional experts evaluated Mr. Castillo and reviewed the same materials provided Dr. Etcoff–as well as the evidence resulting from an adequate investigation into Mr. Castillo's background and social history. Dr. Jonathon Mack is a respected neuro-psychologist, who is able to evaluate such evidence and people with a focus on organic issues which exist in the brain.[32] Dr. Rebekah Bradley is a psychologist who specializes in Post-Traumatic Stress Disorder (PTSD); she is the director of a PTSD program for the Veterans' Administration.[33] The necessity of Dr. Bradley's evaluation of Mr. Castillo for PTSD was directly related to the events which occurred in the first eight years of his life–when the significant traumatic episodes occurred–and records from this period were never provided to Dr. Etcoff.

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[32] Not only can Dr. Mack assess personality issues in the same manner as Dr. Etcoff attempted to accomplish, his evaluation specifically allowed him to determine if Castillo's brain suffered some organic injury which affected his behavior. Dr. Mack's comprehensive written report was attached to the petition as 4 AA 887. His curriculum vitae was attached as 4 AA 954.

[33] Dr. Rebekah Bradley's comprehensive written findings regarding her review of Mr. Castillo and his social history was attached to the petition as 4 AA 861. Her curriculum vitae was attached as 4 AA 880.

The violence, neglect, abandonment and mental illness which pervaded Mr. Castillo's life were related to his actions later in life, including the underlying offense.[34] Dr. Mack found it "abundantly clear that Mr. Castillo's early childhood was marked by extreme inconsistency, primarily stemming from his mother's intensely ambivalent, approach-avoidance behavior towards him from when he was an infant onwards. 2 AA 253-254; 4 AA 915. Dr. Mack documented "extremely violent and scary (especially as a toddler) events, including [Mr. Castillo's] mother's sexual exploits with men." 2 AA 254; 4 AA 915.

Mr. Castillo's social history led him to suffer a reactive attachment disorder and PTSD.[35] 2 AA 254; 4 AA 867; 4 AA 916, 925. Reactive Attachment Disorder results when children are unable to bond with a parent in the first four years of life.[36] 4 AA 870. This disorder inhibits a person's ability to respond to situations in socially acceptable manners or to develop normal relationships.[37] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 130 (4th ed., text revision, 2000). The disorder may become severe when "caregivers are not only unavailable, but are also threatening or abusive as was the case with Mr. Castillo." 2 AA 259, 4 AA 870.

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[34] Dr. Bradley concluded that "[o]ver the course of [Mr. Castillo's] childhood, adolescence and young adulthood, [he] was exposed to a number of adverse events that are likely to have a significant impact on him." 2 AA 255; 4 AA 863.

[35] Posttraumatic Stress Disorder results from "exposure to traumatic/stressful events often involving threat to the life or physical integrity of oneself or of others." 4 AA 867. Dr. Bradley found that Mr. Castillo was "exposed to events of this type beginning in early childhood and persisting across the course of his childhood." Id.; 2 AA 256.

[36] Dr. Bradley found it "abundantly clear that Mr. Castillo's childhood did not provide him the appropriate environment for the development of a secure attachment." 4 AA 870.

[37] In contemporary society, reactive attachment disorder is the substantial concern related to the adoption of children from foreign orphanages. www.nim.nig.gov/medlineplus/ency/article/001547.htm (accessed January 17, 2011); see also www.ldschurchnews.com/articles/50919/Supporting-adoption.html (accessed January 17, 2011) (adopted children suffered from cerebral palsy, shaken baby syndrome, autism, and reactive attachment disorder."). "If young children feel repeatedly abandoned, isolated, powerless, or uncared for–for whatever reason– they will learn that they can't depend on others and the world is a dangerous and frightening place." http://helpguide.org/mental/parenting_bonding_reactive_attachment_disorder.htm (accessed January 17, 2011)

PTSD leads children to act out behaviors of impulsivity, irritability, anger or inattentiveness. 4 AA 867. Dr. Bradley explained that such a disorder may have led Mr. Castillo to be "emotionally numb" and left him with difficulty in "feeling a full range of emotions." 2 AA 256; 4 AA 867. The existence of PTSD in childhood significantly raises the risk for PTSD as an adult. 2 AA 257; 4 AA 867-873.

A defense to trauma in life is dissociation–a condition in which an individual divorces himself from the situation before him–a parallel consciousness. 2 AA 258; 4 AA 861-879; see Sadock, Benjamin James, Sadock, Virginia Alcott, Kaplan & Sadocks Synopsis of Psychiatry, 676 (9th ed. 2003). Dr. Bradley determined that Mr. Castillo reported "a significant level" of dissociative amnesia, even in early childhood. 2 AA 258-259; 4 AA 869.

The multi-generational evidence of abandonment, violence, drug and alcohol abuse, and mental illness provided important evidence for an expert. 2 AA 260-261. Not only does such documentation support the findings of early traumatic episodes in Mr. Castillo's life, but the existence of "family members with mental illnesses and substance use related problems increases an individual's risk for developing those types of problems." 2 AA 261; 4 AA 874. In other words, the existence of these issues in the lives of his family made it more likely Mr. Castillo would suffer the same or similar issues. Id.

The varied mental illnesses and conditions which Mr. Castillo suffered from, beginning in childhood, remained untreated at the time of his offense. Additionally, Dr. Mack discovered that Mr. Castillo suffered from a cognitive disorder–an organic condition in his brain– which led him to overreact to external stimulation. The confluence of these circumstances provide insight into how the offense occurred. 2 AA 254; 4 AA 916-917. As Dr. Mack observed:

> Mr. Castillo was under extreme emotional duress due to the activation of his Posttraumatic Stress Disorder by the specific circumstances of the criminal incident as they unfolded. It is my further opinion, as stated within a reasonable degree of psychological and neuropsychological certainty, that Mr. Castillo's Posttraumatic Stress Disorder combined ... with his organic tendency to be overreactive to environmental inputs as

> a direct consequence of his Cognitive Disorder NOS and underlying difficulties with sensory integration and sensory modulation to render him incapable of conforming his behavior to the requirements of the law.

2 AA 254; 4 AA 917.

e. Other Conduct Below Professional Norm

In addition to previous counsel's failure to conduct an adequate investigation, Mr. Castillo identified other actions by counsel which fell below the professional norm. These errors allowed unreliable evidence before the jury. For example, counsel failed to object when a police officer offered the testimony of an alleged victim of a burglary. 2 AA 262; 18 AA 4307-4311 (Testimony by Officer Michael Eylar). Officer Paul Ehlers was allowed to present similar testimony from a victim of a robbery. 2 AA 262; 18 AA 4315-4328 (Testimony by Officer Paul Ehlers). Neither victim appeared to testify.

Trial counsel failed to prepare defense witnesses for their testimony. Jerry Harring, a counselor at the Nevada Youth Training Center, was unaware of Mr. Castillo's home life and full criminal history. 2 AA 263. Sonny Carlman, a correctional officer who observed Mr. Castillo during his pre-trial incarceration, was unaware of his criminal history. 2 AA 265. Tammy Jo Bryant lived with Mr. Castillo but, on cross-examination, was forced to admit he "smoked pot." 2 AA 266; 19 AA 4539-4546. Such cross-examination could not have surprised trial counsel and such evidence is easily elicited during direct examination. At a minimum, a brief conversation would have allowed these witness to expect the coming cross-examination.[38] 2 AA 264-265.

Finally, counsel allowed the trial judge broad discretion to excuse prospective jurors with no input from counsel, or even an opportunity to object. 1 AA 207; 13 AA 3179. Nowhere in the record are the underlying reasons for the trial judge's exercise of this discretion apparent–denying Mr. Castillo appellate review of the trial judge's decision to

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[38] Moreover, an adequate investigation into Mr. Castillo's social history and background would have answered the prosecutors' cross-examination of Jerry Harring regarding Mr. Castillo's home life and background. Such an investigation would have prepared Dr. Lewis Etcoff for the questions he was asked during cross-examination. Ante, Claim A at 8.

excuse at least twenty-six prospective jurors. 1 AA 207; 13 AA 3179-3202. Moreover, and once again without objection, the trial judge re-ordered the jury list each time a prospective juror sought to be excused for a non-statutory reason. 1 AA 207; 13 AA 3180-3197. In other words, if a prospective juror asked to be excused for an economic reason, the trial judge moved their name to the bottom of the list of prospective jurors–increasing the likelihood they would not be selected to serve on the jury. The random nature of the jury called to hear Mr. Castillo's case was upset and altered–without objection.

4. The Professional Norm

Mr. Castillo was convicted of First Degree Murder and sentenced to death in August, 1996. Mr. Castillo's representation must have met the professional norms which prevailed in 1996. Wiggins, 539 U.S. at 524; Rompilla, 545 U.S. at 385-387. The Supreme Court previously discerned these professional norms by considering the American Bar Association standards or guidelines for the relevant period. Williams, 529 U.S. at 396; Wiggins, 539 U.S. at 524; Rompilla, 545 U.S. at 387; Padilla, 130 S.Ct at 1482 ("We long have recognized that prevailing norms of practice as reflected in American Bar Association standards and the like are guides to determining what is reasonable.") (quotations and citation omitted); but see Bobby, 130 S.Ct. at 17.

a. The Guidelines

At the time of Mr. Castillo's trial, the American Bar Association (hereinafter "ABA") published two relevant guidelines. In 1989, the ABA adopted guideline which were focused on defense counsel in death penalty cases.[39] ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) (hereinafter "Guidelines"). These guidelines were tailored to the responsibilities of defense counsel in death penalty cases because such cases "have become so specialized that defense counsel has duties and

[39] New guidelines were adopted in February 2003. ABA Guidelines for the Appointement and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003) in 31 Hofstra L. Rev. 913 (2003). Moreover, the American Bar Association supplemented these guidelines in 2008. Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (2008) in 36 Hofstra L. Rev. 677 (2008).

functions definably different from those of counsel in ordinary criminal cases." Guideline 1.1, Commentary. In 1993, the ABA adopted standards which were applicable to both prosecutors and defense counsel. ABA Standards for Criminal Justice Prosecution Function and Defense Function (3rd rev. ed. 1993) (hereinafter "Standards"). Although these standards pertain to criminal cases generally, the commentary ante suggests such standards may reflect the minimum performance acceptable in a death penalty case.[40] See Standard 4-1.2 (c).[41]

Counsel must conduct an exhaustive investigation into "the guilt/innocence phase and to the penalty phase of a capital trial."[42] Guideline 11.4.1(A). See Standard 4-4.1(a), at 181 (In every case defense counsel "should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction."). The Standards provide that "[b]ecause the client's life is on the line ... defense counsel should endeavor, within the bounds of law and ethics, to leave no stone unturned in the investigation and defense of a capital client." Standard 4-1.2, Commentary at 123. Indeed, investigation is the necessary and essential basis for any intelligent assessment regarding the defenses to be raised. Guideline 1.1, Commentary. Therefore, counsel should accomplish at least the following:

> B. explore the existence of other potential sources of information relating to the offense, the client's mental state, and the presence or absence of any aggravating

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[40] At the time of Mr. Castillo's trial, professional norms suggested that minimum performance in any death penalty case was never sufficient. Guideline 11.2(B) provided that "[c]ounsel in death penalty cases should be required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, zealously committed to the capital case, who has adequate time and resources for preparation. Guideline 11.2(B) (1989).

[41] Standard 4-1.2 (c) provides:

> Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused. Defense counsel should comply with the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.

[42] A duty to investigate is also applicable to post conviction counsel. Guideline 11.9.3(B) (1989).

factors under the applicable death penalty statute and any mitigating factors;

C. collect information relevant to the sentencing phase of trial including, but not limited to: medical history, (mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays); educational history (achievement, performance and behavior) special educational needs (including cognitive limitations and learning disabilities); military history (type and length of service, conduct, special training); employment and training history (including skills and performance, and barriers to employability); family and social history (including physical, sexual or emotional abuse); prior adult and juvenile record; prior correctional experience (including conduct on supervision and in the institution, education or training, and clinical services; and religious and cultural influences.

D. seek necessary releases for securing confidential records relating to any of the relevant histories.

E. obtain names of collateral persons or sources to verify, corroborate, explain and expand upon information obtained in (C) above.

Guideline 11.4.1(D)(2); see Guideline 11.8.6 (1989) (requires counsel to consider these same areas in the presentation of case at penalty trial). Using information from this investigation counsel will identify "witnesses familiar with aspects of the client's life history" and interview those witnesses to develop evidence which will demonstrate why the defendant should not be sentenced to death. Guideline 11.4.1(D)(3)(B). To the extent required, counsel must secure the assistance of an expert to prepare defenses, rebut aggravating circumstances, or present mitigating evidence to the jury. Guideline 11.4.1(D)(7).

An adequate investigation is required because counsel "should present to the court any ground which will assist in reaching a proper disposition favorable to the accused," and "submit to the court and the prosecutor all favorable information relevant to sentencing ...." [43] Standard 4-8.1(b) at 233. Such a presentation requires that counsel "discover all

[43] Elsewhere the commentary to the standards explains that "[f]acts form the basis of effective representation. Effective representation consists of much more than the advocates courtroom function per se. ...." Further, counsel:

reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." Guideline 11.4.1(C). Once an adequate investigation is accomplished, "[c]ounsel should develop a plan for seeking to avoid the death penalty ...." Guideline 11.8.2(E). All reasonably available mitigating and favorable information, consistent with the defensive theory, must be presented.[44] Guideline 11.8.2(D).

The duties owed to the defendant are no different when counsel is appointed, rather than retained. Throughout the adoption of the Standards, "at no point [was it] thought appropriate to set a different standard according to the nature of the employment." Standard 4-1.2, Commentary at 125. An indigent defendant is still entitled to an adequate investigation and should be provided "with investigative, expert, and other services necessary to prepare and present an adequate defense." Guideline 8.1.

Finally, at trial, counsel has a duty to ensure the record accurately reflects the proceedings. In death penalty proceedings, "post judgment review in the event of conviction and sentence is likely" and the record must demonstrate the existence of any state or federal constitutional issues. Guideline 11.7.3; see Standard 4-7.1 at 211. ("Defense counsel should comply promptly with all orders and directives of the court, but defense counsel has a duty to have the record reflect adverse rulings or judicial conduct which counsel considers prejudicial to his or her client's legitimate interests. ...."). This can only be accomplished

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> ... has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. This cannot effectively be done on the basis of broad general emotional appeals or on the strength of statements made to the lawyer by the defendant. Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself. Investigation is essential to fulfillment of these functions...."

Standard 4-4.1 at 181, 183.

[44] The Guidelines suggest counsel consider all "[w]itnesses familiar with and evidence relating to the client's life and development, from birth to the time of sentencing, who would be favorable to the client, explicative of the offense(s) for which the client is being sentenced, or would contravene evidence presented by the prosecutor." Guideline 11.8.3(F)(1).

by counsels' diligent attention to detail.

b. Mr. Castillo's Representation Fell Below Professional Norm

There can be no reasonable argument that Mr. Castillo received effective representation. Counsel failed to collect available records which demonstrated the profound confusion, neglect, abandonment and abuse which surrounded early childhood. The current petition contains records from charitable organizations, government agencies and the court system which were available to counsel, but never obtained. Guideline 11.4.1(D)(2)(C); see Robinson v. Shiro, 595 F.3d 1086, 1109 (9th Cir. 2010) ("At the very least, counsel should obtain readily available documentary evidence such as school, employment, and medical records ... and obtain information about the defendant's character and background.") Moreover, these records provided names of collateral persons or sources which verified the information obtained. Guideline 11.4.1(D)(2)(E).

Investigation must include more than an interview with the defendant's mother. See Smith v. Mahoney, 611 F.3d 978, 987 (9th Cir. 2010) ("Despite Smith's insistence on pleading guilty, his defense attorney failed to adequately investigate the circumstances of the crime."); Mickey v. Ayers, 606 F.3d 1223, 1237 (9th Cir. 2010) ("An investigation must be more than cursory."); Robinson, 595 F.3d at 1108-1109 ("In preparing for the penalty phase of a capital trial, defense counsel has a duty to conduct a thorough investigation of the defendant's background in order to discover all relevant mitigating evidence"); Correll v. Ryan, 539 F.3d 938, 942 (9th Cir. 2008). Mr. Castillo's mother, like all witnesses, is subject to a faulty memory or biases which color her memory of events.

In Pinholster, the court held that a limited investigation, which only included the defendant's mother, was "grossly inadequate." Id. 590 F.3d at 673. ("Here, defense counsel conducted no investigation into Pinholster's background at all, aside from interviewing his mother. Not only was counsel's investigation grossly inadequate; they also failed to look into any of the limited mitigating evidence that they did discover in their interview with Pinholster's mother ...."). The Guideline's required counsel to seek all witnesses familiar with aspects of Mr. Castillo's life history. Guideline 11.4.1(3)(B). Trial

counsels' investigation of Mr. Castillo's life failed to include both sides of his biological family, failed to include the multi-generational evidence of alcoholism, drug abuse, abandonment and abuse, failed to include the abuse, neglect and abandonment occasioned by Mr. Castillo's mother and step-father, and failed to include the foster-care and family court system involvement during childhood. Such an investigation demonstrated that trial counsel's source for the mitigation investigation, Mr. Castillo's mother, also abused, neglected and abandoned him–repeatedly throughout his childhood.

Although trial counsel sought expert assistance through the appointment of Dr. Etcoff, counsels' failure to conduct an adequate investigation deprived their expert of the evidence and information he needed in order to truly assist in Mr. Castillo's defense. When Dr. Etcoff requested interviews with Mr. Castillo's mother and step-father, the request was ignored. Moreover, counsel even failed to request Dr. Etcoff perform neurological examination–which deprived them of the extraordinary skills and training of their expert. The value of such expert assistance is demonstrated by the reports provided by Dr. Bradley and Dr. Mack. Not only were these experts able to provide the Court a detailed and comprehensive analysis of Mr. Castillo's mental illness issues, corroborating their findings with records and third party witnesses, the experts were able to explain Mr. Castillo's actions in the underlying offense in light of his mental illnesses. Even more important, Dr. Mack identified an organic brain condition, cognitive disorder, which contributed to Mr. Castillo's tendency to over-react. All of this evidence and more, considering the time lapse which occurred before an adequate investigation occurred, was available to previous counsel.

5. <u>Mr. Castillo Was Deprived of a Fair Trial and Reliable Sentence</u>

Prosecutors argued that Mr. Castillo had a bad period in his life, but that his mother and step-father provided a stable home and were committed to helping him overcome any issues. 17 AA 4179-4184. This was untrue. The evidence before this Court demonstrates that Mr. Castillo was born into turmoil and these circumstances pervaded his life. Whenever a stable environment presented itself, it was taken away. Whether it was a loving foster-care home or a juvenile system program, Mr. Castillo's mother pulled him from

it–or simply refused to participate. A woman who was herself broken, abused, neglected and abandoned, she was the only family historian before the jury–the only witness called by counsel to share the story of Mr. Castillo's life. Ultimately, that story was never told.

The evidence in this case is similar to that which persuaded the Supreme Court to find prejudice in Williams, Wiggins, and Rompilla. The multi-generational evidence of neglect, abandonment and abuse is more compelling than the evidence in Williams. Id. 529 U.S. at 395. The elaborate social history which existed, but was not discovered, rendered counsels' strategic decisions in the development of a defense unreasonable–similar to those circumstances in Wiggins. Id. 539 U.S. at 516; see also Smith, 611 F.3d at 988-989. Moreover, apart from their duty to "select and present a defense," counsel has an initial duty to investigate. Mickey, 606 F.3d at 1236. Finally, the availability of records which supported that elaborate social history–demonstrating the failures of foster-care placement, parental abuse, and physical abuse in the juvenile justice system–is similar to Rompilla. Id. Indeed, like counsel in Rompilla, Mr. Castillo's counsel conducted an unreasonable investigation because they failed to obtain records which they knew were relevant to his trial. Id. 545 U.S. at 385-389.

"Prejudice in a capital sentencing proceeding is measured by reweighing the evidence in aggravation against the totality of available mitigating evidence." Robinson, 595 F.3d at 1111; see Wiggins, 539 U.S. at 534; Pinholster, 590 F.3d at 674-675. In other words, this Court must consider the mitigating evidence offered in the underlying petition to determine whether, after learning of such evidence, even a single juror may have struck a different balance in this case. Wiggins, 539 U.S. at 537.

"[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." Boyde v. California, 494 U.S. 370, 382 (1990) (quotations and citation omitted). Moreover, evidence of the organic brain issue, inherent in Mr. Castillo's cognitive disorder, could have altered the jury's impression

of his actions, or led them to conclude he is less morally culpable at the time of the offense. Pinholster, 590 F.3d at 676-677. At a minimum, such evidence "humanizes" him in the eyes of the jury. Id. 590 F.3d at 677. Finally, the evidence before this court would have prevented prosecutors from misleading the jury concerning Mr. Castillo's childhood and the devotion and involvement of his mother in his life. Id. 590 F.3d at 679.

Mr. Castillo understands that evidence of the various circumstances which influenced and maybe controlled his behavior could never absolve him of responsibility in this murder. However, Mr. Castillo was not, and is not, the evil self-centered monster depicted by prosecutors in his trial. He was, and is, a person beaten down– created by the evil and self-centered monsters of his childhood. An understanding of these circumstances would have allowed his jury to evaluate his actions, and moral blameworthiness, in the light in which they occurred.

Mr. Castillo is entitled to relief. See Padilla, 130 S.Ct at 1486 ("It is our responsibility under the Constitution to ensure that no criminal defendant–whether a citizen or not–is left to the mercies of incompetent counsel.") (citations and quotations omitted); Pinholster, 590 F.3d at 684 ("The guarantees of the United States Constitution, as interpreted by the Supreme Court, apply to our most troubled and our most upstanding citizens alike, and our duty as ... judges to fairly and impartially apply those guarantees to all citizens compels us to rule as we do today.").

B. Will Nevada Execute Mr. Castillo Even Though, under Current Law, His Mitigating Circumstances Outweigh the Aggravating Circumstances?[45]

The United States and Nevada Constitutions prohibit the infliction of "cruel and unusual punishments" and the deprivation of life without due process. U.S. Const. amends. VIII, XIV; Nev. Const. art. I, § 6, 8(5). Capital sentencing schemes which fail to adequately guide the sentencer's discretion permit the arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments. Gregg v. Georgia, 428 U.S. 153, 200, 206-07 (1976); Id. 428 U.S. at 220-221 (White, J. concurring). A capital

[45] Petition, Ground Two. See 2 AA 271.

sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and ... reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." McConnell v. State, 120 Nev. 1043, 1063, 102 P.3d 606, 620-21 (2004) (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)).

1. McConnell and Bejarano

In McConnell, this Court considered Nevada's capital sentencing scheme in light of Lowenfield v. Phelps, 448 U.S. 231, 241-46 (1988), and held that "Nevada's definition of felony murder does not afford constitutional narrowing." McConnell, 120 Nev. 1043, 1066, 102 P.3d 602, 622 (2004).[46] Therefore, a jury finding of an aggravating circumstances must narrow the class of persons eligible for the death penalty. McConnell, 120 Nev. at 1066, 102 P.3d at 622. The Court held it is "impermissible under the ... Constitution[] to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated." McConnell, 120 Nev. at 1069, 102 P.3d at 624. Thus, McConnell was a new rule of substantive law with retroactive application. Bejarano v. State, 122 Nev. 1066, 1070, 146 P.3d 265, 268 (2006).

Mr. Castillo was prosecuted for first-degree murder under the theories of felony murder and premeditated murder. 2 AA 389-393. The prosecutor argued, and the jury was instructed on, both theories of culpability. 3 AA 699-701, 711, 714-717; 17 AA 4064-4066. The jury returned only a general verdict, which failed to identify the theory under which Mr. Castillo was convicted. 3 AA 747. The jury relied on the underlying acts of burglary and robbery in order to convict Mr. Castillo of first-degree murder.

Throughout the penalty trial, the prosecutor argued that Mr. Castillo's conviction was aggravated because the murder was committed while he was engaged in a

[46] This Court recognized that the felony-murder doctrine is widely criticized: "The weight of authority calls for restricting the doctrine" and "the trend has been to limit its applicability." McConnell, 120 Nev. at 1069, 102 P.3d at 654 n.71 (citations omitted).

burglary and robbery.[47] 17 AA 4144-4145; 19 AA 4592, 4640-4641. The jury was likewise instructed that Mr. Castillo was eligible for the death penalty if the murder was committed during a burglary and/or robbery. 4 AA 752-778. The jury subsequently 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. 2 AA 404.

This case falls squarely within McConnell and it's progeny. Mr. Castillo was prosecuted for first-degree murder under theories of felony murder and premeditated murder. The jury returned a general verdict of guilt and subsequently found two aggravating circumstances which included the same felony conduct used by prosecutors to obtain Mr. Castillo's conviction. See Bejarano, 122 Nev. at 1079, 146 P.3d at 274. The robbery and burglary aggravating circumstances must be struck–they failed to constitutionally narrow those persons subject to the death penalty in Nevada. See Bejarano, 122 Nev. at 1078, 146 P.3d at 274; McConnell, 120 Nev. at 1066, 102 P.3d at 622. Stated differently, these aggravating circumstances did not "reasonably justify the imposition of a more severe sentence on [Mr. Castillo] compared to others found guilty of murder." McConnell, 120

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[47] The prosecutor argued:

> Now, you yourselves, as jurors in the guilt phase, found beyond a reasonable doubt that Mr. Castillo burglarized . . . [and] killed Isabella Berndt. The State submits that there is no question that this aggravating circumstance has been established beyond a reasonable doubt. In fact, beyond all doubt.
>
> The fourth aggravating circumstance . . . is that the murder was committed during the course of the robbery or flight after committing the robbery of Isabella Berndt. Again, you ladies and gentlemen yourselves, found beyond a reasonable doubt that the defendant was guilty of the robbery of Isabella Berndt and her murder during the course thereof.

19 AA 4592

Nev. at 1067, 102 P.3d at 623. Mr. Castillo is "actually innocent of the invalid aggravating circumstances. Leslie v. McDaniel, 118 Nev. 773, 780, 59 P.3d 440, 445 (2002); see also State v. Haberstroh, 119 Nev. 173, 179, 69 P.3d 676, 680 (2003).

2. Re-weighing Aggravating and Mitigating Circumstances

After two of the aggravating circumstances in Mr. Castillo's verdict are struck pursuant to McConnell, two aggravating circumstances remain. 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. 2 AA 406 Traditionally, in such circumstances, the Court either reweighs the remaining aggravating and mitigating circumstances or engages in harmless error review. Bejarano, 122 Nev. at 1081, 146 P.3d at 276 (citing Clemons v. Mississippi, 494 U.S. 738, 741 (1990)); State v. Haberstroh, 119 Nev. 173, 183, 69 P.3d 676, 682 (2003) ("It appears that either analysis is essentially the same and that either should achieve the same result.").[48] Mr. Castillo contends either analysis is inappropriate. .

A sentencing judge, sitting without a jury, may not find the aggravating and mitigating circumstances necessary for imposition of the death penalty . See U.S. Const. amends. VI, VIII, XIV; Blakely v. Washington, 542 U.S. 296, 313 (2004); Ring v. Arizona, 536 U.S. 584, 602 (2002); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); Johnson v. State, 118 Nev. 787, 803, 59 P.3d 450, 460 (panel of judges may not find aggravating circumstances necessary to impose the death penalty). That the jury found Mr. Castillo guilty of first degree murder does not authorize a death sentence. See NRS 175.554, 233.030(4)(a). A new penalty trial is required because only a jury may find facts sufficient to impose a death sentence. Blakely, 542 U.S. at 305, 308 ("[T]he very reason the framers put a jury-trial

[48] See Bejarano v. State, 122 Nev. at 1083, 146 P.3d 276 ("Reweighing requires us to answer the following question: Is it clear beyond a reasonable doubt that absent the invalid aggravators the jury still would have imposed a sentence of death?"); Leslie v. McDaniel, 118 Nev. 773, 783, 59 P.3d 440, 447 ("Both options ask the same essential question: Is it clear that absent the erroneous aggravator(s) the jury would have imposed death?") (citations omitted).

guarantee into the Constitution is that they were unwilling to trust government to mark out the role of the jury").

In a Nevada death penalty case, the jury determines: (1) whether any aggravating circumstances exist; (2) whether any mitigating factors exist; and (3) whether any mitigating factors outweigh any aggravating circumstances. NRS 175.554, 200.030(4)(a).[49] "The second finding regarding mitigating circumstances is necessary to authorize a death penalty in Nevada, and [this Court] concluded that it is in part a factual determination, not merely a discretionary weighing." Johnson, 118 Nev. at 802, 59 P.3d at 460. Moreover, even if the jury determines the mitigating evidence does not outweigh the aggravating circumstances, a death sentence is not automatic. The jury must also decide whether, in light of all the relevant evidence, death is an appropriate penalty. Middleton v. State, 114 Nev. 1089, 1117, 968 P.2d 296, 315 (1998); Geary v. State, 114 Nev. 100, 952 P.2d 431, 433 (1998). A juror is never required to impose a death sentence, regardless of how egregious the offense is, how much the aggravating factors outweigh the mitigation, or whether any mitigation is found at all. See Middleton, 114 Nev. at 1117, 968 P.2d at 315; Geary, 114 Nev. at 100, 952 P.2d at 433.

One of the mitigating circumstances in this case was "any other mitigating circumstances," 2 AA 406, and the record is silent as to what circumstances the jury found to be mitigating. Any attempt by the Court to attribute this finding to specific evidence at trial can be nothing more than supposition. An appellate court, looking at a cold record, possesses no knowledge of the jury deliberations nor the weight each of the twelve jurors attributed to the aggravating and mitigating circumstances. See Clemons, 494 U.S. at 754

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[49] NRS 200.0300 (4)(a) provides, in relevant part:

> A person convicted of murder of the first degree is guilty of a category A felony and shall be punished:
>
> > (a) By death, only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances are found do not outweigh the aggravating circumstance or circumstances . . .

("Nothing in this opinion is intended to convey the impression that state appellate courts are required ... to engage in reweighing .... In some situations, a ... court may conclude that peculiarities in a case make appellate reweighing or harmless-error analysis extremely speculative or impossible."). In reality, the Court would be forced to make a fact finding based upon its view of the record. Yet, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Blakely, 542 U.S. at 301; see Johnson, 118 Nev. at 803, 59 P.3d at 460 (holding the determination of mitigating factors is protected by the Sixth Amendment and must be made by a jury).

This Court's authority to judicially reweigh aggravating and mitigating circumstances is based upon a twenty-one year-old case, Clemons, which did not address or foresee the changes in capital sentencing jurisprudence which occurred in the last decade. See Clemons v. Mississippi, 494 U.S. 738, 741 (1990). But cf. Blakely v. Washington, 542 U.S. at 303 (2004) (when a judge inflicts punishment that the jury's guilty verdict alone does not allow, the judge exceeds his proper authority by engaging in judicial fact finding); Ring v. Arizona, 536 U.S. 584, 602 (2002); Apprendi v. New Jersey, 530 U.S. 466, 470 (2000) (Due Process requires any factual determination authorizing an increase in maximum punishment must be made by a jury on the basis of proof beyond a reasonable doubt); Johnson v. State, 118 Nev. 787, 802, 59 P.3d 450, 460 (2002) (NRS 175.556(1) "violates the Sixth Amendment right to a jury trial because it allows a panel of judges, without a jury, to find aggravating circumstances necessary for the imposition of the death penalty"); Daniel v. Nevada, 119 Nev. 498, 504, 78 P.3d 890, 894 n.2 (2003). Although Clemons has not been overruled, the petitioner in that case was not seeking relief under the Sixth Amendment. 494 U.S. at 743-33, 754. Clemons cautioned appellate courts that reweighing aggravating and mitigating circumstances may be inappropriate. Id. 494 U.S. at 754

3. The Court Should Consider All Mitigating Evidence

If this Court chooses to reweigh the aggravating and mitigating circumstances in this case, Mr. Castillo contends it must consider all of the mitigating evidence in the record

on appeal.

An adequate harm analysis requires the Court to "actually perform a new sentencing calculous" to determine whether the error involving the invalid aggravator was harmless beyond a reasonable doubt. Haberstroh, 119 Nev. at 183, 69 P.3d at 683 (citations omitted). Thus the Court must disregard invalid aggravating circumstances and reweigh the remaining permissible aggravating and mitigating circumstances. Haberstroh, 119 Nev. at 183, 69 P.3d at 683 (citations omitted). In Haberstroh, the Court held one of the aggravating circumstances found by the jury was invalid. The Court, in an effort to perform a harm analysis, specifically considered mitigation evidence which was presented for the first time in Mr. Haberstroh's successor habeas petition. Id. 119 Nev. at 184, 69 P.3d at 683-84. Mr. Haberstroh's death sentence was vacated. Id. 119 Nev. at 184, 69 P.3d at 684.

Similarly, in Leslie v. Warden, 118 Nev. 773, 59 P.3d 440 (2002), the Court held that one of the aggravating circumstances found by the jury was invalid. Id. 118 Nev. at 779-80, 783, 59 P.3d at 444-447. Even though the jury found only one mitigating factor, a lack of criminal history, the Court recognized that the defendant presented "significant mitigating evidence," consisting of his youth at the time of the offense and family statements that the crime was "out of character." Leslie, 118 Nev. at 783, 59 P.3d at 447. Because the Court could not find that "the jury would have imposed death in the absence of the two erroneous aggravators," it ordered a new penalty trial. Leslie, 118 Nev. at 783, 59 P.3d at 448.

Mr. Castillo is entitled to a new penalty trial. See Haberstroh,119 Nev. at 177, 184, 69 P.3d at 684, 679-680 (relief granted when one of five aggravating circumstances was invalid); Leslie, 118 Nev. at 783, 59 P.3d at 444, 448 (relief granted when two of the four aggravating circumstances were erroneous). Two aggravating circumstances remain in Mr. Castillo's case; circumstances to be weighed against the three mitigating circumstances found

by the jury and the substantial mitigating evidence the jury was never provided.[50] Haberstroh, 119 Nev. at 184, 69 P.3d at 683-84.

4. Conclusion

Two aggravating circumstances found by the jury, the robbery and burglary aggravating circumstance, must be struck. Three mitigating circumstances remain. The record does not demonstrate what "other mitigating circumstances" were found by the jury. The Court should reverse and remand this case for a new penalty trial.

C. Will Due Process Allow Nevada to Execute Mr. Castillo Based Upon Evidence of His Beliefs or Associations, Protected by the First Amendment?[51]

In Mr. Castillo's penalty trial, prosecutors produced testimony and argued that Mr. Castillo was associated with a white supremacist group, and that he believed in "white power," and "pure hate." Prosecutors violated Mr. Castillo's constitutional rights of due process and fundamental fairness when they suggested the jury return a death sentence because of Mr. Castillo's beliefs and associations. This error is not subject to harmless error analysis.

1. The Facts

Mr. Castillo presented testimony from Dr. Lewis Etcoff, a neuropsychologist. 18 AA 4450-19 AA 4504. Prosecutors asked Dr. Etcoff if Mr. Castillo bore tattoos and if he ever explained the significance of his tattoos. Id. at 4499. The prosecutor asked:

> He states that he is a white supremacist, and he has tattoos stating "Pure Hate" and "White Power" on his body in addition to 36 swastikas all over his body with one prominent swastika just beneath his throat. He told me that the swastikas, quote, "give me something to hate. In the joint it's a racial issue. It's a slap in their fucking face," true?

Id. at 4500.

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[50] In an effort to avoid unnecessary duplication, and conserve this Court's resources, Mr. Castillo specifically incorporates by reference the mitigating evidence developed through an adequate investigation which is set forth ante, Claim A at 8.

[51] Petition, Ground Six. See 2 AA 309.

Prosecutors emphasized the significance of Mr. Castillo's tattoos, and the beliefs which they allegedly supported, in argument:

> The tattoos which apparently cover his body probably, as accurately as anything else, convey the personality, the attitude, the anger of this defendant. He has a tattoo which says pure hate, a tattoo which says white power, 36 swastikas all over his body, and on his lower back, he had someone inscribe 100 percent hostile.

19 AA 4648-4649.

2. The Law

"The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws." Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). The Free Exercise Clause guarantees "absolute" freedom of individual belief. See Employment Div., Or. Dep't of Human Resources v. Smith, 494 U.S. 872, 877 (1990); Bowen v. Roy, 476 U.S. 693, 699 (1986) (plurality opinion overruled on other grounds; Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141 (1987)); Cantwell, 310 U.S. at 303. Because the First Amendment protection is absolute, the government may neither "penalize [n]or discriminate against individuals or groups because they hold religious views abhorrent to the authorities ...." Sherbert v. Verner, 374 U.S. 398, 402 (1963) (citing Fowler v. Rhode Island, 345 U.S. 67 (1953)). This limitation on government lies at the core of our constitutional values: "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." Stanley v. Georgia, 394 U.S. 557, 565 (1969).

The Supreme Court held that the First Amendment prevents a prosecutor "from employing evidence of a defendant's abstract beliefs at a sentencing hearing when those beliefs have no bearing on the issue being tried." Dawson v. Delaware, 503 U.S. 159, 168, (1992). In Dawson, the defendant belonged to a white racist prison gang but the prosecutor demonstrated no apparent relevance of that evidence to the sentencing proceeding– the evidence was not related to the murder, did not demonstrate the defendant

to be a future danger, and did not rebut mitigating evidence presented at trial. Id. 503 U.S. at 166-67. Such evidence violated due process because it "was employed simply because the jury would find these beliefs morally reprehensible." Id. at 167; see also Flanagan v. State, 109 Nev. 50, 52, 846 P.2d 1053, 1055 (1993).

3. Application to this Case

The prosecutors' evidence in the instant trial was not relevant to any issue before the jury. The victim's murder was not racially motivated and prosecutors did not offer the evidence to support an aggravating circumstance. Finally, the prosecutors' evidence did not rebut Mr. Castillo's limited mitigation evidence presented.

a. Prosecutors Contended the Crime Was Motivated by Money, or to Avoid Identification

Prosecutors contended Mr. Castillo committed the instant murder in order to obtain money, or something of value, to avoid identification, or to further a robbery or burglary. 17 AA 4087-4090, 4108; 4144-4145; 19 AA 4592; 3 AA 693 (citing NRS 200.033(6)). Prosecutors argued:

> In late November and early December . . . Mr. Castillo needed money. He needed money to pay some legal fees for a matter that is not related and not at issue. He tried to borrow the money. ... So by December 16th, Mr. Castillo had generated a plan to burglarize the home of Ms. Berndt . . . to get the money that he needed for another purpose.

15 AA 3593. Prosecutors further argued :

> . . . [T]he fifth legal aggravator . . . is that the murder was committed to avoid lawful arrest. Now all of . . . us that have been in this courtroom .... for the last several weeks .... [W]e know that he said ... "I was worried about the person seeing my face," referring to Isabella Berndt. He killed ... in part because he didn't want her to see his face and identify him so that he might be lawfully arrested ....

19 AA 4593. Prosecutors never argued that Mr. Castillo's abstract beliefs of "white power" or "white supremacy" were relevant to the instant murder.

b. Mr. Castillo's Personal Beliefs Did Not Support Any Aggravating Circumstance

Prosecutors sought five statutory aggravating circumstances: (1) Mr. Castillo

was previously convicted of a felony involving the use of threat of violence to the person of another; (2) Mr. Castillo committed the murder during the commission of a robbery; (3) Mr. Castillo committed the murder during the commission of a burglary; (4) the murder was committed to avoid or prevent lawful arrest; and, (5) the murder was committed to receive money or something value. 3 AA 691. Evidence of Mr. Castillo's alleged beliefs of "white power" or "white supremacy" do not make any aggravating circumstance more likely.

c. Mr. Castillo's Beliefs Did Not, and Could Not, Rebut His Limited Mitigation Presentation

Trial counsel presented limited mitigation evidence. Ante, Claim A at 8. Mr Castillo's girlfriend and his mother, Barbara Wickham, both offered observations of his good acts and his social history. See 19 AA 4539-4575. Although fairness entitled the state to an opportunity to rebut the evidence presented, such was not accomplished with evidence of tattoos and abstract beliefs of white supremecy. "Evidence of a constitutionally protected activity is admissible only if it is used for something more than general character evidence." Flanagan, 109 Nev. at 53, 846 P.2d at 1056. Such evidence must be relevant to an issue before the jury or specifically answer evidence offered by the defendant. In this case, prosecutors identified no legitimate purpose underlying the need to infect and inflame the jury with racially discriminating evidence and they failed to connect such evidence with any action by Mr. Castillo.

4. Prejudice

In Flanagan v. State, 112 Nev. 1409, 1419, 930 P.2d 691, 697 (1996), this Court held that no harmless error analysis is required for this issue:

> The character of the defendant is usually a relevant, in fact a primary, issue during the sentencing phase, and there is a tremendous risk that improperly admitted character evidence will influence a jury in setting a punishment for a convicted defendant. This risk is unacceptably high when the defendant has been convicted of murder and faces the death penalty.

Flanagan, 112 Nev. at 1419, 930 P.2d at 697. Mr. Castillo is entitled to relief.

In the alternative, Mr. Castillo would show that the presentation of evidence involving his tattoos, and abstract white supremacist beliefs, created an unacceptable risk that

the jury premised its verdict on constitutionally protected–yet morally reprehensible–abstract beliefs involving race. Prosecutors exacerbated this error in argument, contending such evidence demonstrated Mr. Castillo to be dangerous.

5. Ineffective Assistance of Counsel

To the extent that this claim was improperly preserved, Mr. Castillo's constitutional rights to the effective assistance of counsel were violated by the failure to object, litigate, and present this claim in the trial and appellate courts. To the extent this issue was never raised previously, Mr. Castillo further contends his rights to the effective assistance of post-conviction writ counsel were violated. See Crump v. Warden, 113 Nev. 293, 304, 934, P.2d 247, 253-254 (1997) (Right to effective assistance during state habeas proceedings); The failure to identify, preserve and litigate this claim is representation which fell below the professional norm and Mr. Castillo suffered prejudice.

D. Will Gamesmanship Rule the Day?

Prosecutorial misconduct plagued Mr. Castillo's trial, violating his rights to due process.[52] Any instance of misconduct in Mr. Castillo's trial is sufficient to reverse; but such error should be viewed for its cumulative impact. See Darden v. Wrainright, 477 U.S. 168, 181(1986) (prosecutorial misconduct may violate due process); Valdez v. State, 124 Nev. at __, 196 P.3d 465, 481 (2008) (cumulative impact of prosecutorial misconduct required reversal); Collier v. State, 101 Nev. 473, 481, 705 P.2d 1126, 1131 (1985) (cumulative impact of prosecutorial misconduct required new penalty trial).

1. Guilt Trial

a. Prosecutor Solicited Inadmissible Testimony

Mr. Castillo sought a pre-trial order to exclude evidence that he sought money to obtain an attorney for a unrelated criminal charge. 2 AA 264. The trial judge ordered that prosecutors may elicit evidence that Mr. Castillo sought money to pay an attorney but were prohibited from introducing evidence of the nature of the legal services. 13 AA 3084-3089;

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[52] Petition, Grounds Seven and Nine. See 2 AA 314, 323.

See NRS 48.045(2) ("Evidence of other crimes ... is not admissible to prove the character of a person ....").

At trial, the prosecutor elicited the following testimony:

Prosecutor: Were you aware, in the latter part of November or December, of anything about Mr. Castillo's financial circumstances?

* * *

Prosecutor: Let me be more blunt. Did he ever ask you to borrow money?

Harry Kumma, Jr.: Yes, sir, on one occasion.

Prosecutor: And without saying specifically what for, how much did he ask for?

Prosecutor: Did he get the money from you?

Harry Kumma, Jr.: I believe he needed to borrow $350, I believe, and --

Prosecutor: What did you tell Mr. Castillo?

Harry Kumma, Jr.: I really wasn't in a financial position to be lending any money to anybody.

Prosecutor: And that's what you told him?

Harry Kumma, Jr.: Yes, sir.

(Off the record discussion not reported)

Prosecutor: Did you understand that the money was to pay a lawyer?

* * *

Harry Kumma, Jr.: I can't remember the exact conversation, but I was under the impression it was for another case that he had ongoing.

15 AA 3660-3662 (emphasis added).

The prosecutor solicited testimony that Mr. Castillo had "another case," which indicated to the jury that Mr. Castillo had additional criminal charges. Such evidence was inadmissible. See Rose v. State, 123 Nev. 194, 209, 163 P.3d 408, 418 (2007) (improper for prosecutor to infer a defendant had a criminal history). Prosecutors held a duty to instruct their witnesses about a pre-trial order and that such evidence was not to be mentioned. See

McGuire v. State, 100 Nev. 153, 156, 677 P.2d 1060, 1062-63 (1986) (violating order and remarking on defendant's prior felonies constituted "intolerable" misconduct warranting reversal of case); see also ABA Standards for Criminal Justice: Prosecution and Defense Function 3-5.2 (c) (3d ed. 1993) (prosecutor should comply with all orders and directives of the court); Id. at 3-5.6 (b) (prosecutor should not bring inadmissible matter to the attention of the jury or offer inadmissible evidence).

This evidence was introduced without a determination that Mr. Castillo was guilty of the extraneous conduct, or that the prejudicial effect of such evidence did not outweigh any probative value it held.[53] See Armstrong v. State, 110 Nev. at 1324, 885 P.2d at 601 (reversed judgment and remanded because district court did not conduct full hearing on the record); Meek v. State, 112 Nev. 1288, 1292-93, 930 P.2d 1104, 1(1996)106 (same); see also Berner v. State, 104 Nev. 695, 696-97, 765 P.2d 1144, 1145-46 (1988) ("The use of specific conduct to show a propensity to commit the crime charged is clearly prohibited by Nevada Law . . . and is commonly regarded as sufficient grounds for reversal."). Mr. Castillo objected and moved for a mistrial, which the district court denied. 15 AA 3676-3678.

On appeal, this Court held that because Kumma's comments did not disclose whether the case was civil or criminal, the prosecutor did not violate the district court's ruling. Castillo v. State, 114 Nev. 271, 278-79, 956 P.2d 103, 108 (1998). Moreover, the Court reasoned, even if the prosecutor violated the order, the error did not warrant a mistrial. Id. Mr. Castillo contends this holding was unreasonable.

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[53] Before evidence of a collateral offense is admitted, the district court must conduct a hearing outside the presence of the jury and prosecutors must justify the admission of such evidence, that is prove by clear and convincing evidence the defendant committed the offense, and the district court must weigh the probative value of the proffered evidence against its prejudicial effect. Meek, 112 Nev. at 1292-93, 930 P.2d at 1106 (citations omitted). A record must be made of these proceedings. Armstrong v. State, 110 Nev. 1322, 885 P.2d 600 (1994); but see Diomampo v. State, 124 Nev.414, 185 P.3d 1031, 1041 (2008) (failure to hold hearing is cause for reversal unless the record is sufficient to establish that the evidence is admissible or that the trial result would have been the same if evidence was excluded) (citations omitted).

The evidence clearly implied Mr. Castillo was charged with another criminal case and was introduced in direct violation of the district court's order. Mr. Castillo's due process rights were violated because such evidence suggested a "propensity" to violate the law and was received without the procedural safeguards recognized by this Court. Cf. Old Chief v. United States, 519 U.S. 172, 181 (1997) (admitting evidence of prior crime may "deny [the defendant] a fair opportunity to defend against a particular charge") (citations omitted). Additionally, the Court considered an inappropriate harm analysis. See Castillo, 114 Nev. at 278-79, 956 P.2d at 108; Chapman v. California, 386 U.S. 18, 26 (1967). Because this error was constitutional, prosecutors held a burden to prove beyond a reasonable doubt that the misconduct did not contribute to Mr. Castillo's conviction.[54] Chapman, 386 U.S. at 24 ("Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless").

b. Prosecutor's Closing Argument

The prosecutor emphasized Mr. Castillo's need to pay an attorney:

> ... He told his girlfriend, Tammy Jo Bryant, he told Kirk Rasmussen on that fateful Monday, December the 18th, after this happened, and he told the police, "It was Christmas time. I was broke. I couldn't even get family members a tape or other things and I needed $350 to pay attorney's fees and the seed of the idea was put in my mind by my old lady," by Tammy Bryant, "because we were short of money and she didn't get a check, a little care package from friends like she had hoped to get," and you may remember, Harry Kumma testified that the defendant asked him for a three hundred fifty dollar loan to pay his attorney fees and Kumma didn't have it.

17 AA 4094 (emphasis added).[55] Even though this argument did not include statements about

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[54] Mr. Castillo suffered prejudice when the Court failed to apply the appropriate harm analysis on direct appeal. In habeas proceedings, Mr. Castillo must satisfy a much more stringent harm analysis. See Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

[55] Trial counsel failed to object to this argument. To the extent that such error is unpreserved, Mr. Castillo contends his constitutional right to the effective assistance of counsel was violated. See Howard v. State, 106 Nev. 713, 719, 800 P.2d 175, 179 (1990) (failure to object to misconduct is deficient representation); Pertgen v. State, 110 Nev. 554,

Mr. Castillo's other "case," the comments obviously directed the jury's attention to such inadmissible evidence.

The Court previously reversed a conviction and sanctioned a prosecutor for, among other things, violating the pre-trial ruling prohibiting introduction of the defendant's prior criminal history. McGuire, 100 Nev. at 156, 677 P.2d at 1062-63. That misconduct included statements during cross-examination and in argument. Id. 100 Nev. at 156, 677 P.2d at 1062-63 (comments were improper use of character evidence and violated Nevada law); see NRS 48.045(2). Although, in this case, the acts may be more subtle, the jury still was exposed to evidence and argument "generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged." Old Chief, 519 U.S. 172, 180 (1997). Such evidence forced Mr. Castillo to answer charges for which there was no notice, and diverted the attention of the jury from its task of assessing Mr. Castillo's guilt. Nester v. State, 75 Nev. 41, 46, 334 P.2d 524, 527 (1959) (citing People v. Molineux, 168 N.Y. 264, 61 N.E. 286, 294 (1901)); see ABA Standards for Criminal Justice: Prosecution and Defense Function 3-5.8(c), (d) (1993) .

2. Penalty Trial

a. Mitigating factors which were not raised by Mr. Castillo

During closing argument, the prosecutor, over Mr. Castillo's objection, listed the statutory mitigating circumstances which were never raised and for which evidence was not introduced:

> Mr. Bell: Just like aggravating circumstances, mitigating circumstances is a term of art. The legislature in the law specifically lists certain things that can be urged upon you as mitigating circumstances ...There are six things on that list in the statute and, quite frankly, the defense has conceded that four cannot and do not possibly apply to William Castillo.
>
> Let me go through the kind of things the legislature talks about as being mitigating so you

559, 875 P.2d 361, 364 (1994) (failure to object to prosecutorial misconduct "fell below an objective standard of reasonableness.").

can get a flavor for the kind of balancing that is expected.

Number one, the defendant has no prior significant criminal history.

Mr. Schieck: Your Honor, I'm going to object to arguing mitigating circumstances that don't apply to this case. It's improper argument.

***

Mr. Bell: My response is ... that they are entitled to know what the legislature says is mitigating and realize that many of these don't apply to consider the limited area of mitigation that does apply to this defendant at best.

Mr. Schieck: That's not the statutory scheme, your Honor. You don't weigh the mitigators that don't apply in deciding to give the weight to the mitigators that do apply. It is an improper factor into the weighing process to argue the other mitigators don't apply, therefore, this is a death penalty case.

The Court: Well, I don't think he is arguing that. So I will overrule the objection.

Mr. Bell: The State is not arguing that somehow this aggravates the circumstances more, it's just trying to educate you on what the legislature considers as mitigation.

The defendant has conceded ... that Mr. Castillo doesn't have any lack of significant prior criminal history... .

***

Number three, the victim was a participant in the defendant's criminal conduct. Obviously not applicable. Mrs. Berndt had nothing to do with her own death.

Number four, the defendant was an accomplice in a murder committed by another. Now this might be an argument that Ms. Platou might advance to her jury, but it is clear in this case who is the person that repeatedly and consistently viciously pummeled a crow bar into the face of Isabella Berndt and then smothered her out with a pillow and that person is sitting right there, Mr. Castillo.

Number five, that the defendant acted under the duress of another. Again, William Castillo was

> not a follower in some criminal enterprise of some other master mind. In fact, William Castillo was the prime mover in this incident.

19 AA 4594-4596. Despite the prosecutor's assurances, this argument specifically instructed the jury that the lack of evidence on a particular mitigating circumstance was aggravating–Mr. Castillo was the "prime mover" who "viciously pummeled a crow bar into the face," and he had a criminal history. Id.

Before he is eligible for the death penalty, prosecutors must demonstrate Mr. Castillo was within the narrow "class of persons eligible for death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Lowenfield v. Phelps, 484 U.S. 231, 244 (1988) (citing Zant v. Stephens, 462 U.S. 862, 877 (1983)); see Valdez v. State, 124 Nev. 1172, 196 P.3d 465, 475 (2008); Floyd v. State, 118 Nev. 156, 168-69, 42 P.3d 249, 258 (2002) (the state bears the burden in capital sentencing trial). In this case, the prosecutor's argument sought to justify a more severe sentence by describing circumstances the Legislature adopted to address mitigating circumstances–those persons who commit murder but fall outside that narrow class. Therefore, the prosecutor's argument unconstitutionally shifted the burden of proof to Mr. Castillo to demonstrate he should not be included within that class of people for whom a severe sentence is justified. See Valdez, 124 Nev. at __, 196 P.3d at 475 (right to impartial jury in sentencing phase is violated when a juror prematurely forms an opinion in a case, because the burden shifts to the defendant to change the juror's opinion).

The prosecutor further argued evidence which was not in the record–the mitigating circumstances recognized by statute, and Mr. Castillo's failure to offer proof in support of those specific circumstances. Such an argument violates due process. See Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1974); Collier v. State, 101 Nev. 473, 478, 705 P.2d 1126, 1128 (1985); Maggard v. State, 399 So.2d 973 (Fla. 1981) (reversed because prosecutor argued lack of proof of mitigating factor); State v. DePew, 528 N.Ed.2d 542, 558 (Ohio 1985).

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The prosecutor's argument altered Nevada's statutory sentencing scheme such that, in Mr. Castillo's trial, the imposition of a death sentence was arbitrary and capricious. See Penry v. Lynaugh, 492 U.S. 302, 326 (class of defendants eligible for death penalty must be narrowed, and jury may still recommend mercy); McCleksey v. Kemp, 481 U.S. 279, 304 (1987) (carefully defined standards must narrow sentencer's discretion to impose death, but the constitution limits prosecutor's ability to interfere with the jury's discretion in considering evidence that might cause it to decline to impose death); Gregg v. Georgia, 428 U.S. 153, 200, 206-07 (1976) (plurality opinion) (summarizing Furman v. Georgia, 408 U.S. 238 (1972)); NRS 175.554(1), 200.033, 200.035. Even if the jury had sustained every aggravating circumstance alleged, and Mr. Castillo offered no proof of a mitigating circumstance, the jury must still be free to reject a death sentence. Middleton v. State, 114 Nev. 1089, 1117, 968 P.2d 296, 315 (1998); Geary v. State, 114 Nev. 100, 952 P.2d 431, 433 (1998). "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth amendments." Lockett v. Ohio, 438 U.S. 586, 605 (1978).[56]

b. Forced to Choose Between Executing Mr. Castillo or an Innocent Person

The prosecutor improperly forced, over trial counsel's objection, jurors to choose between executing Mr. Castillo or an innocent person:

> Mr. Harmon: ... 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.
>
> Mr. Schieck: I'm going to object, your honor, to the argument

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[56] See McCleskey v. Kemp, 481 U.S. 279, 302 (1987) (jury's discretion should be directed and limited so as to minimize the risk of arbitrary and capricious action) (citing Gregg v. Georgia, 428 U.S. 153, 189 (1976))). To the extent that this issue was never previously raised by appellate counsel, or in Mr. Castillo's initial habeas proceedings, he contends he suffered a violation of his right to the effective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 674 (1984); Evitts v. Lucey, 469 U.S. 387, 396 (1985) (Right to effective assistance on appeal); Crump v. Warden, 113 Nev. 293, 304, 934, P.2d 247, 253-254 (1997) (Right to effective assistance during state habeas proceedings); Howard v. State, 106 Nev. at 713, 719, 800 P.2d 175, 179 (1990) (failure to raise prosecutorial misconduct on appeal satisfies first prong of Strickland).

of future victims.

The Court: Sustained. Jury is admonished to disregard that argument.

Mr. Harmon: Your Honor, I am simply making the argument proved in Redmon v. State, future dangerousness. Future dangerousness to whom? It has to be not to dogs, cats, it has to be to individuals. The cases say that we may argue theories of penology and deterrence, reasons for punishment. The Pellegrini... case, the Jimenez case, the Snow case –

The Court: Yes, I understand, Mr. Harmon. I'll reverse the ruling. You are correct.

19 AA 4650-4651. The prosecutor's argument was improper. See Blake v. State, 121 Nev. 779, 797, 121 P.3d 567, 579 (2005) ("prosecutors cannot argue that the jury must either return a death sentence or take responsibility for the death of a future victim"); McKenna v. State, 114 Nev. 1044, 968 P.2d 739 (1999) (prosecutor may not "tell the jury that its verdict constitutes a choice between the defendant and a future innocent victim"); Howard v. State, 106 Nev. 713, 719, 800 P.2d 175, 178 (1990) ("improper to ask the jury to vote in favor of future victims and against the defendant"); McGuire, 100 Nev. at 158, 677 P.2d at 1064.

The Court has held that an improper statement must be considered within context of the trial. See Browning v. State, 124 Nev. 517, 188 P.3d 60, 72 (2008); Hernandez v. State, 118 Nev. 513, 525, 50 P.3d 1100, 1108 (2002); United States v. Young, 470 U.S. 1, 11 (1985). While, in some circumstances, an improper argument may be "invited" by the argument of the defendant, id. 470 U.S. at 5, 12-13, those circumstances are distinguished from Mr. Castillo's trial. See also Darden, 477 U.S. at 179. The prosecutor's misconduct in Mr. Castillo's case was not "invited response." In the instant case, Mr. Castillo was denied an opportunity to rebut the improper argument.

c. Prosecutor Argued Mr. Castillo Was an Improbable Candidate for Rehabilitation

The prosecutor expressed his personal opinion regarding Mr. Castillo's inability to be rehabilitated:

This is the second phase of these proceedings. We call

> it the penalty hearing. It's not called a rehabilitation hearing. The defendant has had a long history of criminal conduct. He came up through the juvenile system. He graduated through each successive step and he ended up at the Nevada Youth Correction Center. He's had adult offenses for which he has been convicted and now he's committed murder.
>
> So when we look to the purpose of a penalty hearing, I submit this defendant is past notions of rehabilitation.

19 AA 4636. Such arguments are improper. Young, 470 U.S. at 18 (improper for prosecutor to express his personal opinion concerning guilt of the accused); Collier, 101 Nev. at 478-80, 705 P.2d at 1129-30 (remarking that a defendant's "rehabilitation was improbable" was "highly inappropriate"); ABA Standards for Criminal Justice: Prosecution and Defense Function 3-5.8(b) (3d ed. 1993) (prosecutor should not express his personal belief as to the guilt of the defendant).

A prosecutor must be "unprejudiced, impartial, and nonpartisan," and should not attempt to inflame the jury's passions or fears in pursuit of a conviction. Valdez, 124 Nev. at __, 196 P.3d at 478 (citing Collier, 101 Nev. at 480, 705 P.2d at 1130); State v. Rodriguez, 31 Nev. 342, 346, 102 P. 863, 864 (1909)). In this case, the prosecutor's argument prejudiced Mr. Castillo. First, it conveyed the impression that evidence existed, which was not presented to the jury, to support the prosecutor's claim that Mr. Castillo cannot be rehabilitated. Young, 470 U.S. at 15 (deprives the defendant of his right to be tried solely on the evidence before the jury); see Donnelly v. DeChristoforo, 416 U.S. 637, 646 (1974); Berger v. United States, 295 U.S. 78, 84 (1935); ABA Standards for Criminal Justice: Prosecution and Defense Function 3-5.8 (a) (3d ed. 1993) (prosecutor should not mislead jury as to inferences it may draw). Additionally, the prosecutor's statement carried with it the imprimatur of the Government and induced the jury to trust the prosecutor's view of the evidence rather than their own. Young, 470 U.S. at 15; see Collier, 101 Nev. at 480, 705 P.2d at 1130 (citing United States v. Frascone, 747 F.2d 953, 957 (5th Cir. 1984)); Tucker v. Kemp, 762 F.2d 1480, 1484-85 (11th Cir. 1985); see ABA Standards for Criminal Justice: Prosecution and Defense Function 3-5.8 (d) (3d ed. 1993) (prosecutor should refrain from argument which diverts the jury from its duty to decide the case on the evidence).

Plain error warrants a reversal of Mr. Castillo's sentence.[57] See McGuire, 100 Nev. at 156-57, 677 P.2d at 1063 (convictions reversed in two separate cases where prosecutor, among other things, attacked defendant's character, expressed personal beliefs, and attempted to inflame the emotions of the jury).

E. Must the Jury Independently Find That Mr. Castillo Acted Deliberately Under Nevada Law and Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007)?

The instruction to the jury in Mr. Castillo's trial defined the mens rea elements of first degree murder, premeditation, deliberation, and willfulness, NRS 200.030, as a single element, blurring the distinction between first- and second-degree murder.[58] See Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007). This definition allowed Mr. Castillo's jury to convict him of first degree murder in the absence of evidence which demonstrated his actions were deliberate. Id.; In re Winship, 397 U.S. 358, 364 (1970). The district court below held that Nika v. State, 124 Nev. 1272, 198 P.3d 839, (2008), disproved Mr. Castillo's claim and that his claim was untimely. This holding is erroneous.

1. The Court Erred by Relying upon Nika v. State

The jury instruction in Mr. Castillo's trial was approved by Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992), which this Court later renounced in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). In Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), the court considered a similar jury instruction and held that it violated due process, because, under Sandstrom v. Montana, 442 U.S. 510 (1979); Frances v. Franklin, 471 U.S. 307 (1985); and In re Winship, 397 U.S. 358 (1970), the instruction failed to require prosecutors to prove

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[57] To the extent that this claim was not preserved at trial, Mr. Castillo contends his rights to the effective assistance of counsel were violated See Strickland v. Washington, 466 U.S. 668, 674 (1984); Pertgen v. State, 110 Nev. 554, 559, 875 P.2d 361, 364 (1994) (counsel's failure to object to prosecutorial misconduct "fell below an objective standard of reasonableness"); Howard v. State, 106 Nev. at 719-20, 800 P.2d at 179. To the extent that this issue was never raised on appeal, or during initial habeas proceedings, Mr. Castillo contends this failure also resulted in the violation of his right to the effective assistance of counsel. Evitts, 469 U.S. at 396 (Right to effective assistance on appeal); Crump, 113 Nev. at 304, 934 P.2d at 253-254 (Right to effective assistance during state habeas proceedings); Howard, 106 Nev. at 720, 800 P.2d 175, 179 (trial and appellate counsel were remiss under first prong of Strickland)

[58] Petition, Ground Three. See 2 AA 275.

each element of an offense beyond a reasonable doubt. Polk, 503 F.3d at 911.

After Polk, this Court considered whether its opinion in Byford raised federal constitutional issues. Nika, 198 P.3d at 849. The Court discussed its historical interpretations of 'willfulness," "premeditation," and "deliberation," and concluded that it attributed different meanings to the terms at different times. Nika, 198 P.3d at 845 ("Since the days of territorial law, first-degree murder in Nevada has included killings that are willful, deliberate, and premeditated.") (citations omitted). The Court acknowledged that premeditation and deliberation "are not synonyms for 'malice aforethought'" and that such a definition "would obliterate the distinction between [first-and second-degree murder]." Nika, 198 P.3d at 845-846 (citations and quotations omitted); see Hern v. State, 97 Nev. 529, 532, 635 P.2d 278, 280 (1981); State v. Wong Fun, 22 Nev. 336, 341-342, 40 P. 95, 96 (1895). Finally, the Court admitted that its opinion in Powell v. State, 108 Nev. 700, 838 P.2d 927 (1992), essentially "reduced 'premeditation and deliberation' to 'intent.'" Nika, 198 P.3d at 847.

In Nika, the Court held that its opinion in Byford, which renounced the Kazalyn instruction, was a change in the law – rather than a clarification. Even though no element in the murder statute changed, the Court summarily concluded its opinions held no constitutional implications. Nika, 198 P.3d at 849. Mr. Castillo contends the retroactive and unforeseeable change in the Court's interpretation of the Nevada murder statute violated due process. See Bouie v. City of Columbia, 378 U.S. 347, 354 (1964); Garner v. State, 116 Nev. 770, 789 n.9, 6 P.3d 1013, 1025 n.9 (2000) (characterized Byford as a clarification of the law). Moreover, this Court never addressed Mr. Castillo's allegation that the Kazalyn instruction was unconstitutionally vague.

a. Vagueness

NRS 200.010(1) defines "murder" as an unlawful killing of a human being with malice aforethought. Obviously, "malice aforethought" is the mens rea for the offense. In order for murder to be "Murder in the First Degree," NRS 200.030(1) requires additional

proof that the murder was "willful, deliberate and premeditated."[59] In Nika, the Court sought to address the alteration in Nevada law which occurred between its opinions in Kazalyn and Byford. Nika, 198 P.3d at 846 The Court explained how "wilful, deliberate and premeditated" came to be viewed as a single element; the Court even pointed to other courts who adopted similar holdings. Id. 198 P.3d at 847. Finally, the Court held that its decision to change the first degree murder instruction did not implicate the federal constitution. Id. 198 P.3d at 848; see Garner v. State, 116 Nev. 770, 787, 6 P.3d 1013, 1024 (2000). In this Court's view, Polk is wrong because Byford was simply a "change" in Nevada state law. Nika, 198 P.3d at 849.

In Nika, the Court failed to address the lack of distinction between first- and second- degree murder in the Kazalyn instruction. Regardless of the Court's discussion involving semantic distinctions and conflation of "premeditation" and "deliberation," there remained a fundamental constitutional question which centered on the absence of any substantive distinction between "malice aforethought" (the mens rea for second-degree murder) and additional proof of mens rea required for first-degree murder. As the Court itself noted, the Kazalyn instruction "erased" and "obliterated" the distinction between first- and second-degree murder. Byford, 116 Nev. at 235, 994 P.2d at 714 ("...[T]he Kazalyn instruction blurs the distinction between first- and second- degree murder. [Greene v. State, 113 Nev. 157, 168, 931 P.2d 54, 61 (1997)]'s further reduction of premeditation and deliberation to simply 'intent' unacceptably carries this blurring to a complete erasure."). Even a cursory review of Byford compels a conclusion that the definition of first-degree murder given Mr. Castillo's jury, the Kazalyn instruction, was unconstitutionally vague. See Kolender v. Lawson, 461 U.S. 352, 358 (1983).

Whenever there was no coherent distinction between first- and second-degree murder, there is no possibility that "ordinary people can understand what conduct is prohibited." Kolender, 461 U.S. at 357. Even more important, however, is that the

[59] NRS 200.010 and 200.030 provide alternative means of committing murder which are not relevant to Mr. Castillo's case.

"complete erasure" of the distinction between first- and second-degree murder left Mr. Castillo's jury with no "adequate guidelines" to determine whether a homicide was first- rather than second-degree murder. The absence of adequate guidelines not only "encourage[d] arbitrary and discriminatory enforcement," Kolender, 461 U.S. at 357 (citations omitted), it virtually ensured it. Because this Court never addressed constitutional vagueness in Nika, the district court erred in holding Nika precluded relief.

b. Due Process Requires the Application of Byford to Mr. Castillo's Case

The retroactivity principles enunciated in Schriro v. Summerlin, 542 U.S. 348 (2004), and Bousley v. United States, 523 U.S. 614, 619-20 (1998), establish a constitutional floor which binds this Court under the federal due process clause. Although the Court may provide greater retroactivity to its opinion than required under federal law, it may never provide less. "Federal law simply 'sets certain minimum requirements that states must meet but may exceed in providing appropriate relief.'" See Danforth v. Minnesota, 552 U.S. 264, 288 (2008) (citation omitted). The semantic distinctions employed by the Court in Nika, are of no moment. Whether Byford was a correction of a previously erroneous decision, a super-legislative change in the law, or even a non-constitutional ruling, retroactive application is required whenever the Court narrows the scope of a criminal statute.[60] As the Court has held, "there would be 'a significant risk that a defendant . . . faces a punishment that the law cannot impose.'" Bejarano v. State, 122 Nev. 1066, 146 P.3d 265, 274 (2006), quoting Schriro v. Summerlin, 541 U.S. at 352; Bousley v. United States, 523 U.S. at 619-20 (retroactivity not an issue when the court "decides the meaning of a criminal statute"). Mr. Castillo is entitled to the benefit of Byford.

2. The District Court Erred in Holding this Claim was Untimely

The district court held that, by waiting two years after Polk v. Sandoval, 503

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[60] Byford clearly narrowed the scope of NRS 200.030. Prior to Byford, a jury could find a murder was premeditated and deliberate if the defendant made an instantaneous decision. 3 AA 715. After Byford, the jury must find that the defendant dispassionately weighed and considered consequences before he acted. This additional finding necessarily narrowed the scope of the Nevada murder statute. See Byford at 235, 714.

F.3d 903 (9th Cir. 2007), to bring his claim, Mr. Castillo waived the claim. 21 AA 5129. However, the district court failed to consider that a fundamental miscarriage of justice exception occurred in the proceedings which resulted in Mr. Castillo's conviction of first-degree murder. In such circumstances, the claim should not be dismissed. NRS 34.800; see Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

To demonstrate a fundamental miscarriage of justice, there must be a colorable showing of actual innocence. Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); see also Calderon v. Thompson, 523 U.S. 538, 559 (1998). Actual innocence may be established by repudiating a single element of the offense of murder – in this case, deliberation. See, e.g., Wooten v. Norris, 578 F.3d 767, 782 (8th Cir. 2009) (actual innocence may be established with new evidence of mental health infirmities which demonstrated the defendant was "incapable of formulating the necessary mens rea for the underlying offense or the 'knowingly' element of the death qualifying aggravator"); U.S. v. Shaid, 937 F.2d 228, 235-36 (5th Cir. 1991) (An improper mens rea instruction at trial supports a claim of actual innocence). This comports with the well-established constitutional rule that "[n]o man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged." In re Winship, 397 U.S. 358, 363 (1970) (emphasis added); accord Dretke v. Haley, 541 U.S. 386, 395 (2004) ("[D]ue process requires proof of each element of a criminal offense beyond a reasonable doubt"). Mr. Castillo's petition, as well as the mental health reports attached thereto, demonstrated that he did not, or even could not, deliberate prior to or during the offense. 2 AA 278. Respondent never attacked or contradicted this evidence. Thus, the evidence of lack of deliberation is unopposed and must be accepted. Nev. Const. Art. 6, § 4.

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F. Will Nevada Execute Mr. Castillo When the Jury's Verdict Was Based, in Part, upon Prejudicial, Inflammatory, Irrelevant, Tenuous and Impalpable Evidence?[61]

In their pursuit of a death penalty for Mr. Castillo, prosecutors introduced testimony from the victim's daughter and granddaughters which not only included irrelevant and inadmissible evidence, but was a blatant attempt "to rouse jurors' sympathy for the [victim] and increase juror's antipathy" toward Mr. Castillo. Kelly v. California, 129 S.Ct. 564, 567 (2008). Although Mr. Castillo must acknowledge that "victim impact" evidence is generally admissible, see Payne v. Tennessee, 501 U.S. 808 (1991), and that this Court has always found such an error to be "harmless," see e.g. Sherman v. State, 114 Nev. 998, 1014, 965 P.2d 903, 914 (1998), Mr. Castillo contends the evidence presented in his trial went beyond that which was ever sanctioned by this Court or the Supreme Court.

1. Victim Impact Evidence

During the guilt/innocence phase of Mr. Castillo's trial, prosecutors presented testimony from Jean Marie Hosking, the victim's daughter. Hosking testified the victim was 86 years of age, in good spirits, received a "clean bill of health" from the doctor the week of her death, and that she visited her mother over Thanksgiving. 15 AA 3609, 3612-3614.

During the penalty trial, Hosking again testified, along with Lisa Keimach and Ronda Lalicata, the victim's granddaughters. In addition to traditional victim impact testimony regarding the feelings of loss in her life and her love for her grandmother, Keimach testified that, upon learning of her grandmother's death, she was unable to immediately travel to Las Vegas. She had suffered a miscarriage previously and was confined to bed. This miscarriage was a traumatic event which she discussed with the victim the day before her death; she was the last family member to speak with the victim. 18 AA 4408.

Hosking's testimony also went beyond that of traditional victim impact testimony. She described an event when a stray cat startled the victim one night in bed

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[61] Petition, Ground Eight. See 2 AA 318.

stating "...if she had a weak heart, I don't know if she would have made it through that scare. It was quite scary." 18 AA 4440-4441. Hosking described the "hundred or a hundred and fifty [sympathy] cards, from all walks of our life" which she received after the victim's death. 18 AA 4442-4443. She was allowed to read from the sympathy cards received from cousins, "teacher friends," neighbors, and students. Id. Such descriptions did not include information which would allow Mr. Castillo to investigate, or test, the comments.

2. Payne v. Tennessee and Nevada Law

In Booth v. Maryland, 482 U.S. 496, 501-502 (1987), the Supreme Court considered the admissibility of victim impact evidence. The court noted that the constitutionality of the death penalty was dependent upon the ability of a statutory sentencing scheme to allow for an "individualized determination" of the character of the defendant and the circumstances of the crime. Id. 482 U.S. at 502; see Zant v. Stephens, 462 U.S. 862, 879 (1983). Victim impact evidence was held to be irrelevant to these considerations. Booth, 482 U.S. at 502-503 ("... [W]e find that this information is irrelevant to a capital sentencing decision, and that its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner."). Among the Supreme Court's concerns were that the defendant often is unaware of the victim's personal circumstances, the victim's surviving family may be inarticulate, and that the death penalty should not be based upon the victim's value to the community.[62] Id. 482 U.S. at 503-506. In particular, the Court appeared concerned with any considerations of the "value" of the victim, as well as attempts by the defendant to "rebut" such evidence. Id. 482 U.S. at 506-507. The Court held "...the formal presentation of the information by the State can serve no

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[62] Briefly, the Supreme Court held that, unless the defendant was aware of the victim's personal circumstances, evidence of the existence of, and impact on, friends and family was not relevant to the defendant's moral culpability for his crime. Booth, 482 U.S. at 504-505. That a death penalty may be imposed in some cases, and not in others, because the family member or friend may provide compelling testimony seemed arbitrary. Id. 482 U.S. at 505. Finally, "that the victim was a sterling member of the community rather than someone of questionable character ... [did] not provide a principled way to distinguish cases in which the death penalty was imposed, from the many cases in which it was not." Id. 482 U.S. at 506; see Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (Stewart, J.).

other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." Id. 482 U.S. at 508.

The opinion in Booth was not well accepted and ephemeral.[63] Four years later a new majority of the Supreme Court reversed course and held

> ... The misreading of precedent in Booth has, we think, unfairly weighted the scales in a capital trial; while virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances, the State is barred from either offering a quick glimpse of the life which a defendant chose to extinguish, or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide.

Payne, 501 U.S. at 822. The Court acknowledged the concerns expressed in Booth but noted that, "[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief."[64] Id. 501 U.S. at 825.

The Supreme Court's about-turn on the admissibility of victim-impact evidence was well accepted by this Court. The Court stated: "We applaud the decision in Payne as a positive contribution to capital sentencing, and conclude that it fully comports with the intendment of the Nevada Constitution." Homick v. State, 108 Nev. 127, 136, 835 P.2d 600, 606 (1992); see also Adkins v. State, 112 Nev. 1122, 1136, 923 P.2d 1119, 1129 (1996).

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[63] The Tennessee Supreme Court called the Booth opinion–

> ... an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of the Defendant, ... without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims.

State v. Payne, 791 S.W.2d 10, 19 (1990).

[64] Although not before the Court in this case, the holding in Booth which recognized a violation of the defendant's constitutional rights if victims were allowed to express their views on the appropriate punishment was not disturbed. See Payne, 501 U.S. at 830 n.2; Booth, 482 U.S. at 502-509; see also Kaczmarek v. State, 120 Nev. 314, 340, 91 P.3d 16, 34 (2004).

3. Application in this Case

In his concurring opinion in Payne, Justice Souter assured the dissenting justices and other skeptics that the Court's reversal regarding victim impact evidence did not spell impending doom:

> Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation. ... [I]n each case there is a traditional guard against the inflammatory risk, in the trial judge's authority and responsibility to control the proceedings consistently with due process, on which ground defendants may object and, if necessary appeal. With the command of due process before us, the Court and the other courts of the state and federal systems will perform the duty to search for constitutional error with painstaking care, an obligation never more exacting than it is in a capital case.

Payne, 501 U.S. at 836-837 (Souter, J., concurring) (quotation and citation omitted); see also McNelton v. State, 111 Nev. 900, 906, 900 P.2d 934, 938 (1995). The rectitude within Justice Souter's pronouncement is soundly tested by the admission of the victim-impact evidence in this case.

This Court, having embraced Payne, "integrated" it into Nevada law. Kaczmarek v. State, 120 Nev. 314, 339-340, 91 P.3d 16, 34 (2004). NRS 175.552(3) allows the admission of evidence "concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and any other matter which the court deems relevant to the sentence, whether or not the evidence is ordinarily admissible." Admissible evidence includes testimony from the victim's family as well as neighbors or co-workers. Wesley v. State, 112 Nev. 503, 519, 916 P.2d 793, 804 (1996). The Court has left questions of admissibility of evidence in a penalty trial largely to the discretion of the trial judge. Lane v. State, 110 Nev. 1156, 1166, 881 P.2d 1358, 1365 (1994) (citing Milligan v. State, 101 Nev. 627, 636, 708 P.2d 289, 295 (1985)). Appellate review of such issues is a determination whether the trial judge abused that discretion. Sherman v. State, 114 Nev. 998, 1012, 965 P.2d 903, 913 (1998); Wesley v. State, 112 Nev. 503, 519, 916 P.2d 793, 804 (1996); Pellegrini v. State, 104 Nev. 625, 631, 764 P.2d 484, 488 (1988).

The trial judge's discretion is not unlimited. Just as the Supreme Court noted in Payne that such evidence can be so inflammatory as to violate due process, id. 501 U.S. at 825, this Court has held that evidence which is impalpable or highly suspect may not be admitted. Sherman, 114 Nev. at 1012, 965 P.2d at 912; Young v. State, 103 Nev. 233, 237, 737 P.2d 512, 515 (1987); see Smith v. State, 110 Nev. 1094, 1106, 881 P.2d 649, 656-657 (1994). Evidence which is "dubious" or "tenuous" may not be admitted, Allen v. State, 99 Nev. 485, 488, 665 P.2d 238, 140 (1983), nor evidence which is irrelevant to the penalty trial. Collman v. State, 116 Nev. 687, 725, 7 P.3d 426, 450 (2000); see Floyd v. State, 118 Nev. 156, 174-175, 42 P.3d 249, 261-262 (2002) (Evidence of the victim's life, apart from the crime and its impact on the surviving family or friends, can be irrelevant to the sentencing determination). Evidence admitted during the penalty trial must, at a minimum, have sufficient indicia of reliability. Parker v. State, 109 Nev. 383, 391, 849 P.2d 1062, 1067 (1993); D'Agostino v. State, 107 Nev. 1001, 1003-1004, 823 P.2d 283, 284-285 (1991); see Gallego v. State, 117 Nev. 348, 369, 23 P.3d 227, 241-242 (2001).

There can be no argument that Hosking's statements in the guilt/innocence phase of Mr. Castillo's trial were irrelevant to the issues before the jury. The elements of NRS 200.030 require no proof of the victim's general health, her last doctor visit, her spirits, or the last time she visited with her daughter. Such evidence only served to arouse the passions and sympathy of the jury.

Hosking's victim impact testimony in the penalty trial only "added fuel to the fire." Hosking described an unrelated instance when the victim was scared and awoken during the night. She described the one hundred fifty sympathy cards she received from her mother's neighbors, colleagues, and former students. These expressions of sympathy, "from all walks of life," described the victim admirably: wonderful role model mentor, best neighbor and good friend, and a very special lady. 18 AA 4443-4444. Additionally, the jury learned from Keimach that she miscarried before the victim died, and was unable to respond when notified of the victim's death. 18 AA 4408. The victim was obviously a much loved grandmother and former educator, adored by her friends, family, and former students. No

reasonable juror could hear such evidence and not be moved–as was the prosecutors' intention.

The victim impact testimony was not relevant to Mr. Castillo's character or his moral culpability. Mr. Castillo never met the victim; he was unaware of any of the circumstances surrounding her life. Moreover, there was no reasonable manner to challenge or rebut such evidence. Not only was Mr. Castillo without the knowledge to investigate such statements, any attempt to rebut these statements would only further inflame the passions of the jury against him. He could hardly argue that the goodness of the victim did not render him even more worthy of the death penalty–an inference raised by such evidence. The victim impact evidence went too far–it exceeds the "quick glimpse" of the victim's life contemplated in Payne. Id. 501 U.S. at 822.

4. Prejudice

The improper admission of the victim impact evidence in Mr. Castillo's trial was prejudicial; the evidence inflamed the passions of the jury and invited the jury to compare the comparative worth of his life to that of his victim. Even so, the jury found three mitigating circumstances based upon the limited mitigation presentation at trial. 2 AA 406; Ante, Claim A at 8. In such circumstances, the Court can have no confidence that the improperly admitted evidence had no influence on the jury's verdict.

Since Payne was decided, this Court has never found an error in the admission of victim impact evidence to be harmful. See Floyd, 118 Nev. at 175, 42 P.3d at 262 ("[C]ollateral and inflammatory" victim impact evidence was not "unduly prejudicial."); Gallego, 117 Nev. at 369, 23 P.3d at 241-242 (Officer's statement that defendant was responsible for additional murders was not prejudicial); Sherman, 114 Nev. at 1014, 965 P.2d at 914 (Evidence on impact of family of extraneous victim's family was harmless). Mr. Castillo submits that "the command of due process," by which this Court must review this ground, with "painstaking care," see Payne, 501 U.S. at 836-837 (Souter, J., concurring), compels this Court to draw a line in the sand and hold that some victim impact evidence goes too far; Mr. Castillo is entitled to relief.

G. Does Mr. Castillo's Sentence Violate the Eighth Amendment Because the State Presented, as Aggravating Evidence, Acts Mr. Castillo Allegedly Committed as a Juvenile?

Mr. Castillo's death sentence violates the Eighth Amendment ban on cruel and unusual punishment because the jury's verdict was based upon acts Mr. Castillo allegedly committed when he was under eighteen.[65]

1. The Eighth Amendment Prohibits Prosecutors from Relying on Juvenile Acts to Support a Death Sentence

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The last clause "prohibits not only barbaric punishments," Solem v. Helm, 463 U.S. 277, 284 (1983), but any "extreme sentence[ ] that [is] 'grossly disproportionate' to the crime." Ewing v. California, 538 U.S. 11, 23 (2003) (plurality opinion)(quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment)).

In Roper v. Simmons, 543 U.S. 551 (2005), the Supreme Court held that imposition of death for crimes committed by a teenage defendant was cruel and unusual punishment. Roper was the culmination of a long line of cases wherein the Court realized a qualitative difference between the acts of a juvenile or an adult. See Thompson v. Oklahoma, 487 U.S. 815, 835 (1987) ("Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct . . . "); Id. at 853 (O'Connor, J., dissenting) ("Legislatures recognize the relative immaturity of adolescents, and ... permitted ... classes that take account of this ... difference ...."); Johnson v. Texas, 509 U.S. 350, 367 (1993) ("A lack of maturity and an underdeveloped sense of responsibility are found in youth ... and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions"); Graham v. Collins, 506 U.S. 461, 518 (1993) (Souter, J., dissenting) ("A young person may perfectly well commit a crime 'intentionally,' but our prior cases hold that his youth may nonetheless

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[65] Petition, Ground Four. See 2 AA 284.

be treated as limiting his moral culpability because he 'lack[s] the experience, perspective, and judgment' expected of adults") (citation omitted); Eddings v. Oklahoma, 455 U.S. 104, 115-116 (1982) ("Even the normal 16-year-old customarily lacks the maturity of an adult"). Juveniles are unable to withstand negative influences in the same manner as an adult. Roper, 543 U.S. at 569 ("juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"); Thompson, 487 U.S. at 835 (juveniles are "much more apt to be motivated by mere emotion or peer pressure ...."); see also Stanford v. Kentucky, 492 U.S. 361, 395 (Brennan, J., dissenting); Eddings, 455 U.S. at 115 ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage"). Finally, juvenile misconduct often reflects only the transitory nature of their character. Roper, 543 U.S. at 570 ("The third broad difference is that the character of a juvenile is not as well formed .... The personality traits of juveniles are more transitory, less fixed"); see also Graham v. Collins, 506 U.S. 461, 518 (1993) (Souter, J., dissenting).

In light of the differences between juvenile and adult behavior, the Supreme Court concluded that juveniles cannot be classified among the worst offenders. Roper, 543 U.S. at 570 ("These differences render suspect any conclusion that a juvenile falls among the worst offenders"); Thompson, 487 U.S. at 835 ("The reasons why juveniles are not trusted with the privileges ... of an adult also explain why their irresponsible conduct is not as morally reprehensible ...."); see also Graham, 506 U.S. at 518 (Souter, J., dissenting) ("Youth may be understood to mitigate ... a defendant's moral culpability ... for which emotional and cognitive immaturity ... render him less responsible, and youthfulness ... is transitory, indicating that the defendant is less likely to be dangerous ....").

In light of this authority, there can be no doubt that an offense committed by a juvenile does not carry the same moral culpability. These differences must be reflected in our capital sentencing scheme. The prohibition of the execution of an inmate who was under eighteen at the time of his offense creates an inescapable corollary that acts committed by juveniles should not be used to obtain a death sentence.

2. The Prosecution Relied Extensively on Acts Mr. Castillo Committed as a Juvenile to Seek the Death Sentence

From their opening statement, prosecutors relied upon Mr. Castillo's juvenile record. Three witnesses described evidence of Mr. Castillo's juvenile misconduct and prosecutors emphasized the misconduct argument.

Mr. Castillo was born in December, 1972. The prosecutor's open statement emphasized Mr. Castillo's behaviors beginning when he was five years of age:

> ... age five, the defendant drowned his grandmother's dog to get even with her. Age six, defendant killed several birds in anger smashing their skulls with rocks. Age seven, the defendant destroyed a house in Los Angeles. When the family lived in Lake Tahoe, Mr. Castillo was kicked off the school bus on the first day of school for knocking a girl off the bus causing a concussion. In Las Vegas, while at school, the defendant ran a piece of glass down a youth's back requiring three stitches. Prior to the family coming to Las Vegas, the defendant had previously been classified as a juvenile delinquent in Los Angeles County, California and Douglas County, Nevada ...

17 AA 4147. The remainder of the statement detailed acts which occurred when Mr. Castillo was between nine and sixteen. They included setting fires, burglary, larceny, escape, runaway, vagrancy, and weapons. 17 AA 4147-4154. None of the statements included circumstances surrounding Mr. Castillo's life.

Prosecutors presented evidence from Bruce Kennedy, a youth parole officer. Kennedy described thirty juvenile incidents from Mr. Castillo's juvenile record and prosecutors introduced a copy of that record. 17 AA 4185-4188; and 4196-4197. Kennedy provided aggravating details about each offense:

> On October 21, 1990 at 1:10 a.m. William ran away from the Nevada Youth Training Center, successfully escaping the facility. He alluded apprehension until December 19th, 1990 when he was arrested and charged with attempted burglary. The burglary occurred at approximately 1:15 in the afternoon. According to the police report William and another suspect knocked at a door at the residence and then kicked the door in when they got no response. An occupant was in the house at the time of the attempted burglary. The resident of the house had heard the doorbell ring and the door being kicked. She picked up a can of Mace and confronted the subjects with the Mace after the door had flown open. According to the police reports both suspects fled the scene at that time driving off in a car . . . It should be noted that when William was arrested he had a

handgun ....

17 AA 4146-4181. Charmaine Smith, a Nevada parole officer, and Michael Eylar, a detective, further described the attempted burglary, allegedly committed when Mr. Castillo was seventeen. 18 AA 4270-4306. The attempted burglary was one of five aggravating circumstances which prosecutors alleged in their pursuit of the death penalty. 3 AA 639-635.

The trial judge's instructions highlighted Mr. Castillo's juvenile misconduct– "Evidence of a defendant's past conduct from which a reasonable inference can be drawn that even incarceration will not deter the defendant from endangering other's lives, is a factor you may consider in determining the appropriate penalty." 4 AA 771.

In argument, prosecutors continued to pursue the death penalty based upon Mr. Castillo's juvenile conduct:

> William Castillo, and his accomplice, kicked in the door of Marilyn Mills while he had in his hands a loaded semi automatic handgun and, by his own admission, they were there to rob, that the State has met its burden that we have proven to you that he has been convicted of a felony in which violence or the threat of violence was involved. The judgement of conviction has been introduced.
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> ...the State would submit that it is virtually impossible to conceive of a prior criminal history of a person who has been on the earth the number of years that Mr. Castillo has that is either more lengthy or more severe.
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> His significant prior criminal history reflects the character of this defendant. His juvenile history was filled with arson, with escape, with theft, with violence.

19 AA 4590, 4595 and 4646.

3. Application

The Eighth Amendment required jurors treat the defendant as a "uniquely individual human bein[g]" and make a reliable determination that death is the appropriate sentence. Penry v. Lynaugh, 492 U.S. 302, 320 (1989) (citing Woodson v. North Carolina, 428 U.S. 280, 304 - 305 (1976). To minimize any risk of an arbitrary or capricious

imposition of the death penalty, the capital sentencing scheme must guide the juror's discretion and consideration of appropriate particularized circumstances relating to the crime and defendant. Gregg v. Georgia, 428 U.S. 153, 199 (1976) (joint opinion). What is an appropriate consideration for the imposition of death reflects the evolving standards of decency that mark the progress of a maturing society. Trop v. Dulles, 356 U.S. 86, 99-101 (1958) (plurality opinion); Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) (rejecting a death penalty for child sexual assault); Atkins v. Virginia, 536 U.S. 304 (2002) (prohibiting the death penalty when defendant suffers mental retardation). In Roper, the Supreme Court held that every defendant, as a unique human being, develops from childhood, where his actions and decisions may be impulsive and lack fixed moral culpability, to adulthood, where society holds a defendant morally culpable. Id. 543 U.S. at 568. Contemporary standards of decency now recognize that the imposition of a death sentence for immature or childish actions is cruel and unusual. Id. Whether the death sentence is based upon the offense in the charging instrument, the allegations supporting an aggravating circumstances, or other aggravating evidence, is a distinction with little difference. In all such circumstances the prosecutors seek to impose a death sentence based upon a defendant's actions during a time period in which he is less morally culpable.

4. Ineffective Assistance of Counsel

To the extent that this claim was not preserved, Mr. Castillo contends his constitutional right to the effective assistance of counsel was violated by counsel's failure to object to the prosecutors' use of evidence involving juvenile misconduct. To the extent that appellate counsel, or initial appointed habeas counsel failed to identify, preserve and litigate this claim, their representation fell below an objectively reasonable standard, violating Mr. Castillo's constitutional right to their assistance.

H. Is Death an Excessive Sanction for Mr. Castillo's Unique Circumstances?

Mr. Castillo contends that imposition of the death penalty, based upon the circumstances in his case, violates the Eighth Amendment prohibition on excessive punishments. U.S. Const. Amend. VIII ("Excessive bail shall not be required, nor excessive

fines imposed, nor cruel and unusual punishments inflicted."). The evidence before this Court demonstrates that, at the time of his offense, Mr. Castillo suffered from a number of mental and cognitive disorders which interfered with his ability to accurately process events, or to inhibit an inappropriate response.

1. The Law

An excessive punishment may violate the Eighth Amendment's prohibition on excessive punishment. See Weems v. United States, 217 U.S. 349 (1910) (Sentence of twelve years hard labor was excessive). The determination whether a punishment is excessive may turn on the type of crime. For example, in Coker v. Georgia, 433 U.S. 584 (1977), the Supreme Court held that a death sentence is excessive for one convicted of the rape of an adult. Id. 433 U.S. at 596. In Kennedy v. Louisiana, 554 U.S. 407 (2008), the prohibition was extended to those defendants convicted of rape of a child. Id. 554 U.S. at 446-447. And, in Enmund v. Florida, 458 U.S. 782 (1982), the Supreme Court held the death penalty was excessive without proof the defendant killed someone, or intended that someone be killed. Id. 458 U.S. at 793 (No death penalty for "vicarious murder"). These cases are derived from a "precept of justice that punishment for [a] crime should be graduated and proportioned to the offense." Weems, 217 U.S. at 367.

The determination whether a punishment is unconstitutionally excessive may also turn on the defendant. For example, in Atkins v. Virginia, 536 U.S. 304 (2002), the Supreme Court held the execution of a mentally retarded person would violate the Eighth Amendment. Id. 536 U.S. at 321. Further, in Roper v. Simmons, 543 U.S. 551 (2005), the Supreme Court held the death penalty was inappropriate for a defendant who was under eighteen at the time of his offense. Moreover, the Supreme Court held it inappropriate to punish an offender for his "status" or "condition." Robinson v. California, 370 U.S. 660, 666-667 (1962) (Punishment for being an "addict" violates the Eighth Amendment.). These cases support the concept that punishment must be based upon personal moral culpability. Mentally retarded persons and juveniles have a "diminished personal responsibility." Kennedy, 554 U.S. at 420; Roper, 543 U.S. at 571-573; Atkins, 536 U.S. at 319.

A claim that punishment is excessive must be judged by contemporary "standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 100-101 (1958). "Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule." Kennedy, 554 U.S. at 420; see Atkins, 536 U.S. at 311 ("A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the "Bloody Assizes" or when the Bill of Rights was adopted, but rather by those that currently prevail.").

In Atkins, the Supreme Court considered whether execution of mentally retarded persons satisfied two "social purposes served by the death penalty"–retribution and deterrence. Id. 536 U.S. at 318-219. Because murder committed by a mentally retarded person did not reflect a "consciousness materially more depraved than that of any person guilty of murder," the Court concluded retribution was not served. Id. 536 U.S. at 319 (quoting Godfrey v. Georgia, 446 U.S. 420, 433 (1980)). Moreover, the Court held that the cognitive and behavioral impairments associated with mental retardation denied the deterrence effect associated with the death penalty:

> ... The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable– for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses– that also make it less likely they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.

Id. 536 U.S. at 320. Finally, the exclusion of mentally retarded persons from the death sentence did not diminish the deterrent effect of the death penalty generally. Id.

2. Mr. Castillo's Circumstances

The evidence before the Court demonstrates that Mr. Castillo suffers the same cognitive and behavioral impairments which were credited in Atkins, 536 U.S. at 319-320. Mr. Castillo provided two uncontroverted expert reports supporting his claim. Dr. Bradley,

an assistant professor of psychiatry, and director of the Veteran's Administration posttraumatic stress disorder team, evaluated Mr. Castillo. 4 AA 862-863. Dr. Bradley considered the effects of severe physical and emotional abuse, violence, abandonment, and institutionalization. Id. at 863-868. These circumstances culminated in a diagnosis of complex posttraumatic stress disorder with dissociation. Id. at 868, 878. According to Dr. Bradley, "[d]issociation can also involve an alteration in perception of oneself or one's environment which often involves feeling detached and like an outside observer of one's own body or thoughts. This may also include sensory anesthesia, a lack of emotional response and a sense of lacking control of one's actions." Id. Mr. Castillo was also diagnosed with reactive attachment disorder. Id. at 870, 878. Dr. Bradley explained:

> Complex trauma exposure in childhood is associated with increased risk for disruption of key biological and psychological developmental processes including cognitive development and emotional development. These include decreased ability to regulate emotional responses. This may be associated with an inappropriate level of emotional response ....

Id. Additionally, this diagnosis results in one having difficulty regulating his behavior, and difficulty in filtering the information in the environment. Id. Dr. Bradley concluded that it would be "inappropriate and unfair to judge Mr. Castillo's overall character or the crime he has committed without also taking into account the developmental impact of the environments in which he was raised and his other formulative life experiences including his abuse, neglect, and repeated institutionalization over the course of his childhood and adolescence." Id. at 879.

Dr. Jonathon Mack is a neuro-psychologist who evaluated Mr. Castillo. 4 AA 888. Dr. Mack conducted more than ten hours of clinical testing and reviewed voluminous records. Id. at 888-926. Mr. Castillo is not mentally retarded–he scored in the average range of intelligence. Id. at 933. However, Dr. Mack identified numerous clinical disorders and deficits relative to Mr. Castillo, including: Cognitive Disorder NOS (includes Sensory-Integration dysfunction); Reactive Attachment Disorder of Early Childhood; and Posttraumatic Stress Disorder, Chronic. Id. at 952. Each of these disorders were present at

the time of Mr. Castillo's offense. Id.

Considering the social history, the voluminous records, and the results of his own testing, Dr. Mack concluded:

> The history and test finding suggest, ... within a reasonable degree of neuropsychological and psychological certainty, that at the time of the criminal events in question, Mr. Castillo was under extreme emotional duress due to the activation of his Posttraumatic Stress Disorder by the specific circumstances of the criminal incident as they unfolded. It is my further opinion ... that Mr. Castillo's Posttraumatic Stress Disorder combined ... with his organic tendency to be overreactive to environmental inputs as a direct consequence of his Cognitive Disorder NOS and underlying difficulties with sensory integration and sensory modulation to render him incapable of conforming his behavior to the requirements of law.

Id. Therefore, Mr. Castillo suffers from a unique combination of organic and psychological deficits which prevented him from successfully understanding his environment and caused him to react in an disproportional and inappropriate manner.

3. Application

Mr. Castillo contends that his unique circumstances cannot be distinguished from those in Atkins. The Supreme Court noted that a mentally retarded person,

> [b]ecause of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.

Atkins, 536 U.S. at 318. Mr. Castillo's circumstances are no different. He suffers an organic, biological disorder which specifically interferes with his ability to understand and process information from his environment. 4 AA 952. Moreover, this disorder, combined with the unique psychological disorders present, not only prevent his ability to control impulses, they almost guarantee he will overreact on impulse. Id.

Mr. Castillo's execution will not serve the social purposes which serve the death penalty. Atkins, 536 U.S. at 318-319. Because Mr. Castillo is unable to accurately process his environment, his culpability must be diminished from that of those "most deserving of execution." Id. 536 U.S. at 319; Godfrey, 446 U.S. at 433. The fact that Mr.

Castillo, as a result of his disorders, is unable to control inappropriate impulses–indeed he will overreact–demonstrates that deterrence is not served. "[I]t seems likely that capital punishment can serve as a deterrent only when the murder is the result of premediation and deliberation." Enmund, 458 U.S. at 799. Finally, exempting a defendant, such as Mr. Castillo, from execution will not lessen the deterrent effect of this punishment on others who do not suffer such circumstances.

4. Conclusion

Mr. Castillo suffers from multiple organic and psychological disorders which deprive him of the ability to accurately perceive his environment or to inhibit an inappropriate response. Such circumstances, in accord with evolving standards of decency, render the punishment of death excessive. Mr. Castillo is entitled to relief.

I. Did Definition of Deadly Weapon Render the Murder Conviction Unconstitutional?

Mr. Castillo was convicted of Murder with Use of a Deadly Weapon.[66] 2 AA 384-387.[67] 19 AA 4690; and 2 AA 386. Mr. Castillo contends Nevada's definition of a

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[66] The jury's verdict made no reference to any finding of a deadly weapon in association with the robbery. 3 AA 744-4 AA 750. Mr. Castillo's indictment did not include an allegation that Mr. Castillo used a deadly weapon in a robbery. 2 AA 397-401.

[67] NRS 193.165 provides, in pertinent part:

> 1. Except as otherwise provided in NRS 193.165, any person who uses a firearm or other deadly weapon or a weapon containing or capable of emitting tear gas, whether or not its possession is permitted by NRS 202.375, in the commission of a crime shall be punished by imprisonment in the state prison for a term equal to and in addition to the term of imprisonment prescribed by statute for the crime. The sentence prescribed by this section runs consecutively with the sentence prescribed by statute for the crime.
>
> 2. This section does not create any separate offense but provides an additional penalty for the primary offense, whose imposition is contingent upon the finding of the prescribed fact.
>
> . . .
>
> 5. As used in this section, "deadly weapon" means:
>
> a. Any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is

deadly weapon is unconstitutional. NRS 193.165(5)(b) is unconstitutionally vague and overbroad, rendering his sentence invalid under due process.[68]

The void for vagueness doctrine is an aspect of due process and requires that the meaning of a penal statute be determinable. Schwartzmiller v. Gardner, 752 P.2d 1341, 1345 (9th Cir. 1984). A statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 358 (1983) (citations omitted); see Coates v. City of Cincinnati, 402 U.S. 61, 614 (1971); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); Jordan v. DeGeorge, 341 U.S. 223, 231-32 (1951)). Stated differently, the void-for-vagueness doctrine requires the court to analyze a statute under two theories: notice to citizens and arbitrary enforcement. Kolender, 461 U.S. at 358 (statue is void that permits a standardless sweep for policemen, prosecutors, and juries to pursue their personal predilections) (citing Smith v. Goguen, 415 U.S. 566, 574 (1974)). Once a court finds a statute facially vague, it is void; there is no need to analyze the statute as applied to the defendant. Schwartzmiller, 752 P.2d at 1346.

"A criminal statute must be strictly construed against the imposition of a penalty when it is uncertain or ambiguous." Funderburk v. State, 124 Nev. __, 212 P.3d 337, 339 (2009) (citing Zgombic v. State, 106 Nev. 571, 575, 798 P.2d 548, 551 (1990) (superceded by statute, 1995 Nev. Stat., ch. 455 § 1, at 1431). When the language of a statute

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likely to cause substantial bodily harm or death;

b. 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 . . .

NRS 193.165 (1996).

[68] Petition, Claim Eleven. See 2 AA 323.

or one of its provisions is uncertain, this Court will look to the intent of the Legislature.[69] Funderburk v. State, 124 Nev. __, 212 P.3d at 339 (citing Zgombic v. State, 106 Nev. at 575, 798 P.2d at 55). Moreover, this Court will construe the statute "in a manner which avoids unreasonable results." Funderburk v. State, 124 Nev. __, 212 P.3d at 339 (citing Zgombic v. State, 106 Nev. at 575, 798 P.2d at 55).

1. Actual Notice

NRS 193.165(5)(b) is so vague and standardless that it leaves the public no notice as to which conduct is prohibited. See Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966). It is impossible for a person of ordinary intelligence to discern which instruments are "readily capable of causing substantial bodily harm" and which are not. See NRS 193.165(5)(b). This Court interpreted "deadly weapon" to include anything from a trash compactor, Phelps v. Budge, 188 Fed. Appx. 616, 619-620 (9th Cir. 2006), to a ring sizer, Arachnian v. State, 122 Nev. 1019, 1032, 145 P.3d 1008, 1018 (2006). The statute is virtually limitless in application: any crime committed with any object other than one's own bare hands (and, arguably, one's hands may be alleged as deadly weapon under the statute) will result in an additional consecutive sentence. The statute fails to criminalize a weapon – instead it enhances the penalty based upon the harm caused or threatened by the weapon, which is already an element of the primary offense.

2. Arbitrary Enforcement

Nevada's statute, by allowing the prosecutor open and unfettered discretion to seek murder with the use of a deadly weapon, is subject to arbitrary and discriminatory

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[69] In 1995, the Legislature amended NRS 193.165 to include subsection 5, which defines "deadly weapon" using both the "inherently dangerous weapon" test and the "functional test." Under the functional test, an instrument, "even though not normally dangerous, is a deadly weapon whenever it is used in a deadly manner." Zgombic v. State, 106 Nev. 571, 573-74, 798 P.2d 548, 549-50 (1990) (superceded by NRS 193.165(5)) (citing Clem v. State, 104 Nev. 351, 357, 760 P.2d 103, 106 (1988)); see NRS 193.165(5)(a). The inherently dangerous weapon test is met if "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." Zgombic v. State, 106 Nev. 571, 576-77, 798 P.2d 548, 551 (1990); see NRS 193.165(50(b). In doing this, the Legislature provided the greatest possibility that an instrument used in a crime constitutes a "deadly weapon."

enforcement and violates due process. NRS 193.165 contains no standard to determine what will be a deadly weapon, and vests virtually complete discretion in the prosecutor to determine when a deadly weapon was used. See Kolender, 461 U.S. at 359. It "set[s] a net large enough to catch all possible offenders, and leave[s] it to the courts to step inside and say who could be rightfully detained, and who should be set at large." United States v. Reese, 92 U.S. 214, 221 (1876).

NRS 193.165, at the time of Mr. Castillo's offense, was a Legislative reaction to Zgombic v. State, 106 Nev. 571, 798 P.2d 548 (1990). In Zgombic, the Court held the term "deadly weapon" was "indeed uncertain," and vague. Id. 106 Nev. at 575-76, 798 P.2d at 551. The Court disapproved of the functional test, ante at n. 69, because virtually every instrument used in crime will constitute a "deadly weapon," in essence doubling the sentence for every crime. Zgombic, 106 Nev. at 575-76, 798 P.2d at 551 ("NRS 193.165 is designed to deter injuries caused by weapons, not by people.") (emphasis in original). The Court announced that "deadly weapon," as it applied to NRS 193.165, may only encompass weapons that are inherently dangerous if used in ordinary the manner contemplated by its design. Zgombic, 106 Nev. at 577-78, 798 P.2d at 551. As a reaction to Zgombic, the Legislature amended NRS 193.165 to include subsection 5, which defined "deadly weapon" using both a "functional" and "an inherently dangerous" test. See NRS 193.165(5)(a),(b) (1996); see also ante n. 69. As a result, Nevada's definition of a deadly weapon, NRS 193.165, is unconstitutionally vague because it provides no notice what weapons are prohibited and it allows arbitrary prosecution. The vague definition of an element of murder renders the whole murder statute unconstitutionally vague.

3. Ineffective Assistance of Counsel

The Court previously held that Mr. Castillo's claim regarding NRS 193.165 should have been raised on direct appeal. 3 AA 601, 3 AA 675. To the extent that this issue was never preserved on direct appeal, or during the initial post-conviction proceedings, Mr. Castillo contends his right to effective assistance of counsel was violated. Strickland. 466 U.S. at 674, 684-85; Evitts v. Lucey, 469 U.S. at 396 ("A first appeal as of right ... is not

adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney."); Crump v. Warden, 113 Nev. at 303, 934 P.2d at 253 ("We now hold that ... a petitioner who has counsel appointed by statutory mandate is entitled to effective assistance of that counsel.").

J. Did the Instructions Lower the Burden of Proof by Inaccurately Defining Reasonable Doubt?

The trial judge defined reasonable doubt in a manner which elevated the threshold for reasonable doubt, thereby easing the prosecutor's burden of proof and violating fundamental fairness and due process.[70] The trial judge instructed the jury:

> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

3 AA 732.

The Due Process Clause requires the prosecution to prove, beyond a reasonable doubt, every element of the offense. In re Winship, 397 U.S. 358, 364 (1970). While the Constitution does not require that any particular form of words be used to describe "beyond a reasonable doubt," the instructions taken as whole, must correctly convey the concept to the jury. Victor v. Nebraska, 511 U.S. 1, 5 (1994) (quoting Holland v. United States, 348 U.S. 121, 140 (1954)).

In Cage v. Louisiana, 498 U.S. 39 (1990), the trial judge instructed the jury:

> [A reasonable doubt] is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty.

498 U.S. at 40 (emphasis in opinion). The Supreme Court held that "the words 'substantial'

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[70] Petition, Claim Three. See 2 AA 275.

and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable-doubt standard." Id. at 41. When the reference to "moral," as opposed to evidentiary certainty was added into the equation, the Court determined that a reasonable juror "could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." Id.

The reasonable doubt instruction in Mr. Castillo's case suffered two defects similar to those in Cage which inflated the doubt required for an acquittal. The second sentence of the instruction stated that reasonable doubt "is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life." 3 AA 732. This language, similar to the language in Cage requiring "such doubt as would give rise to a grave uncertainty," provided an inappropriate characterization of the degree of certainty required to find proof beyond a reasonable doubt. It offered an explanation of reasonable doubt itself, rather than defining reasonable doubt, and elevated the standard by which reasonable doubt can be determined. This language has proven to be a historical anomaly. As far as can be discerned, no other state currently uses similar language in their reasonable doubt instructions, and the few states which previously used it, have since disapproved it.

The final sentence in the instant instruction was also constitutionally infirm. The trial judge stated that, for "[d]oubt to be reasonable," it "must be actual, not mere possibility or speculation." Id. Once again this language is similar to the "substantial" and "grave" language condemned by Cage. By describing reasonable doubt as "actual, not mere possibility or speculation" the trial judge elevated the threshold of reasonable doubt. The "govern or control" language created a reasonable likelihood that the jury would convict Mr. Castillo based upon a lesser degree of proof than the Constitution required. As a result, the jurors in Mr. Castillo's case received instructions which made reasonable doubt unconstitutionally difficult to recognize while rendering the lack of reasonable doubt more accessible.

The characterization of standard of proof as an "abiding conviction of the truth of the charge," did not cure the defects in this instruction. That statement cannot be linked

to any proper definition of reasonable doubt. In conjunction with the language which immediately preceded this statement, it provided prosecutors with an impermissibly low burden of proof.

K. Will Nevada Permit a Death Sentence Based upon a Presentation of Juvenile Records by a Witness with No Knowledge of Their Truthfulness or Reliability?[71]

1. Introduction

"Death is different." The need for procedural protections and reliability of sentencing in a death penalty case are paramount. Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (Stewart, Powell, and Stevens, JJ.).[72] The admission of evidence regarding Mr. Castillo's mental health, juvenile arrests, home life, behavior, morals, and school performance, all based upon records read by a counselor, rendered his penalty trial unreliable.[73] While Mr. Castillo was denied his constitutional right to confront the authors of these reports, prosecutors flooded the jury with unreliable expert testimony. Mr. Castillo's penalty trial was fundamentally unfair and produced an unreliable sentence.

"In all criminal prosecutions, the accused shall enjoy the right . . . to be

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[71] Petition, Ground Five. See 2 AA 298.

[72] See, e.g., Ring v. Arizona, 536 U.S. 584, 605-06 (2002) ("death is different"); id. at 614 (Breyer, J., concurring) ("Eighth Amendment requires ... special procedural safeguards when they seek the death penalty"); Spaziano v. Florida, 468 U.S. 447, 468 (1984) (Stevens, J., concurring and dissenting) (death penalty "must be accompanied by unique safeguards"); Lockett v. Ohio, 438 U.S. 586, 604 (1978) ("qualitatively different"); Gregg v. Georgia, 428 U.S. 153, 188 (1976) (Stewart, Powell, and Stevens, JJ.) ("penalty of death is different ... from any other punishment"); Furman v. Georgia, 408 U.S. 238, 286-89 (1972) (Brennan, J., concurring) (death "is in a class by itself"); id. at 306 (Stewart, J., concurring) ("penalty of death differs from all other forms of ... punishment, not in degree but in kind").

[73] Bruce Kennedy, a Nevada Youth counselor, read the following to Mr. Castillo's jury: (1) dispositional report dated 7/29/82; (2) behavioral report, dated 6/14/1982; (3) mental health report, dated 6/9/1981; (4) undated psychiatric evaluation; (5) dispositional report dated 1/25/1983; (6) neurological report, undated; (7) dispositional report dated 2/21/1984; (8) undated psychological report; (9) treatment plan, author unknown, dated 5/22/1984; (10) juvenile court report, author unknown, dated 12/19/1985; and (11) undated certification report. 17 AA 4198-4239.

confronted with the witnesses against him."[74] U.S. Const. amend VI. The right envisions:

> . . . a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Ohio v. Roberts, 448 U.S. 56, 64-65 (1980) (citing Mattox v. United States, 156 U.S. 237, 242-43 (1985)). Although rules addressing hearsay evidence and the right of confrontation are "generally designed to protect similar values," they are not equal. Idaho v. Wright, 497 U.S. 805, 814 (1990); see California v. Green, 399 U.S. 149, 155-56 (1970); United States v. Inadi, 475 U.S. 387, 393 n.5 (1986); Dutton v. Evans, 400 U.S. 74, 86 (1970) (plurality opinion). Whether or not the evidence in Mr. Castillo's penalty trial was allowed by statute, his rights of confrontation must control. See Wright, 497 U.S. at 814; Green, 399 U.S. at 155-56 ("We have more than once found a violation of the confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception."); Bruton v. United States, 391 U.S. 123 (1968); Barber v. Page, 390 U.S. 719 (1968).

Addressing a violation of the right of confrontation involves a two-step analysis.[75] Roberts, 448 U.S. at 65. First, "the Sixth Amendment establishes a rule of necessity," meaning "the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." Roberts, 448 U.S. at 65 (citing, e.g., Mancusi v. Stubbs, 408 U.S. 204 (1972); Barber, 390 U.S. 719 (1968); Motes v. United States, 178 U.S. 458 (1900)). A witness is unavailable when "good faith efforts [were] undertaken prior to trial to locate and present the witness." Roberts, 448 U.S. at 74; Barber, 390 U.S. at 724-25; accord Green, 399 U.S. at 161-62; Berger v. California, 393 U.S. 314 (1969).

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[74] The Confrontation Clause applies to states. Pointer v. Texas, 380 U.S. 400, 403-05 (1965).

[75] The analysis in Roberts was abrogated in Crawford v. Washington, 541 U.S. 36, 63-69 (2004). However, Crawford is not retroactive. Whorton v. Bockting, 549 U.S. 406, 421 (2007). Roberts controls the resolution of this claim.

Second, the court must focus on the evidence itself: Only evidence which bears such trustworthiness that "there is no material departure from the reason of the general rule" should be admitted. Roberts, 448 U.S. at 65 (citing Snyder v. Massachusetts, 291 U.S. 97, 107 (1934). Thus, in this case, the prosecutor held a burden to demonstrate that authors of the eleven reports were unavailable. Roberts, 448 U.S. at 67. Thereafter, the prosecutor must further demonstrate each report bore adequate "indicia of reliability." Roberts, 448 U.S. at 67. No hearing was held to determine the unavailability of witnesses, or the reliability of each report. See Roberts, 448 U.S. at 67.

Six reports admitted through Kennedy involved expert evidence relating to medical or mental health evidence.[76] 17 AA 4198-4239. None of the report authors were "qualified as an expert." See Hallmark v. Eldridge, 124 Nev. __, 189 P.3d 646, 650 (2008); NRS 50.275.[77] Whatever training or experience Kennedy had in medicine is unknown. Thus, a lay witness was allowed to testify regarding psychological, neurological, and psychiatric illnesses. See NRS 48.035.

2. This Court Previously Recognized Such Error

This Court granted relief when a penalty trial was "infected by evidence" which was highly suspect and prejudicial. Young v. State, 103 Nev. 233, 237-38, 737 P.2d 512, 515 (1987). In Young, an "expert witness on gangs" testified he saw the defendant with gang members, wearing gang attire, and was previously told the defendant was a gang member. Id. 103 Nev. at 237, 737 P.2d at 515. The expert described typical criminal behavior exhibited by gang members. Id. 103 Nev. at 237, 737 P.2d at 515. The Court held such

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[76] Medical reports included: (1) Las Vegas Mental Health Center Report, dated 6/9/1981; (2) Psychiatric Evaluation, undated; (3) Neurological Report, by Dr. Kirby Reed; (4) Dispositional Report, unnamed author, dated 2/21/84; (5) Psychological Report, undated and; and, (6) Nevada Youth Training Center Treatment Plan, dated 5/22/84, author unknown.

[77] To qualify as an expert witness, NRS 50.275 requires the witness: (1) be qualified in an area of "scientific, technical or other specialized knowledge;" (2) have specialized knowledge to "assist the trier of fact to understand the evidence or to determine a fact in issue;" and, (3) that his testimony be limited "to matters within the scope of [his specialized] knowledge" Hallmark v. Eldridge, 124 Nev. 492, 189 P.3d 646, 650 (2008).

evidence was "highly dubious and inflammatory" and found it "clearly the type of hearsay" which should be prohibited. Id. 103 Nev. at 237, 737 P.2d at 515 (discussed Silks v. State, 92 Nev. 91, 545 P.2d 1159 (1976) (further held a letter by the defendant's cell mate inadmissible)).

In Allen v. State, 99 Nev. 485, 665 P.2d 238 (1983), the Court reversed a death sentence because improper "character evidence" was admitted. Id. 99 Nev. at 487-88, 665 P.2d at 239-40 ("the decision to execute a human being should not be influenced by such dubious, tenuous 'evidence'"). Such evidence included the defendant's failure to uphold his probation requirements and testimony from a jail employee, based upon records, the defendant had disciplinary problems. Id. 99 Nev. at 488, 665 P.2d at 240. The Court held the probative value of such evidence was weak and instructed the trial judge to "be most cautious about admitting such 'character evidence,' as evidence of this kind would be inadmissible to establish guilt." Id. 99 Nev. at 488, 665 P.2d at 240.

The Court again held hearsay evidence inadmissible in Robbins v. State, 106 Nev. 611, 624-28, 798 P.2d 558 (1990). The defendant's girlfriend testified that the defendant threatened members of her family by letter. Id. 106 Nev. at 626-27, 798 P.2d 558. No other testimony was presented and letters were not introduced. Id. 106 Nev. at 626-27, 798 P.2d 558. Although the Court held the error harmless, it stated such evidence should not be allowed. Id. 106 Nev. at 626-27, 798 P.2d 558.

In two opinions, on the same day, after Mr. Castillo's conviction, the Court held the right of confrontation does not apply to evidence in a penalty trial.[78] Johnson v.

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[78] Summers was based upon Williams v. New York, 337 U.S. 241, 243 (1949). See Johnson, 122 Nev. at 1347, 148 P.3d at 770; Summers, 122 Nev. at 1331, 148 P.3d at 782. Williams addressed due process–not confrontation. Moreover, Williams was decided sixty-two years ago, long before most of the Supreme Court's modern decisions regarding the death penalty. See e.g. Ring v. Arizona, 536 U.S. 584 (2002) (Right to jury sentencing); Barefoot v. Estelle, 463 U.S. 880, 898 (1983); Bullington v. Missouri, 451 U.S. 430 (1981) (double jeopardy clause applies to penalty trial); Gardner v. Florida, 430 U.S. 349 (1977) (Due process violates with evidence defendant had no opportunity to deny); Gregg v. Georgia, 428 U.S. 153, 195 (1976) (constitutionality of death penalty is best met by a bifurcated proceeding); Bruton v. United States, 391 U.S. 123 (1968) (Inadmissibility of co-defendant's confession); Gideon v. Wainright, 372 U.S. 335 (1963) (Right to counsel

State, 122 Nev. 1344, 1347, 148 P.3d 767, 769-70 (2006); Summers v. State, 122 Nev. 1326, 1327, 148 P.3d 778, 779 (2006); but cf. Lord v. State, 107 Nev. 28, 43-44, 806 P.2d 548, 557-58 (1991) (right to confrontation applies to Bruton error); Buschauer v. State, 106 Nev. 890, 894, 804 P.2d 1046, 1048-49 (1990) (when victim-impact statement contains defendant's specific prior acts due process required an opportunity to cross-examine). However, "evidence [in a penalty trial] must still be reliable and relevant, and the danger of unfair prejudice must not substantially outweigh its probative value." Summers, 122 Nev. at 1333, 148 P.3d at 783 n.17 (citations omitted).

Johnson and Summers are distinguished because, in those cases, the Court considered the confrontation right in light of Crawford v. Washington, 541 U.S. 36 (2004)–which was decided long after Mr. Castillo's trial. In Crawford, the Supreme Court departed from the analysis it adopted in Roberts and approved a new analytical construct to be applied in future trials. Id., 541 U.S. at 63-69. Because Mr. Castillo's trial was before Crawford, his claim must be analyzed under Roberts. Johnson and Summers do not apply. The Court should address this claim under Young, Allen and Robbins. See Young, 92 Nev. at 237, P.2d at 515, Allen, 99 Nev. at 488, 665 P.2d at 240; Robbins, 106 Nev. at 627, 798 P.2d at 558.

3. Reports Read by Kennedy Were Unreliable

Kennedy read eleven hearsay reports which he did not author. The trial judge never considered whether the reports bore an "indicia of reliability." 448 U.S. at 67. The nature of the reports, in Mr. Castillo's juvenile records, demonstrated an obvious contemplation by their authors that they would be used in criminal proceedings.

a. Expert Reports

Kennedy's testimony included six reports by medical or mental health experts. No hearing was held to determine the qualifications of the author, their training or experience, or even their opportunity to make the observations within the reports. See NRS

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applicable to states).

50.275; Eldridge, 124 Nev. at __, 189 P.3d 646, 650-52 (2008). The jury learned from Kennedy, as he read the medical expert's report, that the expert learned Mr. Castillo fought at school, did "whatever he wants" and was "immune to punishment." 7 AA 1641; 17 AA 4203. Jurors learned the observations of an "unnamed psychiatrist," in an undated psychiatric evaluation, that Mr. Castillo was a "schizo," should be "locked up," and "showed no emotional response." 7 AA 1662; 17 AA 4204-4205.

The jury learned of a neurological report by Dr. Kirby Reed which diagnosed Mr. Castillo with a personality disorder, confirmed no indication of neurological disorder and suggested placement in a residential treatment center for the protection of himself and the public.[79] 17 AA 4209. Kennedy described psychological testing and opinions from a dispositional report dated February 21, 1984 which suggested Mr. Castillo suffered no mental or thought disorder, but scored high in the areas of delinquent behavior and hostility. 8 AA 1845-1846; 17 AA 4211. In the same exhibit the jury received an undated psychological report, attached to the dispositional report, which suggested Mr. Castillo was of average intelligence and supported the allegations in the report. Id. Finally, the jury reviewed a Treatment Plan which Kennedy did not author. ("I am the one that filed the document with the court; however, I'm not the writer of the actual document."). 17 AA 4215-4216. Once again, the jury heard evidence that Mr. Castillo suffered no mental or thought disorder and was simply "unwilling to accept responsibilities for his actions." 17 AA 4217.

Mr. Castillo was denied the ability to rebut the evidence within the State's Exhibits. There is no evidence of the qualifications, training, or experience of the alleged professionals who authored the reports. Many of the alleged experts are not named; some of the reports are based upon unknown third party statements. The thoroughness of the medical or mental health testing is not documented. The circumstances which attended the testing, or Mr. Castillo's placement and the involvement of his family, are not documented.

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[79] A neurologist is a medical doctor who diagnoses and treats nervous system disorders, including diseases of the brain, spinal cord, nerves, and muscles. See http://www.neurologychannel.com/aneurologist.shtml (12/09.08). Neurologists do not make psychological diagnoses.

There is no question that such evidence would never be accepted in other circumstances. See NRS 50.275; Eldridge, 124 Nev. at __, 189 P.3d 646, 650-52 (2008).

An adequate investigation revealed that the expert observations contained in these reports are inaccurate, based upon limited testing and short cited. See post at (c). The evidence had no indicia of reliability.

b. Additional Reports

Kennedy testified from additional juvenile records which he did not author involving matters of which he had no personal knowledge, including a "dispositional report," dated July 29, 1982, through Kennedy's testimony, jurors were informed that Mr. Castillo's mother and step-father "made every effort" to provide him a good home, worked with mental health professionals to provide treatment, but were "totally incapable of helping their son overcome his behavioral problems."[80] Indeed Mr. Castillo's parents felt "that they and their infant daughter are not safe in their home...." 17 AA 4200.

Kennedy also testified from a "behavioral report," dated June 14, 1982.[81] Jurors learned that Mr. Castillo always professes his innocence, "does what he pleases no matter what the consequences," and should be in a secure environment. 17 AA 4202. Jurors were provided a Dispositional Report, dated January 25, 1983, which described Mr. Castillo's arrest for setting fires in Circus Circus Hotel and at the Oz Chinese Restaurant. The report described Mr. Castillo as "nonchalant," and "uncaring."[82] 9 AA 2014.

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[80] A "dispositional report" is a "report that is given to a judge when a judge has to make a decision about what to do with the juvenile who has been found to be delinquent[.]" 17 AA 4198.

[81] "Behavioral reports" concern "behavior that is exhibited in detention." 17 AA 4201. ("So this is a written report about Billy's behavior while he was in custody as a juvenile down at juvenile services.").

[82] Kennedy opined that "somebody from the fire department" wrote the report. 17 AA 4207. ("So this is a report by a law enforcement officer as to what they found?").

Kennedy also described a December 19, 1985, Juvenile Court Review Report.[83] He described to the jury that Mr. Castillo, "although only 12 years of age, is a very sophisticated young man." The author of the report felt that Mr. Castillo "had an abusive upbringing for the first few years, his present home situation and continued delinquent behaviors [were] are of his own making." 17 AA 4220. Further, the jury was informed that Mr. Castillo had "a decent home with many opportunities to succeed." 17 AA 4221. Finally, Kennedy described an undated certification report.[84] Once again jurors heard evidence which suggested Mr. Castillo had a "proper home and controls" and that he "rejected any and all efforts by his parents to assist him." 17 AA 4231.

The manner in which this evidence was presented deprived Mr. Castillo of any opportunity to oppose or question the unsupported conclusions made, in many cases, by unnamed persons. The conclusions were often not limited in scope to specific situations or circumstances which would allow counsel to investigate and demonstrate their over breadth or untruthfulness. Rarely in our justice system do we allow an allegation that "you are a bad kid," or "you are a sociopath," without proof of specific circumstances which can be tested through cross-examination or rebuttal evidence. Yet this occurred in Mr. Castillo's trial.

c. Adequate Investigation

As a result of an adequate investigation, ante, Claim A at 8, the Court knows the broad statements in the juvenile reports are unreliable, and untrue. Mr. Castillo did not only have "an abusive upbringing for the first few years;" he did not have a "a decent home with many opportunities to succeed;" he did not have a "proper home and controls;" his parents did not make every effort to provide him a good home or work with mental health professionals to provide treatment; and his parents were not were "totally incapable of helping their son overcome his behavioral problems." Instead, his parents chose not to help

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[83] "This is a court document given to the judge at a time of a court review." 17 AA 4208.

[84] At a certification hearing, the issue before the judge is whether a juvenile should be tried (or "certified") as an adult. 17 AA 4229-4230.

Mr. Castillo. See 4 AA 842. Mr. Castillo, like his mother, was neglected, physically and mentally abused and abandoned to a foster home. 1 AA 219, 235-236; 4 AA 823, 854-860; 5 AA 1071, 1122; 7 AA 1712-1713, 1716. Like his mother, he endured abuse from her many different sexual partners. 1 AA 219-221; 4 AA 816-818, 837-839; 5 AA 1122. Within his family, Mr. Castillo was surrounded by mental illness. 1 AA 223-224, 245; 4 AA 820-821, 823, 856, 859; 5 AA 1051; 6 AA 1367-1388; 7 AA 1712, 1717, 1719-1720; 8 AA 1906. Perhaps even more distressing, there was no way to escape violence as a member of Mr. Castillo's family. 1 AA 225-226, 240-241, 243-244; 4 AA 785, 789, 801-802, 819-820, 823, 829-831, 834, 842, 845, 853; 5 AA 1026, 1028, 1036-1041; 7 AA 1710. The same parents who provided "a proper home with proper controls" beat Mr. Castillo with belts, kicked him in the ribs, forced him to eat chili peppers and locked him in a room with a pan to relieve himself. 1 AA 241-242; 4 AA 787, 852; 5 AA 1164-1194; 7 AA 1590-1592.

An adequate investigation further revealed the medical or mental health conclusions within Kennedy's testimony was untrue. Statements that Mr. Castillo was "nonchalant," "uncaring," or a "very sophisticated young man" are better understood when competent professionals can describe the behaviors of a child suffering from reactive attachment disorder and post-traumatic stress disorder. 2 AA 254; 4 AA 864, 916. Such a child is unable to respond in a socially appropriate manner. 2 AA 256-259; 4 AA 867, 870; see also American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 130 (4th ed., text revision, 2000). Often such a child will "dissociate" or seemingly remove themselves from stressful situations. 2 AA 258-259; 4 AA 869.

The neurological findings in Mr. Castillo's juvenile records were also inaccurate and incomplete. A comprehensive neuro-psychological examination of Mr. Castillo revealed that he suffered from a cognitive disorder–an organic condition in his brain– which led him to overact to external stimulation. 2 AA 254; 4 AA 916-917. Such a condition provided explanations for observations that Mr. Castillo was "unwilling to accept responsibilities for his actions," or was "immune to punishment."

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What Mr. Castillo's jury heard was more than one-sided. Kennedy's testimony was inaccurate, unreliable, too general and presented in such a manner that it could not be rebutted. Whether this Court applies Summers or Roberts in their analysis of this claim, Mr. Castillo's rights to confrontation, and his rights to a fundamentally fair trial, were violated.

d. Failure to Preserve Error

Although trial counsel were aware of the reports within Kennedy's testimony; counsel failed to object to the testimony or request a hearing. This failure denied Mr. Castillo his right to the effective assistance of counsel. See Boyde v. Brown, 404 F.3d 1179-80 (9th Cir. 2005) (Ineffective assistance for failure to object to prejudicial inadmissible evidence). No reasonable trial strategy would allow the admission of such evidence, without an attempt to rebut. Cf. Davies v. State, 95 Nev. 553, 558 n.4, 598 P.2d 636, 640 n.4 (1979) ("[N]o possible ... trial strategy or tactics which would justify a knowing failure [of counsel] to object" to a patent violation of confrontation clause). Moreover, an adequate investigation would have revealed evidence which demonstrated the unreliability and falsity of the allegations within the records. In the end, the jury, who ultimately sentenced Mr. Castillo to death, relied upon inaccurate, false and misleading information to reach their verdict. Mr. Castillo suffered prejudice.

Mr. Castillo's trial counsel violated his right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685 (1984); Leslie v. Warden, 118 Nev. 773, 775, 59 P.3d 440, 443 (2002). Because this error was never raised during his initial state habeas proceedings, Mr. Castillo's habeas counsel further violated his right to the effective assistance of counsel. Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997)

L. Will Nevada Execute Mr. Castillo Even Though the Tenure of Every Judge Who Heard His Case Was Dependent on Popular Election?

Mr. Castillo's conviction and sentence violated due process because the judge that conducted his trial and the justices of this Court, who reviewed his conviction and sentence, do not meet federal constitutional standards of impartiality required in capital

cases. [85]

In Tumey v. Ohio, 273 U.S. 510, 532 (1927), the mayor of a village served as a judge of cases involving violations of the state prohibition act and received a portion of any fine levied. The Supreme Court held that due process required the mayor's disqualification because of his inherent interest in convicting the defendant. Reviewing the British authorities, the Court noted that "it is very clear that the slightest pecuniary interest of any officer, judicial or quasi-judicial, in the resolving of the subject matter which he was to decide, rendered the decision voidable." Id. at 524 (citations omitted). Regardless of the evidence presented, the judge's conflicting interests resulted in a lack of impartiality which required the conviction be reversed. Id. at 534. Due process required the court to consider whether the circumstances "offer[ed] a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused . . . " Id. at 532; accord Ward v. Village of Monroeville, 409 U.S. 57, 59-62 (1972) (mayor's interest in obtaining funds for a village from fines levied, without personal pecuniary interest, required disqualification). No proof of any actual bias of the judge is required. Indeed, the established procedure for disqualification for actual bias is irrelevant. Ward, 409 U.S. at 61.

The Supreme Court recently considered whether the appearance of judicial bias violated due process and required a judge to recuse himself. In Caperton v. A.T. Massey Coal Co. Inc., 129 S.Ct. 2252 (2009), the court held that a member of the West Virginia Supreme Court erred when he failed to recuse himself from a case which involved a contributor to his campaign. Such circumstances "offer[ed] a possible temptation to the average . . . judge . . . not to hold the balance nice, clear and true." Id., 129 S.Ct. at 2265 [citing] Tumey, 273 U.S. at 532. Whether the judge was actually biased was not an issue. Id.

The tenure of Nevada judges is dependent upon popular contested elections.

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[85] Petition, Ground Fifteen. See 2 AA 353.

Nev. Const. Art. 6 §§ 3, 5. However, when the United States Constitution was adopted, judges who presided over capital trials, which potentially included all felony cases, held tenure during good behavior. All appellate judges, who decided legal issues preserved at trial, had tenure during good behavior. This mechanism was intended to, and did, preserve judicial independence by insulating judicial officers from the influence of the sovereign that would otherwise have improperly affected their impartiality.

The tenure of judges during good behavior was firmly entrenched. Almost a hundred years before the adoption of our constitution, a provision requiring that "Judges' Commissions be made quamdiu se bene gesserint. . . ." was considered sufficiently important to be included in the Act of Settlement, 12, 13 Will. III c. 2 (1700); W. Stubbs, Select Charters 531 (5th ed. 1884); and in 1760, a statute ensured their tenure despite the death of the sovereign, which had formerly voided their commissions. 1 Geo. III c.23; 1 W. Holdsworth, History of English Law 195 (7th ed., A Goodhart and H. Hanbury rev. 1956). Blackstone quoted the view of George III, in urging the adoption of this statute, that the independent tenure of the judges was "essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honour of the crown." 1 W. Blackstone, Commentaries on the Laws of England 258 (1765). The framers of the Constitution, who included the requirement of tenure during good behavior for federal judges under Article III of the Constitution, would not have held a more lenient view of the importance of this due process requirement than George III. Indeed, that the King had made colonial "judges dependent on his will alone, for the tenure of their offices" was one of underlying reasons assigned as a justification for our revolution. Declaration of Independence § 11 (1776); see Smith, An Independent Judiciary: The Colonial Background, 124 U.Pa.L. Rev. 1104, 1112-1152 (1976). Moreover, at the time our Constitution was adopted, no state had a provision for judicial election. Id. at 1153-1155.

Nevada law does not insulate state judges and justices from majoritarian pressures which would affect the impartiality of an average person as a judge in a capital case. Making unpopular rulings favorable to a capital defendant or to a capitally-sentenced

inmate poses the threat to a judge or justice of expending significant personal resources, of both time and money, to defend against an election challenger who can exploit popular sentiment against the judge's perceived pro-capital defendant rulings, and poses the threat of ultimate removal from office. Bright, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75 Boston U.L. Rev. 759, 776-780, 784-792, 822-825 (1995); Bright, Political Attacks on the Judiciary: Can Justice be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?, 72 N.Y.U.L. Rev. 308, 312-314, 316-326, 329 (1997); Johnson and Urbis, Judicial Selection in Texas: A Gathering Storm?, 23 Tex. Tech. L. Rev. 525, 555 (1992); Note, Disqualifying Elected Judges from Cases Involving Campaign Contributors, 40 Stan. L. Rev. 449, 478-483 (1988); Note, Safeguarding the Litigant's Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers, 86 Mich. L. Rev. 382, 399-400, 407-408 (1987).[86]

Members of the Supreme Court have acknowledged, outside of the Court's opinions, the detrimental effects of judicial elections in our society. Former Justice Sandra Day O'Connor spoke out against a referendum that would require the election of judges in Indiana. She argued that local judges needed to be appointed in order to remain independent. Justice O'Connor stated, "They must be able to put what is right and wrong, above what is popular…." Mark Peterson, Justice O'Connor Issues Elected Judges Opinion, WNDU, 04/22/09 at http://www.wndu.com/home/headlines/43483382.html. Justice Anthony Kennedy noted that ". . . in those rare instances that a sitting judge is challenged in an election, an alleged ethical infraction might be the basis for the challenge." Anthony M. Kennedy, Judicial Ethics and the Rule of Law, 40 Saint Louis University Law Journal 1067,

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[86] These threats are just as serious as those exposed and renounced by the Supreme Court in Caperton. In either circumstance, the judge's reality that his tenure in office is subject to the whims of the populace exist. No less than the opportunity to reward a friend and campaign supporter, the threat of an impending election "offer[s] a possible temptation to the average [person] as a judge . . . not to hold the balance nice, clear and true between the state and the [capitally] accused." Tumey, 273 U.S. at 532; Caperton, 129 S.Ct. at 2265.

(Summer 1996). Voters certainly may view any ruling in a capital defendant's favor to be an ethical infraction calling for the judge's ouster.

Members of this Court have acknowledged the effect of a campaign on an elected judge. Legislative Commission's Subcommittee to Study the Death Penalty and Related DNA Testing (Ass. Conc. Res. No. 3 (file No. 7, Statutes of Nevada 2001 Special Session), meeting of February 21, 2002, partial verbatim transcript at 3, noting that the lesson from an election campaign, involving an allegation that justice of the Supreme Court "wanted to give relief to a murderer and rapist," was "not lost on the judges in the State of Nevada, and I have often heard it said by judges, 'a judge never lost his job by being tough on crime.'"); Beets v. State, 107 Nev. 957, 976, 821 P.2d 1044 (1991) (Young, J., dissenting) ("Nevada has a system of elected judges. If recent campaigns are an indication, any laxity toward a defendant in a homicide case would be a serious, if not fatal, campaign liability.")[87] The extraordinary amount of money necessary for judicial campaigns, particularly for

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[87] The instance cited by a member of this Court, related to a hard-fought judicial election for the Supreme Court in which the challenger attempted to characterize the sitting justice as "soft on crime", invoking particular decisions. However absurd such an accusation was, given the particular individual involved, it resulted in a costly and contentious campaign, but there was certainly no reference in the decisions in the subject cases to the prospect of removal.

The controversy involved two opinions. In one, the sitting justice wrote the majority opinions reversing a murder conviction under the corpus dilecti rule. Frutiger v. State, 111 Nev. 1385, 907 P.2d 158 (1995). That decision was promptly limited in the course of the judicial campaign. Sheriff v. Middleton, 112 Nev. 956, 958-962, 921 P.2d 282 (1996). In the other, the sitting justice dissented in a capital case and attacked three-judge sentencing panels as too death-prone, invoking, ironically, the fact that judges are elected. Beets v. State, 107 Nev. 957, 973, 976, 821 P.2d 1044 (1991) (dissenting opn.) Both opinions were excoriated by the justice's opponent. See Larry Henry, "Ruling May Peril Murder Cases", Las Vegas Sun (June 25, 1996)(referral to opponent's criticism of Frutiger); Cy Ryan, "Court Ruling Will Aid in Prosecution of James Meegan", Las Vegas Sun (July 26, 1996)(citing opponent's criticism of Frutiger, and prosecutor's opinion that Court "came to their senses" and "reversed itself," by limiting Frutiger in Middleton decision); Ed Vogel, "High Court Hopefuls Take the Low Road", Las Vegas Review-Journal (October 31, 1996) (referring to opponent's criticism of Beets). The justice's response to the attacks included obtaining an endorsement from the attorney general, who is named counsel for the state in all criminal appeals, and running an advertisement that trumpeted that endorsement, as well as citing his record of affirming 76 death penalty cases and of "fighting crime". See Nevius v. Warden, 114 Nev. 664, 672-673, 960 P.2d 805 (1998) (Springer, C.J., dissenting). The justice later cited the cost of the campaign, half a million dollars, as another problem with judicial elections. See Supreme Court of Nevada, Annual Report of the Nevada Judiciary 2 (2002).

supreme court seats, gives judicial officers a pecuniary interest to deny relief to controversial litigants.[88] See, e.g., Progressive Leadership Alliance of Nevada, The Supreme Jackpot II: A Study of Campaign Contributions to Nevada Supreme Court Candidates 2004 at 13 (September 2005).

It would be wishful thinking to believe that controversial decisions do not affect the electability of judges, and most visibly of the justices of this Court. The wrenching proceedings in the Whitehead case led to the retirement of two justices of the Supreme Court, Cy Ryan, "Judge Points to Bigotry as Reason for Retirement", Las Vegas Sun (December 19, 1996); Cy Ryan, "Springer Will Not Run for Reelection", Las Vegas Sun (May 18, 1998); "Washoe Judge Seeks High Court Seat", Las Vegas Sun (March 4, 1998); and, despite the public offering of other explanations, it appears likely that the decision in Guinn v. Legislature, 119 Nev. 277, 71 P.3d 1269 (2003), contributed to the retirement of another justice. See David Berns, "Agosti's Numbers Plummet From Two Years Ago", Las Vegas Review Journal (May 2, 2004).[89]

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[88] Mr. Castillo is indigent and lives on death row in Nevada. Even if he were inclined, Mr. Castillo is unable to participate in the election of judges.

[89] One issue on which the potential of a contested judicial election is likely to affect fairness, in a way that is difficult to detect or demonstrate, is in the application of arcane procedural rules that courts invoke in order to avoid deciding substantive constitutional issues that might require the granting of relief. See post Claim N at 102, below. On the one hand, this Court has granted relief, or at least reviewed constitutional claims, that were apparently barred by procedural rules. See post Claim N at 102, below. On the other hand, this Court's decisions vehemently deny the existence of discretion in its default rules and attack, in highly adversarial language, any suggestion that the Court exercises such discretion. State v. District Court (Riker), 121 Nev.225, 235-243, 112 P.3d 1070, 1077-1082 (2005); Pellegrini v. State, 117 Nev. 860, 881-886 36 P.3d 519 (2001). The Court has also attacked capital defendants personally for delaying cases, when it is obvious that the defects of the system -- particularly the failure to secure effective counsel – is the major source of delay, rather than any Machiavellian cleverness on the part of capital defendants. See Bejarano v. Warden, 112 Nev. 1466, 1470, 929 P.2d 922 (1996) ("Defendants have made a sham out of the system of justice and thwarted imposition of their ultimate penalty with continuous petitions for relief that often present claims without a legal foundation.") It is not likely to be an accident that one successor habeas case in which the court simply ignored any applicable default rules, and granted relief, and which this Court did not discuss in Riker, was a disposition that was unpublished and thus not readily available to the public. Hardison v.State, No. 24195, Order of Remand (May 24, 1994), 3 AA 693. The most obvious explanation for what can only be called grandstanding on this issue is the prospect of public or political repercussions from rejecting default rules and

Mr. Castillo is not required to demonstrate a particular effect arising from the system of election: the focus is on the objective effect of financial burdens or benefits on the "average" judge. The acknowledgment by a member of this Court that the possible effect of an apparently pro-defense decision was "not lost on" the judges of Nevada, demonstrates the risks identified by the Supreme Court in Turney and Caperton.

Recently, a previous Chief Justice in Nevada, in her State of the Judiciary Address, rhetorically asked "What is a judge?," and offered the following:

> The best description of the job I have found is not new – it was written in 1780 and is found in the Constitution of the State of Massachusetts:
>
> It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit."

Nevada Lawyer, 17 (April 2005), quoting Mass. Declaration of Rights, Art. 29. Another comment on this provision observed:

> The Constitution of the Commonwealth generally provided that all judicial officers shall hold their offices during good behavior. Part II, c. 3, art. 1. See also art. 29 of Part I (the judges of the supreme judicial court should hold their offices as long as they behave themselves well). This Commonwealth has never wavered from the principle that an independent and competent judiciary can best be achieved and maintained by the appointment, rather than by the election of judges.

Apkin v. Treasurer and Receiver General, 517 N.E.2d 141, 145 (Mass. 1988). In order to be "judges [who are] as free, impartial, and independent as the lot of humanity will admit," Nevada judges need the primary guarantee of their independence, tenure during good behavior–something they do not now have.

Mr. Castillo contends that any trial in which a capital sentence could be imposed violates his due process right to an impartial tribunal and a reliable sentence unless

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making substantive rulings that would have to acknowledge the constitutional defects which routinely infect Nevada capital cases.

it is heard by a judge free from influences of a popular election. Such a rule does not leave the Nevada criminal justice system impotent: elected judges may still preside over non-death penalty trials. However, because the judges who have heard Mr. Castillo's case all experienced temptation, which could sway an average judge to not "hold the balance nice, clear and true," Mr. Castillo is entitled to relief The lack of an impartial tribunal is structural error which is reversible per se. See Vasquez v. Hillery, 474 U.S. 254, 263 (1988).

M. Will Nevada Execute Mr. Castillo When the Nevada Lethal Injection Protocol Constitutes Cruel and Unusual Punishment?

The Nevada lethal injection execution protocol constitutes cruel and unusual punishment.[90] Nevada's execution protocol is similar to the protocol employed by California prior to Morales v. Hickman, 415 F. Supp. 2d 1037 (N.D. Cal. 2006). The use of sodium thiopental, pancuronium bromide, and potassium chloride, without the protections imposed in Morales, and recognized in Baze v. Rees, 553 U.S. 35, 62 (2008), to ensure adequate administration of anaesthesia, poses an unreasonable risk of inflicting unnecessary suffering. Although this Court rejected a similar argument in Blake v. State, 121 Nev. 779, 800, 21 P.3d 567, 580 (2005), the Court has yet to consider the Nevada execution protocol in light of Baze and Morales.

Mr. Castillo submits that McConnell v. State, 212 P.3d 307 (Nev. 2009), which held that a challenge to the lethal injection protocol is not cognizable in statutory post-conviction proceedings, is erroneous, that a challenge to a execution protocol is cognizable in habeas proceedings, and that the Nevada protocol violates the Eighth and Fourteenth Amendments to the United States Constitution.

Although the Supreme Court entertained a challenge to an execution protocol brought in a civil rights action under 42 U.S.C. § 1983, Nelson v. Campbell, 541 U.S. 642 (2004); and Hill v. McDonough, 547 U.S. 573 (2006), these cases do not preclude such claims in habeas proceedings. In fact, the Supreme Court held that federal courts might dismiss 42 U.S.C. § 1983 suits challenging a lethal injection protocol in order to protect the

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[90] Petition, Ground Thirteen. See 2 AA 333.

States from piecemeal litigation, leaving habeas corpus as a single avenue for such challenges. Hill, 547 U.S. at 583. The Supreme Court never held or suggested that habeas proceedings cannot include challenges to the lethal injection execution protocol. The court also characterized a § 1983 action in this context as "at the margins of habeas," Nelson, 541 U.S. at 646, and explicitly stated that it "need not here reach the difficult question of how to characterize method-of-execution claims generally," id. at 644, which it "left open." Id. at 646. Further, and most important, in Gomez v. United States District Court, 503 U.S. 653 (1992) (per curiam), the Supreme Court rejected a last-minute § 1983 challenge to the method of execution at least in part because the inmate failed to raise his challenge in four previous habeas petitions. Id. at 653-654. It remains an open question how much of the federal habeas corpus jurisprudence - - including the requirement of exhaustion - - and how much of the § 1983 jurisprudence - - including the requirement that the claim be ripe for adjudication-- will be applied to this claim and Mr. Castillo, out of an abundance of caution, must present it to this Court.

In Baze v. Rees, 128 S.Ct. 1520 (2008), a plurality held that an Eighth Amendment challenge to a lethal injection protocol will prevail upon proof that the protocol created a demonstrated risk of severe pain and that the risk is objectively intolerable. Baze, 128 S.Ct. at 1531. Justice Thomas, in his concurring opinion, reiterated this standard: "As I understand it, that opinion would hold that a method of execution violates the Eighth Amendment if it poses a substantial risk of severe pain that could be significantly reduced by adopting readily available alternative procedures." Id. 128 S.Ct. at 1556 (Thomas, J., concurrence).

The Supreme Court upheld the Kentucky protocol for lethal injection because that protocol had sufficient protections to prevent the condemned from unnecessary suffering. The Court noted that the Kentucky protocol included the requirement that qualified personnel with at least one year of professional experience are responsible for inserting IV catheters, and that a certified phlebotomist and an emergency medical technician perform the venipunctures. Baze, 128 S.Ct. at 1533 - 1535. The warden and deputy warden

remain in the execution chamber with the inmate. Id. After the sodium thiopental is administered, the warden and deputy warden must determine through visual inspection that the inmate is unconscious within 60 seconds. If not, a second dose is administered. Id. In addition to assuring the first dose of sodium thiopental is successfully administered, the warden and deputy warden must also watch for problems with IV catheters and tubing. Id. The execution protocol required that, in the event of a last minute stay, a physician be present to resuscitate the inmate. Id.

The Kentucky protocol further included safeguards regarding the placement of an intravenous line. Under Kentucky's protocol, team members charged with the duty of placing the IV line, along with the rest of the execution team, participate in at least 10 practice sessions per year, which encompasses a complete walk-through of the execution procedure; IV team members establish both primary and back-up lines and prepare two sets of the lethal injection chemicals before execution commences. Baze, 128 S.Ct. at 1533.

Nevada's execution protocol fails to include the same safeguards as the Kentucky protocol. NRS 176.355(1) provides that a sentence of death in Nevada "must be inflicted by an injection of a lethal drug." Pursuant to NRS 176.355(2)(b), the Director of the Department of Corrections "[s]elect the drug or combination of drugs to be used for the execution after consulting with the State Health Officer." Unlike Kentucky's execution protocol, Nevada's execution protocol does not require a physician's participation; does not specify what, if any, training the execution team must have; does not require regular practice sessions of the execution protocol; and, does not require monitoring of the inmate's level of consciousness and IV lines. The absence of Kentucky's safeguards compels the conclusion that Nevada's protocol violates the Eighth Amendment's ban on cruel and unusual punishments.

Mr. Castillo argues that this Court should review this claim and remand this case for an evidentiary hearing to allow Mr. Castillo the opportunity to develop a record in the court below showing that Nevada's lethal injection protocol violates the Eighth and Fourteenth Amendments.

N. Will Procedural Default Trump a Fundamentally Fair Trial?

In its order dismissing Mr. Castillo's petition, the district court based its decision entirely on procedural rules. See NRS 34.726; 34.810; see also 3 AA 596-601. Mr. Castillo submits that none of these rules bar consideration of his claims.

None of the rules relied upon by the district court are applied consistently sufficient to bar the consideration of constitutional claims. Mr. Castillo had a right to effective assistance of counsel in his initial habeas proceeding, which was filed in 1999, Crump v. Warden, 113 Nev. 293, 297, 304-05, 934 P.3d 247 (1997), and the deprivation of that right constitutes cause to overcome any of the asserted defaults, and certainly the successive petition bar.[91] Finally, Mr. Castillo can demonstrate cause to overcome any default: any delay in filing was not his "fault" as that term is described in NRS 34.726; and, the successive petition bar in NRS 34.810 is overcome by the ineffective assistance of post-conviction counsel under Crump.

1. Any Delay in Filing the Petition Was Not Mr. Castillo's "Fault" Within the Meaning of NRS 34.726

a. Inconsistent Definitions/Application

NRS 34.726(1)(a) provides that there is good cause for a delay of more than

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[91] State v. District Court (Riker), 121 Nev. 225, 236, 112 P.3d 1070, 1077 (2005), purported to limit the showing of cause under Crump to the successive petition bar of NRS 34.810. Mr. Castillo contends this limitation is irrational; that opinion imposes a new rule, Ford v. Georgia, 498 U.S. 411, 425 (1991), which cannot be applied to purported defaults which occurred prior to its adoption.

Unpublished decisions in Smith v. State, No. 20959, Order of Remand at 2 (September 14, 1990), 10 AA 2299, and Rider v. State, No. 20925, Order at 1-3 (April 30, 1990) 10 AA 2259, which establish this principle, are proper subjects of judicial notice on the issue whether this Court's application of default rules violate federal equal protection guarantees. Bennett v. Mueller, 296 F.3d 752, 761 n.3 (9th Cir. 2002).

The unpublished dispositions are not cited as precedential authority. Cf. Nev. Sup. Ct. Rule 123. Rather, they are submitted as evidence that, as a factual matter, the Court resolved such claims in an inconsistent manner which establishes a violation of equal protection and due process. See State v. District Court, (Riker), 121 Nev. 225, 235, 112 P.3d 1070, 1076 n. 25 (2005). Moreover, consideration of the inconsistency of unpublished dispositions is required under federal constitutional law. E.g., Valerio v. Crawford, 306 F.3d 742, 776-778 (9th Cir. 2002) (en banc).

one year in filing a petition for writ of habeas corpus if the delay is not petitioner's "fault." The use of the term "the fault of the petitioner" demonstrates that the legislative intent of NRS 34.726(1)(a) is that petitioner himself must act, or fail to act, and cause delay. That language is consistent with other applications of a subjective fault standard: that is, to be found at fault, it must be proven the person seeking relief personally acted, or failed to act, in a manner that constitutes fault. To be at fault, a party must act in a manner that goes beyond negligence because "[f]ault contemplates more than mere negligence, and includes intentional acts." Slade v. Farmers Ins. Exchange, 5 P.3d 280, 285 (Colo. 2000).[92]

In Pellegrini v. State, 117 Nev. 860, 36 P.3d 519 (2001), the Court implicitly adopted the subjective standard arising from the Legislature's use of "fault" by holding counsel's failure to act could not be the petitioner's fault under NRS 34.726:

> For example, in Bennett v. State, 111 Nev. 1099, 1103, 901 P.2d 676, 679 (1995), we concluded that good cause excused the procedural bar at NRS 34.726(1) for untimely filing of a second petition where the first petition had been timely filed, but not pursued by counsel, and any delay in filing the second petition was not the petitioner's fault.

Pellegrini, 34 P.3d at 526 n.10 (emphasis supplied); see also Bennett, 111 Nev. at 1103 (delay in filing supplemental petition occurred "only after counsel was appointed").[93] This

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[92] NRS 104.1201(2)(9) ("[f]ault means a default, breach or wrongful act or omission"); NRS 104A.2103(1)(f) ("[f]ault means wrongful act, omission, breach or default"); In re Termination of Parental Rights as to N.J., 116 Nev. 790, 8 P.3d 126, 133 (2000) (adopting a best interests/parental fault standard in termination of parental rights cases; best interests of child necessarily include considerations of parental fault and/or conduct and both best interests of the child and parental fault must be proven by clear and convincing evidence); Hill v. State, 955 S.W.2d 96, 100 (Tex.Cr.App. 1997) ("[t]he word "fault" implies wrongdoing; "[f]ault" is defined as "a weakness in character, failing imperfection, impairment, . . . misdemeanor . . . mistake . . . responsibility for something wrong") (citation omitted); State v. Jackson, 94 Ariz. 117, 122, 382 P.2d 229, 232 (Ariz. 1963) ("[f]ault implies misconduct not lack of judgment" (citation omitted)); Harrison v. Heckler, 746 F.2d 480, 482 (9th Cir. 1984) (the determination of whether a Social Security recipient is "at fault" for having received an overpayment "is highly subjective, highly dependent on the interaction between the intentions and state of mind of the claimant and the peculiar circumstances of his situation").

[93] In Pellegrini and Bennett, events that occurred after the appointment of counsel, that are not the fault of the petitioner, are sufficient to establish cause. Absence of counsel has been viewed as cause by the Court where appointment of counsel was not mandatory but the Court concluded that it was an abuse of discretion not to appoint counsel.

Court must apply the same subjective fault standard to Mr. Castillo' case.

"Good cause" under NRS 34.726(1) is not the same as the standard of "cause" under NRS 34.810, that is, an "impediment external to the defense." Crump v. Warden, 113 Nev. 293, 302, 934 P.2d 247 (1997). There would be a basis for this assumption if the Legislature had used only "cause," without elaboration, in NRS 34.726, since it would then be presumed that its use of the term incorporated its existing judicial construction. E.g., Latterner v. Latterner, 51 Nev. 285, 274 P. 194 (1929). But the Legislature explicitly adopted a definition of good cause in NRS 34.726(1)(a) that is different from the judicial definition of cause under NRS 34.810; and therefore, the contrary presumption arises, that the Legislature intended to change the meaning. E.g., Utter v. Casey, 81 Nev. 268, 274, 401 P.2d 684 (1965). In short, this Court adopted a standard of cause under NRS 34.726(1)(a) that is inconsistent with the explicit terms of the statute, when there is no valid legal basis to do so.

Mr. Castillo's petition alleged that any delay in the filing of the current petition was not his "fault." 6 AA 01421-01427. As in Bennett, Mr. Castillo was continuously represented by counsel, and any delay in filing is attributable to counsel's actions and not to petitioner. See Pellegrini, 34 P.3d at 526 n.10. Further, any delay in filing this petition is a consequence of an "impediment external to the defense," see Crump, 113 Nev. at 302, partly in the form of this Court's erroneous failure to vacate the conviction and sentence on direct appeal or on appeal from the denial of post-conviction relief.

b. Waiver

The district court found that Mr. Castillo "waived his federal rights, dismissed

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See Stevens v. State, No. 24138, Order of Remand (July 8, 1994). 13 AA 03173-03180. Refusing to apply the same rule here violates state and federal equal protection principles. The subsequent decision in State v. Bennett, 119 Nev. 589, 81 P.3d 1, 3 (2003) does not address the definition of "fault" under the statute. To the extent that language in the latest Bennett decision could be read to imply that counsel's derelictions could be considered petitioner's own "fault," it only further shows the complete incoherence of the Court's procedural default decisions: if counsel's actions in Bennett could not be petitioner's "fault," as Pellegrini held, Pellegrini, 34 P.3d at 523 n.10, they could not simultaneously be petitioner's "fault" in the same case.

his federal petition, and agreed to be executed." 3 AA 597. Mr. Castillo was not executed by order of this Court, which stayed his execution. The district court and the prosecutors use such circumstances in support of the finding of procedural default. Id. This is improper.

The Court has before it voluminous and substantial evidence of the various organic and psychological disorders which Mr. Castillo suffers. The circumstances in which Mr. Castillo must proceed inhibit his abilities to understand or comprehend his situation, and his disorders often result in his overreaction. 4 AA 862-879, 888-953; ante, Claim A at 8. Moreover, these circumstances remained undiscovered until after undersigned counsel were appointed in federal court. An adequate investigation and state habeas petition by Mr. Castillo's initial state habeas counsel would have alleviated the prejudice now imposed on Mr. Castillo.

Mr. Castillo contends the failures of his initial post-conviction counsel to adequately investigate, document and raise the same claims presented below constitutes cause sufficient to overcome any procedural bar. Moreover, the unique circumstances involving Mr. Castillo's organic, neurological and psychological disorders provides sufficient good cause and the failure to consider the instant petition will result in a fundamental miscarriage of justice.

c. Colley v. State

The district court relies upon Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1980), in its apparent holding that Mr. Castillo should have conducted an adequate investigation pro se, and promptly return to district court with his new claims. Essentially the district court holds Mr. Castillo cannot demonstrate good cause to excuse any procedural bar because a federal habeas petition was investigated and filed. Id. Mr. Castillo contends this reading of Colley not only misapprehends reality, but denigrates this Court's constitutional authority and Mr. Castillo's due process rights.

Michael Colley was convicted of attempted murder and battery with intent to commit sexual assault. Colley, 105 Nev. at 235, 773 P.2d at 1229. The Court affirmed. Colley v. State, 98 Nev. 14, 17, 639 P.2d 530, 533 (1982). Colley thereafter filed a federal

post conviction habeas action and was denied relief by the District Court, the Ninth Circuit Court of Appeals, and the Supreme Court. Colley, 105 Nev. at 236, 773 P.2d at 1229. Only after he lost at every level in federal court did Colley attempt to avail himself to the habeas remedies available in Nevada. The district court held Colley's habeas petition was untimely and this Court agreed. Id. at 236, 773 P.2d at 1230 ("[I]n the instant case, the necessity for the orderly administration of justice required the district court to deny Colley's untimely petition for post-conviction relief."). Mr. Castillo's circumstances are easily distinguished.

The instant record demonstrates that Mr. Castillo has an extensive and complex social history. Ante, Claim A at 8. The investigation and documentation of the violence, abuse, mental illness, criminal history and abandonment within Mr. Castillo's family–throughout at least three generations–required extensive travel, patience and a substantial period of time. Mr. Castillo's petition included declarations from 13 persons, all of whom had to be located and interviewed. In addition to the overwhelming nature of such an investigation, Mr. Castillo suffered from cognitive disabilities which impaired his ability to perceive, or understand, any circumstances in which he found himself. Id.

Mr. Castillo was indigent. He had counsel appointed at trial and on appeal. 2 AA 394. After Mr. Castillo was sentenced to death, appointed counsel filed post-conviction habeas proceedings and this Court denied relief. 3 AA 667. At this point, Mr. Castillo found himself indigent, on Nevada's death row, without counsel, and without the skills, education, training or resources to mount a further pro se challenge to his conviction in state court, or to evaluate his previous representation.

The knowledge and ability to attack a death sentence escapes even trained attorneys. See Murray v. Giarrantano, 492 U.S. 1, 27-28 (1989) (Stevens, J., dissenting). Federal courts do not expect defendants who are sentenced to death to possess the knowledge or skills to attack their convictions. McFarland v. Scott , 512 U.S. 849, 855 (1994). Nor does the Nevada Legislature, or this Court. See NRS 34.820(1)(a) (appointment of counsel to prepare state post-conviction habeas petition for defendant sentenced to death); Crump v. Warden, 113 Nev. 293, 304, 934 P.2d 247, 303 (1997) (when appointment of counsel is

statutorily mandated, appointed counsel must provide effective assistance).

These facts distinguish Colley. See, e.g., Hathaway v. State, 71 P.3d 503, 505-506 (2003) (finding good cause under NRS 34.726 and distinguishing Harris v. Warden, 114 Nev. 956, 964 P.2d 785 (1998)). Mr. Castillo was sentenced to death. As the justices of the Supreme Court, as well as this Court, recognize, "death is different." See, e.g., Harmelin v. Michigan, 501 U.S. 957, 994 (1991); Ford v. Wainwright, 477 U.S. 399, 411 (1986); Gardner v. Florida, 430 U.S. 349, 357 (1977); Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Gregg v. Georgia, 428 U.S. 153, 188 (1976); see also Baze v. Rees, 553 U.S. 35, 84 (2008) (Stevens, J., concurring); Abdul-Kabir v. Quarterman, 550 U.S. 233, 284 (2007) (Scalia, J., dissenting); Kansas v. Marsh, 548 U.S. 163, 180 (2006); Id. at 210 (Souter, J., dissenting); Wiggins v. Smith, 539 U.S. 510, 557 (2003) (Scalia, J., dissenting); Ring v. Arizona, 536 U.S. 584, 605-606 (2002); Atkins v. Virginia, 536 U.S. 304, 352-53 (2002) (Scalia, J., dissenting); Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring); Summers v. State, 122 Nev. 1326, 1338, 148 P.3d 778, 786 (2006) (Rose, C.J., concurring and dissenting); Pellegrini v. State, 117 Nev. 860, 884, 34 P.3d 519, 535 (2001); Rhyne v. State, 118 Nev. 1, 15, 38 P.3d 163, 172 (2002) (Becker, J., concurring and dissenting) ("The concept that death is different has been the backbone for high court decisions emphasizing that procedures, evidentiary rules or doctrines permissible in non-capital cases may violate the constitutional prohibitions when applied to capital punishment prosecutions.") Although this Court previously applied the procedural bars in NRS 34.726 and 34.810 to a defendant sentenced to death, Pellegrini, 117 Nev. at 884, 34 P.3d at 535, the Court has yet to address the unique circumstances which such a defendant faces. Stated differently, the Court has never squarely addressed how "death is different" in this context.

After this Court denied relief on Mr. Castillo's initial state post-conviction petition, there was no further state assistance available to Mr. Castillo to investigate or review his conviction or the legal representation he previously received. Even if Mr. Castillo's unique circumstances are not considered, his abilities to discover potential claims which were never presented, or to demonstrate an impediment "external to his defense,"

Hathaway, 119 Nev. at 252, 71 P.3d at 506, were limited. The only route available to Mr. Castillo to challenge his conviction and death sentence was to seek appointment of an attorney in the United States District Court. See McFarland, 512 U.S. at 855; 21 U.S.C. § 848(q) (repealed March 9, 2006); 28 U.S.C. § 2254(h); see also 18 U.S.C. § 3006A & § 3599. It was only through federal habeas proceedings that Mr. Castillo had any opportunity to have the circumstances of his conviction and sentence, as well as the effectiveness of the representation he received, reviewed by qualified counsel. Federal habeas counsel must, in conjunction with their responsibilities to the federal tribunal, investigate and review Mr. Castillo's state habeas proceedings. Such counsel may later return to state courts in their efforts to pursue available remedies. See 18 U.S.C. § 3599(e); Nev. Sup. Ct. Rule 49.11(4); see also Harbison v. Bell, 129 S.Ct. 1481, 1491 (2009).

Mr. Castillo's federal proceedings are also distinguished from those before this Court in Colley. Colley pursued his federal remedies throughout the federal system, including the District Court, the Ninth Circuit Court of Appeals, and the Supreme Court, before his belated return to the Nevada courts. Colley, 105 Nev. at 235, 773 P.2d at 1229. Mr. Castillo's counsel investigated the circumstances of this case and filed an amended petition for writ of habeas corpus in the United States District Court. Instead of continuing to pursue his rights in federal court, Mr. Castillo sought permission from the United States District Court to return to the Nevada state courts. He filed his state petition for writ of habeas corpus on September 18, 2009, and pursued an evidentiary hearing to demonstrate he was entitled to relief.

These circumstances, collectively or individually, distinguish Mr. Castillo's proceedings from those in Colley. Here, the reason for the Colley rule- - to prevent litigants from bypassing state proceedings- -is not implicated, and since the reason for the rule does not exist it should not be applied. E.g., Lockhart v. Fretwell, 506 U.S. 364, 378 (1993)(Rehnquist, C.J.)("Cessante ratione legis, cessat et ispa lex.").

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2. Consideration of the Petition Cannot Be Barred by Applying the Successive Petition Doctrine, since it is Inconsistently Applied and Mr. Castillo Has Shown Cause to Overcome it.

The district court's order denying the petition also invokes the successive petition bar imposed by NRS 34.810. 3 AA 596, 599-600. Mr. Castillo's previous arguments which demonstrated the inconsistent application of the bar in § 34.726 further demonstrate an inconsistency in the successive petition bar. The application of the successive petition bar was explicitly held inadequate to bar review of constitutional claims in later proceedings. E.g., Valerio v. Crawford, 306 F.3d 742, 776-778 (9th Cir. 2002) (en banc) cert. denied, 123 S.Ct. 1788 (2003); see also Koerner v. Grigas, 328 F.3d 1039, 1053 (9th Cir. 2003); cf. Pellegrini v. State, 117 Nev. 860, 34 P.3d 519, 526-529 (2001). Mr. Castillo contends that the very fact that this Court and the federal courts reached contradictory conclusions regarding the consistency of application of the procedural bars demonstrates that the application of procedural bars in Nevada is not sufficiently clear as to satisfy due process and equal protection. See Nevada Power Co. v. Haggerty, 115, Nev. 353, 366, 989 P.2d 870 (1999)(dissent as to meaning of statutory term indicates that statute ambiguous).

Mr. Castillo's allegations of ineffective assistance of post-conviction counsel were sufficiently pleaded to merit an evidentiary hearing: Mr. Castillo's allegations were stated in greater detail than those of the petitioner in Crump, 113 Nev. at 304, 934 P.2d at 254. Mr. Castillo's allegations of ineffective assistance of post-conviction counsel show that counsel did not perform the minimum work necessary to make a habeas proceeding meet the standards of due process and the right to counsel, and was, therefore, deficient: counsel failed to investigate and present evidence demonstrating the ineffective assistance of trial counsel, and counsel failed to use information or evidence in his possession to raise constitutional claims in the petition. Because of these failures, post-conviction counsel raised few issues which were not ascertainable from the record–even though, as the current petition demonstrates, Mr. Castillo had a substantial and particularly complex social history which was so compelling that no reasonable juror would have sentenced him to death. No adequate

attempt to investigate and document such evidence.

The failure of counsel to fulfill the basic requirements of collateral litigation made the previous post-conviction proceeding a "farce, sham or pretense," in violation of state and federal due process guarantees. See Jackson v. Warden, 91 Nev. 430, 433, 537 P.2d 473, 474 (1975) (failure to "conduct careful factual and legal investigations and inquiries with a view to developing matters of defense" violates due process "farce or pretense" test).

Mr. Castillo alleged that his post-conviction counsel was ineffective under Crump, and this allegation is sufficient to entitle him to a hearing.

3. This Court Cannot Apply the Alleged Bars Under NRS 34.726 or 34.810 Without Violating Mr. Castillo's Right to Due Process and Equal Protection of the Laws under the State and Federal Constitutions

The district court's order invoked procedural default rules under NRS 34.726 and 34.810 that are not consistently applied and do not provide adequate notice of when they will be applied or excused. Refusing to review the constitutional claims on the basis of these rules violates due process and equal protection. E.g., Bush v. Gore, 531 U.S. 98, 106-109 (2000) (per curiam); Village of Willowbrook v. Olech, 528 U.S. 562, 564-565 (2000) (per curiam); Myers v. Ylst, 897 F.2d 917, 921 (9th Cir. 1990) (equal protection requires consistent application of state law to similarly-situated litigants).

This Court has exercised 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 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).[94]

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[94] Although this Court asserted in Pellegrini that application of the statutory default rules, some of which were adopted in the 1980's, was mandatory, id. 34 P.3d at 536, the examples herein, and within Mr. Castillo's petition, establish that the Court has always exercised, and continues to exercise, complete discretion. 1 AA 193-203.

This Court's dispositions routinely use discretionary language in addressing constitutional claims despite the existence of all types of procedural bars, or simply ignores those bars.[95]

This Court's dispositions show inconsistent applications of specific procedural rules as well. The Court has routinely failed to apply the procedural bar of NRS 34.726 to preclude its review of constitutional claims contained in successive capital habeas petitions.[96]

The Court's application of the procedural default rules is also inconsistent when it decides whether a petitioner can demonstrate "cause" to excuse a procedural default. One particularly striking inconsistency is the Court's treatment of cases in which trial and/or

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[95] See, e.g., Leslie v. Warden, 118 Nev. 773, 59 P.3d 440, 445 (2002) ("elected" to hear argument); Bejarano v. State, 106 Nev. 840, 843, 801 P.2d 1388 (1990) (considered effective assistance "sua sponte"; Bejarano v. Warden, 112 Nev. 1466, 1471 n.2, 929 P.2d 922 (1996) (addressed merits); Bennett v. State, 111 Nev. 1099, 1103, 901 P.2d 676 (1995) (addressed merits); Ford v. Warden, 111 Nev. 872, 886-887, 901 P.2d 123 (1995) (addressed claim in second habeas petition); Gunter v. State, 95 Nev. 319, 592 P.2d 708 (1979); Krewson v. Warden, 96 Nev. 886, 887, 620 P.2d 859 (1980); Hardison v. State, 84 Nev. 125, 128, 437 P.2d 868 (1968); Hill v. Warden, 114 Nev. 169, 178-179, 953 P.2d 1077 (1998) (addressed claim in third habeas petition); Lane v. State, 110 Nev. 1156, 1168, 881 P.2d 1358 (1994) (vacated aggravating circumstance); Lord v. State, 107 Nev. 28, 38, 806 P.2d 548 (1991) (addressed merits without objection); Powell v. State, 108 Nev. 700, 705-06, 838 P.2d 921 (1992) (addressing claim not raised at trial or on appeal); Stocks v. Warden, 86 Nev. 758, 760-761, 476 P.2d 469 (1970) ("chose" to consider claim in second habeas petition); Warden v. Lischko, 90 Nev. 221, 222, 523 P.2d 6 (1974) (trial judge's "choice" to address barred claim). Mr. Castillo's petition in these presents provides additional examples of the inconsistent application of procedural default rules which is found within this Court's unpublished orders. 1 AA 193-203.

[96] E.g., Hill v. State, 114 Nev. 169, 953 P.2d 1077 (1998) (addressed merits in successive petition filed directly with the Nevada Supreme Court; successive petition claims filed September 19, 1996); Bennett v. State, 111 Nev. 1099, 901 P.2d 676 (1995) (amended petition filed December 30, 1993); Farmer v. State, No. 29120, Order Dismissing Appeal (November 20, 1997) (successive petition filed August 28, 1995), 9 AA 2119-2122; Nevius v. Warden, No. 29027, Order Dismissing Appeal (October 9, 1996) (successive petition filed August 23, 1996); Nevius v. Warden, Order Denying Rehearing (July 17, 1998) (successive petition filed February 7, 1997), 9 AA 2239-2242; Riley v. State, No. 33750, Order Dismissing Appeal (November 19, 1999) (successive petition filed August 26, 1998), 10 AA 2263-2266; Sechrest v. State, No. 29170, Order Dismissing Appeal (November 20, 1997) (successive petition filed July 27, 1996), 10 AA 2294-2297; Wilson v. State, No. 29802, Order Dismissing Appeal (April 9, 1998) (successive petition filed March 5, 1993); Ybarra v. Warden, No. 32762, Order Dismissing Appeal (July 6, 1999) (successive petition filed April 22, 1993); see also Koerner v. Grigas, 328 F.3d 1039, 1043-44 (9th Cir. 2003) (successive petition filed July 7, 1993); 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), 9 AA 2152-2166.

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), 9 AA 2191-2206; with Nevius v. Warden, Nos. 29027, 29028, Order Dismissing Appeal and Denying Petition (October 9, 1996) (petitioner "arguabl[y] established "cause" under same circumstances), 9 AA 2225-2237; with Wade v. State, No. 37467, Order of Affirmance (October 11, 2001) (holding sua sponte that petitioner had established "cause" to allow filing of successive petition in same circumstances), 10 AA 2311-2314 with 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), 9 AA 2135-2137.

This Court inconsistently applies the "cause" standard to excuse the filing of untimely petitions under NRS 34.726(1)(a). In published opinions, the Court has held that only a timely filed direct appeal tolls the one-year deadline for filing a petition for a writ of habeas corpus. Additionally, an untimely direct appeal has been held to be insufficient to establish "cause" to file an untimely habeas petition.[97] However, the Court has excused the late filing of a petition and found "cause" on the basis that the direct appeal was untimely, in an unpublished opinion.[98] The fact that the definition of "cause" under NRS 34.726 is treated differently in published versus unpublished dispositions demonstrates the statute is not clearly and consistently followed. This Court reached inconsistent results on the issue of whether a procedural rule that did not exist at the time of a purported default may preclude

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[97] Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998); accord Gonzalez v. State, 118 Nev. 590, 53 P.3d 901, 902 & n.4 (2002).

[98] See, e.g., State v. Randle, No. C121817, Order Denying Defendant's Petition for Writ of Habeas Corpus, at 5 (December 15, 1998) (finding cause because the "Defendant did not have the opportunity to address his issues on direct appeal" due to untimely notice of appeal), aff'd, Randle v. State, No. 33677, Order of Affirmance, at 2 n.2 (September 3, 2002) (affirming district court's finding of "good cause to overcome the procedural bar"). 21 AA 5044-5050.

the review of the merits of meritorious constitutional claims.[99]

In Robinson v. Ignacio, No. 02-17298 (9th Cir. March 10, 2004), the Ninth Circuit found that Robinson's reliance on a court-approved stipulation established cause for his default, citing State v. Haberstroh, 119 Nev. 173, 69 P.3d 676, 681-682 (2003), in which this Court held that the parties could not stipulate to overcome the state's procedural defenses, but construed such a stipulation as establishing cause to overcome the default rules without identifying any theory of cause that such a stipulation would establish or how it could have existed before the stipulation was entered. Contra Doleman v. State, No. 33424, Order Dismissing Appeal (March 17, 2000) (finding stipulation with state 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), 9 AA 2106-2107.[100]

4. The Discretionary and Inconsistent Application of Procedural Default Rules Precludes this Court from Declining to Entertain Mr. Castillo's Claims, Consistent with Federal Constitutional Standards.

The dispositions cited herein, and within Mr. Castillo's petition below, demonstrate that there is no consistency in this Court's application of procedural default rules. Those "rules" are not treated as rules that bind the Court at all, but merely as exercises of discretion by which the Court applies, excuses, or ignores the rules at will. Even the state

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[99] 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 application of one-year default rule announced for the first time in that case); Jones v. McDaniel, No. 39091, Order of Affirmance (December 19, 2002) (same) 9 AA 2151-5166; with Haberstroh, 119 Nev. 173, 69 P.3d 676, 681-82 (2003) (refusing to retroactively apply rule that parties may not stipulate out of 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) 10 AA 2299-2301; Rider v. State, No. 20925, Order (April 30, 1990) (same) 10 AA 2259-2261.

[100] See Leslie v. State, 118 Nev. 773, 59 P.3d 440, 445 (2002) (expanding definition of miscarriage of justice exception to default rules to include "innocence" of aggravating factor); Rogers v. Warden, No. 36137, Order of Affirmance, 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); 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), 9 AA 2125-2133.

essentially admitted that this Court disregards procedural default bars 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)), 9 AA 2075-2101; Nevius v. McDaniel, United States District Court Case No. CV-N-96-785-HDM(RAM), Response to Nevius' Supplemental Memorandum at 3 (October 18, 1999) (Nevada Supreme Court noted 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"), 9 AA 2244-10 AA 2250.

Obviously, default bars that can be "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. As Justice Kennedy wrote in 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 contemporary practices in Nevada habeas proceedings 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.

Mr. Castillo recognizes, of course, that this Court has taken the position that it applies its rules consistently. Pellegrini v. State, 34 P.3d at 536; Valerio v. State, 112 Nev. 383, 389, 915 P.2d 874 (1996). But neither Pellegrini, nor any other case, addressed the arguments raised herein with respect to the Court's unpublished dispositions. See In re Tartar, 52 Cal.2d 250, 339 P.2d 553, 557 (1959) (cases not authority for propositions not considered). Further, Mr. Castillo has raised this issue as a violation of the equal protection and due process, and the state courts must afford him a hearing that is adequate to allow him to litigate his claims. Franks v. Delaware, 438 U.S. 154, 171-172 (1978). This Court must

allow Mr. Castillo an evidentiary hearing to address and decide the issues raised by his petition.

5. Conclusion.

Mr. Castillo's claims were not addressed in District Court. His arguments regarding procedural default were not adequately addressed. There can be no legitimate basis for applying a procedural bar to Mr. Castillo's claims unless some Court will address all of this Court's dispositions and to demonstrate that the rules are applied clearly and consistently. "[I]t is the actual practice of the state courts, not merely the precedents contained in their published opinions, that determine the adequacy of procedural bars preventing the assertion of federal rights." Powell v. Lambert, 357 F.3d 871, 879 (9th Cir. 2004), citing Valerio v. Crawford, 306 F.3d 742, 776 (9th Cir. 2002) (en banc). Accordingly, the procedural bars cited in the district court's order cannot bar consideration of Mr. Castillo's claims.

O. Does the Cumulative Effect of All These Errors Justify Relief?

The cumulative effect of error in this case entitles Mr. Castillo to relief. Each of the claims in this brief, and in the petition below, required vacation of the conviction or sentence. The cumulative effect of these errors deprived Mr. Castillo of fundamentally fair proceedings and resulted in an unconstitutional judgment and sentence. Whether any individual error requires the vacation of the judgment or sentence, the totality of these errors resulted in substantial prejudice. Byford v. State, 116 Nev. 215, 242, 994 P.2d 700, 717 (2000); Hernandez v. State, 118 Nev. 513, 534, 50 P.3d 1100, 1115 (2002) (cumulative errors may violate constitutional right to a fair trial); see also Chambers v. Mississippi, 410 U.S.284, 302 (1973); Parle v. Runnels, 505 F.3d 922, 927-28 (9th Cir. 2007).

The State cannot show, beyond a reasonable doubt, the cumulative effect of these constitutional errors was harmless beyond a reasonable doubt; in the alternative, the totality of these constitutional violations substantially and injuriously affected the fairness of these proceedings and prejudiced Mr. Castillo. Chapman v. California, 386 U.S. 18, 24, (1967); Flores v. State, 121 Nev. 706, 721, 120 P.3d 1170, 1180 (2005); Bolden v. State, 121

Nev. 908, 914, 124 P.3d 191, 194 (2005).

Dated this 31st day of January, 2011.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

Dated this 31st day of January, 2011

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that pursuant to NRAP 25(d)(B) this document was filed electronically with the Nevada Supreme Court on the 31st day of January, 2011. Electronic Service of the foregoing APPELLANT'S OPENING BRIEF 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