IN THE SUPREME COURT OF THE STATE OF NEVADA

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WILLIAM CASTILLO Appellant, v. E.K. McDANIEL, Warden, and CATHERINE CORTEZ MASTO, the Attorney General of the State of Nevada, Respondents.	)	Case No. 56176

APPELLANT'S REPLY BRIEF
Appeal from Order Denying Petition for Writ of Habeas Corpus (Post-Conviction)

Eighth Judicial District Court, Clark County

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I. Introduction

In his opening brief, Mr. Castillo demonstrated that his trial was fundamentally unfair, that substantial evidence was never presented to his jury, including a brain injury (cognitive disorder) and mental illness, and that application of any procedural bar to his petition was impermissible. Respondents failed to address the merits of Mr. Castillo's claims and argued only that his claims are barred. Answering Brief at 15-41.

Because respondents failed to address the merits of his claims, they have conceded prejudice before this Court. Mr. Castillo's death sentence is subject to the reasonable possibility of constitutional error, which is demonstrated by the claims before this Court, and a refusal to consider these claims means he will die. Calderon v. Coleman, 525 U.S. 141, 145-46 (1998); Brecht v. Abrahamson, 507 U.S. 619, 637 (1993); see Brown v. Payton, 544 U.S. 133, 166 (2005) (Souter, J., dissenting) ("And since Payton's death sentence is subject to the reasonable possibility of constitutional error, since he may die as a consequence, the effect of the instruction failure is surely substantial and injurious.").

Respondents alleged that Mr. Castillo's habeas petition is barred through every possible statutory procedural default rule, case law, and common law known in Nevada. Answering Brief at 15-20. Apparently, no action short of Mr. Castillo–despite being represented by counsel in the state habeas proceedings–instituting his own investigation, involving a comprehensive review of the representation by initial habeas counsel, and drafting a pro se successive petition for writ of habeas corpus, including every constitutional error in these proceedings, would allow this Court to consider his claims. Id. at 31 ("The state procedural rules simply do not afford a petitioner the luxury of federal counsel and an investigation before being required to bring state claims."). This argument is remarkable in light of the uncontroverted evidence before this Court that Mr. Castillo suffers from a brain injury (Cognitive Disorder NOS), Reactive Attachment Disorder of Early Childhood, and Chronic Posttraumatic Stress Disorder. 4 AA 952. Thus, the prosecutor suggests that

Mr. Castillo, suffering from brain damage and mental illness, is required to grasp and command the same legal acumen for which the courts and defense bar have strived for decades. See generally 1 ABA Standards for Criminal Justice 4-1.1, pp 4-53(2d ed. 1980); ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (1989); ABA Standards for Criminal Justice, Prosecution Function and Defense Function (3d ed. 1993); ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003); ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (2008); In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases, ADKT No. 411 (Order, Oct.16, 2008). Not surprisingly, respondent's suggestion is not endorsed by any professional standard, which place the responsibility for raising all available constitutional claims on counsel.

II. The Time Petitioner Spent in Federal Proceedings In Order to Investigate and Identify Constitutional Issues and Document the Ineffective Assistance of Initial State Post-Conviction Counsel Should Not Permit Imposition of Timeliness Bars Under Colley v. State.

Respondents argue "the pursuit of federal remedies does not constitute good cause to overcome state procedural bars." Answering Brief at 31. Thus, relying upon Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989), respondents argue Mr. Castillo cannot demonstrate good cause to excuse any procedural bar. Id. Such a reading of Colley not only creates a legal charade, wherein Mr. Castillo is magically transformed into an individual qualified to litigate a death penalty case in this and other courts, but questions the fundamental fairness of Nevada's capital sentencing scheme and violates Mr. Castillo's due process rights.

A. Colley v. State

Colley was convicted of attempted murder and battery with intent to commit sexual assault. Colley, 105 Nev. at 235, 773 P.2d at 1229. This Court affirmed his conviction. 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 United States District Court, the Ninth Circuit Court of Appeals, and the United States Supreme Court. Colley, 105 Nev. at 236, 773 P.2d at 1229. After he lost at every level in federal court, Colley attempted to avail himself of the habeas remedies available in Nevada courts. The district court held Colley's habeas petition to be 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."). These circumstances are worlds away from those of the instant case.

The record before this Court demonstrates that Mr. Castillo's trial, appellate and initial state habeas counsel never completed an adequate investigation into Mr. Castillo's, life, social history, and mental health. Such an investigation revealed that Mr. Castillo suffered from a host of psychological disorders, including a brain injury and posttraumatic stress disorder. 1 AA 211; 4 AA 878-879; 952; see Rompilla v. Beard, 545 U.S. 374, 387 (2005) (quoting ABA Standards for Criminal Justice 4-4.1); Williams v. Taylor, 592 U.S. 362, 395-98 (2000); Strickland v. Washington, 466 U.S. 668, 688 (1984); Crump v. Warden, 113 Nev. 209, 303, 934 P.2d 247, 253 (1997); Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 281 (1996). Throughout his childhood, Mr. Castillo was repeatedly abused, neglected and abandoned. 1 AA 216-2 AA 261. Moreover, as his habeas petition and psychological evaluations revealed, Mr. Castillo suffered from Posttraumatic Stress Disorder, Reactive Attachment Disorder, and Cognitive Disorder NOS. Id. at 215. His ability to take any premeditated action is surely questionable. 1 AA 209-210; 4 AA 952.

1. Mr. Castillo's Family

The testimony at trial failed to approximate Mr. Castillo's abusive and neglectful childhood. His mother was a substance-addicted, suicidal, mentally-ill prostitute who would "slap, punch, and brutally beat Billy with a belt." 1 AA 223; 4 AA 820; 4 AA 864; 891, 900; 7 AA 1720. She married Mr. Castillo's father, an abusive, substance-addicted,

mentally-ill criminal, because he threatened to "cut [her] up." 1 AA 216; 4 AA 818; 19 AA 4558. She was a heroin addict who stayed out all night and slept all day, giving Mr. Castillo no attention. 4 AA 899. Mr. Castillo's mother resented him. 1 AA 218; 19 AA 4569. She verbally and physically abused him; she told him he was worthless and just like his biological father. 1 AA 241; 4 AA 864; 859. She "spanked" Mr. Castillo even before he was a year old. 1 AA 233; 7 AA 1710.

Mr. Castillo's father, known as "Animal" in his criminal motorcycle gang, was an abusive addict who spent most of his time "yelling at or beating Billy." 1 AA 226; 4 AA 864. He regularly "beat the shit out of" and raped Mr. Castillo's mother, once hanging her over a highway overpass by her legs. 1 AA 216-217; 4 AA 819 (Mr. Castillo's father raped his mother underneath the family Christmas tree); 1 AA 226; 4 AA 818. When Mr. Castillo's mother was eight months pregnant, he threw her down a flight of concrete stairs. 1 AA 217; 19 AA 4617-4618. He once "threw [Mr. Castillo] across the room." 4 AA 864. On a separate occasion, when Mr. Castillo was fifteen months old, his father injured him by "flinging [him] against the wall." Id.

Mr. Castillo's father "tied his mother to a bed, poured gasoline on top of the mattress, lit it on fire, and left." 1 AA 227; 4 AA 845. On Christmas day of 1981, he shot his own father. 1 AA 000229; 6 AA 1339. Because they would not give him money to buy drugs, Mr. Castillo's father locked his mother and wife in a bedroom, "doused it with lighter fluid, and set the room on fire." 1 AA 226, 4 AA 819; see also 5 AA 1036. His father put a knife to his second wife's throat and threatened to slit her neck. 1 AA 227; 4 AA 833.

After two unsuccessful marriages, Mr. Castillo's father dated a fifteen year old girl that he nicknamed "slave girl." 1 AA 227; 4 AA 799. He raped her and forced her to have "sex with multiple gang members at a time on a single day . . .." 1 AA 228; 4 AA 799. He kidnaped another young girl from a McDonald's restaurant, raped her, and allowed gang members to do the same. 1 AA 231; 5 AA 1028. He held a knife to the girl's breast,

threatening to cut it off and hang it in his clubhouse. Id.

Mr. Castillo's adoptive father beat him regularly. 4 AA 864; 1 AA 241-242; 5 AA 1163-1194; 7 AA 1589-1592; 1678. He forced Mr. Castillo to eat soap and hot peppers until he became sick, and to write until his fingers bled. 1 AA 242; 4 AA 787; 864. He locked Mr. Castillo in his room and forced him to urinate and defecate in a frying pan. Id. Mr. Castillo was forced to sleep in the garage, which was not heated, and to eat less desirable food than the rest of the family. 4 AA 864.

2. Abandonment

Mr. Castillo was repeatedly abandoned. The vast majority of his first six years of life were spent in the care of his grandparents or a foster home. 1 AA 237. One foster mother remembered the evident neglect of Mr. Castillo:

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

Id. at 238; 4 AA 996. Mr. Castillo did not know how to use silverware or a toothbrush. Id.

As a young child, Mr. Castillo awoke at night screaming and crying, believing snakes were crawling all over him or that his mother was hurt. 1 AA 238; 4 AA 996. At four years-old, Mr. Castillo demonstrated how his father abused his mother and stated, "I am afraid my daddy might hurt my mommy." 4 AA 863. Whenever Mr. Castillo heard an ambulance, he was afraid his mother was inside. Id.

When he was older, Mr. Castillo's mother and adoptive father abandoned him to the juvenile system where, once again, he was abused. 1 AA 248; 4 AA 866-870. Mr. Castillo witnessed a sexual assault between an older and younger child at the Nevada Youth Training Center. 1 AA 248; 4 AA 863. A counselor at the Center beat Mr. Castillo with a metal clamp on his face, head, back, and chest, and spread wood putty in his hair. 1 AA 248; 4 AA 864;-865.

Mr. Castillo experienced a history of serial childhood concussions. 4 AA 896. He was struck in the head with a bottle, and his uncle hit him with a scuba tank, which rendered him unconscious. Id. Although no injuries were reported, he fell off a roof when he was three years old. 4 AA 888 (medical records questioned why a three year old was on the roof alone). Because of parental neglect, Mr. Castillo was diagnosed with gastroenteritis and pneumonia before he was one year old. 4 AA 899.

3. Mental Illness, Neurological Disorders, and Cognitive Disorders

Mr. Castillo suffered from Posttraumatic Stress Disorder (PTSD) at a young age. 2 AA 254, 256; 4 AA 893, 916. He had a preoccupation with monsters and imaginary playmates, and was plagued by nightmares. 2 AA 256; 4 AA 867; 900. The trauma he experienced disrupted his biological and psychological development, including his cognitive and emotional development. 4 AA 867, 870; 2 AA 256. These circumstances caused Mr. Castillo to display an inappropriate level of emotional response and denied him the ability to manage his emotions. Id. Ultimately, the abuse, trauma and neglect resulted in a deficit in executive functioning, leading to impulsive behavior. Id. Put simply, posttraumatic stress disorder caused Mr. Castillo to exhibit symptoms of impulsivity, anger, and inattentiveness. 4 AA 867.

As an adult, Mr. Castillo's posttraumatic stress disorder rendered him emotionally numb and unable to feel connected or to have positive feelings towards others. 2 AA 256; 4 AA 867. He is unable to learn from experience because of the deficits in his brain. 2 AA 254, 258; 4 AA 868, 870; 903.

Mr. Castillo suffers from "dissociation," which is described as a breakdown in the ability to integrate information–to understand the world around him. 2 AA 258; 4 AA 868.[1]

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[1] Mr. Castillo's dissociative disorder may explain his offense:

> He reports that when the robbery was not proceeding according to his plan and he thought that the person in the house was not a woman as he

Psychological processes and behaviors that would normally be connected, are disconnected. Id. Dissociation denies Mr. Castillo a memory of events, an emotional response to some situations, and a sense of lack of control. Id. It may cause an unawareness of his own circumstances and lead him to act aggressively. 4 AA 868.

Mr. Castillo was diagnosed with Cognitive Disorder NOS, Reactive Attachment Disorder, Posttraumatic Stress Disorder, and Conduct Disorder. 2 AA 254; 4 AA 887-953. These disorders were present at the time of this offense. 2 AA 255; 4 AA 887-953.

4. Death is Different

Mr. Castillo's brain damage, mental illness and history of physical, emotional and verbal abuse distinguish him from Colley. See, e.g., Hathaway v. State, 119 Nev. 248, 251, 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 is sentenced to death.[2] As the justices of the United States 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.

> had believed but a man who was about to wake up, he entered this type of dissociative state. "I made my aggressive move; I went into penitentiary battle mode."

4 AA 869.

[2] 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 never squarely addressed how "death is different" in this context.

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.").

Mr. Castillo's involvement in federal proceedings is totally unlike those at issue in Colley. Colley pursued his federal remedies throughout the federal system, including the United States District Court, the Ninth Circuit Court of Appeals, and the United States Supreme Court, before his belated return to the Nevada courts. Colley, 105 Nev. at 235, 773 P.2d at 1229. Here, 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 obtained the consent of the parties and 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, seeking an evidentiary hearing to demonstrate he was entitled to relief. The evidence of Mr. Castillo's brain injury and the various mental illnesses he suffered were documented on December 11, 2008. 4 AA 888-953; 4 AA 862-879. The instant proceedings began less than ten months later, on September 18, 2009. Mr. Castillo's claims were presented to the district court within a reasonable time. NRS 34.726.

B. Legal Charade

Even if Mr. Castillo had not suffered from a brain injury and posttraumatic stress disorder, it would be unreasonable to expect him to navigate, much less manipulate, the American criminal justice system. See McFarland v. Scott, 512 U.S. 849, 855 (1994)

("Congress' provision of a right to counsel ... reflects a determination that quality legal representation is necessary in capital habeas corpus proceedings in light of the seriousness of the possible penalty and the unique and complex nature of the litigation.") (quotations omitted); Murray v. Giarratano, 492 U.S. 1, 14, 27-28 (1989) (Kennedy, J., concurring) ("The complexity of our jurisprudence ... makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law."); id. (Stevens, J., dissenting) ("Capital litigation ... is extremely complex. ... [T]his Court's death penalty jurisprudence unquestionably is difficult even for a trained lawyer to master.").

After this Court denied relief on Mr. Castillo's initial state post-conviction petition, there was no further state assistance available to Mr. Castillo. Even if Mr. Castillo's brain injury and posttraumatic stress disorder are not considered, every Court to consider Mr. Castillo's case determined that he was indigent. Moreover, pursuant to the judgment in this case, he was transferred to the Nevada Department of Corrections, specifically, Ely State Prison. From his prison cell, with no legal training and no funds for investigation, Mr. Castillo was left to investigate his own mental illness, evaluate the performance of his initial state habeas counsel, and draft a comprehensive habeas petition which demonstrated the evidence and claims which counsel missed, Crump v. Warden, 113 Nev. at 304, 934 P.2d at 253 (1997), or discover an impediment "external to his defense." Hathaway, 119 Nev. at 252, 71 P.3d at 506. Such circumstances render Mr. Castillo's rights essentially "meaningless" and amount to nothing less than a legal charade. See State v. Antwine, 743 S.W.2d 51, 65 (Mo. 1987) ("We do not believe the Supreme Court intended a charade when it announced Batson."); see also Purkett v. Elem, 544 U.S. 765, 773 (1995) (Stevens, J., dissenting).

C. Procedural Fairness

This Court is obligated to "re-examine capital-sentencing procedure[s] against

evolving standards of procedural fairness in a civilized society." Gardner v. Florida, 430 U.S. 349, 357 (1977). Having determined that Mr. Castillo is entitled to effective assistance from his appointed habeas counsel, Crump, 113 Nev. at 302-303, 934 P.2d at 253, the Court should not allow procedural obstacles to ensure that no capital defendant will ever successfully mount such a challenge.

The only reasonable route available to Mr. Castillo to investigate his case, and evaluate the performance of state habeas counsel, 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 had received, reviewed by qualified counsel. See ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases 5.1, pp 682-83 (2008). 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, 556 U.S. 180, 129 S.Ct. 1481, 1491 (2009).

"[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." California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring); see Penry v. Lynaugh, 492 U.S. 302, 319 (1989). This is because punishment should be "directly related to the personal culpability of the criminal defendant." Penry, 492 U.S. at 319; see Eddings v. Oklahoma, 455 U.S. 104, 113-114 (1982) ("Just as the State may not by statute preclude the sentencer from

considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.") (emphasis in original); Lockett v. Ohio, 438 U.S. 586, 604 (1978) ("[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.") (emphasis in original).

Through no action or fault of his own, Mr. Castillo's trial counsel never presented evidence that he was born into a generational web of mental illness, violence, criminal behavior, parental neglect and abandonment, physical, sexual and emotional abuse, and to parents incapable of nurturing or caring for him. See 1 AA 206-2 AA 271. Trial counsel never learned that Mr. Castillo suffered from a Cognitive Disorder–a brain injury– and posttraumatic stress disorder. 4 AA 952. Trial counsel's failure to conduct an adequate investigation, and share the results of that investigation with a qualified expert, deprived Mr. Castillo of expert testimony that demonstrated

> 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.

4 AA 917; 2 AA 254.

Thus, Mr. Castillo's jury never considered, and was deprived of any ability to give effect to, evidence which questioned his guilt of first degree murder and which demonstrated that his unique life history made him less culpable than others. See Penry v. Johnson, 532 U.S. 782, 797 (2001) ("For it is only when a jury is given a vehicle for expressing its reasoned moral response to that evidence in rendering its sentencing decision

... that we can be sure that the jury has treated the defendant as a uniquely individual human being and has made a reliable determination that death is the appropriate sentence.") (quotations omitted).

D. Summary

Mr. Castillo has demonstrated good cause to overcome any procedural bar because both his trial and state habeas counsel failed to conduct a reasonable investigation into his substantial and horrific life story. The failure of Mr. Castillo's appointed habeas counsel to conduct the comprehensive investigation into evidence which trial counsel failed to discover provides this Court with good cause and prejudice to avoid any procedural bar. Crump, 113 Nev. at 304, 934 P.2d at 253. Mr. Castillo's circumstances deprived him of any ability to apprise this Court of habeas counsel's failures until he sought an attorney in federal court. These circumstances, collectively or individually, distinguish Mr. Castillo's proceedings from those in Colley.

III. Stevens v. State, Docket No. 24138 (Order of Remand, July 8, 1994)

In Stevens v. State, Docket No. 24138 (Order of Remand, July 8, 1994), 10 AA 2303, this Court found good cause to overcome the procedural bar of an untimely successor petition brought by a litigant who voluntarily abandoned his state post-conviction petition in order to pursue relief in federal court. Stevens was convicted of first-degree murder, robbery with the use of a deadly weapon, possession of a stolen credit card and grand larceny auto.[3] 10 AA 2303. He was sentenced to death by his jury. Id. Stevens' conviction and sentence were affirmed on direct appeal. 10 AA 2303-2304 (citing Stevens v. State, Docket No. 17590 (Order Dismissing Appeal, Oct. 21, 1988)).

Stevens filed a timely post-conviction petition and the state responded. 10 AA 2304.

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[3] Stevens is not cited as precedential authority, see SCR 123, but to demonstrate how the same procedural statutes are applied to similarly situated litigants; dissimilar treatment of Mr. Castillo violates the state and federal constitutional guarantees of equal protection and due process.

Thereafter, Stevens "moved to withdraw his petition so that he could pursue federal habeas corpus relief." Id. Although Stevens voluntarily abandoned his state post-conviction petition, he was required to return to state court in order to exhaust the same claims he previously deserted. Id. Stevens filed an untimely successor petition nearly three years after his direct appeal. Id.

The underlying documents reveal that the district court dismissed this successor petition as untimely. In spite of these circumstances, this Court held that Stevens demonstrated good cause for his delay and remanded the case to the district court for a new trial. 10 AA 2307. Even though Stevens was not entitled to mandatory appointment of counsel during state post-conviction proceedings, this Court held that the district court abused its discretion in not appointing counsel because Stevens was "under a penalty of death and had alleged an arguably colorable ineffective assistance of counsel claim in his first petition."[4] 10 AA 2306. Thus, although Stevens held no statutory right to the appointment of counsel, good cause was demonstrated because "Stevens needed independent advice with respect to his first petition." 10 AA 2306.

A. Mr. Castillo Never Voluntarily Withdrew his Petition from the Nevada Courts in Order to Pursue Federal Relief

The underlying record in Mr. Stevens' case demonstrates that Stevens "explained that he wanted to get out of State District Court and speculated that he might want in the future to file a writ of habeas corpus in federal court." Indeed, the district court conducted a colloquy with Stevens regarding his desire to dismiss his state petition and held that he was aware he was voluntarily surrendering his right to relief in state court.

In this case, by contrast, Mr. Castillo presented his claims to the Nevada courts to allow them an opportunity to correct the constitutional error infecting his conviction and sentence. 1 AA 8 - 21 AA 5143. Such circumstances should place him on equal, if not

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[4] NRS 177.345(1) (repealed in 1993) did not mandate appointment of counsel for post-conviction petitions.

better, footing with this Court to present evidence of his constitutional error and background and his "colorable ineffective assistance of counsel" claim.

B. Good Cause in light of Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989)

As in the instant proceedings, the prosecutor and the district court relied upon Colley to hold that Mr. Stevens was procedurally barred from presenting a successor state petition for a writ of habeas corpus. This Court, in a footnote, held Stevens is distinguishable from Colley. Stevens v. State, Docket No. 24138, at 5 n.4. 10 AA 2307. Although it is far from clear, it appears that the circumstances which distinguished Stevens' case from Colley is the lack of an attorney's assistance to explain the ramifications of his choice to pursue relief in federal court. Id. at 4-5.

The Court stated that "had counsel been appointed as it should have been . . . Stevens would either have pursued the first petition or knowingly waived pursuit" of it. Stevens v. State, Docket No. 24138, at 4. 10 AA 2306. This holding implies that counsel's advice is required before a capital defendant may knowingly waive a post-conviction claim. See State v. District Court (Riker), 121 Nev. 225, 242, 112 P.3d 1070, 1081 (2005) (failure to appoint counsel, when appointment was not mandatory, demonstrated good cause in Stevens because he was "under a penalty of death and had alleged an arguable colorable ineffective assistance of counsel claim in his first petition").

Similar circumstances existed in the instant proceedings. Mr. Castillo did not knowingly waive any post-conviction claim. He relied upon habeas counsel appointed by the District Court to adequately investigate his case and raise every constitutional claim of merit related to his conviction and death sentence. Once the habeas proceedings concluded, Mr. Castillo was without counsel to assist in the evaluation of his initial habeas proceedings. He had no counsel to determine whether appointed habeas counsel failed to conduct an adequate investigation, or failed to identify every constitutional error, associated with his conviction, sentence or habeas proceedings. Moreover, counsel appointed in the state

habeas proceedings could not effectively or ethically advise the client about whether a claim of ineffective assistance of habeas counsel exists or should be litigated under Crump. That would involve an inherent conflict of interest in counsel advising the client on the issue of his or her own ineffectiveness.

C. Summary

The circumstances in Stevens v. State, No. 24138 (Order of Remand (July 8, 1994), 10 AA 2303, and those surrounding Mr. Castillo's case are substantially similar in that both defendants filed a successor habeas petition which the prosecutor argued was procedurally barred under Colley. Both defendants were without counsel to advise them as to the appropriate procedures to follow in order to ensure that all constitutional claims of merit were raised before this Court. Both defendants had colorable–indeed compelling–claims of ineffective assistance of counsel. Mr. Stevens is now off death row. There exists no rational basis upon which to distinguish Mr. Castillo's case from Stevens. See U.S. Const. amends. V, XIV; Nev. Const. Art. 1, §§ 1, 8.

Simply put, Mr. Castillo was constitutionally guaranteed effective assistance of counsel at trial, but that counsel did not inter alia, investigate and present compelling mitigating evidence of his abusive childhood and mental illness. Mr. Castillo was granted effective assistance of state habeas counsel under Crump, but that counsel also did not investigate and present this compelling mitigation. Now that current counsel has presented this evidence, the state's response is, essentially, "too bad." This Court should not endorse this position, which makes our capital review system merely a travesty of justice. At a minimum, this Court should clearly establish a procedure prescribing how a capital habeas petitioner can, as a practical matter, enforce his rights to effective trial and habeas counsel without being barred by procedural rules. Barring consideration of Mr. Castillo's claims under these circumstances will violate his state and federal rights to notice, due process and equal protection. See U.S. Const. amends. V, XIV; Nev. Const. Art. 1, §§ 1, 8.

IV. Mr. Castillo has Demonstrated Cause, Prejudice, and a Fundamental Miscarraige of Justice Such That This Court is Obligated to Vacate His Death Sentence Pursuant to McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004).

A. McConnell v. State

A capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." McConnell, 120 Nev. at 1063, 102 P.3d at 620-621 (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)). The Nevada Constitution requires no less. Id. at 1063, 102 P.3d at 620-21 (citing Nev. Const. Art 1, §§ 6,8(5)). This Court held it impermissible under both the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution upon the same felony which underlies a felony murder. McConnell, 120 Nev. at 1069, 102 P.3d at 624. Moreover, the rule announced in McConnell applies retroactively. Bejarano v. State, 122 Nev. at 1078, 146 P.3d at 274 (McConnell determined under what circumstances and to whom capital punishment may be constitutionally applied). Because the district court held that McConnell error was not constitutional, and did not support a claim of a fundamental miscarriage of justice, Mr. Castillo's constitutional rights to due process, equal protection and the prohibition of cruel and unusual punishments were violated. See 26 AA 5129.

B. McConnell Error

Mr Castillo was charged with first-degree murder under alternating theories of premeditated or felony murder; no special verdict form indicated which theory the jury found supported his conviction. See Bejarano, 122 Nev. at 1080, 146 P.3d at 274; 2 AA 389-93; 3 AA 699-701, 711, 714-17; 17 AA 4064-4066; 3 AA 747. The jury further found two aggravating circumstances which were solely based upon the underlying felonies in this prosecution: that the crime was committed while Mr. Castillo was engaged in a burglary and a robbery. See id. at 1080, 146 P.3d at 274; 2 AA 404. Under McConnell, these aggravating circumstances must be stricken. See id. at 1078, 146 P.3d at 274.

The jury found two additional aggravating circumstances: Mr. Castillo was previously convicted of a violent felony; and the crime was committed to avoid or prevent a lawful arrest. 2 AA 404. Therefore, the remaining aggravating circumstances must be weighed against the mitigating circumstances found by the jury: Mr. Castillo's youth at the time of the offense; the offense was committed while Mr. Castillo was under the influence of extreme mental or emotional disturbance; and "any other mitigating circumstances." 22 AA 406. In addition, the must mitigating evidence now before the Court should be weighed. See Haberstroh, 119 Nev. 173, 184, 69 P.3d 676, 684 (2003) ("We are also cognizant that the jury heard no mitigating evidence and that Haberstroh would now offer evidence in mitigation."); cf. State v. Bennett, 119 Nev. 589, 605, 81 P.3d 1, 11 (2003) (in granting relief, Court considered three mitigating circumstances found by jury as well as additional mitigating evidence presented during penalty trial that was not recognized by jury's verdict); Leslie v. Warden, 118 Nev. 773, 783, 59 P.3d 440, 447 (2002) (although a jury found only one mitigating circumstance, Court noted "significant mitigating evidence" and cited two additional mitigating circumstances in granting relief). Moreover, this Court must consider the impact of constitutional error in conjunction with other error in the trial. See Bennett, 119 Nev. at 597-98, 602, 81 P.3d at 10, 13.

C. No Procedural Bar

The district court acknowledged that McConnell and Bejarano are intervening changes in the law which occurred after Mr. Castillo's initial habeas petition was denied. 26 AA 5129. However, in denying relief, the district court once again penalized Mr. Castillo for seeking appointment of counsel from the federal court. Ante at 2 ("II"). Under this reasoning, an untrained and uneducated defendant, suffering from a brain injury and posttraumatic stress disorder, living on death row in Ely, must routinely search this Court's opinions, identify which opinions are relevant, and immediately return to state court to litigate any new claim, despite being represented by counsel. Moreover, no direction is

provided to a defendant already engaged in the investigation of his initial state post-conviction proceedings. Must he return to state court before his investigation is complete? May he wait and raise all new claims in one successor habeas petition?

Perhaps more disturbing, the district court held that McConnell error can never constitute a fundamental miscarriage of justice because only legal innocence is concerned. 26 AA 5129. The conclusion flies directly in the face of this Court's decision in Leslie and its progeny, including State v. Katie, 124 Nev. 969, 975, 194 P.3d 1263, 1267 (2008), a case involving the invalidity of an aggravating factor under McConnell. Those cases recognize that the prejudicial invalidity of an aggravating factor constitutes a claim of innocence of the death penalty, and that refusal to address such a claim based on a procedural rule would result in a fundamental miscarriage of justice. E.g., Leslie v. Warden, 118 Nev. 773, 780, 59 P.3d 440, 445 (2002). However, because McConnell error is constitutional, this Court will strike an invalid aggravating circumstance on appeal even if the issue is not raised by the parties. Archanian v. State, 122 Nev. 1019, 1040-41, 145 P.3d 1008, 1023 (2006). Moreover, after an invalid aggravating circumstance is stricken, the aggravating and mitigating circumstances must be "reweighed" to determine whether Mr. Castillo is "eligible" for the death penalty. Id.; Hernandez v. State, 124 Nev. 978, 986, 194 P.3d 1235, 1240 (2008). A fundamental miscarriage of justice occurs if Mr. Castillo demonstrates a "colorable showing" that he is "ineligible for the death penalty." Pellegrini, 117 Nev. at 887, 34 P.3d at 537.

D. The Merits of Mr. Castillo's Claim

In spite of its findings regarding good cause and a fundamental miscarriage of justice, the district court reached the merits of Mr. Castillo's claim:

> Even applying McConnell, this Court finds that only the felony-burglary and felony-robbery aggravators would be stricken and that two valid aggravators would remain, namely being convicted of a prior crime of violence, and murder committed to avoid or prevent a lawful arrest. This Court finds the evidence in aggravation to be compelling but the evidence in mitigation to be relatively weak. After reweighing the remaining aggravating

> and mitigating evidence, this Court concludes beyond a reasonable doubt that the jury still would have imposed death absent the erroneous aggravating circumstances.

26 AA 5129. Thus the District Court purported to reweigh the aggravating and mitigating evidence in Mr. Castillo's case with no explanation as to what mitigating circumstances it considered, which circumstances were "relatively weak," or why the mitigating circumstances did not outweigh the remaining aggravating circumstances. Id. Indeed, the district court's order did not even list the mitigating circumstances found by Mr. Castillo's jury.

The district court erred. The remaining aggravating circumstances are inconsequential and the mitigating circumstances substantial. The jury found "any other mitigating circumstances" and did not designate what evidence supported this finding. 2 AA 406. Finally, considering the substantial evidence which now exists to demonstrate Mr. Castillo suffered from a brain injury and posttraumatic stress disorder, the mitigating evidence in Mr. Castillo's current petition should be considered in any reweighing analysis.

1. Remaining Aggravating Circumstances are "Inconsequential"

Respondents argue the aggravating circumstances which must be stricken pursuant to McConnell, that the crime was committed while engaged in a burglary and robbery, were insignificant and had an "inconsequential impact" on the balance of the aggravating and mitigating circumstances. Answering Brief at 37. Respondents contend that, because the aggravators involve "underlying facts of the crime itself," it is unlikely they "carried substantial weight in the jury's mind when determining [Mr. Castillo] death eligible."[5]

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[5] However, the facts and circumstances of a crime may always be considered in determining the appropriate sentence. Evans v. State, 112 Nev. 1172, 1203, 926 P.2d 265, 285 (1996); see Payne v. Tennessee, 501 U.S. 808, 832 (1991); Satterwhite v. Texas, 486 U.S. 249, 261 (1988); see also Doleman v. State, 107 Nev. 409, 418, 812 P.2d 1287, 1293 (1991) ("We conclude that, given the appellant and the facts of this crime, the imposition of the death sentence was not excessive."); Neuschafer v. State, 101 Nev. 331, 338, 705 P.2d 609, 613 (1985).

Answering Brief at 37. A reasonable extension of respondents' argument is that one of Mr. Castillo's remaining aggravating circumstances, that his crime was committed to avoid or prevent lawful arrest, is likewise insignificant, because it was also based upon the "underlying facts of the crime itself." See Answering Brief at 37.

Mr. Castillo's final remaining aggravating circumstance is that he was previously convicted of a violent felony. 2 AA 404. Mr. Castillo was 20 years old at the time of this felony. Id. At the time of trial, Mr. Castill's jury found his youth to be a mitigating circumstance.[6] 2 AA 406. One must presume the jury found Mr. Castillo's youth mitigated the aggravating circumstance as well. See Leslie, 118 Nev. at 780, 59 P.3d at 445; Bennett, 119 Nev. at 605, 81 P.3d at 32.

Mr. Castillo contends that, in light of the remaining aggravating and mitigating circumstances, this Court can not conclude beyond a reasonable doubt that Mr. Castillo's jury would have found him eligible for the death penalty in the absence of the two erroneous aggravating circumstances.

2. Mr. Castillo's Jury Would Not Have Found Him Eligible for the Death Penalty in Light of the Mitigating Evidence in the Instant Petition.

Mr. Castillo's jury found that he was entitled to every mitigating circumstance upon which they were instructed. 2 AA 406. The weight of these mitigating circumstances would be substantially increased with consideration of the evidence in Mr. Castillo's instant petition, while the weight of the aggravation would have been decreased by the removal of the invalid factors. See Bennett, 119 Nev. at 605, 81 P.3d at 11-12 ("Considering the remaining aggravators, the mitigating evidence that the jury heard, and the undisclosed

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[6] Mr. Castillo's jury also found his emotional and mental distress was a mitigating circumstance. 2 AA 406. The evidence now before this Court demonstrates that Mr. Castillo suffered a brain injury, posttraumatic stress disorder and other mental illnesses which rendered him incapable of conforming his conduct to the requirements of the law. 2 AA 254; 4 AA 917; Opening Brief at 28; 1 AA 249, 254, 258; 7 AA 1642, 1645; 4 AA 862-879, 915 926.

mitigating evidence that the jury did not hear, particularly the evidence regarding Beeson's dominant role in the crimes, we cannot conclude beyond a reasonable doubt that the jury would have imposed the death penalty in the absence of the erroneous aggravator and the State's Brady violations.").

a. Mr. Castillo's Youth

Had Mr. Castillo's jury been presented with the evidence of repeated physical and emotional abuse, neglect, violence, and mental illness in his childhood, as well as evidence of his brain injury, at least one juror would have refused to impose a death sentence. Mr. Castillo's mother abandoned him four times to German St. Vincent's Catholic Charities (the same organization where his grandmother abandoned his mother) and left him on a doorstep with a note pinned to his shirt. 1 AA 219; 4 AA 814; 823, 854; 5 AA 1071; 1122; Opening Brief at 22. Mr. Castillo arrived in foster care neglected, with no idea how to use silverware or a toothbrush. 1 AA 238; 4 AA 996. When Mr. Castillo's mother ultimately abandoned him to the Nevada Youth Training Center, he was physically abused by counselors and forced to participate in "gladiator school," which involved fighting other children. 1 AA 247-49; 4 AA 863; 865; 8 AA 1838-42. Such evidence could only have bolstered the weight of the mitigating circumstance found by the jury.

b. Mr. Castillo's Mental and Emotional Mitigation

The weight of the mitigating circumstance of extreme mental or emotional disturbance, found by Mr. Castillo's jury, becomes overwhelming when the evidence in the instant petition is considered. 2 AA 406. Most every adult in Mr. Castillo's life suffered mental illness and abused drugs. 1 AA 223; 7 AA 1712 (his mother used cocaine and marijuana); 1 AA 245 (his father, a member of a violent biker gang, was addicted to heroin and used LSD and marijuana). His grandmother and aunt were hospitalized for mental conditions, his grandfather and aunt attempted suicide, and his father was adjudged criminally insane. 1 AA 224; 5 AA 1051; 4 AA 856; 1 AA 224; 4 AA 854; 6 AA 1367; 8

AA 1906; Opening Brief at 22. Mr. Castillo's mother attempted suicide on at least six occasions, was hospitalized, and underwent electroshock therapy. 1 AA 223; 4 AA 820-21; 7 AA 1720; 8 AA 1770; Opening Brief at 22.

Mr. Castillo, in addition to Reactive Attachment Disorder, Posttraumatic Stress Disorder, and dissociative amnesia, suffered from an organic brain injury.[7] 2 AA 254, 58-59; 4 AA 867, 869; 4 AA 916, 925; Opening Brief at 26. The confluence of these illnesses and organic injury created a perfect storm:

> Mr. Castillo was under extreme emotional duress due to the activation of his Posttraumatic Stress Disorder .... 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; Opening Brief at 28.

c. This Court Should Consider New Evidence

This Court has granted relief after re-weighing mitigating and aggravating circumstances in other cases which required much greater discernment than required in the instant proceedings. In Leslie v. Warden, the defendant shot a store clerk during a robbery and was convicted of burglary, robbery, and first-degree murder. 118 Nev. at 775-76, 59 P.3d at 443. The jury found four aggravating circumstance including: the defendant

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[7] Reactive Attachment Disorder results when children are unable to bond with adults during the first four years of their life, and can forever prevent the child from developing relationships with others or from responding to situations in a normal manner. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 130 (4th ed., text revision, 2000); Opening Brief at 26. Posttraumatic Stress Disorder results from "exposure to traumatic/ stressful events often involving threat to life or physical integrity of oneself or others." 2 AA 254-56; 4 AA 915; Opening Brief at 26. In his childhood, Mr. Castillo experienced "extremely violent and scary events ... including [his] mother's sexual exploits with men." 2 AA 254-56; 4 AA 915; Opening Brief at 26. PTSD leads children to act out with impulsivity, irritability, and anger. 4 AA 867; Opening Brief at 27.

knowingly created a great risk of death to more than one person; murder committed by a person engaged in or fleeing a burglary; murder committed by a person engaged in or fleeing a robbery; and an at random murder with no apparent motive. Id. The jury found only one mitigating circumstance-no significant criminal history. Id.

After striking aggravating circumstances, this Court granted relief even though it found the remaining aggravating circumstances were "certainly supported by substantial evidence." Leslie, 118 Nev. at 783, 59 P.4d at 447. The Court relied upon "significant mitigating evidence" which it felt was not reflected by the jury's verdict. Id. The Court held that a fundamental miscarriage of justice resulted when the defendant was actually innocent of an aggravating circumstance and there existed a reasonable probability the jury would not have imposed death. Id. at 780, 59 P.3d at 445 (citing Pelligrini, 117 Nev. at 886-86, 34 P.3d at 537). A new penalty hearing was ordered. Id. at 783, 59 P.4d at 447.

In State v. Bennett, 119 Nev. 589, 81 P.3d 1 (2003), the defendant killed a store clerk during in an attempted robbery, and his co-defendant shot a fleeing customer. Id. at 593, 81 P.3d at 2. The jury found four aggravating circumstances: the defendant knowingly created a great risk of death to more than one person; murder committed in the commission of a burglary; murder committed while engaged in an attempted robbery; and an at random murder with no apparent motive. Id. at 596, 81 P.3d at 7-8. In an untimely successor post-conviction petition, the Court struck the final aggravating circumstance. Id. at 597, 81 P.3d at 12.

The Court weighed the remaining aggravating circumstances against three mitigating circumstances: no criminal history; youth; and alcohol and drug usage. Bennett, 119 Nev. at 604, 81 P.3d at 32. Again the Court relied upon mitigating evidence which was not reflected in the jury's verdict. Id. at 605, 81 P.3d at 32 (evidence the defendant fascinated by heavy metal music, was influenced by friends, and was depressed, dyslexic, and had trouble in school). "Considering the remaining aggravators, the mitigating evidence that the

jury heard, and the undisclosed mitigating evidence that the jury did not hear," the Court remanded for a new penalty hearing. Id. at 605, 81 P.3d at 32; see also State v. Haberstroh, 119 Nev. 173, 69 P.3d 676 (2003). If this Court were to ignore the compelling mitigation evidence presented in Mr. Castillo's case, while considering mitigation evidence not presented to the jury in Bennett and Haberstroh, it would constitute a blatant violation of equal protection of the laws, U.S. Const. Amend. XIV; Rev. Const. Art. 4 § 21, by treating similarly-situated litigants differently.

d. Conclusion

Under McConnell, two of the aggravating circumstances found by the jury in Mr. Castillo's case are invalid and must be stricken. The remaining two aggravating circumstances must be reweighed against the three mitigating circumstances found by Mr. Castillo's jury. In addition to the mitigating evidence before the jury, substantial evidence is before the Court that Mr. Castillo suffered from Posttraumatic Stress Disorder, Reactive Attachment Disorder, dissociative amnesia, and organic brain injury. 2 AA 254, 58-59; 4 AA 867, 869, 4 AA 916, 925; 4 AA 917; Opening Brief at 26-26. Mr. Castillo was repeatedly abandoned, abused, and neglected as a child, 1 AA 219, 4 AA 814, 4 AA 854, 5 AA 1071, 4 AA 823, Opening Brief at 22, and most every adult Mr. Castillo's life was addicted, mentally ill, violent, abusive, suicidal and criminal. 1 AA 244-49; 4 AA 789; 823; 850; 863; 4 AA 819; 5 AA 1036; 5 AA 1029; 1051; 6 AA 1344; 1 AA 241-42; 4 AA 787; 852; 5 AA 1164-1194; 7 AA 1590-92; 8 AA 1838-42. In light of Leslie, Bennett, and Haberstroh, this Court cannot find, beyond a reasonable doubt, that Mr. Castillo's jury would have found him death eligible after the exclusion of the invalid aggravating circumstances.

V. Law of the Case

Respondents contend a number of Mr. Castillo's claims are barred under the doctrine of law of the case. Answering Brief at 19, 20, 22, 23, 25, 26. "The law of a first appeal is

the law of the case on all subsequent appeals in which the facts are substantially the same." Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969); see also Graves v. State, 84 Nev. 262, 439 P.2d 476 (1968); but see Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994). Although the Court has held the doctrine is not "avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings," Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975), the Court will depart from its "prior holdings ... [when it] determine[s] that they are so clearly erroneous that continued adherence would work a manifest injustice." Clem v. State, 119 Nev. 615, 620, 81 P.3d 521, 525 (2003); see also Paine v. State, 110 Nev. 609, 615, 877 P.2d 1025, 1028 (1994).

The doctrine of law of the case is not absolute. The Court retains discretion to revisit issues whenever the factual basis for the claim is substantially different, when new authority questions the ruling, or whenever the Court determines its previous decision was erroneous and works a manifest injustice. See Nika v. State, 124 Nev. 1272, 1299, 198 P.3d 839, 857 (2008); Bejarano, 122 Nev. at 1074, 146 P.3d at 271 ("However, the doctrine of the law of the case is not absolute, and we have the discretion to revisit the wisdom of our legal conclusions if we determine that such action is warranted."); Hsu v. County of Clark, 123 Nev. 625, 173 P.3d 724 (2007) ("We agree that in some instances, equitable considerations justify a departure from the law of the case doctrine."); Pellegrini, 117 Nev. at 884-885, 34 P.3d at 535-36 ("[I]t cannot be seriously disputed that a court of last resort has limited discretion to revisit the wisdom of its legal conclusions when it determines that further discussion is warranted."); Murray v. State, 106 Nev. 907, 909-910, 803 P.2d 225, 226-27 (1990). A review of Mr. Castillo's claims in these proceedings demonstrates that the underlying factual basis for his claims is substantially different than those previously presented.

VI. CONCLUSION

No procedural bar prevents the Court's consideration of Mr. Castillo's claims. Mr.

Castillo respectfully requests the Court reverse his conviction and sentence. In the alternative, Mr. Castillo requests the Court remand his case to the court below for a hearing on his meritorious constitutional claims.

Dated this 16th day of September, 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 16th day of September, 2011.

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 16th day of September, 2011. Electronic Service of the foregoing **APPELLANT'S REPLY BRIEF** shall be made in accordance with the Master Service List as follows:

Steve Owens
Clark County District Attorney

Katrina Manzi,
An Employee of the Federal Public Defender