IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * * * * * * *

SAMUEL HOWARD

Appellant,

vs.

E.K. McDANIEL, WARDEN, and CATHERINE CORTEZ MASTO, ATTORNEY GENERAL FOR THE STATE OF NEVADA,

Respondents.

Case No. 57469

APPELLANT'S OPENING BRIEF

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

Eighth Judicial District Court, Clark County

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I. JURISDICTION

Mr. Howard appeals from an order by the district court dismissing his amended petition for writ of habeas corpus (post-conviction) challenging his conviction and death sentence. The court filed its order on November 6, 2010, 14 AA 3366-3401, and notice of entry of the order was filed on December 6, 2010, 14 AA 3402. Mr. Howard filed a timely notice of appeal on December 21, 2010, 14 AA 3404-3405. This Court has jurisdiction under NRS 34.575(1).

II. ISSUES PRESENTED FOR REVIEW

A. Mr. Howard is innocent of the death penalty.

i. The alleged aggravating circumstance of murder during the course of a robbery is void under McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004).

ii. The remaining aggravating factor, a prior conviction involving violence, is also void because (1) it was never alleged as an aggravating circumstance, (2) it was not based on a final conviction, and (3) its use violates both the ex facto clause and the due process clause of the Fifth and Fourteenth Amendments.

iii. The mitigating evidence, both adduced at trial and in post conviction, establish Mr. Howard's innocence of the death penalty.

B. Mr. Howard was deprived of the effective assistance of trial counsel.

C. The jury instruction on "premeditation" violates due process of law.

III. STATEMENT OF THE CASE

Mr. Howard is in the custody of the State of Nevada at the Ely State Prison in Ely, Nevada, pursuant to a state court judgment of conviction and sentence of death entered on May 6, 1983, in the Eighth Judicial District Court, Clark County, Nevada, by the Honorable John F. Mendoza, Case No. C53867. 7 AA 1572-1573, 1592.

On June May 25, 1981, a Clark County Grand Jury indicted Mr. Howard on two counts of robbery with the use of a deadly weapon, and one count of murder in the first degree with use of a deadly weapon. 1 AA 1-3. On April 22, 1983, the jury found Mr.

Howard guilty of all charges. 6 AA 1344-1346. Following the penalty hearing on May 2-4, 1983, the jury sentenced him to death. 7 AA 1570-1571. This Court affirmed Mr. Howard's conviction and sentence on December 15, 1986, Howard v. State, 102 Nev. 572, 729 P.2d 1341 (1986), cert. denied, 484 U.S. 872 (1987).

On October 29, 1987, Mr. Howard filed a petition for post-conviction relief in the Eighth Judicial District Court for the State of Nevada. 7 AA 1593-1602. The court held an evidentiary hearing on August 25-26, 1988. 7 AA 1603-1680. Counsel filed post-hearing briefs, 7 AA 1681-1696, and on February 14, 1988, the court rendered its decision denying Mr. Howard's petition for post-conviction relief. 7 AA 1697-1711. Mr. Howard appealed and, on November 7, 1990, this Court dismissed the appeal. Howard v. State, 106 Nev. 713, 800 P.2d 175 (1990). While the state court proceeding was pending, Mr. Howard filed a federal petition for habeas relief in the United States District Court for the District of Nevada (CV-N-88-0264-ECR). On June 23, 1988, the federal court dismissed the case without prejudice, to permit Mr. Howard to exhaust claims.

On May 1, 1991, Mr. Howard filed another federal habeas corpus petition in the United States District Court for the District of Nevada (CV-N-91-196-ECR). Mr. Howard's petition was a "mixed" petition, and on October 16, 1991, the United States District Court granted Mr. Howard's request to stay the case and to return to state court for exhaustion purposes.

On December 16, 1991, Mr. Howard returned to state court and filed an amended petition for post-conviction relief alleging four unexhausted claims.[1] 7 AA 17121716. On April 17, 1992, Mr. Howard filed a response to the state's motion to dismiss his amended petition, agreeing to summary dismissal of the claims "so long as it is made clear his [three claims] are exhausted and ripe for review in . . . Petitioner's federal habeas action." 7 AA

[1] Those claims were (1) prosecutorial misconduct, (2) ineffective assistance of counsel in failing to explain the concept of mitigation to Petitioner, and the (3) prejudice stemming from the cumulation of error occurring at trial and on appeal. A fourth claim that Mr. Howard's right to a speedy trial was violated was conceded because counsel could not substantiate the claim.

at 1719. On July 7, 1992, the district court denied the amended petition. 7 AA 1721-1725. On March 19, 1993, this Court dismissed his appeal. 10 AA 2347-2348.

Mr. Howard filed another federal petition for writ of habeas corpus (2:93-cv-01209-LRH-LRL) on January 12, 1994. He filed an amended petition on May 8, 1995, and a second amended petition on January 27, 1997. On September 13, 2002, the federal court stayed the second amended petition to allow Mr. Howard to again return to state court to exhaust his pending federal habeas claims.

On December 20, 2002, Mr. Howard filed his third state petition for writ of habeas corpus (post-conviction). 7, 8 AA 1726-1782, and on August 20, 2003, filed an amended petition for writ of habeas corpus. 8 AA 1783-1847. On October 23, 2003, the state court dismissed the amended petition. 8 AA1848-1851. On December 1, 2004, this Court affirmed that dismissal. 8, 9 AA 1992-2002.

On February 23, 2005, the federal court lifted its stay and directed the clerk to file Mr. Howard's third amended petition for writ of habeas corpus. On December 23, 2005, respondents filed a motion to dismiss the third amended petition. On July 26, 2006, the court granted respondents' motion due to appointed counsel's failure to file a response to the motion, even after requesting two extensions of time to do so. On February 12, 2007, the federal court discharged Mr. Howard's appointed counsel because she abdicated her responsibilities as appointed counsel in a capital habeas case and did little or no substantive legal work on Mr. Howard's behalf since the case was re-opened.[2]

On October 25, 2007, Mr. Howard filed another state petition for writ of habeas corpus (post-conviction), 8 AA 1852-1986, within one year of this Court's decision in Bejarano v. State, 122 Nev. 1066, 146 P.3d 265, (2006), in which this Court held that the

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[2] On December 28, 2009, the federal court denied Mr. Howard's third amended petition and issued a certificate of appealability as to one issue. Mr. Howard timely filed his notice of appeal in federal court on January 27, 2009. On May 12, 2010, the Ninth Circuit Court of Appeals granted a stay of Mr. Howard's federal appeal pending resolution of his state court proceedings which are the subject of the instant appeal.

decision in McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004), reh'g denied 107 P.3d 1287 (2005), was retroactive. See NRS 34.726. Mr. Howard filed an amended petition for writ of habeas corpus (post-conviction) on February 24, 2009. 9, 10 AA 2247-2340. Respondent's filed a motion to dismiss the petition and a reply to the opposition on October 7, 2009, 13, 14 AA 3213-3285, and Mr. Howard filed a response. 14 AA 3286-3314. On February 4, 2010, the district court heard argument on the petition and motion to dismiss. 14 AA 3355-3365. On November 6, 2010, the court filed its findings of fact, conclusions of law and order denying Mr. Howard's petition. 14 AA 3366-3401.

IV. SUMMARY OF THE ARGUMENT

The district court found all of Mr. Howard's claims procedurally defaulted under NRS 34.726, NRS 34.810 and NRS 34.800. The district court, however, refused to address the merits of Mr. Howard's petition: that his innocence of the death penalty forgave those defaults, and, instead, held that those arguments were also time barred. There is no doubt that one of the aggravating factors alleged, murder in the course of robbery, is invalid. See McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004), reh'g denied 107 P.3d 1287 (2005).[3] Given that invalidity, Mr. Howard's claim of innocence revolves around two alternative arguments. The first is that the remaining aggravator, a prior conviction involving violence, is itself also invalid for three reasons: first, the prosecution gave no notice of its intent to use the New York proceeding as an aggravating factor. Second, that proceeding did not result in a final conviction under then existing Nevada law. Third, to permit such a proceeding to apply to Mr. Howard's case violates due process of law and the ex post facto clause of the Fifth Amendment. The second alternative is that if the New York proceeding were to survive as a valid aggravator, this Court must still reweigh the valid aggravator against the mitigating evidence, and in doing so, must consider not just the evidence adduced

[3] Mr. Howard argues here that he could not have brought his McConnell claim until this Court found the claim to be retroactive in Bejarano v. State, 122 Nev. 1066, 146 P.3d 265, 271 (2006). It was only then that Mr. Howard had a viable claim to raise. See Clem v. State, 119 Nev. 615, 81 P.3d 521 (2003).

at trial, but all the evidence adduced in post-conviction proceedings, as well as the reasons for failure to present the evidence at trial. In this context, Mr. Howard has established that he is innocent of the death penalty and any procedural defaults are overcome.

Mr. Howard's trial counsel, both staff attorneys with the Clark County Public Defender's Office, failed to provide the required effective assistance of counsel. The victim was a popular Las Vegas dentist whose patient list included the staff of the public defender: most of the staff refused to have anything to do with Mr. Howard's case and some vocally wished for his execution. The two counsel assigned to the case conducted no investigation whatsoever, and failed to make any effort to obtain his California mental health records. Had they done so, they would have learned information that would easily have led to most if not all of the information plead above. Their professed excuse - that Mr. Howard refused to sign releases - has been expressly rejected by the United States Supreme Court.

The premeditation instructions given to the jury were constitutionally infirm in failing to define deliberate as a separate, distinct element of first-degree murder, and thus violated clearly established Supreme Court law.

V. MR. HOWARD'S TRIAL

Before Mr. Howard's trial, the prosecution filed a notice of intent to seek the death penalty with three aggravating factors alleged. The first was a murder committed by a person who had previously been convicted of a prior violent felony:

> felony involving the use of or threat of violence to the person of another. [Citation omitted.] The evidence will consist of certified judgments of conviction and/or certified court minutes and/or state prison records showing that defendant Samuel Howard was convicted in San Bernardino County, California, in 1980 or 1981 of the felony offenses of robbery with use of a firearm and unlawful taking of a motor vehicle.

1 AA 46-48. The second aggravating factor was that the murder occurred in the course of a robbery. Id. A third aggravating factor alleged murder for the purpose of avoiding or preventing a lawful arrest, but was abandoned. 6 AA 1388-1389.

The notice of intent to seek death also alleged additional evidence it intended to offer at the penalty phase - that Mr. Howard had been convicted in absentia of first-degree robbery.

The state admitted, however, that it could not produce a certified copy of a judgment of conviction because Mr. Howard had jumped bail after two days of testimony. 1 AA 47. The state also argued that it would present evidence of the 1979 murder of Louis Zumpano, a used car salesman in Queens, NY. Id. Neither offense was listed as a statutory aggravating factor.[4]

During the guilt phase, the state used the California conviction for car theft and robbery and the in absentia proceedings in New York for the robbery of Dorothy Weisband to cross-examine Mr. Howard but offered no details of either offense. 5 AA 1142-1143.

The penalty phase commenced on the afternoon of May 2, 1983. The first witness called by the state was Dorothy Weisband, who testified that Mr. Howard robbed her. 6 AA 1400-1416. John McNicholas, the investigating detective, also testified. 6 AA 1417-1428. The state introduced exhibit 69, a certified copy of the minutes from the Supreme Court of New York. Defense counsel objected to its admission but the trial court overruled the objection. 6 AA 1425-1426.

The following day, the prosecutor informed the court that he intended to call the investigating officer from San Bernardino, California, and to move for the introduction of the abstract of judgment from California indicating that on May 27, 1982, Mr. Howard was convicted of one count of theft and one count of robbery. 6 AA 1431. The defense objected, arguing that Mr. Howard had been convicted of the California offense after the commission of the Nevada offense and therefore the California offense was not a prior conviction within the meaning of the statute. 6 AA 1431-1443. The trial court sustained the objection. Id. at 1443.

> The Court: Counsel, let's not waste any time. The court is going to sustain the objection.
>
> I don't think you can read this sentence any way other than it is. Your

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[4] On January 12, 1983, the district attorney filed a supplemental notice of intent to seek death contending that they would offer evidence of three additional robbery offenses. 1 AA 81-82. None of these offenses were alleged to have resulted in a conviction or qualified as statutory aggravating factors. Id.

misinterpretation of it doesn't change it. The sentence reads:

> The murder, which is the murder under consideration, was committed by a person who was previously convicted of another murder or a felony involving the use or threat or violence to the person of another.
>
> The reason the other information came in or the other felony came in from New York was because it was a previous felony involving violence. This felony that we have in California is a subsequent felony involving violence.
>
> Your objection is sustained.

6 AA 1442-1443.

Penalty phase jury instruction number 9 instructed the jury that a first degree murder could be aggravated if (1) the murder was committed by a defendant who was previously convicted of a felony involving the use or threat of violence to the person of another or (2) if the murder was committed while the defendant was engaged in the commission of any robbery. 7 AA 1561.

In its closing arguments to the jury, the prosecutor stated:

> Ladies and gentleman, court minutes are in evidence as State's Exhibit 69. You heard the testimony of Detective John McNicholas, that the defendant was convicted of these crimes. There is no doubt they occurred May 24, 1978. Mr. Howard had previously been convicted of a crime involving the use of violence before he even came to Las Vegas in 1980, and that is the circumstance that aggravates murder in the first degree, and that's been proven beyond a reasonable doubt.

7 AA 1512.

The jury found both aggravators as alleged by the state, no mitigating circumstances sufficient to outweigh the aggravating circumstances, and voted for death. 7 AA 1570-1571.

VI. ARGUMENT

A. THE McCONNELL AGGRAVATOR

As noted above, the state alleged and the jury found that Mr. Howard murdered Dr. Monahan while committing the offense of robbery. Despite this Court's prior holdings in both McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004) and Bejarano v. State, 122 Nev. 1066, 146 P.3d 265, 271 (2006), the Court below ruled that Mr. Howard's challenge to that aggravator was time barred because it had not been brought within one year of the

McConnell decision. Mr. Howard both contended below and now contends before this Court that the one year deadline of NRS 34.726 commences when the new claim is expressly made retroactive by this Court.

In Clem v. State, 119 Nev. 615, 81 P.3d 521 (2003), the defendant sought to take advantage of a more restrictive definition of deadly weapon. At the time of Clem's trial, this Court employed a functional definition of the concept, focusing on how the instrument was used and the facts and circumstances of that use. 119 Nev. at 619, 81 P.3d at 524. Applying that test, the Court concluded that the evidence in Clem's case satisfied that standard.

After Clem's trial and appeal, this Court, in Zgombic v. State, 106 Nev. 571, 798 P.2d 548 (1990) reexamined its holding and adopted a more narrow definition of deadly weapon, that required proof that the instrument was inherently dangerous. Clem then filed a successor post-conviction petition and argued that Zgombic should be applied retroactively. This Court rejected that argument. Because the claims were time barred, Clem could overcome that default "with a sufficient showing of good cause and actual prejudice." 119 Nev. at 620, 81 P.3d at 525.

> To establish good cause, appellants must show that an impediment external to the defense prevented their compliance with the applicable procedural rules. A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of any default. In Kimmel v. Warden, [101 Nev. 6, 692 P.2d 1286 (1985)], this court opined, without deciding, that new state-law clams might constitute good cause in this context. However, we now determine that proper respect for the finality of convictions demands that this ground of good cause be limited to previously unavailable constitutional claims.

119 Nev. 621, 81 P.3d at 525-26. Bejarano made it clear that not all constitutional rules are given retroactive effect. New rules, and McConnell was such a rule, are given retroactive effect if the new rule is substantive. Bejarano v. State, 122 Nev. at 1075-77, 146 P. 3d at 271-273. Because the McConnell decision was substantive, that is, because the interpretation narrowed the scope of a criminal statue, it was retroactive. It was only at that point that the McConnell claim was available to all those whose post conviction petitions would otherwise be time barred. The Court below erred when it refused to consider the challenge to Mr.

Howard's murder in the course of a robbery aggravator.

B. THE PRIOR CONVICTION INVOLVING VIOLENCE AGGRAVATOR

It is clear that the prosecution relied on the New York robbery to satisfy its allegation of a prior violent felony conviction aggravating factor, a reliance legally inappropriate for several reasons. First, the prosecution did not allege the robbery as an aggravating factor in its notice of intent to seek death. See Kirksey v. State, 107 Nev. 499, 503, 814 P.2d 1008, 1010 (1991); NRS 175.552. Second, Mr. Howard was never convicted of the robbery in New York. Third, to hold otherwise violates due process of law and the ex post facto clause of the Fifth Amendment.

i. Lack of notice

At the time of Mr. Howard's trial, NRS 175.552 mandated notice of aggravating factors at any time "before the commencement of the penalty hearing." See Rogers v. State, 101 Nev. 457, 466,-67, 705 P.2d 664, 671 fn. 2 (1985), cert denied, 476 U.S. 1130 (1986). Thus, once the penalty phase started in Mr. Howard's trial, the state was barred from altering its notice of intent to seek death.

In Bennett v. Eighth Judicial District Court, 121 Nev. 802, 121 P.3d 605 (2005), the prosecution filed a notice of aggravating factors in 1988 and obtained a death sentence which was later reversed and a new penalty hearing ordered. At that point, three aggravating factors remained from the original prosecution: the murder created a risk of death to more than one person, NRS 200.033(3), the murder was committed in the course of a burglary, NRS 200.033(4), and that the murder was committed during the course of an attempted robbery, NRS 200.033(4). The last two aggravators were invalidated under McConnell v. State, before the second penalty hearing. The state then sought to add three new aggravating factors to its notice of intent under SCR 250(4). The trial court permitted this new addition and Mr. Bennett sought a writ of mandamus to compel their dismissal. 121 Nev. at 805, 806, 121 P.3d at 607-08. This Court agreed:

> Our view on this matter is only strengthened by the fact that this evidence upon which the State bases the newly alleged aggravators has existed since

> Bennett's original prosecution in 1988. The State originally passed on these aggravators, which it has recognized in its answer to Bennett's petition were weaker than the ones it actually chose to pursue. That we issued the McConnell opinion does not now give the State cause to resurrect weaker aggravating circumstances it rejected nearly 17 years ago.

121 Nev. at 811, 121 P.3d at 611.

In the case at bar, the prosecution, prior to trial, chose not to allege the New York prosecution as an aggravating factor. Once the prior violent felony conviction from California was disallowed by the trial court, the prosecution was left only with the murder in the course of a robbery; there was no other aggravating factor alleged. The New York trial cannot and should not save the case now. Because the only remaining aggravating factor before the Court to justify Mr. Howard's death sentence is the murder during the course of a robbery, an aggravating factor no longer valid after McConnell and Bejarano, the death sentence must be set aside.

This resolution is supported, not just by state law, but by the requirements of due process, especially notice. This Court has insisted that the notice provisions, whether statutory under NRS 175.552, or rule based under SCR 250, be interpreted strictly. These two sets of procedures, NRS 175.552 and SCR 250 (enacted in 1990 and applicable only to capital trials after its effective date) "are intended to ensure that defendants in capital cases receive notice sufficient to meet due process requirements." State v. Second Judicial District Court, 116 Nev. 953, 959, 11 P.3d 1209, 1212 (2000); see also Deutscher v. State, 95 Nev. 669, 678, 601 P.2d 407, 413 (1979) ("We believe that the purpose of [NRS 175.552] is to provide the accused notice and to insure due process so that he can meet any new evidence which may be presented during the penalty hearing.") (Emphasis added).

This Court has consistently and strictly applied the requirements of each procedure. Even technical compliance may violate due process. See Emmons v. State, 107 Nev. 53, 62, 807 P.2d 718, 724 (1991) ("Consistent with the constitutional requirement of due process, defendants should be notified of any and all evidence to be presented during the penalty hearing. Although the state in this case did give the accused notice before the

commencement of the penalty hearing [and thus complied with the statute], it was only one day's notice. We hold that the notice given in this case was inadequate to meet the requirements of due process."); see also Mason v. State, 118 Nev. 554, 562, 51 P.3d 521, 526 (2002).

The Fifth and Fourteenth Amendments are equally demanding:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. (Citation omitted). . . . It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.

Cole v. Arkansas, 333 U.S. 196, 201 (1948); Lankford v. Idaho, 500 U.S. 110, 121, 127 n.22 (1991) ("fair notice is the bedrock of any constitutionally fair procedure.").

Here, the state made no effort to amend its notice of intent to allege the New York proceedings as an aggravating factor, even after the penalty hearing began. It simply substituted evidence it had previously intended to use to demonstrate Mr. Howard's character. There was no notice given that would justify or support the use of the Queens County Supreme Court case, and because the jury instructions made no reference to a specific prior offense, there was no evidence that could have supported the jury's decision on this aggravating factor. The state cannot rely on a theory that it neither provided notice of, nor submitted to the jury. Mr. Howard's death sentence cannot stand.

C. THE NEW YORK PROCEEDINGS DID NOT SATISFY NEVADA LAW

Even if the state had provided proper notice, the New York proceedings were not sufficient to satisfy then existing Nevada law to prove a conviction. The evidence of the Queens Supreme Court case is uncontradicted. The state introduced no conviction or sentence. Mr. Howard appeared for trial for two days and then disappeared. The trial judge submitted the case to the jury and obtained a guilty verdict from that jury, but took no other action.

At the time of Mr. Howard's trial, the term "conviction" had a specific legal meaning. NRS 50.095 permitted the use of convictions to impeach a witness's credibility. This Court interpreted the term "conviction" to require something more than merely an arrest or, as in the case at bar, a guilty verdict. In 1967, the Court, in Fairman v. State, 83 Nev. 287, 289, 429 P.2d 63, 64 (1967), ruled that a jury verdict of guilty against a defendant, where the entry of a judgment on that verdict and sentencing had been delayed a week, did not permit the prosecution to use that verdict to impeach the defendant in a trial occurring after the verdict but before entry of judgment and sentencing: "A verdict of the jury was not a judgment of the court, nor is it the final determination." The Court upheld the rule of Fairman, in Colle v. State, 85 Nev 289, 292, 454 P.2d 21, 23 (1969), Boley v. State, 85 Nev. 466, 470, 456 P.2d 447, 449 (1969), and Ruvelta v. State, 86 Nev. 224, 227, 467 P.2d 105 (1970).

In Ruvelta v. State, this Court ruled that no judgment of conviction can be complete without a sentence. In another context, this Court ruled that the mere pronouncement of a conviction and sentence of imprisonment was not sufficient to constitute a conviction; the judgment could not be final until signed by the judge and entered by the clerk. Miller v. Hayes, 95 Nev. 927, 604 P.2d 117 (1979); see also Bradley v. State, 109 Nev. 1090, 864 P.2d 1272 (1993).

It is presumed that the Nevada Legislature was "cognizant of these constructions."

> In the absence of any language in the amendment indicating a contrary intention, it must also be presumed that the word . . . was used by the Legislature with the meaning ascribed to it by the court. If the Legislature uses words which have received a judicial interpretation, they are presumed to be used in that sense, unless the contrary intent can be gathered from that statute.

Latterner v. Latterner, 51 Nev. 285, 290, 274 P. 194, 195 (1929).

In 1997, the Legislature amended NRS 200.033(2)(b) to permit the use of a prior violent felony conviction aggravating factor when the jury simply returned a guilty verdict. This Court has held that when the Legislature changes an existing statute, it intends to either create a new right or withdraw an old one. The change is presumed to indicate a change in legal rights. Courts assume the Legislature was aware of the previous interpretation and

evinced its disagreement with it by enacting the change. Utter v. Casey, 81 Nev. 268, 274, 401 P.2d 684, 688 (1965).[5]

Nevada law, in 1981, required the prosecution to prove a "conviction" by establishing both the existence of and the entry of a final judgment; under that standard, the New York proceeding fails. Consequently, the prior conviction involving violence aggravator cannot sustain Mr. Howard's death sentence.

D. THE EX POST FACTO CLAUSE AND DUE PROCESS

This Court is not free either to apply the 1997 amendment to NRS 200.033(2)(b), or to alter the definition of conviction commonly understood in 1981.

In Rogers v. Tennessee, 532 U.S. 451 (2001), the Supreme Court made it clear that, while the Ex Post Facto clause of Art. I, Sec. 10 of the Constitution did not apply to judicial constructions of a statute, Bouie v. City of Columbia, 378 U.S. 347 (1964) incorporated the due process concepts of foreseeability, fair warning, and notice to ban certain retroactive judicial constructions. Judicial interpretations that are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue" violate due process. 532 U.S. at 462, quoting from Bouie, 378 U.S. at 354. This Court can neither retroactively apply the 1997 amendment to Mr. Howard's 1983 trial or judicially alter Nevada law as it existed in 1983.

Under then-existing Nevada law, Mr. Howard was never convicted in New York. The New York court never entered a sentence or judgment of conviction, even if proper notice

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[5] The Legislative history of the change indicates that the Legislature intended to make a very precise change. Senator Mark James, Chair of the Committee on Judiciary asked, when the bill came up, what was wrong with the "previously convicted of another murder" language. The representative of the Nevada District Attorneys Association noted that the existing language was confusing. Committee counsel noted that under the then-existing statute, a person would have to be convicted of murder at the time of the commission of a subsequent murder to invoke the aggravating circumstances; "with passage of the proposed amendment, a person would only need to have been convicted at the sentencing stage prior to commission of a subsequent murder in order to invoke aggravating circumstances." Clearly, the Legislature intended this amendment to reduce the state's burden of proof but only as to the timing of the prior conviction, not the quantum of proof required to establish it.

was given. The death sentence must be set aside.

E. REWEIGHING REQUIRES VACATION OF THE DEATH SENTENCE

Finally, even if the Queens Supreme Court action were a valid aggravating factor, this Court must still reweigh the evidence against this remaining aggravating factor; this reweighing must also excuse the procedural bars advocated by the state. Bejarano v. State, 122 Nev. at 1973, 146 P.3d at 270. This Court has, in the past, considered not just the evidence presented at trial but all of the mitigating evidence that should have been presented at that trial. Leslie, 118 Nev. 773, 59 P.3d 440; see also State v. Haberstroh, 119 Nev. 173, 69 P.3d 676 (2003) (new evidence not previously presented based on trial counsel's ineffectiveness); State v. Bennett, 119 Nev. 589, 81 P.3d 1, 11 (2003) (evidence relevant to mitigation was suppressed by state: "Considering this undisclosed mitigating evidence with the invalid aggravating evidence, we conclude that the district court correctly vacated Bennett's death sentence and ordered a new penalty hearing.").[6] Even if these cases do not apply, federal law mandates the same procedure.

The new evidence must be considered because Nevada death penalty eligibility requires the jury to both find a valid aggravating factor and balance that aggravating factor against proffered mitigating evidence. Rippo v. State, 122 Nev. 1086, 1094, 146 P.3d 279, 284 (2006) ("The primary focus of our analysis, therefore, is on the effect of the invalid aggravators on the jury's eligibility decision, i.e., whether we can conclude beyond a reasonable doubt that the jurors would have found that the mitigating circumstances did not outweigh the aggravating circumstances even if they had considered only the three valid aggravating circumstances rather than six.") Further, after reweighing the remaining aggravating factors and the mitigating evidence, if the Court finds a reasonable probability

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[6] This Court has also considered mitigating evidence not presented at trial in a case resulting in an unpublished deposition. See Williams v. Warden, No. 44706, Order Denying En Banc Reconsideration at 3-4 (July 5, 2007). This disposition is cited not as legal authority, see S.C.R. 123, but to demonstrate that this Court has treated a similarly-situated capital habeas petitioner differently than the district court treated Mr. Howard, for purposed of analysis under the state and federal guarantees of equal protection of the laws.

that, absent the invalid aggravating factor, the jury would not have imposed a death sentence, the defendant has established the fundamental miscarriage of justice that overcomes any procedural bars. Leslie v. Warden, 118 Nev. 773, 59 P.3d 440 (2003); Bennett v. State, 119 Nev. 589, 598, 81 P.3d 1, 4 (2003); Pellegrini v. State, 117 Nev. 860, 34 P.3d 519, 537 (2001) (procedural bars can be overcome by demonstrating that the court's failure to review an issue would result in a fundamental miscarriage of justice.)

It is this balancing that distinguishes the Nevada procedures from those reviewed in Sawyer v. Whitley, 505 U.S. 333 (1992), relied upon by the court below. There, the Louisiana statute, La. Code Crim. Proc. Ann. Art. 905.3, allowed the jury to find a defendant death eligible once it concluded "beyond a reasonable doubt that at least one statutory aggravating circumstance exists. . . ." 505 U.S. at 342, fn 9. The mitigating evidence was merely a sentencing factor. 505 U.S. at 342-43. ("[O]nce eligibility for the death penalty has been established to the satisfaction of the jury, its deliberations assume a different tenor. . . [T]he defendant must be permitted to introduce a wide variety of mitigating evidence.").

Because Nevada requires the jury to consider mitigating evidence to determine eligibility, under Sawyer, this Court must review all of the evidence tendered at trial and in post conviction. In House v. Bell, 547 U.S. 518 (2006), the Court made it clear that, where a habeas petitioner argues that his actual innocence forgives a procedural default, the habeas court must consider not only the trial evidence but the new evidence as well. Id. at 536, citing Schlup v. Delo, 513 U.S. 298, 324-32 (1995). In Sawyer, the Court extended the Schlup exception to a claim of innocence of the death penalty and required a showing that, but for the constitutional error, no reasonable juror would have found the defendant eligible for the death penalty.

F. MITIGATING EVIDENCE

The newly developed mitigating evidence is compelling and leaves little doubt that no reasonable sentencing jury would have sentenced Mr. Howard to death.

i. Ages birth to three

Mr. Howard grew up in a volatile household, the son of Mariah Jackson and Samuel Howard, Sr. Mr. Howard's mother was only nine years old when her mother died. She and her siblings moved in with Frank and Maggie Dudley, distant relatives. Life with the Dudleys was hard: Maggie Dudley was cruel to both children, always hitting and cursing them. She forced them to work in the fields to tend her crops. When there were no crops to tend, as in the winter, she simply locked the children out of her home. She was interested only in the check she received from the welfare agency that was meant to take care of Mr. Howard and his sister. 10 AA 2356-2358.

When Mariah Jackson was nineteen, she married Sam Sr., despite warnings that he was a violent drunk and often in trouble with the police. Many believed that he killed his first wife, Julie Horsecloth, by stabbing her. Id. at 2357.

In 1948, Mr. Howard was born in Clanton, Alabama. Twenty-seven months later, his sister Diane was born. Another sister, Elizabeth was born in 1951.

a. Racism

Clanton, Alabama, in the 1950's was a segregated culture where African-Americans were excluded from restrooms, restaurants, schools, drinking fountains, forms of public transportation, employment opportunities and were deprived of all human dignity. In Clanton in the 1950's, only farm labor or similar work was available to African-Americans. African American men and women sometimes disappeared in Alabama; no one would ever see them again. In the l950s, the Klu Klux Klan thrived in Clanton. KKK members rode through the streets at night, fully robed, blowing their horns in order to instill fear in the Black population. There were many unsolved murders of Black citizens in Alabama. Black churches were bombed, and many black men were beaten, even castrated by the KKK. 10 AA 2360-2363.

b. Domestic violence

In addition to the racism, Mr. Howard witnessed extreme violence in his own home.

His father physically and emotionally abused his mother throughout their marriage and spent all of his money on alcohol, becoming increasingly violent when drunk. 10 AA 2355-2358. He often beat his wife in front of their children and threatened to kill her on several occasions. 10 AA 2355-2358, 2364-2366.

Mr. Howard's maternal cousin, Olisa Reese, believed that his aunt had never lived in a home where there wasn't violence and cruelty to the vulnerable. He recalled that Sam, Sr., once tried to knock his own house off of its foundation by backing his car into it. Sam, Sr. often shot the lights out in the home. "I heard how he tried to stab Mariah but he hit their daughter Diane instead. Diane was cut real bad on her legs." 10 AA 2368.

c. The murder of Mr. Howard's mother

When Mr. Howard was three years old, his father murdered both his wife and infant daughter Elizabeth and tried to kill Diane as well. Mr. Howard witnessed it. 10 AA 2370-2436. Sam Sr's prison records described the murders.

> After reaching home, subject in a drunken rage, picked up his 22 automatic rifle and began shooting at Marie who had picked up 3 month old Elizabeth. The shots hit both Marie and the baby killing them instantly. Diane was wounded in the thigh as she ran to her mother's side. . . . Subject admits to standing over Marie and continuing to shoot her after she had fallen to the floor following the first shot.

10 AA 2364-2366; see also 10 AA 2359-2363, 2370-2436, and 10, 11 AA 2437-2513. Sam Sr. was convicted and sentenced to two (2) terms of life imprisonment at the Alabama State Penitentiary. After he was sent to prison, the prison official who interviewed Sam Sr. believed Sam Sr. meant to kill his entire family. 10 AA 2364-2366.

ii. Ages 3 to 12

After the murders, Mr. Howard and Diane moved in with the Dudleys who were at that point elderly (Maggie was 71 years old and Frank 74) and unable to care for two young children. They were also very poor. 10 AA 2370-2436, 10, 11 AA 2437-2513. Frank Dudley supported them with odd jobs and preaching. 10 AA 2381. Neighbors gave them vegetables from their gardens and used clothes for the children. 10 AA 2382.

Mr. Howard never recovered from the murders. 10 AA 2360-2363, 2369. According to Alabama Department of Human Resources (DHR) records, Mr. Howard told a caseworker "his mother was in the grave and that his father had a gun while his mother lay on the floor." 10 AA 2382. Young Mr. Howard spoke of his mother often. He did not understand that his mother was not coming back. 10 AA 2360-2363. Mr. Howard refused to be called by his father's, Sam Sr.'s, name. Instead, he went by "Bob Junior" to those around him, and wrote his name as "Bob Junior" on all school papers. 10 AA 2385.

Mrs. Dudley collected a welfare check for the children's benefit; people suspected this was her true motivation for having them in her home. 10 AA 2355-2358, 2367-2369. Often, the children could not go to school, because Mrs. Dudley demanded they work at home. 10 AA 2355-2358. She was cruel to both children. 10 AA 2355-2358, 2367-2369. Jimmie Baker, Mrs. Dudley's biological grandson, reported that "She used her cane to whack [Mr. Howard], even if he did nothing wrong." 10 AA 2359-2363. She called them names. 10 AA 2355-2358. Mr. Howard became withdrawn and did whatever Mrs. Dudley wanted. 10 AA 2359-2363. People in Clanton felt sorry for the children, but there was no one else who could take them in. 10 AA 2355-2358, 2367-2369.

When Mr. Howard was ten years old, Mrs. Dudley called DHR to complain of Mr. Howard's conduct. She was then 78 years old and her husband 81. She threatened Mr. Howard with either a detention school or DHR removal. When confronted she admitted that when Mr. Howard got mad, he started crying and said things for which he later apologized. 10 AA 2390. Mr. Howard allegedly gave Mrs. Dudley "smart talk" or fits, and refused to go to school. Id. She compared Mr. Howard to his father, telling the DHR caseworkers that she was afraid he had the same disposition as his father, and that he would end up just like him. 10 AA 2391.

In 1958, a neighbor called DHR to report that Mrs. Dudley had simply dropped the children off at her home, and given the neighbor permission to assume custody of the children. 10 AA 2390, 2398. Several days later, Mrs. Dudley appeared at DHR and alleged

that the neighbor had taken the children without her permission. 10 AA 2391.

Later that same year, Mrs. Dudley told DHR that Bob Howard, the children's uncle, took the children to his home in Elmore County. 10 AA 2391-2392. She demanded their return. Mr. Dudley contacted the DHR worker to ask for help; he knew they could not care for the children. 10 AA 2391. Mr. Dudley admitted that his wife was "extremely nervous and . . . a very difficult person to get along with." 10 AA 2394. Mr. Dudley also reported, "his wife has always been most difficult to get along with and that even he had quite a bit of trouble as at times she nearly drove him crazy." 10 AA 2395. Several weeks later Mrs. Dudley told DHR that she and her husband had retrieved the children from Bob Howard's home, 10 AA 2392, when Bob Howard was not there. Bob Howard gave up trying to help the children. 10 AA 2465.

When Mr. Howard was eleven years old, Mrs. Dudley again sought help from DHR about his behavior; he was "hard-headed" with crying spells. She threatened, over her husband's objections, to send Mr. Howard to reform school to get him to behave. 10 AA 2392-2394.

The DHR caseworker tried to move Mr. Howard to his uncle, Bob Howard's home, because Mrs. Dudley continued to complain about the children, and demanded their removal. The caseworker "suggested to [Mrs. Dudley] that she make up her mind whether she wanted to keep the children in her home or whether she wanted them to go to their uncle's home . . . to live on a permanent basis." 10 AA 2395. Unfortunately, Bob Howard died of cancer that year. 10 AA 2395, 2399. On another attempt to place the children, Mrs. Dudley sabotaged efforts to remove the children from her home by telling them to hide them when a potential guardian visited the house. 10 AA 2396.

When Mr. Howard turned twelve, Mrs. Dudley finally succeeded. She told DHR to "put [Mr. Howard] anywhere, that she did not really care [where]." 10 AA 2397. Mr. Dudley finally agreed; the children's presence was "actually breaking up his home." Id. at 2398. Mrs. Dudley kept Diane at home; she told DHR that she kept Diane out of school so

that she could help her around the house. 10 AA 2399, 2442.

The DHR caseworker had no recourse other than to send Mr. Howard to Mt. Meigs, or as it was formally known, the Alabama Industrial School for Negro Children. 10 AA 2400. In a letter to the authorities at Mt. Meigs, Mr. Howard's DHR caseworker summarized most of what has been set forth above about Mr. Howard's life. 10 AA 2441-2442. A progress report sent to Mt. Meigs noted that "the years spent with [Mrs. Dudley], and the ideas she impresses upon his [sic] concerning his father took its toll on Samuel's personality." 10 AA 2428, 2443.

Without any juvenile convictions, a court committed Mr. Howard to Mt. Meigs on March 1, 1961. He remained at the school until October 1, 1963, more than 2 ½ years. 10 AA 2428, 2443, and 2445.

iii. Ages 12 to 15

a. The Alabama Industrial School for Negro Children at Mt. Meigs, Alabama

Throughout its history, authorities investigated Mt. Meigs for inadequate housing, inadequate schooling, serious physical abuse, and work conditions that rendered the school a "slave camp" for children. 11 AA 2516. The phrase "cruel and unusual" does little to describe the barbaric treatment children received there. Mr. Howard was only twelve years old when he arrived.

Alabama law charged Mt. Meigs with the "reclamation and rehabilitation of Negro boys and girls in Alabama." 11 AA 2522-2563. In reality, the Mt. Meigs staff abused the children in every way imaginable. The boys were not taught right from wrong, but "[i]nstead, they learned violence from the authorities in charge of their care." 11 AA 2520.

> Although Mt. Meigs was supposed to be a place where kids in trouble came to be rehabilitated and educated, this was not what really happened there. E. B. Holloway [the school's superintendent] had only one focus: to make money.

11 AA 2564-AA002567. Children were taught to lie and steal, to prey on their fellow human beings. 11 AA 2568-2572.

Many of the children whether dropped off by a county sheriff, or sent by a judge, were sent to Mt. Meigs without the benefit of a hearing or any adjudication of delinquency. "It literally was a dumping ground for young kids with no place else to go, a glorified orphanage of sorts." 11 AA 2518. Some children were truants or runaways and yet were housed with juvenile murderers. 11 AA 2573-2582. One child was sent to Mt. Meigs because his dog fought the sheriff's bulldog when the sheriff's bulldog attacked the child. 11 AA 2583-2586.

Mt. Meigs provided no adequate clothing. The children wore old, adult-sized, discarded Army fatigues and walked around with pants legs six inches too long and just rolled up. 11 AA 2514-2521. The sleeves hung down over their hands. "Many children went without shoes, even while working in the fields." 11 AA 2517. The boys got one pair of shoes a year. If the shoes didn't fit, if they outgrew them, if someone took them away by force, if they were stolen, they would not be replaced until the following year and the boy would have to go barefoot, even to work in the fields. 11 AA 2587-2590. Any boy who tried to run away would have his shoes taken from him and forced to go without shoes for days at a time. 11 AA 2591-2594.

Every morning the children lined up for field work, and walked to the fields. 11 AA 2595-2598, 2621. "We were forced to run to the fields behind a supervisor who drove the truck or with a mule wagon behind us." 11 AA 2622-2624. After work, they returned to the dorms by again running in front of the truck. 11 AA 2595-2598.

The dining hall was old and dilapidated. 11 AA 2599-AA002604. The food prepared there was inedible and never enough to stave off hunger. Almost every meal was the same: beans, fatback, bread, grits and greens. 11 AA 2605-2608. The fatback still had hair on it. 11 AA 2573-2582. The grits and corn had dirt in them. 11 AA 2568-2572. The food contained roaches, boll weevils and worms. Id. at 2571. On Saturdays, the children got one meal and a piece of gingerbread at night. 11 AA 2587-2590.

> Going hungry was a way of life there. It was so bad that kids did some really horrible things just to survive. I remember seeing boys on their hands and knees in the fields, eating corn they found underneath cow manure. One time, on Thanksgiving Day, a kid got sick during dinner and vomited on his food

> tray. He went to throw the stuff away, but another boy took the tray and ate the vomited food.

Id. at 2589.

Willie Baldwin worked at Mt. Meigs as a security guard and observed some boys performing sex acts in exchange for food. 11 AA 2591-2594. Others killed snakes and rabbits to eat them. 11 AA 2605-2608. One boy snuck into a pear orchard for food one night, only to be beaten almost to death. 11 AA 2568-2572.

Until 1969 Mt. Meigs has no established rules for discipline. 11 AA 2522-2563.

> Corporal punishment, in its most extreme form, was inflicted freely. Some of the adults at Mt. Meigs literally tortured the children there. Many children told me of being severely beaten, to the point of suffering broken bones. I personally saw welts and bruises on the bodies of some children I met, which corroborated their accounts. I remember seeing one child whose skin was literally split open from a beating he received at Mt. Meigs. Additionally, some children told me of being disciplined by having their hands and feet held in boiling water. One girl I spoke to had burn scars on her from such torture. The children told me they were often beaten for minor infractions, such as not picking their prescribed day's quota of cotton.

11 AA 2517.

No one supervised either the guards or their "discipline." The guards beat the boys for "any little thing." 11 AA 2522-2563. Denny Abbott remembered "the morning bench."

> Every morning, they would put a child on the bench and beat him in front of the other children, as a reminder to the children of who was in charge and what they could get away with.

11 AA 2517. Most of the former Mt. Meigs inmates interviewed remember the bench, although the name varied. James Cohill, who worked at Mt. Meigs from 1961 to 1964, remembered that the Superintendent, Mr. Holloway, beat the children himself, in public, at the "Discipline Bench." 11 AA 2564-2567. Sometimes the boys were whipped on their way to breakfast. Id. at 2565. Johnny Johnson called it "the moaning bench." 11 AA 2609-2612. The guards used canes, tree limbs, whips, fan belts, broomsticks, hoe handles and lamp cords to beat the children. 11 AA 2514-2521, 2587-2590, 2591-2594, and 2609-2612. One former inmate recalled that a supervisor hit him over a hundred times on his legs with a Chinaberry tree limb, "because he thought I wasn't working hard enough." 11 AA 2613-2615.

> We were knocked down, slapped around, and beaten all the time for things like not having enough cotton in our sacks. I still have a scar on my back where I was whipped with a fan belt when I was thirteen years old. The beating took the skin off my back.

11 AA 2611.

> The guards engaged in sadistic games and made the boys fight each other.
>
> The Mt. Meigs staff used us boys for fun. The adults put boys in a ring and made us fight each other. They had what they called 'gladiator school.' We were taught to fight using our knuckles and told to 'go for the eyes.' We had no choice but to participate in their sick games.

11 AA 2617. The toughest at Mt. Meigs became "Charge Boys" with more freedom that the rest. 11 AA 2573-2582, 2595-2598. "They made inmates give them cigarettes, candy and whatever else they wanted." 11 AA 2577-2579.

> It was not just the staff at Mt. Meigs who brutalized the boys there. I remember an inmate called 'Big Bomber.' He was one of the bigger, older boys and he beat us something awful. My body got so numb from the beatings, I stopped feeling the pain.

11 AA 2617.

Tom Glover, the supervisor of farm operations, beat the children for not picking cotton fast enough, not filling the bag of cotton full enough, not working their row fast enough, or accidentally chopping down a cotton plant. 11 AA 2569-2572.

Harold Dawkins was an inmate at Mt. Meigs:

> When Mr. Dawkins was about fourteen years old, he was sent to the reform school in Mt. Meigs because of his truancy. Mr. Dawkins was familiar with Mt. Meigs, as he had seen other kids after they left Mt. Meigs. Some of them were released and some of them had escaped Mt. Meigs.
>
> Mr. Dawkins and another child were put in leg shackles and driven to Mt. Meigs by a White man and woman. When they arrived at the reform school, the boys were searched. All of their hair was cut off. Early the next morning, the dorm supervisor came through the dorm where Mr. Dawkins slept, knocking on the walls yelling, "Wake up and see where your hard head caused your black ass to be." He was then sent to the fields to pick cotton.
>
> Mr. Dawkins said that at the end of his first day in the cotton field, he was beaten because he had not picked enough cotton. Mr. Dawkins said he didn't even know how to pick cotton because he had never been in a cotton field before arriving at Mt. Meigs. He found it difficult to keep up with the rest of the boys. Like the other men I interviewed about Mt. Meigs, Mr. Dawkins was beaten over what was viewed as inadequate performance in the cotton field. One of the farm supervisors, Tom Glover, told Mr. Dawkins to put his penis

> in a hole Glover dug in the ground. Glover beat Mr. Dawkins on the back of his legs -- right on the muscle --until his leg busted open. Mr. Glover also hit Mr. Dawkins on the back of his head.
>
> Mr. Dawkins said he was still living at Mt. Meigs when Tom Glover died in the kitchen. Mr. Dawkins said he bets many of the kids at Mt. Meigs wanted to celebrate when Glover died, because the man was so cruel to them.

11 AA 2580.

If the boys had to go to the hospital after a beating, they were beaten again when they returned. 11 AA 2587-2590. The staff beat the last 25 boys to finish hoeing their row of cotton. Id. The supervisor hit each bag of cotton with a stick and if the stick did not bounce back, the boy was beaten. 11 AA 2605-2608, 2625-2626. Tom Glover beat one boy because Glover didn't think he "cleaned the sewage ditch good enough . . . Tom Glover whipped me so bad I couldn't walk." 11 AA 2583-AA002586. Superintendent Holloway, was no better.

> Mr. Holloway used to drive around in his big Plymouth. All he had to do was say to a boy, 'bend over' and that was it. The boy was in for a brutal whipping. I remember seeing Mr. Holloway beat a boy's behind so bad that blood started shooting out of the boy's rectum.

11 AA 2587-2590.

> There was one man, a Mr. Lockhart, who sometimes came in the dorm, woke us all up and beat everyone there. He never told us why. I guess Mr. Holloway, the Director at Mt. Meigs, told him to beat us.

11 AA 2573-2582.

b. Sexual Abuse

The staff at Mt. Meigs condoned sexual abuse of the boys; a mentally retarded man called "Penny" who first came to Mt. Meigs when he was 10 years old was one of the main perpetrators. 11 AA 2591-2594.

> Penny was in his 50's when I knew him to be molesting boys at the facility. E.B. Holloway knew Penny was raping the boys; he even caught him doing it but he did not stop it from happening. Sometimes Mr. Holloway fussed at Penny for 'fucking' the boys, but only because sometimes Penny hurt the boys so bad that they could not keep up while working in the fields the next day. Mr. Holloway said he needed all the boys to work. He seemed more concerned that the boys remained productive than he was about their well-being.

Id. at 2592. "Penny received some sort of disability every month, which went to Mr.

Holloway." 11 AA 2597.

Tom Glover also sexually assaulted the boys. "He referred to himself as 'Tom Glover, the backbone breaker and booty lover.'" 11 AA 2588. He whipped the boys on their thighs until their skin burst open. Id. The school principal, Mr. Von, also molested the boys. 11 AA 2568-2572.

> Some of the boys were even presented as 'trophies' to farm supervisors who excelled in the growing and harvesting of crops. The warden or guards decided which boys were chosen to be presented as sex toys for these farm supervisors.

11 AA 2573-2582.

Older boys also preyed on younger children. 11 AA 2583-2586. "The youngest boys, ages six to eleven, lived in a building we called 'the little boys home.'" 11 AA 2565. The older boys sneaked over to abuse the younger boys.

> The first day I got there, I was sent to the little boys dorm. I was almost immediately jumped on by one of the inmates. Every time a young kid came to Mt. Meigs, he was raped.

11 AA 2584. "Some children at Mt. Meigs lived in constant fear. Other boys became predators." 11 AA 2578.

c. Field Work

The staff required the children to fill six foot long sacks of cotton, 11 AA 2605-2608, but failed to proved proper tools for the job; if the boys did not work fast enough, the guard beat them. 11 AA 2591-2594. Mr. Baldwin remembered the boys chopping cotton with hoe blades attached to tree limbs. Id. at 2593. They stayed in the fields all day long. If the boys needed to use the bathroom they asked the supervisor for permission and then brought him the bowel movement on a stick to prove it. The children were not safe from sexual abuse even when they worked the fields. Besides the beatings, there were other kinds of violence at Mt. Meigs. Harold Dawkins saw one of the younger boys being raped in the cornfield. He believed he would have gotten raped, too, except for the fact that he was in a group of boys who tried to "stick together for protection." 11 AA 2581.

The conspiracy of silence by all in authority at Mt. Meigs extended from the farm supervisors all the way up to the Board of Directors and the Governor.

> It was common knowledge the income from the farm was shared by one of the Board of Directors, a white landowner whose farm was located across the highway from the campus. The school was not provided all the income earned as a result of the children's labor.

11 AA 2564-2567. Mr. Cohill recalled that boys who worked for him repaired tractors owned by the school's Directors. He knew that his students built equipment at Mr. Holloway's request, equipment that later "simply disappeared." Id. at 2566.

> There was a Board of Directors who was responsible for overseeing the operations at Mt. Meigs. Based upon my own observations and information I was provided by children who were sent to Mt. Meigs, these Directors did nothing to encourage or promote anything positive for the children there. Most of the Directors actually profited from their relationship with the reform school. Many of these Directors, all of whom were white, owned farms near the Mt. Meigs campus. When it came time to harvest their crops, they depended on the staff at Mt. Meigs to provide children (and state owned farm equipment) to work in their own fields. The same members of the Board of Directors were usually on hand when hogs were butchered at the farm. I heard stories of how they pulled their trucks up and took possession of hogs. This was food that should have gone to the children. Instead, it went to the adults who were responsible for seeing to the well-being of these children. In effect, the Directors used the children at Mt. Meigs as slave laborers.

11 AA 2517.

The children had no hope that they would ever function in normal society when they left Mt. Meigs. ". . . I did not attend school regularly while I was at Mt. Meigs. Going to school was not mandatory." 11 AA 2610. "[T]he staff at Mt. Meigs taught the children in their care to be thieves and killers." 11 AA 2607.

> I learned to be a crook while I was there. The supervisor, Tom Glover, had me do a lot of stealing for him. He had me steal things like fertilizer, sacks of pecans, farm chemicals, soda for the plants and even livestock. For instance, I would take a pig and hide it in a particular spot. Later that night, Mr. Glover would pick it up. I did the same thing with the other stuff. The staff who worked there were known to take property and use it for themselves.

11 AA 2572.

> While I lived at Mt. Meigs, it was impossible for me to think of my future. The horrible circumstances really were forced us kids to only think of surviving one day to the next. I learned a lot during those three years; things that had a bad effect on the rest of my life. I learned that violence is a way to resolve any conflict. I learned that it is okay to steal in order to survive. Take

> what you want and never have any living enemies. Those lessons are difficult to unlearn once you are forced to live by them for so many years.

11 AA 2607.

It made no difference that the staff at Mt. Meigs was African-American. "The place was run by Black staff members, and they treated us worse than I had ever been treated by a white person." 11 AA 2569.

> One of the things about Mt. Meigs that hurt me the most was that Blacks were abusing Blacks there. Us kids were literally treated like slaves, only it was Blacks abusing us. As a young child, this was hard to take.

11 AA 2624. The staff at Mt. Meigs were often poor people with their own horrible problems, who found themselves in a position of power over the boys at Mt. Meigs. These people were sadistic and violent to the kids under their care. 11 AA 2573-2582.

> The fact that the adults who worked at Mt. Meigs and mistreated the boys there were Blacks made me real bitter. The people who were in charge of us at Mt. Meigs said it was us kids who had problems, but it was really the adults who had mental problems. They had to be disturbed in some way, because they enjoyed what they were doing to us.

11 AA 2618.

Mt. Meigs was the worst place Harold Dawkins had ever been:

> it was worse than being in prison. Mr. Dawkins stayed at Mt. Meigs one year and six months. He said he could never understand why the adults at Mt. Meigs, all who were Black people, treated the children so badly.

AA002581.

d. Pesticides

Children sentenced to servitude at Mt. Meigs faced not only violence and exploitation but serious neurotoxin exposure as well. Mt. Meigs extensively used pesticides on the growing crops. "The pesticide was shot onto the crops (and us) from a tractor with a long-armed spraying device attached to it." 11 AA 2606-2607. As soon as the tractor passed, the children returned to the field, even though the crops were still wet. The poison burned their skin. 11 AA 2568-2572.

> The plants that were sprayed were the same ones we were fed. We were being poisoned twice by the spraying: we got soaked with the poison in the fields and we were fed the poisons through the food. I heard the poison was DDT.

Id. at 2570.

> I remember the boys had to shower and change clothes after working the cotton fields, because they came out with poison on their clothes, from when the crops were sprayed with pesticides.

11 AA 2565. According to Corstnell Green, Mt. Meigs used crop-dusting planes as well as tractors to apply the chemicals.

> The poison was white and was like a mist. The spray got on my skin and it got in my eyes, nose and on my head. The chemicals burned me. Only kids who could afford hats had one, so most of us got soaked with the chemicals. The supervisors got angry if you took water and rinsed the poison out of your hair.

11 AA 2584-2585.

> They sprayed the fields for every crop, and not just the cotton fields. The poison was a white liquid. The plane sprayed the rows beside the rows where the inmates were working. The wind blew the white liquid all over us. We had to cover our faces. The poison burned our hands. Some inmates got sick and had to be taken to the infirmary. They sprayed every two weeks for the entire summer.

11 AA 2626. "In the fall, the chemicals sprayed on the fields were pink." 11 AA 2596.

> The chemicals got on our skin: our faces, heads and arms. The spray burned our eyes and stung our noses. I remember being choked by the chemicals that were sprayed, it was stifling. When we were hit with these sprays, we usually had to slow down. At other times, chemicals were sprayed on the crops by someone on a tractor. When the spray tractor came through, we went in the field right behind the spraying. The worst time was in the mornings when the chemicals and the dew were mixed. Our clothes were soaked to our skin. We kept working like that until the sun dried our clothes.

11 AA 2618.

> Whatever the poison was, it smelled strong and burned our nostrils. Sometimes the smell was so strong, some kids had to stop and sit down for a minute to keep from passing out. If we complained, we had to wait until a lunch break or quitting time to go to the clinic. We were given thirty minutes for lunch, so we had to eat and then go see the doctor. Maybe the doctor was available, and maybe not. If we did see someone at the clinic, they would only give us something to rinse our nose or cough syrup for our coughing.

11 AA 2610.

Lorenz Grubbs, who owned the airplane, also stored the chemicals at Mt. Meigs, from 1956 to 1971. He sprayed the fields at Mt. Meigs, as well as those from neighboring farms. 11 AA 2627-2631.

An open sewage ditch ran behind the boys' dormitories. 11 AA 2633. The staff used pesticides and other chemicals to control the mosquitoes and the smell.

> This open ditch was how raw sewage was sent away from the buildings. It was called the 'shit ditch.' They sprayed this ditch with chemicals. Us kids had to chop the grass around the ditch and then clear the shit out of the ditch with hoes.

11 AA 2571.

> The ditch, which ran behind our dorms, carried raw sewage to the cesspool. The place always smelled so bad. Us kids were lined up all along the ditch with hoes, which we used to chop at the grass that grew along the water's edge. After that, we used our hoes to pull the feces forward, spreading it out. When it dried, we used it as fertilizer.

11 AA 2607.

Auburn University Entomologist Ron Smith, now retired, spent over thirty years studying pests and their effect on Alabama agriculture. He concluded that Mr. Howard was very likely exposed to some very dangerous chemicals in an irresponsible manner.

> A review of the inmate declarations leads me to conclude that most, if not all, of the children at Mt. Meigs were used to cultivate and harvest cotton. . . . Pesticide is a general term that applies to several types of toxins designed to kill pests and all kinds of pests have to be addressed. Pesticide, generally speaking is designed to kill insect pests by disrupting the bugs' central nervous system to such an extent that the pests die. What is also clear is that some of these pesticides have the same effect on people, an effect that's been recognized since the early 1940's.
>
> There are three primary types of pesticides: Organochlorines, organophosphates, and carbamates. Organochlorines, the most common of which was DDT in the 1950's and 1960's, were widely used on cotton crops and to control mosquitos. The Mt. Meigs inmates in their declarations frequently refer to their work in cotton production during this time period. 11 AA 2568-2572, 2591-2594, 2595-2598 2605-2608, 2609-2612, 2625-2626, and 2627-2631. They note both the use of aerial sprays and land based spraying. They also note the presence of a drainage ditch through which raw sewage flowed. Mosquito control over this ditch would have been of paramount concern. The declarations of Jesse Andrews and Larry Kennedy describe the ditch treatment as white smoke; in this time period, and with this description, the pesticide is very likely to have been DDT since it was available as a 10% dust.
>
> Organochlorines were in widespread use prior to the use of organophosphates but concern arose about the persistence of DDT in the environment, especially after the publication in 1964 of "Silent Spring" by Rachel Carson. This concern led to the movement to ban DDT in the United States, a ban that was finally accomplished in December of 1972. People were concerned of the effect of DDT outside its intended target: pests. Further,

while there was a long residual in the environment and in the food chain of animals and fish which lasted for years, the efficacy in controlling boll weevils lasted only a few days. After about ten years of use, the weevil acquired a resistance to the organocholorines.

Because of this growing fear and insect resistance, there was a decline in reliance on DDT and other organochlorines and a corresponding rise in the use of organophos-phates, a family of chemicals which did not persist in the environment to the extent of organochlorines but whose toxicity to humans in some cases was much more severe. These phosphates were derived from chemicals developed in the Second World War as nerve gases. Because their residual lasted only a few days, the sprays for the weevil using these chemicals had to be reapplied every 3-5 days, starting in early July every season and continuing until the crop matured in September. This resulted in 12-16 applications of the chemicals every season and, given that the two classes of pesticides were often mixed, produced an application total of over 50 pounds per field. These applications continued until a new class of chemistry (pyrethroids) was introduced in the late 1970's.

Both types of chemicals were being used and there is documentary evidence to support this. . . . The [1962 Alabama Cotton Insect Recommendations] list each of the pests that threatens or limits cotton production. With the exceptions of Sevin, and Ethion, every chemical listed is either an organophosphate or an organochlorine and the report often recommends a simultaneous application of chemicals from both classes. . . I am completely confident that these chemicals were used in a similar fashion, if not an identical one, from 1960 to 1963. [Reports note] that [i]nsecticides are poisonous to man, bees, wildlife and fish.

The prosecution introduced evidence of Mr. Howard's effort to shoplift at Sears and his incredibly violent response to the security staff's efforts to take him into custody. His flight from the parking lot almost caused several accidents. This is behavior consistent with a limbic region damaged by pesticides

11 AA 2634-2640.

Dr. Smith concluded that "few if any . . . safety precautions were followed. The young men and boys were heavily exposed to very toxic chemicals." Id. at 2639.

i. Official Investigations of Mt. Meigs

Denny Abbott, the chief probation officer tried to complain but to no avail.

On many occasions after speaking to children about their experiences at Mt. Meigs, I complained through official channels about conditions there. At that time, the agency that had statutory authority for investigation of complaints about Mt. Meigs was the State Department of Pensions and Security. This was basically what we now refer to as a state welfare department. My complaints did not produce any changes. As a matter of fact, the response from Pensions and Security for each of my complaints was that the complaint was unfounded. I found this to be very frustrating, because I had evidence that children were being abused and neglected at the facility.

11 AA 2518. The annual report to the Governor from the Department for fiscal year 1959, however, acknowledged the problem. 11 AA 2641-2649.

ii. Morale and Discipline

> There is no established plan for administering disciplinary measures. Corporal punishment is administered but there are no regulations known to the State Department for prescribing or limiting it in any way.
>
> In reports submitted in the past to the Board it has been pointed out that the disciplinary program has not been formalized and that the board has no opportunity to examine or scrutinize disciplinary planning.
>
> It has further been pointed out that reports of inhumane treatment of children at the School have been made to the State Department of Pensions and Security. The State Department continues to be concerned since again reports are being made with reference to cruel forms of punishment administered to the children.

Id. at 2646.

Mt. Meigs would not allow the children to complain to their families. The school monitored all correspondence. 11 AA 2595-2598. "Mrs. Holloway checked all letters written by the kids. If she didn't like what you wrote, she called you in and tore up your letter." Id. at 2597. Mt. Meigs punished any child who wrote anything negative about the conditions and refused to mail the letters. 11 AA 2616-2619.

The school also closely monitored visitation. The school did not allow any visits with any child who had been beaten. Mrs. Holloway met with the children in her office before the visitation and told them to say everything was fine. 11 AA 2595-2598. If a family went to see a child at the institution, someone from the staff would supervise the visit so that the child could not tell his family the truth.

Documents obtained from the Alabama Department of Archives and History show that as early as 1959 citizens wrote the Alabama Governor asking him to look into the abuses at Mt. Meigs. 13 AA 3210-3212. By 1967 nothing had changed, as evidenced by a letter from Jane and Harold Holcombe to Governor Lurleen Wallace written on behalf of their Negro maid who had a grandson at Mt. Meigs. 11 AA 2650-2652. "She says that the boys are underfed . . . beaten so savagely that they sometimes end up in the hospital, and that in

general the place is unsanitary." Id. at 2651.

Mt. Meigs provided no counseling, recreational or rehabilitative programs. 11 AA 2653-2656. The Alabama Legislature only minimally funded the school which then met its needs by selling the crops grown there using the children as laborers. 11 AA 2514-2521, 2591-2594, 2599-2604. Those crops included corn, cotton, sugar cane, cucumbers, sweet potatoes, oats, soybeans and other vegetables. 11 AA 2568-2572. All of the children at Mt. Meigs worked more than half of each day in the fields. 11 AA 2514-2521. Denny Abbott visited Mt. Meigs at least once, sometimes twice, a month during his eleven-year tenure. Id. at 2516. No matter when he arrived, he saw children working in the fields or traveling to and from the fields. "The children at Mt. Meigs worked in the fields, under extremely harsh conditions, while children enrolled in Alabama public schools were in class." Id. at 2516-2517.

E.B. Holloway, the school superintendent, tried to excuse his behavior after a federal investigation of the school was initiated.

> They didn't send me to the department of Pensions and Security to learn about child welfare. They sent me to Kilby.
>
> . . . The question they always asked was 'how many bales of cotton have you made?' and never 'How many children have you helped.'

13 AA 3208-AA003209.

Three or four of the farm supervisors were illiterate. 11 AA 2522-AA2563 at 15. Tom Glover had a fourth grade education. 11 AA 2522-2563 at 4. Some of the farm supervisors/guards had criminal records. 11 AA 2627-2631.

The school buildings were dilapidated. In January of 1962, an inspector for the State of Alabama Building Commission described those buildings in his report.

> The exterior concrete walls have numerous cracks, mostly extending through the wall, and most running from window sills downward to footings. . .
>
> The wood floor system is in bad condition. . . There is and has been for a number of years evidence of termites. . . The wood flooring is, in general, in very bad condition over the entire building due to wear, shrinkage, etc.
>
> All heating flues appear to be in bad order. Plaster is disintegrated and

> apparently some of the chimney masonry is bad. . . Several fires had been caused by overheating of the flues. . .
>
> The plumbing is completely inadequate and is in a deplorable condition. The toilet rooms are literally falling apart, concrete floors disintegrating and fixtures are broken and those that are usable are hardly fit for human use. . .
>
> The electrical wiring system is obsolete, inadequate and probably dangerous. Classroom lighting is practically non-existent.

11 AA 2657-2661.

The dormitories were no better. They were not only dilapidated, but overcrowded. 11 AA 2514-2521. A committee appointed by the Governor to inspect conditions at Mt. Meigs in 1963 reported on their condition.

> The three main problems are overcrowded housing, dilapidation and a staff limited due to budget. In all buildings, the bathroom facilities are pitifully inadequate. For example, two tubs and two showers serve almost 100 girls, so that cleanliness is very difficult to maintain. . .
>
> . . . The boys' dormitories are in most desperate condition due to overcrowding. The crowded bunk beds, covered with torn army blankets for spreads, are a very sad sight. It is tragic to think of these active boys being locked into overcrowded rooms at dark with literally nothing to do until they are let out the next day. . .

11 AA 2599-2604.

The Governor appointed the committee to inspect the school following the passage of a joint resolution of both houses of the Alabama legislature directing the appointment of a legislative committee to investigate the conditions at Mt. Meigs. 11 AA 2662-2664. House Joint Resolution 23 cited an inspection by newspaper reporters and Juvenile Court Judges on March 13, 1963, which disclosed "a state of affairs and conditions existing to shock the conscience of all loyal Alabamians." Additionally the resolution stated ". . . this condition has apparently existed for a long time and consists of outmoded buildings, over-crowded and unsanitary conditions and generally disgraceful surroundings." 11 AA 2599-2604.

Unfortunately, the Governor's committee did not investigate the treatment of the children. Instead, the children at Mt. Meigs suffered until a full-scale investigation was initiated in 1970, nearly a decade after Mr. Howard served his time at the slave camp.

iv. Ages 15 to 16

On May 14, 1963, Mr. Holloway advised Chilton County that Mr. Howard was to be released as soon as there was a suitable placement for him. 10, 11 AA 2437-2513. Chilton County forwarded the request to Houston County, where Mr. Howard's father - - the murder of his mother - - was living with his surviving daughter and sister. In September a Houston County welfare worker visited the home and reported her findings.

> We do not consider this home a satisfactory one from the standpoint of adequate supervision but it appears that this is the only plan for Samuel Jr.

10 AA 2370-2436. There were no other relatives willing or able to take Mr. Howard into their homes.

Sam Sr. could not control his children, however. 10 AA 2370-2436 at 34. He beat Diane and, when intoxicated, Mr. Howard.

Sam Sr.'s girlfriend, Rosie Blackmon, moved in with the Howards, bringing her own children into the home. Jim and Johnny Blackmon, Ms. Blackmon's sons, remembered Sam Sr. as a really weird man. 12 AA 2760-2763, 2764-2766. He used to sit and stare at whoever was in the house. He did not speak often, just stared. 12 AA 2760-2763. He sometimes talked to himself. 12 AA 2764-2766. Jim Blackmon thought Sam Sr. mean. 12 AA 2760-2763. Sam Sr. sat at the back door of the house with a gun and shot at people as they walked by. 12 AA 2764-2766.

Sam Sr. physically abused Ms. Blackmon and her children. Johnny Blackmon hit Sam Sr. one time after he had beaten Ms. Blackmon. In retaliation, Sam Sr. stabbed one of Ms. Blackmon's other sons, thinking he was Johnny; the boy required 80 stitches. 12 AA 2764-2766. When Ms. Blackmon moved out a year later, Sam Sr. threatened to kill her. Jim Blackmon remembered that Diane was terrified of her father. The Blackmon children believed that Sam Sr. had sexually abused Diane. 12 AA 2760-2763.

v. Ages 16 to 19

In October, 1964, Dothan, Alabama authorities arrested Mr. Howard for burglary. Sam Sr.'s sister, Pinkie Williams, took Mr. Howard to live with her in the Bedford-

Stuyvesant and Jamaica-Queens neighborhoods of New York City, a move which proved a difficult transition for Mr. Howard. 12 AA 2767-2771.

Mr. Howard's cousin, Winston Williams, remembered Mr. Howard as quiet and reluctant to discuss his past. Id. at 2769. After Mr. Howard moved in with Aunt Pinkie, he never discussed his father's violence. He did, however discuss Mt. Meigs and boys getting wrapped up in blankets and then slashed or stabbed or beaten through the blankets, individual victims attacked by groups of boys at the facility, frequent fights and strange things to prove physical strength. For instance, Mr. Howard said he used to lie down on the ground and allow other boys to stand and jump up and down on his head, and other parts of his body. Id.

Mr. Howard initially lived in Bedford-Stuyvesant ("Bed-Stuy"), a 100 square block neighborhood in Brooklyn; in 1964 almost 400,000 people lived there, almost all African-American. 12 AA 2781. In 1967, Mayor Lindsay described Bed-Stuy as one of his city's most blighted areas, one of three "hard-core ghetto areas which are the shame of this city." Id. at 2782.

Crime was constant in Bed-Stuy. In 1961, Mayor Robert Wagner ordered additional police to the neighborhood because of an alarming rise in teen gang related violence. 12 AA 2793. In 1965, neighborhood residents did their own policing because of inadequate official police staffing. Id. at 2785. In December, 1967, African-American ministers tried unsuccessfully to secure 500 more police officers to patrol the area. They complained that businesses were fleeing the area and that parishioners were afraid to attend church; the pleas fell on deaf ears. 12 AA 2786-2787.

By 1969, organized crime simply took over. Between Bed-Stuy, Harlem, and the South Bronx, the area lost $223 million every year to organized crime, through policy rackets and heroin distribution. Crime was so rampant and open that residents suspected the police aided and protected it. 12 AA 2780-2813. A federally financed study concluded in 1971 that organized crime was a major economic force in Bed-Stuy and so pervasive that the residents

no longer saw it as a problem. 12 AA 2789, 2795. The study concluded that from 1963 to 1971, the amount of money lost to organized crime tripled to over $100,000,000. The network is so extensive that were it to disappear overnight, the economy of the Bedford-Stuyvesant area could conceivably be thrown into a depression. Despite this level, only one arrest of an identified Mafia figure in ten years was noted.

> What emerges is a stark profile of an area that houses a quarter of a million people, drained by criminal activities, amounting to $90-million a year, beset by violence and increasingly emptied of resources.

12 AA 2795.

The number of deaths by homicide was almost as high as the number of all other violent deaths (97 - 100). In 1963, it had been half (52 and 105). Translated, that means that almost as many people are killing each other as die by accidental means. 12 AA 2780-2813. Suicides doubled, rapes increased by almost 30%, robberies increased 15 fold, from 139 in 1963 to 2133 in 1970, burglaries from 633 to 4780. In the 1960's, Bed-Stuy was a criminal war zone. One study concluded that organized crime made more money in Bed-Stuy than the federal government collected in taxes. Illegal gambling employed more people in Bed-Stuy's than any thing else. 12 AA 2794.

More than crime blighted Bed-Stuy. As early as 1963, the government tried to address housing that was both overcrowded and deteriorating.

> The neat facades of the two-story and three-story houses and the almost complete absence of rundown six-story tenements belie the fact that nearly a third of the area's homes have no private bathrooms. Many homes also lack hot water, are rat-infested and fail to keep out wind and rain.

12 AA 2791. In 1963, of the 2544 buildings in the 86 square blocks of the area, almost 23,000 building code violations were noted. 274 buildings were referred for rent reductions, 53 taken into receivership. The middle class fled, the neighborhood powerless to stop further decay. Many of the existing apartments were shabby, with leaky plumbing, falling plaster and peeling paint; the residents, however, could not leave because of racial discrimination in more affluent parts of New York City. Id. Actions taken against slum lords refer to the rental housing as "the worst properties ever inspected" with visible fire hazards, cellars filled

with water, rotting floors and woodwork, noxious stench, and rat infestation. NY Times, August 5, 1960. 12 AA 2806. Policing did not exist. 12 AA 2799.

Nonexistent sanitation services provoked demonstrations. 12 AA 2780-2813. In 1966, sanitation conditions got so bad, the city of New York had to authorize "demonstration projects" simply to clean up trash. 12 AA 2788-2789.

A massive redevelopment plan, announced in 1966, collapsed within 6 years because of a lack of funds. 12 AA 2792.

Race riots in the 1960s - 1964, 1966 and 1968, plagued Bedford-Stuyvesant. 12 AA 2797-2798, 2800, 2803-2805, 2807-2811. Survey after survey asked the residents of Bed-Stuy their opinions about the riots' cause. Most blamed racism, unemployment, poor housing, poor schools, and high rents. They complained of living in constant fear. 12 AA 2801-2802, 2811. In an article dated April 1, 1962, the newspaper covered protests against Bed-Stuy merchants for their "Jim Crow" practices. In May, 1967, there were protests against the neighborhood school system for its refusal to bring classes for neighborhood children up to grade level. 12 AA 2812-2813.

On July 29, 1967, President Johnson issued Executive Order #11365 authorizing the National Advisory Commission on Civil Disorders to prepare a report on race riots in general by analyzing its causes and potential solutions. In March, 1968, the Commission, known as the Kerner Commission, issued that report.

In its summary, the Kerner Commission noted that there was no such thing as a typical riot. 12 AA 2814-2830. "The disorders of 1967 were unusual, irregular, complex and unpredictable social processes. . . . they did not unfold in an orderly sequence."[7] Id. at 2819. The Commission's analysis, however, did enable it to reach certain relevant conclusions.

1. The riots were not the result of triggering events. "Instead, it was generated out of an increasingly disturbed social atmosphere, in which typically a series of tension-heightening incidents over a period of weeks or months became linked in the minds of m any in the Negro

[7] Bedford Stuyvesant was not specifically addressed in the Kerner Commission report though its conclusions clearly apply to Bed-Stuy.

community with a reservoir of underlying grievances."

2. These prior incidents were police actions in half of the cases.

3. What the rioters sought was not destruction of the community for its own sake but fuller participation in the social order and material benefits then being enjoyed by most Americans. "Rather than rejecting the American system, they were anxious to obtain a place for themselves in it."

12 AA 2820.

The African-American community of the 1960's had certain grievances which, while they varied in intensity from city to city, generally fell into 12 categories:

1. Police practices;
2. Unemployment and Underemployment;
3. Inadequate housing
4. Inadequate education;
5. Poor recreational facilities;
6. An ineffective political structure;
7. Disrespectful white attitudes;
8. Discriminatory administration of justice;
9. Inadequate federal programs;
10. Inadequate municipal services;
11. Discriminatory consumer and credit practices;
12. Inadequate welfare programs.

12 AA 2820-2821.

When asked to identify the root cause of these issues, though the analysis was complex, the answer was simple: white racism catalyzed by other forces including hopes frustrated by the slow pace of integration following civil rights legislation, a climate that encouraged violence created by white terrorism in the southern states, the feeling among African-Americans that violence was the only means to achieve social justice and a police force perceived as the symbol of white power. 12 Id. at 2822.

vi. Ages 19 to 21

a. Vietnam

In January 1968, Mr. Howard enlisted in the United States Marine Corp and was assigned as a mine-sweeper to Company A, 7th Engineer Battalion, First Marine Division. 12 AA 2831-2881. He was deployed to DaNang, Vietnam from July of 1968 to August of 1969. 12 AA 2831-2881. During the six months of Mr. Howard's tour, he was based near

the village called "Lanko." His unit lived in a bunker at the base of a bridge that had been blown up. 12 AA 2882-2885. Every day they swept a public road for mines. They walked eleven miles up a hill, with a machine gun patrol riding along side them, on constant alert for an enemy attack. Id. at 2883. The point man for the day carried a mine sweeping device. All the men hated that position because it was the most likely duty to result in death or serious injury if a mine was triggered. The soldiers walked several yards apart; if the point man was killed up ahead, the men in back might be safe. The North Vietnamese planted mines along the road, and hid in the trees, waiting for the mine sweepers to walk close enough to the mine for them to detonate it remotely. Id.

In addition to the constant threat of mines and sniper fire, the men also suffered trauma and death at their camp. On one occasion, Mr. Howard's sergeant was cleaning his gun when it accidentally fired and shot the radio operator in the head. 12 AA 2884. Likewise, at base camp, the Company was frequently attacked by rocket fire from the North Vietnamese Army. The soldiers were on constant vigilance, both from enemy and friendly fire.[8]

The racial tension present in the United States existed among the troops in Vietnam. In Mr. Howard's unit, blacks and whites did not associate with one another. 12 AA 2882-2885. Many soldiers in Vietnam consumed drugs. Nearly everyone smoked marijuana, including Mr. Howard. Other soldiers in Mr. Howard's unit got high by inhaling Carbona Spot Remover: they soaked a rolled-up sock in the chemicals and inhaled the fumes. Id. at 2884. Others got drugs from local children, who sold heroin or other opiates. Id. Some soldiers bought items cheaply to sell them to the locals for a profit, and used the money to

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[8] While in Vietnam, Mr. Howard claimed he was wounded by a mine in a counterinsurgency between DaNang and PhuBai. 12 AA 2886-2971, 2972-2995. The Marine in front of Mr. Howard stepped on a mine, and Mr. Howard was also injured in the blast. After the injury, Mr. Howard claimed difficulty sleeping. He also claimed to use street drugs to self-medicate for the sleep deprivation and the headaches that followed.

Mr. Howard claimed other head injuries, including a motorcycle accident in 1978, after which he lost consciousness, and an incident in which he was hospitalized after being hit with the butt of a gun in 1980. 12 AA 2886-2971.

pay prostitutes or buy more drugs. Id.

b. Post-Vietnam

After Mr. Howard returned to New York from Vietnam, he seemed to have different personalities. His voice changed and he laughed constantly for little or no reason. He created elaborate stories to trick people for laughs, but often was the only one laughing. 12 AA 2770. Although he always wanted to know more about other people, he rarely gave details about his own life. He never spoke of his background. 12 2772-2775.

Mr. Howard's behavior became more erratic and aggressive after the war. 12 AA 2767-2771, 2776-2779. He used his size and facial expressions to intimidate people. Mr. Howard stole when he got out of the military, despite the fact that he had a job that paid him a decent wage. He engaged in reckless behaviors like racing street cars and motorcycles. 12 AA 2767-2771.

A friend, Roberta Stokes, asked Mr. Howard several times why he was so reckless, but he never replied. She knew he was a Vietnam veteran, but he refused to discuss his military service and his childhood with her. 12 AA 2776-2779. Ms. Stokes, whose brother was diagnosed with PTSD after his tours in Vietnam, saw some of the same symptoms in Mr. Howard. Mr. Howard, for example, was an extremely fidgety person; it was hard for him to keep still. His foot was always tapping; his knees were always bouncing; he frequently paced back and forth and bit his fingernails excessively. 12 AA 2776-2779. Mr. Howard had odd eating habits. He loved to eat and he always had some kind of food in his hands. "It seemed like Sam was always chewing something." 12 AA 2779.

> Sam could easily become frustrated over the slightest disagreement, and fly into a complete rage. During these episodes Sam screamed at the top of his voice, used a lot of profanity, his hand gestures and facial expressions were very animated, and he rapidly paced back and forth. At a certain point in each of these rage episodes, the focus of Sam's fury would drift away from the person who had angered him, and drift into the distant ether. Sam's rage then degenerated into an angry incoherent discussion with himself, to the point that it seemed like he was in his own world and the person was no longer there with him. Usually, the person who angered him simply walked away, seemingly outside of Sam's awareness, and Sam would continue the argument with himself, sometimes for an extended period of time.

> During Sam's episodes of rage, it was not unusual for him to become very emotional and begin crying. I consoled Sam at times and tried to get him to discuss his feelings, but he never did.

12 AA 2778.

Mr. Howard self-medicated. He drank beer, smoked a lot of marijuana and consumed amphetamines.

> By far, marijuana was Sam's drug of choice and it seemed like he could have been self-medicating in his use of it. Sam seemed more mentally stable, calm, and less jittery whenever he smoked weed. He was also easier to be around.

12 AA 2778-2779.

Theodore Pugh, also served in Vietnam and recognized Post Traumatic Stress Disorder, or PTSD in Mr. Howard. 12 AA 2772-2775. Some of Pugh's relatives and friends were diagnosed with PTSD; he worked at the Creedmore Psychiatric Center where many of the patients suffered from PTSD. 12 AA 2772-2775. On many occasions Mr. Howard would talk to someone and then all of a sudden he would stop talking and his eyes would wander off into the distance. Friends would have to loudly call Mr. Howard's name and snap their fingers to bring Mr. Howard out of his trance and back to the present. "On another occasion, I was riding with Sam in his car one evening when he suddenly pulled over and started staring into the bushes as if he was trying to find something." Id. at 2774. The person with him had to literally snap him out of the fugue state; Mr. Howard then continued driving as if he had never stopped and the incident had never occurred.

vii. Late 1970s - Early 1980s

In the months before the crimes in Las Vegas and California, Mr. Howard's mental state deteriorated. Dawana Thomas, a girlfriend apprehended with him in California, recalled that Mr. Howard was really messed up by his Vietnam experience. 13 AA 3005-3010. Mr. Howard saluted airplanes "flying overhead, even if he had to stop the car and get out in order to perform the salute." Id. at 3007. He told Ms. Thomas stories about combat in Vietnam. Ms. Thomas at first thought it all exciting, but then she realized how troubled he was by his wartime experiences. She referred to him as "a nutcase," "shell-shocked" by

what he went through in Vietnam." Id.

Mr. Howard frequently had nightmares. He mumbled in his sleep and woke up with cold sweats. He dreamed of shooting "gooks," but they kept popping back up and he had to cut off their ears. Ms. Thomas frequently tried to calm Mr. Howard after his nightmares, but she felt helpless; there was nothing she could do. 13 AA 3005-3010.

Mr. Howard suffered from wild and violent mood swings. He often hit Ms. Thomas, and disappeared for days. When he returned, he was physically and emotionally exhausted. Mr. Howard "was violent one minute, then cried and begged for forgiveness the next. He paced around like a caged animal. Other times, Sam rocked himself back and forth, like a hysterical child." 13 AA 3008. Despite Mr. Howard's violence, he could also be kind and caring to Ms. Thomas and her children. Id. at 3009.

Mr. Howard's emotional state continued to deteriorate. His disappearances became more frequent. When he reappeared, his clothes were always wrinkled; Ms. Thomas suspected he was sleeping in their car. 13 AA 3005-3010. One night, Mr. Howard drove Ms. Thomas to a dark street. After he parked the van, he got into the backseat and did not allow her to turn around to look at him. "Sam rocked back and forth and was very distraught." Id. at 3008. He did not allow Ms. Thomas to comfort him. He berated her saying she was a bad mother for leaving her children. He then started cry to cry. Ms. Thomas knew he required mental health treatment. 13 AA 3005-3010.

Mr. Howard tried to get mental health treatment on several occasions. Mr. Howard claimed he was hospitalized in Bellevue Hospital in the psychiatric unit for four weeks. 12 AA 2886-2971, 13 AA 3011-3156. He also claimed to have been hospitalized in Creedmore Mental Hospital for two weeks and at a VA Hospital in New York, all under aliases. See 12 AA 2886-2971. When Mr. Howard and Ms. Thomas left New York and started their trip to Las Vegas, and eventually California, Mr. Howard stopped at VA Hospitals in Denver, Colorado and Salt Lake City, Utah. 13 AA 3157-3158.

In 1980, the police in San Bernardino, California arrested Mr. Howard. After his arrest, Mr. Howard became irrational and agitated.

> It finally progressed to the point where he made several statements that we were going to have to kill him to make him do anything, that white people hated him all his life, and that he might as well be shot right now. He asked several times to shoot him right there on the spot.

13 AA 3184. Mr. Howard refused to leave the police car and became increasingly violent. He was forcibly removed at the police station. He was visibly distressed and broke into tears during an interview with Las Vegas police.

> Samuel Howard, after filling out the names and hospital information on a sheet of paper, indicated that he wanted to kill himself and commit suicide, indicating that the reason he wanted to do this was because he was tired of hurting people and that he wanted to see his mother and sister who had been killed by his father.

13 AA 3194.

Mr. Howard tried to commit suicide in jail by attempting to hang himself with a chain attached to a secured bunk. 9 AA 2073. He made inappropriate facial expressions and mannerisms at his arraignment hearing. 9 AA 2076, 12 AA 2891, 13 AA 003197-3200. The judge found him incompetent and sent him to Patton State and Atascadero State mental institutions where he spent ten months. Reports from doctors who evaluated Mr. Howard during this time indicate found him difficult to evaluate and diagnose.

> Because of the many difficult opinions and ways in which this man presents himself, I am unable to come to a solid or firm opinion. Frankly I am uncertain if this man is feigning mental illness for the purpose of eluding litigation or whether he is mentally ill with a super imposition of other factors.

12 AA 2897.

> He appears to be a rather confused, disorganized individual who cannot relate information logically and coherently. He appeared to be evasive and I wonder what exactly his mental capabilities are. There is certainly a possibility of some malingering here as well as obvious evidence of mental disorganization.

12 AA 2904. At Patton State Hospital Mr. Howard displayed suspicious and paranoid behaviors. He was evasive and refused psychiatric testing. He reported poor memory for past events but still displayed the ability to engage in activities on the ward (e.g., board

games) that require the use of short term memory. During this time he was given a variety of psychiatric labels including "malingering, antisocial personality disorders, rule out chronic schizophrenia and organic brain syndrome." 12 AA 2886-2971.

In his 1981 report, Dr. Van Putten from Atascadero stated that "Throughout the interview this examiner gets the feeling that this man is not quite playing with a full deck: . . ." 13 AA 3041.

> It is my opinion that this man suffers from a schizophrenic-type illness and that presently he has only negative symptoms - that is, apathy, blunting of affect and withdrawal. However, this defect state is not compatible with playing an animated game of Pinochle on the ward. He could be malingering but it would be a very good act.

13 AA 3041.

No one ever considered a PTSD diagnosis for Mr. Howard. 13 AA 3011-3156 , 3201-3204. Dr. John A. Riley, a former psychologist at Atascadero who was on Mr. Howard's diagnostic team, had a unique perspective on Mr. Howard. Dr. Riley, himself a Vietnam veteran, conducted a treatment group for combat veterans. "Through the group, I realized that many of the combat veterans that had little or no criminal history before their tours in Vietnam and had engaged in violent crime after their discharge from the military." 13 AA 3202. Dr. Riley believes that PTSD should have been considered as a psychiatric diagnosis for Mr. Howard at the time of the trial for the offense in question. He also suggested that some of the behaviors displayed by Mr. Howard in the decade between Vietnam and the offense in question (i.e., strong emotional reaction when feeling cornered, fleeing from courtrooms) are similar to behaviors of other Vietnam veterans with PTSD placed at Atascadero. 13 AA 3201-3204.

a. Psychiatric and Psychotic Impressions of Mr. Howard

Dr. Bekh Bradley, who reviewed extensive data on Mr. Howard and his history, also concluded that PTSD is a diagnosis that should have been considered for Mr. Howard when he was being evaluated in both Patton State Hospital and Atascadero State Hospital as well

as in other court-ordered psychiatric evaluations. 11 AA 2682-2717.[9] After reviewing all of the underlying documents referenced above, Dr. Bradley concluded that a diagnosis of PTSD for Mr. Howard is consistent for multiple reasons.

> First, in order to receive a diagnosis of PTSD a person must have been exposed to a "Criterion A" traumatic event. As noted above Mr. Howard's experiences serving as a United States Marine in Vietnam-era combat qualifies as a criterion A stressor. In addition to his experience of combat in Vietnam, Mr. Howard was exposed to stressful events meeting the DSM Criterion A for PTSD over the course of his childhood and adolescence. First, his presence at the time that his mother was murdered by his father was a Criterion A traumatic event. Second, based on the statements of other family members, Mr. Howard experienced physical abuse from Mrs. Dudley. Third, based on Mr. Howard's own statements to his cousin, he witnessed other boys at Mt. Meigs being beaten. Further, it seems highly likely given the multiple statements about the frequency and regularity of physical and sexual abuse at Mt. Meigs, that Mr. Howard would have witnessed and been subjected to both physical and sexual abuse Mt. Meigs. Of note, all of these traumatic events, combat, these childhood events, witnessing violence and ultimately murder, being abused at Mrs. Dudley's house and being at Mt. Meigs were not one-time trauma events but traumatic events that would be present repeatedly and persistently over extended periods of time. In addition they occurred during early and key periods in Mr. Howard's biological and psychological development. Both of these factors are related to increased risk for negative outcomes, including PTSD.

11 AA 2702-2703.

Dr. Bradley placed a great deal of importance on the effect of Mt. Meigs's on Mr. Howard's mental health; Mr. Howard's placement in Mt. Meigs resulted in significant exposure to trauma and to continued threats of violence for Mr. Howard.

> Exposure to violent institutional environments such as Mt Meigs is likely to lead to the over-development of a sense of one's environments as threatening and of both other people and other institutions as untrustworthy. In the case of Mr. Howard, this is compounded by his earlier experiences of the adults who were supposed to be caring for him being both threatening and untrustworthy. Thus, his exposure to this environment is likely to have laid the foundation for his later suspiciousness, paranoia and inability to trust other individuals and institutions that are supposed to be assisting him. This may include his persistent belief that his attorneys and the court and governmental systems in which they operate are not trustworthy or working with his best interests in mind. Such beliefs would likely have been exacerbated by his experiences in combat.

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[9] Dr. Bradley is an Assistant Professor of Psychology at Emory University in Atlanta Georgia who has published over 30 articles and also serves on the staff of the Veteran's Administration Hospital in Atlanta.

> The environment at Mt. Meigs was constantly threatening and violence from staff towards the boys who were placed there, as well as between the boys, was pervasive and severe. This is likely to have led to establishment of a self-protective, aggressive manner of interacting with others. The environments in which children and adolescents are placed are the ones in which they learn the boundaries of appropriate and acceptable behaviors. The constant and extreme violence and threat at Mt Meigs (as well as Mr. Howard's family environment prior to and after his placement at Mt. Meigs) would have taught him that violence, aggression and abusive behaviors are normative, appropriate and effective ways of treating others and addressing and solving problems. Put another way, in the environment of Mt. Meigs, force and domination become normalized and habits of violence would have been learned and reinforced. It is of note in this case that younger placement in correctional environments such as that experienced by Mr. Howard is associated with increased likelihood of developing violent habits and a self-protective and aggressive stance towards others.
>
> The environment at Mt. Meigs was marked with extreme and overarching external controls on behavior. Placement in such an environment (particularly at a young age as Mr. Howard was) is likely to be associated with difficulty developing self discipline and an internal locus of control for behavior. This is related to difficulty appropriately and effectively adapting to environments where such external controls are absent. Of note, the environment of the military to which Mr. Howard was also exposed in young adulthood is also one with high levels of structure and external controls on behavior (though not in as extreme a manner as the one at Mr. Meigs).
>
> The environment at Mt. Meigs would have been criminogenic for the boys placed there in several ways. One of these is the direct modeling of criminal and violent behavior by the staff and by other boys. Another is that boys placed there would sometimes engage in violent and criminal behavior in order to be placed in prison or jail rather than being placed at Mt. Meigs. Lastly, the environment at Mt. Meigs was so dangerous and lacked needed resources such as food and clothing at such a level that the boys placed there would have learned to focus only on their own survival even when this would mean engaging in violent and criminal behaviors.

11 AA 2700-2701.

Institutional racism exacerbated his exposure to trauma and violence. As noted above, Mr. Howard was exposed to racism in his community, even before his placement at Mt. Meigs. After his commitment to Mt. Meigs, however, Mr. Howard was exposed to a different kind of exploitation, one where members of his own race took advantage of him to improve their own lot. 11 AA 2514-2521, 2522-2563, 2564-2567, 2682-2717. This institutional exploitation severely impacted Mr. Howard's development as a child and his progression to adulthood. 11, 12 AA 2718-2759. "Minority children raised in such a setting "learn the inferior status to which they are assigned . . . Minority children often react to this

role designation with feelings of inferiority and a sense of personal humiliation." 11 AA 2723. As a result, "many African-American children become confused about their own sense of personal worth." Id. This sense of inferiority may be diminished if the minority child receives strong countervailing messages of his worth from his family. A chaotic or abusive family life, however, impedes a minority child's ability to process the confusing messages, and the child may internalize the self-hatred. 11 AA 2723-2724.

Dr. Bradley also noted that the pesticide exposure may well have exacerbated Mr. Howard's already increased risk for violent behavior.

Dr. Bradley also noted that Mr. Howard's inability to effectively communicate his trauma history to mental health evaluators, or even to counsel, is entirely consistent with a diagnosis of PTSD. 11 AA 2703. A person suffering from PTSD, for instance, may have difficulty remembering the traumatic event. Even if the person is able to recall the event, the recollection is so traumatic as to result in psychological stress for the person, and therefore the person tends to try to forget about it. Id. at 2704. Lastly, some traumatic events, such as sexual abuse or similar experiences, result in feelings of shame or humiliation. Such feelings are more common in men, particularly men like Mr. Howard who were institutionalized at such a young age in a place such as Mt. Meigs where sexual violence appears to have been commonplace. Id.

Mr. Howard's drug abuse and alcoholism were also consistent with PTSD. Use of substances is often an effort to self-medicate the emotional responses to the trauma exposure and the PTSD symptoms. 11 AA 2708. Likewise, attempts to commit suicide are also common in sufferers of PTSD and in people with psychotic disorders. Id. at 2709. Mr. Howard's exposure to pesticides, particularly organophosphates, at Mt. Meigs is also a contributing factor to an increased neurological risk and behavioral problems. Id. at 2710.

In addition to a diagnosis of PTSD, Dr. Bradley believed that Mr. Howard presented symptoms of a psychotic disorder. 11 AA 2705-2706. Mr. Howard displayed psychotic symptoms simultaneously with the symptoms of his PTSD. Id. at 2707. Exposure to high

incidents of trauma in early development is associated with a higher risk for presentation of psychiatric disorders, including psychotic symptoms and PTSD. Id.

Dr. Bradley also believed that Mr. Howard's difficulties in dealing with his counsel throughout these legal proceedings was a direct result of a paranoid thought process best classified as "Psychotic Disorder Not Otherwise Specified." Id. at 2706. Dr. Bradley believed a more comprehensive evaluation was also necessary to rule out schizophrenia. Id. The mental health experts that evaluated Mr. Howard were unaware that his father, Sam Sr., also suffered from several psychiatric disorders. First, Sam Sr. suffered from alcohol abuse. 11 AA 2699. Further, and more importantly to Mr. Howard, Sam Sr. was diagnosed with a psychotic disorder "schizophrenia, paranoid type (with indications of organic brain syndrome and premature aging)" in 1974. 11 AA 2700, 12, 13 AA 2996-3004. Sam Sr. displayed "apparent delusions of persecution" which were present across time. 11 AA 2700. This information was relevant to Mr. Howard because having a relative (particularly a first degree relative such as a parent) with a psychotic disorder significantly increased Mr. Howard's risk for also having such a disorder.[10] Id.

Mr. Howard exhibited many symptoms common to people exposed to serious trauma and violence in their formative years, including symptoms of PTSD, psychotic symptoms, alcohol and substance use, suicidal thoughts and behaviors, difficulty trusting others and associated difficulties in forming relationships, difficulties in regulating emotions, difficulties in managing anger and aggression, delinquent and criminal behaviors. 11 AA 2709.

Mr. Howard was at increased risk for these problems in part because exposure to serious trauma disrupts and thwarts a number of key biological and developmental processes.

> These include both cognitive (thought) and emotional (feeling) capacities. Among the capacities often disrupted is the ability to regulate ones emotional responses. This means that exposure to abuse and other adverse events in early childhood and across adolescence is related to increased

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[10] Mr. Howard's son, David Harris, is currently incarcerated in Pennsylvania for a double homicide. Mr. Harris' reported behavior appears to be significantly similar to the two generations of Howard men before him. 13 AA 3205-3207.

> frequency of experiencing negative emotions, increased strength of the emotional response, and a tendency for the experienced emotions (particularly negative emotions) to last for longer periods of time. In addition to this, the ability to use reason and logical thinking to override emotional responses is developed over the course of childhood and adolescence and even into early adulthood. As such, exposure to abuse and other adverse events in childhood and early adulthood impairs this ability.
>
> Another reason why exposure to childhood abuse and other adverse/stressful events in childhood such as that experienced by Mr. Howard, is damaging is because it is often associated with problems in primary attachment relationships (relationships with parents or other care givers in early childhood). Such relationships form the foundation from which people develop their core beliefs about themselves, others and relationships. Mr. Howard's attachment relationships were disrupted in multiple and severe ways, including the murder of his mother when he was 3 years of age and the subsequent incarceration of his father for committing the murder. The impact of disrupted early attachment can sometimes be ameliorated if children are provided with later stable, caring and supportive environments. However, Mr. Howard was not provided with this opportunity. In fact his environments following his mother's murder and father's incarceration were likely to have exacerbated problems associated with disrupted early attachment. Strong and secure attachment relationships are the foundation for the development of later abilities to control emotions and emotional responses particularly in the face of threat or danger. Thus Mr. Howard's lack of secure attachment as a child would have placed him at increased vulnerability to negative outcomes when faced with later stressful and traumatic experiences such as placement in Mt. Meigs and combat exposure in Vietnam.

11 AA 2709-2710.

All of this evidence would have inevitably been unearthed had counsel merely taken the steps to obtain the records of the California hospitals. The California hospital records noted that Mr. Howard's father killed his mother, though Mr. Howard contradicted that information at times. They also noted that he was raised in Alabama. Any competent counsel seeing those records would have sent a competent investigator to Alabama to resolve the conflict and would have learned more about Mr. Howard's violent experiences at the hands of his father. Competent counsel would have at least made an effort to find out if the allegations were true. A minimal record search of the Chilton and Houston County records would have revealed the truth that Sam Sr. indeed killed Mr. Howard's mother and sister and, as a result, Mr. Howard was placed in the custody of the Dudleys. A cursory review of those records would have also revealed how inept the Dudleys were in raising children and that their sole motivation was to obtain more welfare money. Counsel would also have learned

of Mt. Meigs. Mr. Howard's experiences at Mt. Meigs were horrifying and the information could have been discovered had counsel conducted even a preliminary investigation into Mr. Howard's childhood.

Trial counsel knew Mr. Howard had been in the military and served in Vietnam, 12 AA 2886-2971, 2972-2995, 13 AA 3011-3156, but they did nothing to investigate his actual military experiences. Dr. John Riley, Mr. Howard's Atascadero psychologist, could easily have placed Mr. Howard's life in context.

> [I was given] a brief history of Sam's life, including his life with his foster parents, the Dudleys, his time at Mt. Meigs, his time in Bedford-Stuyvesant, and his time in Vietnam. The attorneys also provided me with descriptions of Sam's bizarre behaviors, such as staring off into space, arguing with himself, use of narcotics, saluting airplanes, disappearances, crying fits, and nightmares that Sam reportedly experienced after he returned from Vietnam. I was also informed of Sam's behavior at the Sears store when he was apprehended in Nevada, of his behavior when he was arrested in San Bernardino, and his outbursts in court in both California and Nevada.
>
> It is my opinion that Sam's behavior is entirely consistent with a PTSD diagnosis. Sam's behavior in the Sears when he was confronted by the security guards is consistent with a PTSD fight or flight episode. In my experience, I have discovered that similar PTSD episodes can last for as little as a few seconds or as long as days. Crimes occurring during a PTSD episode, then, can often be attributed to the triggering stressor, and the person suffering the episode is often unaware of the consequences of his actions.
>
> Had Sam's trial counsel contacted me at the time of his trial in 1983, I could have strongly suggested that they consider PTSD as a likely diagnosis for Sam, and as a possible explanation for his behavior and actions in Nevada. Although PTSD was a relatively new diagnosis in the mental health field, I could have discussed the disorder with trial counsel and relayed to them my opinion that it was certainly a possible diagnosis for Sam based on his life-long history of exposure to significant trauma.

13 AA 3201-3204.

By simply obtaining the California records, learning of Dr. Riley's existence and interviewing him with details of Sam's behavior and a minimal presentation of Mr. Howard's life, counsel would have known that PTSD was a viable issue.

G. INEFFECTIVE TRIAL COUNSEL

As noted above, both Schlup v. Delo supra and House v. Bell, compel this Court to examine the reasons why this newly developed mitigating evidence was not presented at trial.

In short, trial counsel failed to investigate and present any case that would have served as a basis for a sentence less than death. On December 21, 1982, Allen Wilmuth of the Clark County Public Defender's Office wrote a memo to Mr. Howard's counsel Mike Peters: "[o]n December 1, 1982 at 1:40 P.M. I spoke with. Mary Caruther at California Medical Facilities Vacaville, CA, at 707/448-6841 and she pulled the medical file on Howard. She stated the records indicate that Howard is there as a prisoner, is under psychiatric treatment, had been under lots of care and attention, is diagnosed as having psychic in remission, with a possibility of developing serious problems in the future." 1 AA 10. Despite that notice, trial counsel made no real effort to secure those documents, or go to California to find out any information about Mr. Howard's medical condition.[11] Had counsel made an adequate effort, he and his colleague would have learned all of the evidence presented here. First, counsel would have learned of Mr. Howard's treating psychologist and the likely effect of PTSD. Second, he would have learned of Mr. Howard's victimization at the hands of his father in Alabama. A modest effort to investigate the family history in Alabama would have revealed both Mt. Meigs and Bedford Stuyvesant. Counsel already knew of Mr. Howard's Vietnam experience.

The extensive mitigating evidence presented above is compelling. With the invalid aggravating factors and the vast amount of uninvestigated and unpresented mitigating evidence, Mr. Howard is innocent of the death penalty: that is, it is reasonably probable that if a jury heard the mitigating evidence, it would not have found Mr. Howard eligible for a sentence of death. He has established both trial counsel conduct that fell well below the standard expected of counsel and prejudice as a result of that failure.

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[11] At the evidentiary hearing held on this allegation, trial counsel argued that he did not get the records because Mr. Howard would not sign any releases, an argument accepted by this Court. 7 AA 1606-1607, 1609, 1620. When asked by state post-conviction counsel why he did not subpoena the records, trial counsel had no answer. The mental health records themselves were prefaced by a business records affidavit reflecting compliance with a subpoena.

I. Argument

This Court should revisit the issue of trial counsel's ineffective penalty phase presentation because the law on that issue has changed and it is now clear that the previous decision of this Court was wrong. When this Court addressed this issue in the appeal from the denial of Mr. Howard's first state post-conviction challenge, the Court denied the claim, holding that the fault for failing to present mitigating evidence lay with Mr. Howard and his refusal to sign releases.[12] Howard v. State, 106 Nev. 713, 721-22, 800 P.2d 175, 180 (1990). In Porter v. McCollum, 558 U.S. ___, 130 S. Ct. 447 (2009) (per curiam), the Court found trial counsel ineffective, even though Mr. Porter was a very difficult client. He represented himself with standby counsel during pretrial proceedings and at the start of his trial in 1998. Just before the completion of the guilty phase, he changed his plea to guilty, and then changed his mind and asked for counsel to represent him at the penalty phase. The court appointed counsel about one month before the penalty phase commenced but counsel put on very little evidence and the judge imposed a death sentence.

In post-conviction proceedings, Porter presented extensive mitigating evidence including family violence, a war record and resulting PTSD, but those claims were rejected by the lower court. "It is unquestioned that under the professional norms at the time of Porter's trial, counsel had an 'obligation to conduct a thorough investigation of the defendant's background.'" Porter v. McCollum, 130 S. Ct at 452. Counsel failed to obtain Mr. Porter's medical, school, or military service records or interview any member of Porter's family. To justify his failure to investigate, counsel described Porter as fatalistic and uncooperative.

> Counsel thus failed to uncover and present any evidence of Porter's mental health or mental impairment, his family background, or his military service. The decision not to investigate did not reflect reasonable professional judgment. Wiggins [v. Smith, 539 U.S. 510, 534 (2003).] Porter may have been fatalistic or uncooperative, but that does not obviate the need for defense counsel to conduct some sort of mitigation investigation. See Rompilla [v.

[12] Trial counsel could have and should have obtained these records by the use of a subpoena.

Beard, 545 U.S. 374, 381-82 (2005)].

Porter v. McCollum, 130 S. Ct. at 453 (emphasis in original); see also Hamilton v. Ayers, 583 F.3d 1100, 1118-19 (9th Cir. 2009) ("A defendant's lack of cooperation does not eliminate counsel's duty to investigate.").

While this Court addressed this issue, the law of the case doctrine is not a doctrine that enshrines a prior holding; it is subject to the Nevada courts' discretion to consider the matter again. See Pellegrini v. State, 117 Nev. 860, 884-85, 34 P.3d 519, 535-36 (2001) (law of the case properly disregarded where new facts were adduced at a new hearing, citing Paine v. State, 110 Nev. 609, 615-16, 877 P.2d 1025, 1028-29 (1994)). "However, it 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."); Hsu v. County of Clark, 123 Nev. 625, 173 P.3d 724, 728 (2007) ("We agree that in some instances, equitable considerations justify a departure from the law of the case doctrine."); Bejarano v. State, 122 Nev. 1066, 146 P.3d 265, 271 (2006) ("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.").

In Pepper v. United States, 131 S. Ct. 1229, 1250-51 (2011), the Supreme Court described the doctrine of law of the case as "'an amorphous concept,' '[a]s most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.' Arizona v. California, 460 U.S. 605, 618 (1983). This doctrine 'directs a court's discretion, it does not limit the tribunal's power.' Id. Accordingly, the doctrine 'does not apply if the court is "convinced that [its prior decision] is clearly erroneous and would work a manifest injustice."' [citation]." Pepper, 131 S. Ct. At 1250-51. Given the holding in Porter v. McCollum, supra, Mr. Howard has clearly met that standard. The decisions of the United States Supreme Court and the Ninth Circuit Court of Appeals, subsequent to this Court's decision in Mr. Howard's case, clearly warrant revisiting this claim.

H. THE PREMEDITATION INSTRUCTION

The state contends that Mr. Howard's challenge to the premeditation instruction is untimely. That contention, however, is not correct. Mr. Howard raised that challenge in his third petition, 8 AA 1810-1811; it was dismissed. The legal landscape left by this Court's ruling in Nika v. State, 124 Nev. ___, 198 P.3d 839 (2008) requires this Court to revisit the claim.

Jury Instruction 8 defined murder as "the unlawful killing of a human being, with malice aforethought, either express or implied." 6 AA 1320. Instruction 9 defined malice as "the intentional doing of a wrongful act without legal cause or what the law considers adequate provocation." 6 AA 1321. Instruction 10 defined express malice as the "deliberate intention unlawfully to take the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." 6 AA 1322. In Instruction 11, murder of the first degree was defined as murder which is "(a) perpetrated by any kind of willful, deliberate and premeditated killing, or (b) committed in the perpetration or attempted perpetration or attempted perpetration of robbery." 6 AA 1323.

Against this background, Instruction 12 defined the culpable mental states that purported to distinguish first-degree murder from second-degree murder:

> Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.
>
> Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the Jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

6 AA 1324. In short, once the jury found that the homicide was committed with premeditation, it had no choice but to find that it was committed deliberately, willfully, and with malice without any further consideration.

i. Nika: A change in state law.

In Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000), this Court addressed its standard instructions on the issue of premeditation, referred to as the Kazalyn instruction, the same instruction given here. See Kazalyn v. State, 108 Nev. 67, 75, 825 P.2d 578, 583 (1992). This Court concluded in Byford that the Kazalyn "line of authority should be abandoned."

> By defining only premeditation and failing to provide deliberation with any independent definition, the 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.

116 Nev at 235, 994 P.2d at 713.[13] This Court concluded that deliberation is a distinct element of mens rea and, as such, had to be defined by a separate instruction. 116 Nev. at 216, 994 P.2d at 714. Shortly after Byford, in Garner v. State, 116 Nev. 770, 787-88, 6 P.3d 1013, 1024 (2000), this Court refused to grant relief concluding the Byford holding was not constitutionally based.

In Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), the Ninth Circuit analyzed Byford, disagreed with this Court's conclusion that the Constitution was not involved, and concluded that Polk's Kazalyn instruction violated due process.

> Instead of acknowledging the violation of Polk's due process right, the Nevada Supreme Court concluded that giving the Kazalyn instruction in cases predating Byford did not constitute constitutional error. In doing so, the Nevada Supreme Court erred by conceiving of the Kazalyn instruction issue as purely a matter of state law. . . . The state court failed to analyze its own observations from Byford, under the proper lens of Sandstrom [v. Montana, 442 U.S. 510 (1979)], [Francis v.] Franklin, 471 U.S. 307 (1985), and [In re] Winship, 397 U.S. 358 (1970) and thus, ignored the law the Supreme Court established in those decisions that an instruction omitting an element of the crime and relieving the state of its burden of proof violates the Federal Constitution.

503 F.3d at 911.

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[13] In Greene v. State, this Court stated that "the terms premeditated, deliberate, and willful are a single phrase, meaning simply that the actor intended to commit the act and intended death as a result." 113 Nev. at 168, 931 P.2d at 61.

After Polk, this court addressed the issue once more, in Nika v. State, 124 Nev. ____, 198 P.3d 839 (2008). It is this resolution that requires the earlier premeditation ruling to be addressed once more in Mr. Howard's case.

The Nika court reviewed its history of the issue on the premeditation instruction. Citing first, State v. Wong Fun, 22 Nev. 336, 341-41, 40 P. 95, 96 (1895) and then Hern v. State, 97 Nev. 529, 632, 635 P.2d 278, 280 (1981), this court recognized that the terms willful, deliberate, and premeditated were not synonymous with "malice aforethought." 198 P.3d at 845. "Malice is not synonymous with either deliberation or premeditation" because "[t]o view it otherwise would obliterate the distinction between the two degrees of murder." 198 P.3d at 846. This court approved of the statement from Hern: "[i]t is clear from the statute that all three elements, willfulness, deliberation, and premeditation, must be proven beyond a reasonable doubt before an accused can be convicted of murder." 198 P.3d at 846, quoting from Hern v. State, 97 Nev. at 532, 635 P.2d at 280.

According to the Nika court, what was changed by Byford was not the meaning of the underlying concepts - premeditation and deliberation - or the State's burden of proof on each of the three culpable mental states, but the implementation of instructions on the elements of first-degree murder. The Byford court simply found that the procedures, mandated by Kazalyn, were flawed and did not adequately or correctly set forth the applicable law. See Nika v. State, 198 P.3d at 846. ("When this court decided Kazalyn, in 1992, it was not asked to distinguish between 'premeditation' and 'deliberation.' Instead, the issue presented was whether the jury instruction on premeditation sufficiently distinguished between premeditation and malice aforethought . . . . The court determined that the premeditation instruction, which later became known as the Kazalyn instruction, and the malice instruction were sufficiently distinct."); see also Kazalyn v. State supra, 108 Nev at 75, 825 P.2d at 583 ("Kazalyn argues that the jury instruction on premeditation is misleading because it does not distinguish between premeditation and malice aforethought.").

The Nika Court decided that Byford "announced a change in state law." 198 P.3d at 849.

> Similar principles are relevant to whether a decision effected a change in the law. Until Byford, we had not required separate definitions for 'wilfulness,' 'premeditation,' and 'deliberation' when the jury was instructed on any of these terms. And the court had approved of the Kazalyn instruction and rejected challenges to that instruction on the grounds that it failed to distinguish between premeditation and deliberation. Byford 'abandoned' that precedent - - Powell and its progeny.

198 P.3d at 849

It is apparent that Byford changed the requirement for instructing juries adequately on the culpable mental states. What was not changed, however, was that these culpable mental states - premeditation, deliberation and willfulness - were separate and distinct elements which had to be proven beyond a reasonable doubt before a defendant could be convicted of first-degree murder. See Nika, 198 P.3d at 846, (quoting Hern v. State, 97 Nev. at 532, 635 P.2d at 280). They were not interchangeable and not the same concept. Nika argued that Byford changed the procedure by which the issue was to be decided.[14]

The Nika resolution, however, did not address the issues raised by Polk. Polk made it clear that any instruction that relieves the state of its burden of proof "on the critical question of [the defendant's] state of mind," violates due process. 503 F.3d at 909-10, quoting from Sandstrom v. Montana, 442 U.S. 510, 521 (1979); see also Francis v. Franklin, 471 U.S. 307, 326 (1985); In re Winship, 397 U.S. 358, 364 (1970). Because Byford "reaffirmed" that NRS 200.030(1)(a) required all three mental states of first degree murder be established beyond a reasonable doubt, the use of the Kazalyn instruction "created a reasonable likelihood that the jury applied the instruction in a way that violated Polk's right

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[14] As part of its reasoning, the Byford court acknowledged that its past opinions had conflated the three culpable mental states. In Powell v. State, 108 Nev. 700, 708-10, 838 P.2d 921, 927 (1992), the Court concluded that its precedent, Briano v. State, 94 Nev. 422, 581 P.2d 5 (1978) and DePasquale v. State, 106 Nev. 843, 803 P.2d 218 (1990), conflated the three terms into "a single phrase, meaning simply that the actor intended to commit the act and intended death to result." See also Greene v. State, 113 Nev. 157, 168, 931 P.2d 54, 61 (1997). The Byford court concluded that its prior line of authority set forth in Powell, had to be abandoned. 116 Nev. at 235, 994 P.2d at 713. In doing so, it reaffirmed its previous holdings in Hern and Wong Fun.

to due process." 503 F.3d at 910. In short, Nika simply does not address the due process problems presented by the Kazalyn instruction. Byford's conclusion that the use of the new jury instructions was not retroactive is simply of no moment.

Even if Byford changed the substantive law on Nevada's three culpable mental states for first degree murder and redefined them, the resolution of that issue in Nika still creates insurmountable problems for the state in the instant matter. This Court acknowledged that its decision in Powell v. State, 108 Nev. 700, 838 P.2d 927 (1992), "reduced 'premeditation and deliberation' to 'intent,'" a decision this Court justified by claiming that three other states made the same mistake in interpreting their first-degree murder statutes. Nika, 198 P.3d at 846-47. Powell does not apply to Mr. Howard's case.

This court decided Powell in 1992. Mr. Howard's trial was in 1983 before Powell conflated the three culpable mental states into one concept. The Kazalyn instruction erroneously set forth the correct law at the time of Mr. Howard's trial; the due process analysis of Polk still applies. Powell is inapplicable.

ii. This Court's interpretation of Nevada's murder statute has rendered the statute unconstitutionally vague

The Nika Court overlooked the constitutional vagueness concerns that arose from this Court's interpretation of the law in Powell, Briano and DePasquale. Taking what this Court said in Nika, Byford, and Hern as true, this Court changed the law in such a way as to completely erase the "distinction between first- and second-degree murder." Byford v. State, 116 Nev. 215 at 235, 994 P.2d 700 at 713. Under the state and federal constitutions, penal statutes must give "fair notice" of what is forbidden, e.g., Gallegos v. State, 123 Nev.289, 163 P.3d 456, 458-459 (2007); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); and "the more important aspect of the vagueness doctrine 'is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement.'" Kolender v. Lawson, 461 U.S. 352, 358 (1983), quoting Smith v. Goguen, 415 U.S. 566, 574-575 (1974). "[A]bsent adequate guidelines, a criminal law may permit a standardless sweep, which would allow the police, prosecutors, and juries to 'pursue their personal predilections.'" Silvar v. Dist. Ct.,

122 Nev. 289, 293, 129 P.3d 682, 685 (2006) (emphasis added), quoting Kolender, 461U.S. at 358; Gallegos, 163 P.3d at 461.

That a capital murder statute may violate due process standards because of vagueness depends on the application of two distinct principles. First, a statute may be void for vagueness if it fails to provide notice to an ordinary citizen that his conduct is forbidden, or if it encourages arbitrary and erratic law enforcement conduct, criminalizes normally innocent conduct or places unfettered discretion in the hands of law enforcement. Papachristou v. City of Jacksonville, 405 U.S. 156, 165-168 (1972). Second, a death penalty statute may be so vague as to violate both the Eighth Amendment and the due process clause of the Fourteenth Amendment if the statute applies no restraint on the arbitrary and capricious infliction of the death penalty. Godfrey v. Georgia, 446 U.S. 410 (1980). Both principles are violated by this court's construction of the pre-Byford statute.

Under the Powell standard, all meaningful distinctions between first- and second-degree murder were erased. In Kolender v. Lawson, 461 U.S. 352 (1983), the Court considered a challenge to a California statute that made it criminal for a suspect to fail to provide "credible and reliable" identification when so demanded by a police officer. The Court noted that the void for vagueness doctrine requires that a penal statute define an offense with sufficient clarity that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. 461 U.S. at 356, citing Village of Hoffman Estates v. Flipside, 455 U.S. 489 (1982). The more important aspect of the doctrine "is not actual notice, but the other principal element of the doctrine - the requirement that a legislature establish minimal guidelines to govern law enforcement." When those guidelines are missing, a criminal statute may permit "a standardless sweep [that] allows policeman, prosecutors and juries to pursue their personal predilection." 461 U.S. at 358, quoting from Smith v. Goguen, 415 U.S. 566, 574-75 (1974); see also City of Chicago v. Morales, 527 U.S. 41 (1999); Bradvica v. State, 104 Nev. 475, 477, 760 P.2d 139, 140 (1988).

In the case at bar, conflating the requirements of the culpable mental states so that there is no meaningful distinction between first- and second-degree murder leaves the decision on whether to prosecute a homicide as a death penalty eligible case, a first degree murder case, or a second-degree murder case, solely in the hands of the prosecution, without any meaningful standard, in fact, no standard at all. That decision is thus left solely to the prosecutor's individual judgment, bias and predilection, a discretion forbidden by the due process clause.

iii. The Kazalyn instruction results in the arbitrary and capricious infliction of the death penalty

In the death penalty context, there is an additional concern: both due process and the Eighth Amendment require a restraint on the arbitrary and capricious infliction of the death penalty. A capital sentencing scheme must provide a meaningful basis for "distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not." Godfrey v. Georgia, 446 U.S. at 427.

> This means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way obviates "standardless discretion.

446 U.S. at 429, quoting from Gregg v. Georgia, 428 U.S. 153, 196, n.47 (1976).[15] The lack of any distinction, much less a meaningful distinction, between first- and second-degree murder invites the kind of unlimited discretion condemned in Godfrey. See also Stringer v. Black, 503 U.S. 222, 228, 235-36 (1992); cf. Jones v. State,101 Nev. 573, 582, 707 P.2d 1128 (1985) (high degree of premeditation is a prerequisite to death eligibility).

Clearly, this legal challenge to Nevada's death penalty scheme did not arise until this court handed down its opinion in Nika, which created a class of Nevada cases – those litigated with the use of the Kazalyn instruction before the Byford decision, in which there

[15] "[W]e adhere to Furman's determination that where the ultimate punishment of death is at issue a system of standardless jury discretion violates the Eighth and Fourteenth Amendments."

was no rational distinction between first and second degree murder and where the Court has refused to recognize any constitutional problem in that use.

iv. The Kazalyn instruction erases the distinction between first and second-degree murder and treats similarly situated defendants differently

Further, this court's conflicting precedents (which caused it to declare that it had simply changed the law in Nika), results in no possibility that "ordinary people can understand what conduct is prohibited" as first-degree murder under the Kazalyn instruction. Kolender, 461 U.S. at 357. Even more important, however, is that the "complete erasure" of the distinction between first and second-degree murder left juries with no "adequate guidelines" for determining when a homicide is first rather than second-degree murder. The absence of such adequate standards does not merely "encourage arbitrary and discriminatory enforcement," Kolender, 461 U.S. at 357 (citations omitted), it virtually ensures it. This constitutional violation leads, in turn, to another constitutional violation. The "standardless sweep" of the definition of first-degree murder will result in disparate treatment of similarly situated defendants, whose offenses are indistinguishable but whose treatment, by conviction either of first- or of second-degree murder, will be determined by the "personal predilections" of juries. This gives rise to a violation of the equal protection guarantee that "all persons similarly situated should be treated alike," Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985), unless there is a "rational basis for the difference in treatment." Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000)) (per curiam) (citations omitted). The conflation of premeditation and deliberation with simple intent to kill also has the effect of eliminating any necessity of showing any actual evidence from which the jury could infer that the defendant actually premeditated and deliberated. See Sandstrom v. Montana, 442 U.S. 510, 521 (1979); Polk, 503 F.3d at 909-10. The "instantaneous" premeditation theory has the practical effect of eliminating the necessity for any such evidentiary showing from which premeditation and deliberation can be inferred. See State v. Thompson, 65 P.3d 420, 427 (Ariz. 2003). If a court can simply recite that premeditation can be instantaneous, and therefore essentially identical to, and arising at the same time as,

simple intent to kill, it can completely ignore the absence of any evidence that would support an inference that premeditation and deliberation actually occurred.

v. The Kazalyn instruction violates the Nevada constitution

The Kazalyn instruction also violates Article 6 § 12 of the state constitution which provides that "[j]udges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law." Nev. Const. Art. 6 § 12. The few cases applying this provision have held that it is violated when a judge expresses or implies an opinion on a factual issue, and thus deprives the defendant of the "uninfluenced and unbiased" decision of the jury guaranteed by this section.[16] In particular, judicial comments or instructions referring to the credibility of witnesses or the quality of the evidence violate the section.[17] The Kazalyn instruction has the same effect. See State v. Stenback, 2 P.2d 1050, 1056 (Utah 1931). It emphasized to the jury how short (or even non-existent) a time was necessary for the formation of premeditation and deliberation; and it did not include any counterbalancing language that would have emphasized to the jury that some factual conditions could interfere with, or extend the time necessary for, the defendant to form the necessary mental state. See 2 LaFave, Substantive Criminal Law § 14.7(a) at 479. Nor did it, as the post-Byford instruction does, caution the jury that it is not the amount of time available in the abstract that is determinative, but whether the defendant actually did premeditate and deliberate the act of killing. See Byford, 116 Nev. at 236-237. Mr. Howard possesses a constitutionally protected liberty interest in the application of this constitutional provision under Hicks v. Oklahoma, 447 U.S. 343, 347 (1980); an arbitrary denial of that right violates the Federal

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[16] State v. Harkin, 7 Nev. 377, 383-384 (1872) (judge's comment on state of evidence in ruling on objection violated section); State v. Tickel, 13 Nev. 502, 510-512 (1878) (judge's comment on accuracy of justice court's record of witness' deposition violated section); State v. Scott, 37 Nev. 412, 430-431 (1914) (judge's comments before the jury as to adequacy of evidence that statement was dying declaration violated section).

[17] State v. Warren, 18 Nev. 459, 463-465 (1884) (judge's comment, in refusing instruction, that he did not remember evidence to support it violated section, where evidence was present in record); Graves v. State, 82 Nev. 137, 141, 413 P.2d 503 (1996) (reversing under art. 6, § 12 and its "sense of justice," because the district court instructed the jury on "consequences" and "temptations" relating to defendant's own testimony).

Constitutional guarantee of Due Process of Law.

vi. Failure to apply Byford to Mr. Howard's case violates his due process rights

This Court's Nika opinion raises yet another problem that did not exist until the decision and thus, must be addressed by this court. While the Ex Post Facto clause of the Constitution applies only to legislative enactments, the Due Process Clause of the Fourteenth Amendment does prohibit the retroactive application of a judicial construction of a criminal statute which is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." Rogers v. Tennessee, 532 U.S. 451, 458 (2001); Bouie v. City of Columbia, 378 U.S. 347, 352 (1964).

This Court's complete failure to determine whether Byford should apply retroactively to defendants like Mr. Howard because it involves a substantive rule of criminal law violates his federal due process rights. Specifically, the retroactivity principles enunciated in Schriro v. Summerlin, 542 U.S. 348 (2004), establish a constitutional floor that binds state courts under the federal due process clause. While this court may choose to provide greater retroactivity than exists in federal habeas proceedings, it may not provide less: "Federal law simply 'sets certain minimum requirements that States must meet but may exceed in providing appropriate relief.'" See Danforth v. Minnesota, 552 U.S. 264, 128 S. Ct. 1029, 1045 (2008) (citation omitted). It does not matter whether this court characterizes Byford as a super-legislative change in the law or whether it characterizes Byford as a non-constitutional ruling, Nika, 198 P.3d at 848-851; Summerlin requires retroactive application when a decision of the court narrows the scope of a criminal statute; otherwise, "there would be 'a significant risk that a defendant . . . faces a punishment that the law cannot impose.'" Bejarano v. State, 146 P.3d at 274 (citation omitted); e.g., Bousley v. United States, 523 U.S. 614, 619-20 (1998) (retroactivity not an issue when the court "decides the meaning of a criminal statute"). This Court's decision in Nika opens two lines of irreconcilably inconsistent jurisprudence: in one universe, the court applies the Summerlin framework to determine whether a new rule is substantive and retroactive; in the other universe, the court

simply cites to Bunkley v. Florida, 538 U.S. 835 (2003), and ignores the Summerlin framework.[18] The failure of this court to apply the rule of Byford and its progeny in Nika as a substantive rule of law violates the federal constitutional guarantee of due process of law.

VII. CONCLUSION

Mr. Howard respectfully requests that this Court reverse the decision of the Court below and vacate his sentence of death. At a minimum, this Court should remand the case for a hearing on Mr. Howard's claims of ineffective counsel.

Dated this 12th day of May 2011.

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[18] Compare Bejarano v. State, 122 Nev. 1066, 146 P.3d 265, 272-74 (2006); Mitchell v. State, 122 Nev. 1269, 1276-77 & n.25, 149 P.3d 33, 38 n.25 (2006), with Nika v. State, 124 Nev. ___, 198 P.3d 839 (2008); Clem v. State, 119 Nev. 615, 622-25, 81 P.3d 521, 526-29 (2003).

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 12th day of May 2011.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 12th day of May 2011. Electronic Service of the foregoing Appellant's Opening Brief shall be made in accordance with the Master Service List as follows:

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