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 APPENDIX

Appeal from Order Denying Petition
for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County

VOLUME 14 OF 14

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oral argument on the issue, not as a substantive independent ground for relief, but because of the issue's potential impact on the court's harmless error analysis. Id.

Similarly, Howard confuses the Court's discretion to entertain issues on appeal with the Court's requirement to apply procedural bars. A judicial practice of generally declining to consider issues not first raised below is a policy designed to help an appellate court orderly manage its caseload. Just because a court may depart from this judicial principle in an appropriate case does not equate with ignoring procedural bars. Such issues may be considered within the framework of good cause and prejudice, a fundamental miscarriage of justice, or actual innocence consistent with application of the procedural bars.

In this case, Howard's erroneous and unfounded accusations that Nevada's procedural default rules are not consistently applied do not constitute good cause for excusing Howard's delay in filing the instant claims.

3. Brady and Giglio Claims

Evidence that was not disclosed by the prosecution at an earlier date in violation of Brady or Giglio can be good cause for failure to raise claims relating to that evidence in a timely fashion. The non-disclosure constitutes good cause, while the materiality standard under Brady usually demonstrates prejudice. Mazzan v. Warden, 116 Nev. 48, 61-65, 993 P.2d 25, 36-37 (2000)(Mazzan II). However, as with ineffective assistance of counsel claims, Brady/Giglio issues must be timely brought under NRS 34.726 and NRS 34.800. Boyd v. State, 913 So.2d 1113 (Ala.Crim. App 2003); DeBruce v. State, 890 So.2d 1068 (Ala. Crim. App. 2003). That is, the claim should be brought within a reasonable time period of its discovery, which is presumptively no later than one year after its discovery pursuant to the rationale discussed in Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001).

Here, the Petition does not set forth any specific facts that were not discoverable through due diligence due to Brady/Giglio improprieties. The Petition simply makes a general allegation. A general allegation is insufficient to overcome the procedural bars, even when timely made.

4. Good Cause Conclusion

To the extent Howard is also implying that good cause exists because his claims were in Federal Court, the Nevada Supreme Court has consistently rejected federal court proceedings as good cause for delay. Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989). (See attached Exhibit 3, Order of Affirmance, Kirksey v. State, # 49140, p. 11, FN 7. evidencing the Nevada Supreme Court still relies on Colley.).

Howard has failed to demonstrate good cause to overcome the procedural bars. In its order affirming the dismissal of the Third State Post-Conviction Petition, the Nevada Supreme Court analyzed many of the arguments made in this Petition for excusing the delay and concluded they did not constitute good cause to overcome the procedural bars. The same rationale still holds true.

4. Actual Innocence – New York Prior Felony

Generally, a defendant who has procedurally defaulted on a claim may subsequently raise the claim in a habeas petition only upon a showing of good cause, prejudice, or actual innocence. Bousley v. State, 523 U.S. 614, 1611, 118 S.Ct. 1604, 1611 (1998). Courts have consistently found "actual innocence" to be a miscarriage of justice sufficient to overcome any procedural post-conviction time bar or default without analyzing good cause and prejudice. See Sawyer v. Whitley, 505 U.S. 333, 338-39, 112 S.Ct. 2514, 2518-19 (1992). In other words, actual innocence acts as a "gateway" for innocent defendants to present constitutional challenges to a court years after the procedural defaults and bars have run. See Id. at 315, at 861.

A claim of actual innocence requires both an allegation that the defendant's constitutional rights were violated and the presentation of newly discovered evidence. The Eighth Circuit Court of Appeals has "rejected free-standing claims of actual innocence as a basis for habeas review stating, '[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.'"

Meadows v. Delo, 99 F.3d 280, 283 (8th Cir. 1996) (citing Herrera v. Collins, 506 U.S. 390, 400, 113 S. Ct. 853, 860 (1993)).

Furthermore, the newly discovered evidence suggesting the defendant's innocence must be "so strong that a court cannot have confidence in the outcome of the trial." Id. at 316, at 861. Actual innocence focuses on actual not legal innocence, and therefore, a defendant who only challenges the validity of evidence presented at trial has not sufficiently claimed actual innocence to overcome the procedural bars and defaults. See Sawyer, 112 U.S. at 339, 505 S. Ct. at 2519. The United States Supreme Court has held that, "Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of the barred claim." Schlup v. Delo, 513 U.S. 298, 316, 115 S. Ct. 851, 861 (1995).

The applicable standard applied to the actual innocence analysis depends upon whether the defendant is challenging his conviction or his death ineligibility:

> To avoid application of the procedural bar to claims attacking the *validity of the conviction*, a petitioner claiming actual innocence *must show that it is more likely than not* that no reasonable juror would have convicted him absent a constitutional violation. Where the petitioner has argued that the procedural default should be ignored because he is *actually ineligible for the death penalty*, he must show by *clear and convincing evidence* that, but for a constitutional error no reasonable juror would have found him death eligible. (Emphasis added).

Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

Once a defendant has made such a showing, he may then use the claim of actual innocence as a "gateway" to present his constitutional challenges to the court and require the court to decide them on the merits. Schlup, 513 U.S. at 315, 115 S. Ct. at 861.

Howard alleges that he is actually innocent of the death penalty because the "prior violent felony" and " *McConnell* robbery" aggravators relied upon to sentence him to death were invalid; he further alleges that the jury would not have imposed the death penalty had trial counsel presented mitigating evidence. Therefore, it appears that Howard is attacking

his eligibility for the death penalty and asserting a *Leslie* claim as to the New York robbery conviction.

To reiterate, a defendant challenging his eligibility for the death penalty "must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found petitioner eligible for the death penalty under the applicable statute." Sawyer, 505 U.S. at 336, 112 S. Ct. at 2517. As a matter of federal constitutional law, the Sawyer Court also indicated that to qualify for "actual innocence" sufficient to overcome the procedural bars, a petitioner must eliminate all aggravating circumstances.

> "Thus, a petitioner may make a colorable showing that he is actually innocent of the death penalty by presenting evidence that an alleged constitutional error implicates *all* of the aggravating factors found to be present by the sentencing body. That is, but for the alleged constitutional error, the sentencing body *could not* have found *any* aggravating factors and thus the petitioner was ineligible for the death penalty. In other words, the petitioner must show that absent the alleged constitutional error, the jury would have lacked the discretion to impose the death penalty; that is, that he is *ineligible* for the death penalty." *Johnson v. Singletary,* 938 F.2d, at 1183 (emphasis in original).

Sawyer v. Whitley, 505 U.S. 333, 347, 112 S.Ct. 2514, 2523 (1992).

In addition, any new evidence regarding mitigating factors is not considered in an "actual innocence" death eligibility determination. The United States Supreme Court has indicated that the "actual innocence" standard is a very narrow and limited method of overcoming procedural bars and should be based on objective standards, not subjective issues relating to the weight to be given to mitigating evidence.

> But we reject petitioner's submission that the showing should extend beyond these elements of the capital sentence to the existence of additional mitigating evidence. In the first place, such an extension would mean that "actual innocence" amounts to little more than what is already required to show "prejudice," a necessary showing for habeas relief for many constitutional errors. See, *e.g., United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985); *Strickland v. Washington,* 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). If federal habeas review of capital sentences is to be at all rational, petitioner must show something more in order for a court to reach the merits of his claims on a successive habeas petition than he would have had to show to obtain relief on his first habeas petition

> But, more importantly, petitioner's standard would so broaden the inquiry as to make it anything but a "narrow" exception to the principle of finality that we have previously described it to be. A federal district judge confronted with a claim of actual innocence may with relative ease determine whether a submission, for example, that a killing was not intentional, consists of credible, noncumulative, and admissible evidence negating the element of intent. But it is a far more difficult task to assess how jurors would have reacted to additional showings of mitigating factors, particularly considering the breadth of those factors that a jury under our decisions must be allowed to consider. (Internal citations omitted)

Sawyer v. Whitley, 505 U.S. 333, 345-346, 112 S.Ct. 2514, 2522 (1992).

Because the Nevada Supreme Court relied upon Sawyer in Pelligrini, the limitations on the "actual innocence" doctrine discussed in Sawyer should also apply to the instant petition and State law procedural bars.

The Nevada Supreme Court recognizes one other form of "actual innocence" involving aggravating circumstances. Where the legal interpretation of an aggravating circumstance is found to be in error, and the facts of the case are such that a court can say, as a matter of law, that the aggravating circumstance did not apply, then a defendant is "actually innocent" of that aggravating circumstance. Leslie v. Warden, Ely State Prison, 118 Nev. 773, 783, 59 P.3d 440, 447 (2002). In Leslie, the High Court concluded that a previous interpretation of the "random and no apparent motive" aggravator was incorrect based upon new evidence in the form of legislative history surrounding the enactment of that aggravator. The Court then concluded, as a matter of law, based upon the facts of the case, that the aggravator was not applicable and that Leslie was "actually innocent" of that aggravator.

The Nevada Supreme Court did not refer to Sawyer but it did cite to the Nevada case that recognized the Sawyer standard, Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). When read with Pellegrini, Leslie indicates that to be "actually innocent" of an aggravating circumstance under Leslie a defendant must demonstrate, by clear and convincing new evidence, that; 1) The Supreme Court previous interpretation of an aggravating circumstance was legally incorrect; 2) Under the correct interpretation, based

upon the evidence presented at trial, no reasonable juror would have found the existence of that aggravating factor beyond a reasonable doubt. However, the analysis does not stop there. To be "actually innocent" of an aggravator for purposes of overcoming the procedural bar applicable to that aggravator, a court must also find that there is a reasonable probability that, absent the aggravator, the jury would not have imposed a sentence of death. If the defendant can meet this standard, the procedural bar has been overcome as to that aggravator and the aggravating circumstance is stricken. Leslie, 118 Nev. at 780, 59 P.3d at 445.

The court then; 1) Reweighs the remaining valid aggravators with the mitigating factors derived from the evidence at trial; or 2) Conducts a harmless beyond a reasonable doubt review. Leslie, 118 Nev. at 783, 59 P.3d at 447. Under either standard, if it is clear the jury would still have imposed death, the sentence is upheld. If the court cannot make such a determination, then a new penalty hearing is ordered. Leslie, 118 Nev. at 783, 59 P.3d at 447.

In addition, Leslie only controls the ability to demonstrate "actual innocence" for purposes of overcoming the procedural bar as to that aggravator. It does not act as "gateway actual innocence" for overcoming procedural bars or doctrines on other claims. For example, in Leslie, the Supreme Court applied the Law of the Case Doctrine to bar reconsideration of issues that were decided on direct appeal. 118 Nev. at 784, 59 P.3d at 448. The State submits that if a defendant wishes to argue that the Leslie claim provides grounds for demonstrating "actual innocence" as it relates to death eligibility, then the petitioner must demonstrate, by Sawyer's clear and convincing standard, that, absent the stricken aggravator and but for constitutional error, no reasonable juror would have concluded the aggravating circumstances were not outweighed by the mitigating circumstances (or the aggravating circumstances outweighed the mitigating circumstances) and therefore "actual innocence" relating to death eligibility was shown..[21] As noted above,

[21] Pursuant to NRS 200.030(4)(a), a person convicted of first-degree murder may be sentenced to death if one or more aggravating circumstances are found and any mitigating circumstances found do not outweigh the aggravating circumstance(s); see also Summers v. State, 112 Nev. 1326, 148 P.3d 778, 783 (2006).

the "actual innocence" requirement focuses exclusively on those elements that render a defendant eligible for the death penalty; any additional mitigating evidence that was not presented at trial – even if it was the result of alleged constitutional errors – is irrelevant and will not be considered in an actual innocence determination. Id. at 347-48, at 2523-24.

Contrary to Howard's assertions, Howard is not "actually innocent" of the death penalty. Even assuming the felony robbery aggravator must be eliminated pursuant to McConnell, Howard has failed to present any new evidence, legislative or otherwise, suggesting his actual innocence of the remaining aggravator. Howard raises procedurally barred legal arguments challenging the sufficiency of the New York felony aggravator. Howard argues that, without a actual judgment of conviction, the New York felony is invalid and that improper notice was given of the aggravator under SCR 250. There is no evidence, let alone clear and convincing evidence, indicating the Legislature did not intend a jury verdict to act as a conviction under the statute and that a formal judgment of conviction is necessary to prove a prior crime of violence. There is no evidence indicating Howard is "actually innocent" of the New York robbery. And even assuming that SCR 250 provisions quoted were in existence at the time of Howard's trial, failure to comply does not demonstrate Howard did not commit the New York robbery. Thus this case is easily distinguished from Leslie.

As Howard cannot meet the Leslie standard for actual innocence of an aggravator, the prior violent felony aggravator remains valid. Given the aggravator, and the evidence rebutting the mitigating testimony provided by Howard, Howard also has not demonstrated by clear and convincing evidence that, absent the McConnell felony robbery aggravator, no reasonable juror would have found the aggravating circumstance was not outweighed by the mitigating evidence which existed at trial (or the aggravator outweighed the mitigating evidence). Thus "actual innocence" for death eligibility has not been proven and the procedural bars relating to penalty phase claims have not been overcome.

VI
BYFORD/POLK/NIKA ANALYSIS

Howard alleges that the First Degree Murder instruction (the "*Kazalyn*" instruction) failed to properly instruct the jury concerning the "premeditation and deliberation" elements of the capital offense. Howard claims that his due process rights were violated because the instruction failed to define willfulness, premeditation, and deliberation as separate elements for first-degree murder. As noted earlier, this claim is procedurally barred. Howard's previous challenges to this instruction in the Third State Petition were rejected by the Nevada Supreme Court and found to be procedurally barred.

Howard asserts, based upon the Ninth's Circuit decision in Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), that the Nevada's Supreme Court's decision to replace the *Kazalyn* instruction in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000) is now retroactive and he therefore as good cause for raising the claim again. However, Howard's reliance on Polk is misplaced. Even assuming Polk were controlling, the basis for the Ninth Circuit's ruling, as stated in Polk, was that Byford clarified existing Nevada law and therefore Polk could raise his claim that the *Kazalyn* instruction relieved the State of the burden of proof as to the defendant's state of mind. See Sandstrom v. Montana, 442 U.S. 510, 521 99 S.Ct. 2450 (1979); Francis v. Franklin, 471, U.S. 307, 326, 105 S.Ct. 1965 (1985), In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068 (1970)(Cases relied upon in Polk to justify the Ninth Circuit's jurisdiction in the matter). As such, the underlying argument and authority relied upon in Polk has always been available to the defense and, therefore, does not the provide Howard with any new claim. As such, Howard should have raised his *Kazalyn* claim, at the maximum, within one year of the Byford decision, not seven years later. Thus it is still barred under NRS 34.726.

However, the Nevada Supreme Court has recently rejected the Polk rationale and stated that Byford represented a change in Nevada law, and is not retroactive. It does apply to those cases that were not final at the time Byford was decided. Nika v. State, 198 P.3d 839 (2008). As the Nika Court explained, Byford does not apply retroactively because the Court did not hold that the *Kazalyn* instruction was constitutional error, but rather announced

a change in Nevada law. Nika, 198 P.3d at 849-50. Howard's conviction was final on February 12, 1988, upon issuance of remittitur following his direct appeal. Thus Byford does not apply and his challenges to the *Kazalyn* instruction remain procedurally barred.

Even if Byford and the new definition of murder were to apply to Howard's case, any error in the *Kazalyn* instruction would be harmless beyond a reasonable doubt. A defendant would not be entitled to relief for a constitutional error unless that defendant can show that "the error had a substantial and injurious effect or influence in determining the jury's verdict." Polk, citing Brecht v. Abrahamson, 507 US 619, 637, 113 S.Ct. 1710 (1993) (internal quotation marks and citation omitted); see also Fry v. Pliler, 127 S.Ct. 2321 (2007); California v. Roy, 519 US 2, 117 S.Ct. 337 (1996).

Here, even if this Court were to find that Howard was entitled to the revised premeditation and deliberation jury instruction, Howard's conviction should nevertheless be affirmed either because the evidence in this case supports beyond a reasonable doubt deliberation and premeditation on Howard's part and felony murder. In Byford, the Nevada Supreme Court set forth the following definition for deliberation:

> Deliberation is the process of determining upon a course of action to kill as a result of thought, including weighing the reasons for and against the action and considering the consequences of the action.
>
> A deliberate determination may be arrived at in a short period of time. But in all cases the determination must not be formed in passion, or if formed in passion, it must be carried out after there has been time for the passion to subside and deliberation to occur. A mere unconsidered and rash impulse is not deliberate, even though it includes the intent to kill.

116 Nev. at 236, 994 P.2d at 714.

Howard lured Dr. Monahan into a meeting under the auspices of buying the Monahan van. He used the items he stole from Security Officer Kinsey to pose as a security official from Caesar's Palace. He robbed Dr. Monahan and then killed him with one bullet to the head, execution style. This facts clearly establish this was a deliberate, premeditated act committed during a robbery. Thus any error was harmless beyond a reasonable doubt.

VII
MCCONNELL ANALYSIS

The Nevada Supreme Court has indicated that where an aggravating circumstance is stricken, the death sentence may be upheld if the court can conclude, beyond a reasonable doubt, that the jury would still have found the remaining aggravators were not outweighed the mitigating circumstances or that the inclusion of the improper aggravator amount to harmless error. In reviewing the evidence, the court looks at the evidence at the time of trial. Leslie v. Warden, 118 Nev. at 783, 59 P.3d at 440. . See Rippo v. State, 122 Nev. 1086,___,146 P.3d 279, 284 (2006)(Nevada Supreme Court considered only the remaining aggravators and trial mitigation evidence in re-weighing after striking McConnell aggravators).

Howard claims that State v. Haberstroh, 119 Nev. 173, 69 P.3d 675 (2003) stands for the proposition that new mitigation evidence must be considered in a Leslie re-weighing analysis. However, the Nevada Supreme Court specifically rejected this concept in Footnote 23, stating that re-weighing does not involve factual finding because only the trial evidence is considered. 119 Nev. at 184, 69 P.3d at 683.

In the instant case the jury heard aggravator evidence that Howard committed armed robbery in New York approximately one year prior to robbing and murdering Dr. Monahan. He attacked a woman he knew, Dorothy Weisband, taking her money and car.

The mitigating evidence consisted of Howard's testimony. Howard indicated he served honorably in Vietnam, was wounded and received a Purple Heart and that he had a history of mental illness possibly attributable to his experiences in Vietnam. He testified that he had been incarcerated in the mental health facilities or wards of California's prison system with people like Charles Manson. Howard also said he told Detective Leavitt he doesn't know what he hurts people and that he needed help. The jury also heard evidence that, at a young age, Howard witnessed his father murder his mother and sister. The record reflects Howard broke down or became emotional when asked questions about the incident, necessitating a recess. Yet Howard never expressed remorse at Dr. Monahan's death or Howard's treatment of Nurse Weisband.

Other evidence presented at trial and in the penalty hearing rebutted Howard's portrayal as a troubled Vietnam veteran with mental health issues. Howard himself indicated he knew what he was doing. His actions in robbing the Sears store, contacting Dr. Monahan and arranging the false test drive also belie this picture. So too does his robbery of Mr. Schwartz in New York. None of his actions in those instances support he was acting out of mental illness as opposed to greed.

The Petition discusses the emphasis the State made in closing arguments on the felony robbery aggravator. But equal emphasis was placed on the prior violent felony aggravator and Howard's actions as they rebutted the alleged mitigation evidence. Moreover, the jury could consider the facts of the Monahan robbery as they related to rebutting Howard's mitigating evidence even if the Monahan robbery could not be used to support the "in commission of a robbery" aggravator.

In his Opposition, Howard also indicates that for purposes of the McConnell issue, he may raise the validity of the New York robbery conviction and an allegedly improper argument and instruction about executive clemency under Sechrest v. Ignacio, 549 F.3d 789 (9th Cir. 2007). McConnell re-weighing does not act as actual innocence or good cause for raising other procedurally barred claims. Although the Nevada Supreme Court considered the affect an allegedly improper jury instruction might have in its re-weighing analysis in Rippo, the Court did not address the procedurally barred claim involving the instruction. It simply noted that this was the instruction that was actually used, so the reweighing had to take it into consideration. Thus Howard may not use the McConnell analysis as an end run around the procedural bars.

Based upon the evidence, the State submits that any error related to the felony robbery aggravator was harmless beyond a reasonable doubt. The jury would still have found the aggravating circumstance was not outweighed by the mitigating evidence. Given Howard's violent actions before, during and after the Monahan murder, his lack of remorse and his obvious credibility problems (he denied ever meeting Monahan, yet his fingerprints were on the van, etc.) the jury would still have rendered a verdict of death.

CONCLUSION

Based on the foregoing, the State's Motion to Dismiss should be granted as the claims are procedurally barred. In the alternative, as to the McConnell claim, the Court should deny the petition, finding that any error was harmless beyond a reasonable doubt.

DATED this 7th day of October, 2009.

Respectfully submitted,

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Clark County District Attorney
Nevada Bar #002781

BY _____
NANCY A. BECKER
Deputy District Attorney
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CERTIFICATE OF MAILING

I hereby certify that service of STATE'S NOTICE OF MOTION AND MOTION TO DISMISS DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION), was made this 7th day of October, 2009, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

MICHAEL B. CHARLTON
Assistant Federal Public Defender
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Eileen Davis

Employee for the District Attorney's Office

NAB/ed

EXHIBIT 1

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HHoward v. McDaniel
D.Nev.,2008.
Only the Westlaw citation is currently available.
United States District Court,D. Nevada.
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E.K. McDANIEL, et al., Respondents.
No. 2:93-CV-01209-LRH-LRL.

Jan. 9, 2008.

ORDER

LARRY R. HICKS, District Judge.
*1 In this capital habeas case, petitioner Howard has filed a motion for reconsideration (docket # 244) of this court's order of July 26, 2006 (docket # 211) granting respondents' motion to dismiss (docket # 206) portions of his third amended petition for writ of habeas corpus (docket # 189). The court granted the motion to dismiss because it had concluded that several of Howard's habeas claims are barred from review under the doctrine of procedural default. Prior to granting the motion, the court allowed Howard's previous counsel, Patricia Erickson, two extensions of time within which to oppose the motion.Docket208/210. When counsel failed to file an opposition, despite having nearly seven months within which to do so, the court granted the motion and ordered the respondents to answer Howard's remaining claims.

In February of 2007, this court relieved Erickson as Howard's counsel and appointed the Federal Public Defender to represent Howard in this case.Docket222/223. In seeking reconsideration of the court's decision to bar several of his claims as procedurally defaulted, Howard contends that his prior counsel's failure to file an opposition to the motion to dismiss was either due to excusable neglect or the product of a conflict of interest that the court should have resolved prior to ruling on the respondents' motion to dismiss. Howard further argues that, upon due consideration, this court must reverse its decision that Nevada's one-year time limit on post-conviction petitions (Nev.Rev.Stat. § 34.726) is an "adequate" procedural rule for the purpose of barring federal court review. Alternatively, Howard contends that his procedural defaults are excused, under Nevada law, because he is "innocent of the death penalty."

A district court may rescind, reconsider, or amend a previous order pursuant to its inherent power to modify interlocutory orders before entry of final judgment. *City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 886-87 (9th Cir.2001). Because of the unique circumstances presented by this case, this court agrees that Howard's application for habeas relief should not be undermined by his former counsel's failure to oppose the respondents' motion to dismiss his petition. Thus, the court has reviewed its dismissal of Howard's habeas claims on procedural default grounds, this time taking into consideration the substantive arguments contained in Howard's motion for reconsideration, the respondents' response thereto (docket # 253), and Howard's subsequent reply (docket # 258).

It is well-established that a federal court will not review a claim for habeas corpus relief if the decision of the state court denying the claim rested on a state law ground that is independent of the federal question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991). In claiming that this court erred in its procedural default analysis, Howard argues that, even though the Nevada Supreme Court dismissed his habeas claims on state law grounds, the procedural bars applied to the claims are not "adequate" to preclude federal court review of the merits of those claims.[FN1] While Howard challenges the adequacy of other procedural bars and the Nevada's Supreme Court application of procedural bars in general, the only procedural bar at issue here is the timeliness rule set forth at Nev.Rev.Stat. § 34.726. See docket # 211, p. 6.

FN1. The procedural history of Howard's case and a discussion of the procedural bars applied by the Nevada Supreme Court are set forth in the court's order of July 26, 2006. Docket # 211; pp. 1-3, 5.

***2** A state procedural rule is "adequate" if it is "clear, consistently applied, and well-established at the time of the petitioner's purported default."*Calderon v. United States Dist. Court,* 96 F.3d 1126, 1129 (9th Cir.1996) (citation and internal quotation marks omitted). In granting respondents' motion to dismiss on procedural default grounds, this court adhered to the burden-shifting analysis mandated by *Bennett v. Mueller,* 322 F.3d 573, 585-86 (9th Cir.2003), to determine the adequacy of Nevada's timeliness bar under Nev.Rev.Stat. § 34.726. Under *Bennett,* the State carries the initial burden of adequately pleading "the existence of an independent and adequate state procedural ground as an affirmative defense."*Id.* at 586.The burden then shifts to the petitioner "to place that defense in issue," which the petitioner may do "by asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule."*Id.* Assuming the petitioner has met his burden, "the ultimate burden" of proving the adequacy of the state bar rests with the State, which must demonstrate "that the state procedural rule has been regularly and consistently applied in habeas actions."*Id.*

Because Howard failed to file an opposition to respondents' motion to dismiss, this court's *Bennett* analysis began and ended with the determination that the State had carried its initial burden of pleading "the existence of an independent and adequate state procedural ground as an affirmative defense" by asserting the timeliness bar under Nev.Rev.Stat. § 34.726 and citing to *Moran v. McDaniel,* 80 F.3d 1261 (9th Cir.1996). Docket # 211, p. 6. Howard now argues that Nevada's procedural default rules, including Nev.Rev.Stat. § 34.726, are inadequate because the Nevada Supreme Court has always exercised unfettered discretion in applying them.

As for the Ninth Circuit's determination in *Moran* that the Nevada Supreme Court has consistently applied statutory timeliness bars, including Nev.Rev.Stat. § 34.726, Howard argues that the holding does not control the result here because *Moran* predates both the burden-shifting regime set forth in *Bennett* and the Ninth Circuit's approval of the use of unpublished decisions to show inconsistent application of a state procedural rule (*see Powell v. Lambert,* 357 F.3d 871, 879 (9th Cir.2004)). Unquestionably, the manner in which the adequacy issue is litigated has undergone substantial changes since the Ninth Circuit decided *Moran.*Moreover, the burden-shifting mandated in *Bennett* suggests that adequacy is an issue that can or must be decided on a case-by-case basis.

Even so, a post-*Bennett* Ninth Circuit case instructs that the court's past determinations as to the adequacy of a procedural rule for a given time period are to be accorded deference in applying the *Bennett* analysis. In *King v. Lamarque,* the court held as follows:

***3** In *Ortiz v. Stewart,* 149 F.3d 923 (9th Cir.1998), we held that a petitioner had not met his burden because we had already held the state procedural rule to be consistently applied and the petitioner failed to cite cases demonstrating *subsequent* inconsistent application. *Id.* at 932.*This holding helps prevent inconsistent determinations regarding a state procedural rule's adequacy during a given time period.*This same reasoning provides a firm foundation for applying the *Ortiz* requirement bilaterally. Once we have found a state procedural rule to be inadequate, petitioners may fulfill their burden under *Bennett* by simply challenging the adequacy of the procedure; the burden then shifts back to the government to demonstrate that the law has *subsequently* become adequate....

This holding is necessary to maintain the primary principle we announced in *Bennett:* the government bears the ultimate burden of establishing the adequacy of a rule. This burden should exist whether or not the petitioner identifies the correct basis upon which to challenge the adequacy of the rule. If we held otherwise, the government could avoid its burden under *Bennett,* and illogical results would occur. Here, for example, we would bar King's claim based on a procedural rule already found to be inadequate. *In essence, we would be holding that the same rule is adequate in some cases and inadequate in others. This defies common sense. A procedural rule is either adequate or inadequate during a given time period; its adequacy does not depend upon the facts of a petitioner's case.*

464 F.3d 963, 967-68 (9th Cir.2006) (emphasis added). Thus, based on *King,* this court is bound by the Ninth Circuit's determination that, as of March 1996 (the relevant date in *Moran*), the Nevada Supreme Court had consistently applied statutory timeliness bars to post-conviction petitions.

Whether the Nevada Supreme Court continued to consistently apply Nev.Rev.Stat. § 34.726 to post-conviction petitions after March 1996 remains open to contention under *Bennett*.Indeed, the court in both *Ortiz* and *King* made clear that either the petitioner or the government, as the case may be, can challenge a previous Ninth Circuit adequacy determination by showing how the state applied the rule in subsequent cases.[FN2]

FN2. In *King*, the court stated:
Here, because we held in *Morales* that the California timeliness rule was insufficiently clear, the government must show on remand that the rule has since been clarified for noncapital cases and that the clarified rule has since been consistently applied.
King, 464 F.3d at 967. Similarly, in *Ortiz*, the court stated:
Ortiz has not pointed to any Arizona decisions after our *Poland* opinion that demonstrate that Arizona has become inconsistent and irregular in its reliance on procedural default.
Ortiz, 149 F.3d at 932.

According to Howard, an example of the Nevada Supreme Court's inconsistent application of Nev.Rev.Stat. § 34.726 can be found in *Rippo v. State*, 146 P.3d 279, 285 (Nev.2006), where the court addressed whether a certain penalty phase jury instruction regarding the consideration of mitigating circumstances was improper. Howard notes that the Nevada Supreme Court raised the issue *sua sponte* long after the time limit imposed by Nev.Rev.Stat. § 34.726 had passed. In addition to the *Rippo* case, Howard cites several instances, in both published and unpublished opinions, where the Nevada Supreme Court did not use Nev.Rev.Stat. § 34.726 to bar claims even though application of the rule appeared to be warranted. Docket # 244, p. 16-17. By using specific factual allegations and evidence to assert the inadequacy of Nev.Rev.Stat. § 34.726, Howard has carried his modest burden under *Bennett* with respect to the time period between March 1996 and the date he filed his time-barred state petition (December 20, 2002).*See Bennett*, 322 F.3d at 586;*Powell*, 357 F.3d at 876.

***4** Thus, the "ultimate burden" of proving the adequacy of Nev.Rev.Stat. § 34.726 falls upon the respondents. *Bennett*, 322 F.3d at 585. This court must consider unpublished as well as published decisions of the Nevada Supreme Court to determine whether that court had, "in actual practice, a clear, consistently applied, and well-established rule at the time of [Howard's] purported default."*Powell*, 357 F.3d at 872, 879 (internal quotation marks omitted). This examination "should be limited to the language of the state court opinions" rather than "based on a *post hoc* examination of the pleadings and record" in the cases reviewed. *Bennett*, 322 F.3d at 584. A rule need not be applied in every case to be considered consistently applied; however, it must be applied in the "vast majority of cases." *Dugger v. Adams*, 489 U.S. 401, 410-411 n. 6 (1989).

In *Bennett*, the Ninth Circuit indicated that the scope of the state's "ultimate burden" would depend on the nature and depth of the petitioner's allegations of inadequacy. *Bennett*, 322 F.3d at 584-85, (quoting *Hooks v. Ward*, 184 F.3d 1206, 1217 (10th Cir .1999)). Here, the respondents have provided their explanations as to why the published and unpublished opinions relied upon by Howard do not establish that the Nevada Supreme Court has been inconsistent in applying Nev.Rev.Stat. § 34.726. With respect to published Nevada cases predating the issuance of *Moran*, respondents correctly point out that these cases were available for consideration by the Ninth Circuit when it determined that the Nevada Supreme Court had consistently applied its procedural rules to bar untimely claims. Because this court is bound by *Moran* for the time period addressed by that case, the inquiry here must be directed towards Nevada Supreme Court opinions issued after March 1996.

Respondents dispute that *Rippo* is evidence of inconsistent application by pointing out that the published opinion contains neither a reference to Nev.Rev.Stat. § 34.726, nor any indication that Rippo's petition was untimely filed. Respondents also point out that the Nevada Supreme Court expressly found "good cause" to entertain Rippo's belated *McConnell* claim.[FN3] The state petition for writ of habeas corpus that gave rise to the appeal in *Rippo* was, in fact, filed in a timely manner. 146 P.3d at 282. The state district court had already denied Rippo's petition when the Nevada Supreme Court issued its decision in *McConnell*, but the Nevada Supreme Court found good cause for Rippo raising the claim on appeal, as opposed to returning to the lower court, because the legal basis for the claim "was not available at the time he pursued his habeas

petition in the district court" and because the claim "present[ed] questions of law that [did] not require factual determinations outside the record."*Id.* at 283 (internal citations omitted).

> FN3. In *McConnell v. State,* the Nevada Supreme Court held that "it [is] impermissible under the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated."102 P.3d 606, 624 (Nev.2004).

Howard's suggestion that the Nevada Supreme Court circumvented Nev.Rev.Stat. § 34.726 in raising the jury instruction issue *sua sponte* after the one-year time limit is misleading because the issue was ancillary to the court's adjudication of Rippo's *McConnell* claim. The court's subsequent opinion shows that the court sought oral argument on the issue, not as a freestanding ground for relief, but because of the issue's potential impact on the court's harmless error analysis. *See id.* at 285, 287-88.Thus, the Nevada Supreme Court in *Rippo* did not arbitrarily overlook statutory default rules, as Howard claims. Instead, the court merely solicited oral argument on an aspect of a broader habeas claim (i.e., Rippo's *McConnell* claim) that had been raised in a manner consistent with Nevada law.

***5** Accordingly, there is no merit to Howard's claim that, in light of *Rippo,* the application of procedural rules to bar consideration of the merits of his habeas claims would constitute a violation of the equal protection and due process clauses of the Fourteenth Amendment. In presenting habeas claims in a state petition filed more than 15 years after his conviction became final, Howard was not "similarly-situated" to Rippo in the proceeding described above; and, the Nevada Supreme Court's rejection of those claims as untimely did not constitute "arbitrarily disparate treatment." See docket # 244, p. 13 (citing *Bush v. Gore,* 531 U .S. 98, 106-09 (2000); *Village of Willowbrook v. Olech,* 528 U.S. 562, 564-65 (2000); and *Myers v. Ylst,* 897 F.2d 417, 421 (9th Cir.1990)).

Of the several other published Nevada Supreme Court opinions that Howard cites to support his claim that the Nevada Supreme Court is inconsistent in applying Nev.Rev.Stat. § 34.726, only *Bejarano v. Warden,* 929 P.2d 922 (Nev.1996) and *Hill v. State,* 953 P.2d 1077 (Nev.1998) were issued after the Ninth Circuit decided *Moran.*Respondents correctly note that the Nevada Supreme Court in *Bejarano* expressly addressed whether Bejarano's default should be excused based on cause and prejudice. Moreover, the court concluded that Bejarano had, in fact, failed to meet his burden under the cause and prejudice exception. *Bejarano,* 929 P.2d at 926. While the court briefly addressed, in a footnote, Bejarano's claim that his direct appeal counsel was ineffective, the court clearly upheld the lower court's rejection of Bejarano's state petition on procedural grounds. *Id.* As such, *Bejarano* does not show that the Nevada Supreme Court disregards procedural bars. *See Loveland v. Hatcher,* 231 F.3d 640, 643-44 (9th Cir.2000); *Moran,* 80 F.3d at 1269.

Respondents do not specifically address whether *Hill* stands as an example of the inconsistent application of Nev.Rev.Stat. § 34.726. In that case, the Nevada Supreme Court addressed a claim on the merits that was not raised in the lower court. *Hill,* 953 P.2d at 1084. Making no reference to the timeliness of the claim, the state supreme court reasoned that "because this issue raises a claim of constitutional dimension which, if true, might invalidate Hill's death sentence and 'the record is sufficiently developed to provide an adequate basis for review,' we will address it."*Id.* (citation omitted). This court notes that, although Hill apparently raised the claim on appeal more than one year after his conviction became final, his petition in lower court was timely filed. *Id.* at at 1081.Under the circumstances, the Nevada Supreme Court's failure to apply Nev.Rev.Stat. § 34.726 to the lone claim does little to undermine the adequacy the rule.

As for the unpublished opinions cited by Howard,[FN4] respondents point out that, with respect to most of them, the Nevada Supreme Court did, in fact, impose a procedural bar to deny the petitioner's post-conviction claims. Docket # 253, p. 5-7. In five of the opinions-*Farmer v. State,* Case No. 29120, 11/20/97 (Exhibit 106); *Nevius v. Warden,* Case Nos. 29027, 29028, 10/9/96 (Exhibit 118); *Riley v. State,* Case No. 33750, 11/19/99 (Exhibit 123); *Sechrest v. State,* Case No. 29170, 11/20/97 (Exhibit 126); and *Williams v. Warden,* Case No. 29084, 8/29/97 (Exhibit 131), the court did not invoke Nev.Rev.Stat. § 34.726, but relied on other procedural bars such as Nev.Rev.Stat. § 34.810(1) (calling for dismissal of claims that could have been raised in an earlier

proceeding), Nev.Rev.Stat. § 34.810(2) (requiring the dismissal of successive petitions), or the doctrine of law of the case. While the state supreme court considered the merits of some of the barred claims, such review was expressly for the purpose of determining whether the default might be excused due to "cause and prejudice" or a "fundamental miscarriage of justice." *See, e.g., Nevius,* Exhibit 118, p. 3-4 (cause and prejudice); *Williams,* Exhibit 131, p. 3-4 (miscarriage of justice).

> FN4. With his motion for reconsideration, Howard has submitted 32 unpublished Nevada Supreme Court opinions, which he cites to support various arguments set forth in the motion. Docket # 244-46, Exhibits 103-119, 121-135. He cites to nine of those opinions (i.e., Exhibits 106, 112, 114, 118, 119, 121, 123, 126, and 131) to support his specific claim that the Nevada Supreme Court fails to consistently apply statutory time bars to capital habeas petitioners. Docket # 244, p. 16-17. Howard cites additional opinions in his reply to respondents' opposition to motion for reconsideration; however, all of the newly-cited opinions predate *Moran.* Docket # 258, p. 13-14.

***6** While the Nevada Supreme Court may have been able to apply Nev.Rev.Stat. § 34.726 in the five cases above, respondents argue that the state supreme court's failure to impose all applicable procedure bars does not undermine the adequacy of the ones not imposed. Respondents cite to the Nevada Supreme Court's treatment of the issue in *State v. Dist. Ct. (Riker),* 112 P.3d 1070 (Nev.2005). In *Riker,* the court reasoned:

... A court need not discuss or decide every potential basis for its decision as long as one ground sufficient for the decision exists. This proposition is fundamental to legal analysis and judicial economy, as well as simple logic. Thus, our conclusion in a case that one procedural bar precludes relief carries no implication regarding the potential applicability of other procedural bars.

112 P.3d at 1079 (internal citations omitted). Although not controlling here, the state court's reasoning is sound; and, Howard has provided no contravening federal authority on the issue. Accordingly, this court concludes that the Nevada Supreme Court's opinions in the five above-noted cases do not undermine the State's ability to demonstrate that Nev.Rev.Stat. § 34.726 is an adequate procedural bar in this case.

As for the remaining four unpublished opinions Howard cites to show inconsistent application of the one-year time limit, respondents note that the Nevada Supreme Court applied Nev.Rev.Stat. § 34.726 in three of them-*Jones v. McDaniel, et al.,* Case No. 39091, 12/19/02 (Exhibit 112); *Milligan v. Warden,* Case No. 37845, 7/24/02 (Exhibit 114), and *O'Neill v. State,* Case No. 39143, 12/18/02 (Exhibit 121)). In both *Jones* and *Milligan,* the Nevada Supreme Court relied upon Nev.Rev.Stat. § 34.726 to affirm the lower court's dismissal of the petition on procedural grounds. Here again, the court's discussion of the merits of petitioner's claims in both cases was limited to addressing whether the default might be excused due to "cause and prejudice" or a "fundamental miscarriage of justice." *Jones,* Exhibit 112, p. 10-15; *Milligan,* Exhibit 114, p. 6-16. In *O'Neill,* the Nevada Supreme Court noted that O'Neill's petition was untimely under Nev Rev. Stat. § 34.726, but concluded that he could demonstrate sufficient cause and prejudice to excuse the default. Exhibit 121, p. 5. Thus, rather than show inconsistent application of Nev Rev. Stat. § 34.726, *Jones, Milligan,* and *O'Neill,* demonstrate just the opposite.

In only one unpublished opinion of the nine did the Nevada Supreme Court arbitrarily disregard a procedural rule to reach the merits of the petitioner's claim. In an order denying rehearing of the *Nevius* decision cited above, the court ruled on a cruel and unusual punishment claim that was raised for the first time in petitioner's request for rehearing. *Nevius v. Warden,* Case Nos. 29027, 29028, 7/17/98 (Exhibit 119). The court noted that the Nevada Rules of Appellate Procedure barred such a claim, but, "in the interest of judicial economy," addressed the merits of the claim rather than remand it to the lower court. *Id.,* p. 2-3.This minor deviation in the application of procedural rules does not impact the adequacy of Nev Rev. Stat. § 34.726 for the purposes of this case. *Dugger, supra.*

***7** In addition to arguing that the opinions relied upon by Howard do not establish inconsistent application of Nev.Rev.Stat. § 34.726, respondents

point to Ninth Circuit jurisprudence regarding the rule and list 261 Nevada Supreme Court opinions (almost all unpublished) in which they claim the court imposed the rule. With respect to the former, respondents cite *Collier v. Bayer*, 408 F.3d 1279, 1285 (9th Cir.2005); *High v. Ignacio*, 408 F.3d 585, 590 (9th Cir.2005); *Valerio v. Crawford*, 306 F.3d 742, 778 (9th Cir.2002); *Loveland, supra;* and *Moran, supra.*None of these cases squarely addresses the adequacy of Nev.Rev.Stat. § 34.726 for any period after March 1996. Even so, all five cases (as cited above) mention or affirm the Nevada Supreme Court's consistent application of the state's timeliness bars.

The 261 Nevada Supreme Court opinions listed by respondents show the frequency and regularity with which the Nevada Supreme Court applies Nev.Rev.Stat. § 34.726. Even though the opinions all postdate the Ninth Circuit's holding in *Powell* (issued February 2004),[FN5] there is nothing to suggest that Nevada Supreme Court was less consistent in applying the bar prior to 2004.

> FN5. According to respondents, the Nevada Attorney General's office began collecting unpublished cases citing Nev.Rev.Stat. § 34.726 as a result of the holding in *Powell* that unpublished cases are relevant to determining the adequacy of a procedural bar.

Howard discounts respondents reliance on non-capital cases to reinforce the adequacy of Nev.Rev.Stat. § 34.726. He cites to *Valerio*, 306 F.3d at 778, and *Petrocelli v. Angelone*, 248 F.3d 877, 887-88 (9th Cir.2001) to argue that noncapital cases are not relevant in assessing the adequacy of Nevada's procedural bars in capital cases. In both cases, the Ninth Circuit noted a difference in the way the Nevada courts applied a procedural bar in capital cases, as opposed to non-capital cases, but the bar at issue was procedural default through failure to raise a claim in a prior proceeding. *See Valerio*, 306 F.3d at 778;*Petrocelli*, 248 F.3d at 888. In the absence of any authority to the contrary, this court concludes that the Nevada courts do not distinguish between capital and noncapital cases in applying Nev.Rev.Stat. § 34.726. *Cf. Bennett v. Mueller*, 322 F.3d 573, 583-84 (9th Cir.2003) (recognizing that "California's rules governing timeliness in capital cases differ from those governing noncapital cases").

Based on the foregoing, this court concludes that the Nevada Supreme Court has continued, since *Moran,* to consistently apply Nev.Rev.Stat. § 34.726 to untimely petitions. Howard's default under the statute occurred sometime between January 1, 1994,[FN6] and December 20, 2002, the date he filed the state petition found untimely by the Nevada Supreme Court. Thus, the court affirms its previous decision that several of Howard's habeas claims are barred from review under the doctrine of procedural default

> FN6. Petitioners whose convictions became final prior to January 1, 1993, and who had timely filed a first petition under [Chapter 177], were allowed one year from the date Nev.Rev.Stat. § 34.726 became effective (January 1, 1993) to file any successive petitions. *Pellegrini v. State*, 34 P.3d 519, 529 (Nev.2001).

Lastly, Howard contends that his procedural defaults are excused, under Nevada law, because he is "innocent of the death penalty." In support of this argument, Howard explains, at length, why the aggravating factors applied in his case are invalid. According to Howard, his ineligibility for the death penalty requires the Nevada courts to review his habeas claims on the merits notwithstanding any procedural bars; and, as a result, he is filing yet another petition for writ of habeas corpus in the Nevada courts.

***8** Howard is not arguing that his procedural default should be excused by this court under the federal standard for actual innocence of the death penalty. *See Sawyer v. Whitley*, 505 U.S. 333, 336 (1992). Instead, he is asserting that he can make the necessary showing under the state law equivalent, which in turn, means that the state courts will address the merits of his habeas claims. Therefore, according to Howard's argument, this court should allow the Nevada courts to adjudicate his newly-filed state petition instead of dismissing the procedurally defaulted claims in his pending federal petition.

Having considered Howard's argument, this court is simply not willing to issue what, in essence, amounts to a stay in these proceedings based on the assumption that the Nevada courts will consider the

merits of Howard's habeas claims. For one, Howard's assertion that the Nevada courts will excuse his procedural defaults based on his "actual innocence" claim is speculative, at best. Second, even if the state courts find merit in his actual innocence claim, Howard is incorrect in stating that the state court would then consider the merits of *all* of his claims. Rather, the state court's review would presumably be confined to the particular claims based on invalid aggravating factors. *See, e.g.,* Leslie v. Warden, 59 P.3d 440, 445 (Nev.2002). As respondents point out, most of the claims this court determined to be procedurally defaulted allege constitutional error in the guilt phase of Howard's trial or are otherwise unrelated to his death penalty eligibility. As such, the adjudication of this case shall proceed notwithstanding Howard's pending petition in state court.

IT IS THEREFORE ORDERED that petitioner's motion for reconsideration (docket # 244) is GRANTED, but only to the extent that the court has conducted a *de novo* review of its July 26, 2007, decision to grant respondents' motion to dismiss (docket # 206). The motion for reconsideration is otherwise DENIED. Claims 1, 3 through 9, 11, 12, 13, 15, 16, 17(3, 5-13, 17, and 19-22), and 18 through 23 of the third amended petition for writ of habeas corpus (docket # 189) are DISMISSED as procedurally barred from review by this court.

IT IS FURTHER ORDERED that respondents shall have **sixty (60) days** from the date this order is filed in which to file and serve an **answer** to Claims 2, 10, 14, and 17(1, 2, 4, 14-16, and 18) of the third amended petition.

IT IS FURTHER ORDERED that, in all other respects, the schedule set forth in the scheduling order entered on March 25, 2005 (docket # 191), shall remain in effect.

D.Nev.,2008.
Howard v. McDaniel
Slip Copy, 2008 WL 115380 (D.Nev.)

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EXHIBIT 2

EXHIBIT 2

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105781

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID ROBERT RIKER,
Appellant,
vs.
DIRECTOR, NEVADA DEPARTMENT OF CORRECTIONS, HOWARD SKOLNIK,
Respondent.

No. 50216

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus in a death penalty case. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Appellant David Robert Riker was convicted, pursuant to a guilty plea, of first-degree murder with the use of a deadly weapon and robbery with the use of a deadly weapon and was sentenced to death by a three-judge panel. This court affirmed Riker's judgment of conviction and death sentence. Riker v. State, 111 Nev. 1316, 905 P.2d 706 (1995). Remittitur issued on January 30, 1996. Riker filed his first post-conviction petition for a writ of habeas corpus, with the assistance of appointed counsel, in November 1996, which the district court denied in 1998. This court dismissed his subsequent appeal in December 1998. Riker v. Warden, Docket No. 31791 (Order Dismissing Appeal, December 8, 1998). Riker then filed a second post-conviction petition in March 2003, more than eight years after this court decided Riker's direct appeal and five years after this court dismissed his appeal from the denial of his first post-conviction petition. The State filed a motion to dismiss the petition

09-04115

as procedurally barred pursuant to NRS 34.726, NRS 34.800, and NRS 34.810. After original writ proceedings in this court to require the district court to consider applicable procedural bars, State v. Dist. Ct. (Riker), 121 Nev. 225, 112 P.3d 1070 (2005), the district court granted Riker relief from the death sentence on the ground that the sole aggravator—that the murder was perpetrated during the commission of a robbery—was invalid under McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004), but denied the remainder of Riker's claims without conducting an evidentiary hearing based on procedural bars. Riker appeals from the district court's order.

Riker argues that the district court erred by denying his post-conviction petition as procedurally barred without conducting an evidentiary hearing. Riker further contends that the application of any procedural bars is unconstitutional because this court has arbitrarily and inconsistently applied them, resulting in disparate treatment of similarly situated capital habeas petitioners.

Application of procedural bars

Riker contends that the district court improperly applied the procedural default rules provided in NRS 34.726, NRS 34.800(2), and NRS 34.810. For the reasons below, we conclude that Riker failed to show that the district court erred by denying his post-conviction petition as procedurally barred.

NRS 34.726

Riker argues that the district court erred by denying his petition pursuant to NRS 34.726 because any delay in filing his petition was not his fault. In particular, he argues that the district court relied on the wrong standard for a showing of good cause under the statute and erred in failing to conduct an evidentiary hearing on Riker's assertion that the delay was not his fault. Riker further argues that his claims of

ineffective assistance of post-conviction counsel constitute good cause to excuse the delay. We disagree.

This court has consistently and repeatedly stated that to satisfy the good cause requirement under NRS 34.726(1)(a), a defendant must establish that an impediment external to the defense precluded the timely filing of a post-conviction petition for a writ of habeas corpus. See, e.g., Sullivan v. State, 120 Nev. 537, 542, 96 P.3d 761, 765 (2004); Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); Harris v. Warden, 114 Nev. 956, 959, 964 P.2d 785, 787 (1998). "An impediment external to the defense may be demonstrated by a showing 'that the factual or legal basis for a claim was not reasonably available to counsel, or that "some interference by officials," made compliance impracticable.'" Hathaway, 119 Nev. at 252, 71 P.3d at 506 (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)); Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). This standard recognizes that good cause means that some event or circumstance beyond a defendant's control precluded the filing of a timely habeas petition. We conclude that the definition contemplates conditions that are not the "fault of the petitioner."

Riker, however, suggests that the term "fault of the petitioner" shows that the legislative intent of NRS 34.726(1)(a) "is that petitioner himself must act or fail to act to cause the delay." He asserts that this court has implicitly adopted this subjective standard for good cause relative to NRS 34.726 in Pellegrini and Bennett v. State, 111 Nev. 1099, 901 P.2d 676 (1995). However, nothing in Pellegrini supports Riker's contention in this regard and Bennett presented a different procedural posture than this case. We conclude that the district court applied the correct standard to determine whether Riker had shown good cause to

excuse his delay. To the extent Riker argues that he was entitled to an evidentiary hearing to establish that any delay in filing his petition was not his fault, he failed to provide any factual allegations supporting his contention. Because Riker asserted only a bare claim for relief, he was not entitled to an evidentiary hearing. See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

Finally, Riker suggests that the delay in raising his ineffective-assistance-of-post-conviction-counsel claims should be excused because he could not have raised them within the one-year time period after his direct appeal—they were not "ripe" within that period. In this, Riker suggests that our prior decision in this case erroneously concluded that a post-conviction counsel claim could not establish good cause. We recognized in that decision that claims of ineffective assistance of first post-conviction counsel are not immune from procedural default for untimeliness, but we did not specifically address what would constitute cause for raising such claims in an untimely fashion. State v. Dist. Ct. (Riker), 121 Nev. 225, 235, 112 P.3d 1070, 1077 (2005). And here, Riker has not demonstrated cause for the five-year delay after the district court denied his first post-conviction petition in raising his claims of ineffective assistance of first post-conviction counsel. Absent specific factual allegations to support a finding of good cause, Riker was not entitled to an evidentiary hearing to support his claim of good cause. See Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

We conclude that Riker failed to show that the district court improperly applied NRS 34.726 to bar consideration of his untimely petition. Accordingly, the district court did not err by summarily denying Riker's petition as procedurally barred pursuant to NRS 34.726.

NRS 34.800

Riker contends that because he sufficiently rebutted the presumption of prejudice to the State, the district court erred by summarily denying his petition as procedurally barred pursuant to NRS 34.800(2). In particular, Riker argues that the victim's murder was fully litigated during his recent trial in California for another murder, demonstrating that the State would not be prejudiced in its ability to prosecute him in a new trial.

NRS 34.800(2) provides that "[a] period exceeding 5 years between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction creates a rebuttable presumption of prejudice to the State." The statute affords a petitioner the opportunity to respond to the State's allegations of prejudice before the district court rules on any motion to dismiss based on that prejudice.

Considering the nature and extent of the evidence admitted during the California prosecution, we conclude that Riker rebutted the presumption of prejudice to the State respecting its ability to retry him for the victim's murder. See NRS 34.800(1)(b). However, it is unclear whether Riker rebutted the presumption of prejudice to the State respecting its ability to respond to the petition due to the passage of time. See NRS 34.800(1)(a). Nonetheless, as explained above, Riker's petition was procedurally barred pursuant to NRS 34.726. Therefore, even if the district court erred by finding Riker's petition procedurally barred pursuant to NRS 34.800, Riker has not demonstrated that he is entitled to relief.

NRS 34.810

Riker contends that the district court erred by denying his petition as procedurally barred under NRS 34.810 because he established that the failure to present his claims in his first petition was due to the ineffective assistance of post-conviction counsel, which constitutes good cause under Crump v. Warden, 113 Nev. 293, 296-97, 934 P.2d 247, 249 (1997). To the extent that the district court dismissed Riker's claims of ineffective assistance of first post-conviction counsel as successive, the district court erred. Riker was appointed first post-conviction counsel by statutory mandate, NRS 34.820(1)(a), and therefore was entitled to the effective assistance of that counsel. Crump, 113 Nev. at 303, 934 P.2d at 253. Under Crump, such claims may provide cause for filing a successive petition. Id. at 303-05, 934 P.2d at 253-54. However, the district court's proper application of NRS 34.726, discussed above, nevertheless supports the denial of Riker's habeas petition. Therefore, we conclude that the district court did not err by denying Riker's petition as procedurally barred without conducting an evidentiary hearing.[1]

Alleged inconsistent application of procedural bars

Riker argues that he should be excused from procedural default rules because this court arbitrarily and inconsistently applies them. This court has previously rejected this precise claim, concluding, after painstaking analysis, that it does not arbitrarily "ignore procedural

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[1]To the extent Riker contends that the district court ignored his claims of ineffective assistance of first post-conviction counsel, we conclude that the record before us and the district court's order on the whole show that the district court was aware of Riker's claims respecting post-conviction counsel and concluded that they were procedurally barred.

default rules" and that "any prior inconsistent application of statutory default rules would not provide a basis for this court to ignore[ ] the rules, which are mandatory." State v. Dist. Ct. (Riker), 121 Nev. 225, 236, 112 P.3d 1070, 1077 (2005). Accordingly, we conclude that Riker's contention lacks merit.

Having considered Riker's arguments and concluded that the district court did not err by denying his post-conviction petition without conducting an evidentiary hearing, we

ORDER the judgment of the district court AFFIRMED.[2]

_____, C.J.
Hardesty

_____, J.
Parraguirre

_____, J.
Saitta

_____, J.
Gibbons

_____, J.
Pickering

cc: Hon. Michael Villani, District Judge
Federal Public Defender/Las Vegas
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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[2]The Honorables Michael L. Douglas and Michael Cherry, Justices, voluntarily recused themselves from participation in the decision in this matter.

EXHIBIT 3

EXHIBIT 3

IN THE SUPREME COURT OF THE STATE OF NEVADA

JIMMY TODD KIRKSEY,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K. MCDANIEL, AND THE STATE OF NEVADA, OFFICE OF THE ATTORNEY GENERAL, CATHERINE CORTEZ MASTO,
Respondents.

No. 49140

FILED

AUG 21 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

On January 12, 1990, the district court, pursuant to a guilty plea, convicted appellant of first-degree murder. A three-judge panel recommended the death penalty, and the district court imposed the death penalty. On appeal, this court concluded that two of the aggravating circumstances found by the three-judge panel should not have been considered but affirmed the conviction and sentence. Kirksey v. State, 107 Nev. 499, 814 P.2d 1008 (1991). The remittitur issued on December 18, 1991.

On February 28, 1992, appellant, with the aid of counsel, filed a petition for post-conviction relief pursuant to former NRS chapter 177 in the district court. The State opposed the petition. An evidentiary hearing was conducted on February 1, 1993. On April 14, 1993, the district court

court's discretion in determining the existence of good cause except for clear cases of abuse." Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989) (citing State v. Estencion, 625 P.2d 1040, 1042 (Haw. 1981)).

GOOD CAUSE AND ACTUAL PREJUDICE

Appellant appears to raise several good cause and prejudice arguments to overcome procedural defects for specific claims for relief raised in his petition below. Specifically, he argues he has good cause and prejudice to raise: (1) claims relating to competency based on newly discovered evidence of the creation of the second report; (2) claims relating to judicial bias based on newly discovered evidence of the creation of the second report; (3) claims relating to competency and the validity of his guilty plea based on a finding of mental retardation; and (4) claims that could have been raised in his direct appeal based on appellate counsel's conflict of interest.[4] Appellant also appears to argue the authorship of a letter written to the trial judge provides good cause and prejudice to overcome the procedural bars for the entire petition.[5] The remainder of this discussion addresses these arguments.

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[4]To the extent that appellant argues these arguments would provide good cause and prejudice for the entire petition, we reject that argument. These arguments do not provide good cause for the entire petition as they do not provide good cause for each claim raised in the petition. Therefore, the district court did not err in rejecting this argument.

[5]In his petition below appellant claimed the following provided good cause to excuse the procedural defects: (1) constitutional claims are not subject to procedural bars; (2) NRS 34.726 does not apply because appellant did not know it would apply to successive petitions; (3) any delay was the fault of appointed counsel and not appellant's fault; and (4) equal protection requires his claims to be considered on the merits because Nevada does not apply the procedural bars in a consistent manner.

continued on next page . . .

New Evidence of Judicial Bias as Good Cause and Actual Prejudice

First, appellant argues that the district court erred in denying his claim that newly discovered evidence of judicial bias established good cause and prejudice to excuse the procedural defects to raise claims relating to competency. Prior to his guilty plea, appellant was evaluated for competency by Dr. Master and by Dr. Jurasky. Dr. Jurasky concluded that appellant was competent, but Dr. Master concluded that appellant was incompetent because he was suicidal and depressed. The trial judge, believing that Dr. Master did not discuss the legal standard for competency in his first report, contacted Dr. Master to ask him to clarify his report. A second report, which Dr. Master signed, was filed on June 22, 1989. The second report concluded that appellant was competent to aid his counsel, could understand the nature of the charges against him, and knew the difference between right and wrong. The district court concluded that appellant was competent and subsequently, appellant pleaded guilty.

In August of 2000, more than 9 years after the issuance of the remittitur on direct appeal and more than 11 years after the issuance of the second report, counsel for appellant in federal habeas proceedings noticed that the font of the second report did not match the font from the first report. However, the font of the second report appeared to match documents produced by the trial judge. In September of 2000, an expert

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. . . continued

Appellant did not discuss or argue these good cause claims on appeal and we therefore conclude that he has abandoned these good cause claims and we will not consider them.

document examiner looked at the documents and concluded that the second report was not produced by Dr. Master but was likely produced by the trial judge. In 2003, appellant filed the instant petition in state court claiming that newly discovered evidence that the trial judge produced the second report indicates that the trial judge was biased. Appellant argues he has good cause to raise claims concerning appellant's competency to enter a guilty plea because the evidence regarding the creation of the report is newly discovered.[6]

The proper framework to analyze this claim was established in our prior order regarding the State's original petition, and we will consider this good cause and actual prejudice argument within that framework. State v. District Court (Kirksey), Docket No. 43559 (Order Granting Petition in Part and Denying in Part, December 2, 2004).

1. Whether the new information was discovered and presented in a reasonably timely manner.

Appellant argues that the district court improperly rejected his assertion that evidence that the trial judge prepared the second report was newly discovered because it was only discovered in 2000 in federal habeas proceedings. We disagree. Appellant fails to demonstrate that his claim that the trial judge produced the second report was not reasonably available prior to the filing of the 2003 state habeas petition. "[T]he mere fact that counsel failed to recognize the factual or legal basis for a claim, or

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[6]Appellant's claims relating to competency were claim 3 (he was incompetent to enter his guilty plea) and claim 5 (he was incompetent to be sentenced). However, as noted earlier, claim 5 was rendered moot when the death penalty sentence was vacated and a new sentencing hearing was ordered.

failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." Murray, 477 U.S. at 486. Appellant had access to the second report since the district court forwarded the report to both the State and defense counsel in 1989. As appellant had access to the second report in 1989, any challenge to the origin or authenticity of the second report was reasonably available for approximately 14 years prior to the filing of the 2003 state habeas petition. That appellant only noticed that there may be a claim involving the second report in 2000 does not demonstrate that an impediment external to the defense prevented this claim from being raised in a timely manner or that this claim was not reasonably available prior to the instant filing.[7] The district court determined that the claim arising from the second report was reasonably available prior to the filing of the 2003 state habeas petition and substantial evidence supports that conclusion. We conclude that the district court did not abuse its discretion in determining that appellant failed to demonstrate good cause to raise his claim relating to competency to enter a guilty plea in an untimely and successive petition.

As stated earlier, in order to overcome his procedural defects, appellant must demonstrate good cause and prejudice. Even though we conclude that appellant failed to demonstrate good cause because his

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[7]In addition, appellant began the litigation of this claim in federal court in 2000. Notwithstanding any statements made during the federal litigation by the Attorney General's Office, appellant does not demonstrate any impediment external to the defense prevented him from litigating this claim in state court from when he became aware of it in 2000. Thus, appellant failed to excuse the delay in filing the instant petition in 2003, three years after the alleged discovery of the factual basis for this good cause argument. See Colley, 105 Nev. 235, 773 P.2d 1229.

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DISTRICT COURT

CLARK COUNTY, NEVADA

SAMUEL HOWARD, Petitioner, v. E. K. McDANIEL, Warden of ELY STATE PRISON; CATHERINE CORTEZ MASTO, Attorney General, State of Nevada; and THE STATE OF NEVADA, Respondents.	Case No. C053867 Dept. No. XVII Date of Hearing: January 28, 2009 Time of Hearing: 8:15 **RESPONSE TO MOTION TO DISMISS** (Death Penalty Case

I. Procedural Defaults

In response to Mr. Howard's amended petition, the State filed a motion to dismiss alleging that all of the claims are barred by the various Nevada procedural bars, including NRS 34.726 (the one year rule), NRS 34.810(2) (successive/abusive petition), NRS 34.810(1)(b) (waiver- failure to file in previous petition), NRS 34.800 (laches) and finally the law of the case doctrine because the claims were addressed in previous petitions.[1] State's Motion to Dismiss, pp. 20-26.

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[1] The District Attorney also argues that the office of the Federal Public Defender is not authorized to represent individuals in non-clemency state court proceedings without a federal court (continued...)

The District Attorney also addressed Mr. Howard's claim of actual innocence of the death penalty and acknowledge that "a defendant who has procedurally defaulted on a claim may subsequently raise the claim in a habeas petition only upon a showing of good cause, prejudice, or actual innocence." State's Motion to Dismiss, p. 40. The State argues, however, that such a claim

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[1](...continued)
order authorizing that litigation. See footnotes 1 and 2, State's Motion to Dismiss, citing Harbison v. Bell, ___ U.S. ____, 129 S.Ct. 1481 (2009). The District Attorney reads Harbison too narrowly. 18 U.S.C. § 3599, the statute construed in Harbison, has two relevant provisions: subsection (a)(1) provides for the appointment of counsel; (a)(2) describes the scope of that appointment:

> . . . each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriations motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive clemency as may be available to the defendant.

(Emphasis added). Under this statute, the only order required is the order appointing counsel. Once that is accomplished, counsel's duty extends to all subsequent judicial proceedings unless she decides to withdraw. Harbison is not limited to clemency proceedings. A copy of the order appointing the office of the Federal Public Defender to represent Mr. Howard is attached.

Moreover, the State, as the opposing party in this litigation, has no proper or constitutional role in the selection of counsel to represent the Petitioner. Counsel representing the Petitioner are duly licensed, See SCR 41, 49.10, 7`4, and are able to represent the Petitioner without interference from the State. Further, allowing the State to have any influence in the selection of counsel for the opposing party poses obvious conflict of interest and due process issues. See e.g. Death Row Prisoners of Pennsylvania v Ridge, 948 F.Supp. 1278, 1279k n 2 (E.D. Pa, 1996); State v Madrid, 468 P.2d 561, 562 (Ariz. 1970)("for the prosecution to participate in the selection or rejection of its opposing counsel is unseemly."; Gomez v Superior Court, 717 P.2d 9902, 905 (Ariz. 1986)(noting "public suspicion" that would arise "regarding an attempt by the state to disqualify a defendant's attorney"); Knapp v Hardy, 523 P.2d 1308, 1313 (Ariz. 1974) ("That the county attorney has standing to object to a determination of indigency there can be no doubt, but once that indigency is determined the county attorney h as no standing to object as to who will or will not represent the defendant or be associated as counsel."); State v Hayes, 135 S.E.2d 653, 655 (NC 1965)(per curiam)(reversing conviction without a showing of prejudice where defense counsel was assigned by the prosecutor; "[f]undamental fairness requires that assignment of counsel be made by one in a position of impartiality - the judge."). Simply put, the District Attorney's office should have no input into or influence in the assignment or appointment of Mr. Howard's counsel.

"requires both an allegation that the defendant's constitutional rights were violated and the presentation of newly discovered evidence." That evidence must be "so strong that a court cannot have confidence in the outcome of the trial." Id. at 40-41. According to the District Attorney, actual "innocence focuses on actual not legal innocence, and, therefore, a defendant who only challenges the validity of evidence presented at trial has not sufficiently claimed actual innocence to overcome the procedural bars and defaults." Id. at 41. In the context of challenging eligibility for the death penalty, a defendant "must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found petitioner eligible for the death penalty under applicable law." Id. at 42. The District Attorney also urged that any new mitigating evidence could not be considered in this equation. Id.

The prosecution conceded that there is a theory of actual innocence "involving aggravating circumstances." Id. at 43. For that claim to succeed, "a defendant must demonstrate, by clear and convincing new evidence, that (1) a previous Nevada Supreme Court interpretation was legally incorrect and (2) under the correct interpretation, no reasonable juror would have found the existence of that aggravating factor beyond a reasonable doubt." Id. at 43-44.

Under these standards according to the District Attorney, "Howard is not 'actually innocent of the death penalty.'"

> Even assuming the felony robbery aggravator must be eliminated pursuant to McConnell, [v. State, 120 Nev. 1043, 102 P.3d 606 (2004)] Howard has failed to present any new evidence, legislative or otherwise, suggesting his actual innocence of the remaining aggravator. Howard raises procedurally barred legal arguments challenging the sufficiency of the New York felony aggravator. Howard argues that, without an actual judgment of conviction, the New York felony is invalid and that improper notice was given of the aggravator under SCR 250. There is no evidence, let alone clear and convincing evidence, indicating that the Legislature did not intend a jury verdict to act as a prior crime of violence.

Id. at 45.

This argument is, to put it bluntly, just plain wrong. Even where a petition is both untimely and successive, this court may excuse the failure to show cause where the prejudice from a failure to consider the claim amounts to a "fundamental miscarriage of justice.'" Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001), (quoting Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996)). Likewise, a fundamental miscarriage of justice overcomes the presumption of

prejudice to the State based on laches. See NRS 34.800(1)(b); Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540, 545 (2001). In this context, the fundamental miscarriage of justice standard is met if the habeas petitioner "makes a colorable showing he is . . . ineligible for the death penalty." Pellegrini, 117 Nev. at 887, 34 P.3d at 537. Slip op. at 3-4.

Thus, like Mr. Paine, Mr. Howard need not make the clear and convincing showing that the prosecution argued, nor need he rely solely on newly developed factual evidence. If the two aggravating factors are colorably invalid, or if only one is invalid and reweighing fails to persuade the court that a death sentence would still be imposed, the procedural defaults must be set aside and the merits addressed.

II. The McConnell Claim

McConnell v. State held that it is "unconstitutional to base an aggravating circumstance on the same felony upon which felony murder is predicated." Bejarano v. State, 122 Nev. 1066, 1079, 146 P.3d. 265, 274 (2006)

At the guilt phase of Mr. Howard's trial, the trial court instructed the jury that:

> Murder of the First Degree is murder which is (a) perpetrated by any kind of willful, deliberate and premeditated killing, or (b) committed in the perpetration or attempted perpetration of robbery.

2 ROA 229 (emphasis added). The trial court further instructed the jury that:

> There are certain kinds of murder which carry with them conclusive evidence of malice aforethought. One of these classes of murder is murder committed in the perpetration or attempted perpetration of robbery. Therefore, a killing which is committed in the perpetration or attempted perpetration of robbery is deemed to be murder of the first degree, whether the killing was intentional, unintentional or accidental. The specific intent to perpetrate or attempt to perpetrate robbery must be proven beyond a reasonable doubt.

2 ROA 229.

At guilt phase closing argument, the prosecutor emphasized the felony murder rule to the jury:

> We further know, with regard to the killing, we know that Doctor Monahan was killed, that he was murdered; we know that he was robbed, because he had things and they were later missing. The question in this case, and they're easily resolvable according to the instructions: was there premeditation on behalf of the defendant when he did the killing? Did he think about doing the killing before he did it? And was there malice in his mind? And I'm not going to go through all these things because that's settled real easily in a couple of instructions, and let me go over them

with you now.

> With regards to the premeditation and in a murder case the state must show premeditation, listen to instruction number 11, if you would, it's very short on murder of the first degree. I've never mentioned that before but that's what the state is obviously asking for in this situation:
>
> Murder of the first degree is murder which is, number one, perpetrated by any kind of willful, deliberate and premeditation killing; or B, committed in the perpetration or attempted perpetration of robbery.
>
> So if Doctor Monahan was killed while the robbery was going on, you don't even need to worry about premeditation. The law does not require it. The fact of the killing is enough within the scope of a robbery to bring it up to the level of first degree murder and the law demands that that occur.

14 ROA 2392-2393.

The prosecutor reiterated the felony murder theory in rebuttal:

> The court, in instructions 11 and 13, has made it clear that where a killing occurs during the commission of a robbery, because that is an inherently dangerous felony and because those who made our law wanted to deter that type of conduct, where a killing occurs during a robbery it is deemed to be murder in the first degree. So if you find that George Monahan was killed during the commission of a robbery, if you find that the motive of Mr. Howard in posing as Keith, a security guard for Caesars Palace, and in luring this man out for a test drive in a vehicle when, according to his girlfriend, he had no money, they were broke, was to rob him and if Mr. Monahan was murdered during a robbery, then instructions 11 and 13 establish the offense is murder in the first degree and it is with the use of a deadly weapon.

14 ROA 2419.

The jury returned a general verdict of guilt on the murder charge and a guilty verdict on the robbery charge. 2 ROA 293; Ex. 144.[2]

The State's Notice of Intent to Seek the Death Penalty, filed against Mr. Howard on January 7, 1983, alleged, in part, that:

> The murder was committed while the person was engaged in the commission of or an attempt to commit any robbery. [See NRS 200.033(4)]. The evidence in support of this allegation will consist of testimony and physical evidence arising out of "the aggravated nature of the offense itself" and will be introduced during the guilt phase of these proceedings.

1 ROA 86.

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[2] Exhibits 101 through 163 were filed on October 25, 2007, in support of Mr. Howard's Petition for Writ of Habeas Corpus (Post-Conviction). Exhibit references beginning with 164, et. seq., were filed with Mr. Howard's Amended Petition (Post-Conviction) on February 23, 2009. All exhibits are incorporated herein by reference.

The penalty hearing began on May 2, 1983. The trial court instructed the jury on the alleged aggravating factor of felony-murder as follows:

> You are instructed that the following factors are circumstances by which Murder of the First Degree may be aggravated: . . . (2) The murder was committed while the defendant was engaged in the commission of any robbery.

2 ROA 284.[3]

In penalty phase argument, the prosecutor emphasized that the felony murder aggravator was based on the same robbery of George Monahan that formed the basis of the first degree murder conviction:

> Circumstance number two alleged is set forth in instruction nine as follows:
>
> The murder was committed while the defendant was engaged in the commission of any robbery.
>
> Well, our legislature, the people we put in office, has made certain judgments in terms of what circumstances aggravate a first degree murder.
>
> Robbery, as you have been instructed, is a crime of violence. It involves threat. It involves force. Many times it involves the use of a gun. It's an apparently dangerous felony. You know, it's bad enough to decide you're going to kill anyone, but to involve also the notion you're going to rob and kill them, and maybe murder is very probably the likely outgrowth of any robbery. The law in this state says if you rob and murder, that aggravates murder in the first degree. I've already made a finding in connection with this case. But Mr. Howard not only murdered George Monahan, he robbed him. So certainly that aggravating circumstance has been proven beyond a reasonable doubt.
>
> There's little doubt that Mr. Howard took the Seiko wristwatch from George Monahan. There's little doubt that the C.B. radio he carried into the Motel 6 with wires hanging out of it had been taken from George Monahan's van. Dawana Thomas saw credit cards and photographs of children, family-type pictures, soon after he came back after a 45-minute absence to the motel. Both those aggravating circumstances have been proven beyond a reasonable doubt. This is a robbery/murder. This is a robbery/murder committed by a defendant who has already committed and been convicted of a prior crime of robbery.

15 ROA 2601-2602 (emphasis added). The prosecutor further expressed to the jury his personal opinion that Mr. Howard had "forfeited his privilege to continue to live" because he had committed both robbery and murder:

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[3] In a hearing outside the jury's presence, the prosecution informed the trial court that they intended to argue the felony murder aggravating factor to the jury; they declined additional proof. "We'll just argue that it's been shown as clearly as it can be." 15 ROA 2481.

> . . . I believe in the rule of law, and I believe that those who commit crimes, particularly crimes of robbery and murder, deserve to be punished. And I believe their punishment should fit their crime. And it is the position of the State of Nevada that the man who killed George Monahan, Samuel Howard, has forfeited his privilege to continue to live.

15 ROA 2596 (emphasis added).

On May 4, 1983, the jury imposed a sentence of death and made a finding that the felony murder aggravating factor of murder in the course of a robbery was present. 2 ROA 294.

It is clear in Mr. Howard's case that the State based the felony robbery aggravating factor on the same robbery underlying the felony murder theory of guilt. By whatever standard the Court applies, both McConnell and Bejarano v. State, 122 Nev. 1066, 1079, 146 P.3d 265, 274 (2006) control and the murder in the course of a robbery aggravating factor must fall.[4]

III. Previous Conviction for a Crime of Violence

A. Mr. Howard was not provided sufficient notice of the aggravating factors.

Prior to Mr. Howard's trial, the Clark County District Attorney's office 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

> 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 offense of robbery with the use of a firearm and unlawful taking of a motor vehicle.

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[4] The State's arguments that Mr. Howard's McConnell issues are time barred and defaulted are disingenuous and not supported by any statute or case law. The statutes cited, NRS 34.726 and NRS 34.810, are both silent as to any time limitation for petitioners, like Mr. Howard, raising newly available legal claims. In Mr. Howard's case, the McConnell decision did not apply to him until the Court decided Bejarano. There, the Court rejected all of the prosecution arguments on procedural default because the McConnell decision was not available to Mr. Bejarano before. Further, Mr. Bejarano could not satisfy the prejudice prong of the good cause defense until the Court made the McConnell decision retroactive. 122 Nev. at 1973, 146 P.3d at 270. Only when Mr. Howard could establish prejudice, i.e. when the McConnell was made retroactive, was the claim legally available to him. Because Mr. Howard filed his claim within the one year after it was legally available to him, he has satisfied NRS 34.726. Finally, to apply those procedural bars to Mr. Howard would result in a gross miscarriage of justice.

1 ROA 85. The second aggravating factor was the murder in the course of a robbery now invalid under McConnell and Bejarano. 1 ROA 86. A third aggravating factor alleged murder for the purpose of avoiding or preventing a lawful arrest; it was abandoned before trial. 1 ROA 86-87; 15 ROA 2480.

The prosecution also alleged, as additional evidence it intended to offer at the penalty phase, that the Mr. Howard had been "convicted in absentia of first degree robbery of Dorothy Weisband." They admitted in their pleading that they could not offer or produce a certified copy of a judgment of conviction in the matter because Mr. Howard "jumped bail" after two days of testimony. 1 ROA 86 They also argued that they would present evidence of the 1979 murder of Louis Zumpano, a used car salesman in Queens, NY. Id. Neither offense was listed as an aggravating factor.[5]

During the guilt phase, Mr. Howard testified; he was impeached with the conviction in California for car theft and robbery and the in absentia proceedings in New York for the robbery of Dorothy Weisband. 13 ROA 2271; 13 ROA 2271-2272. No other details were elicited.

At the penalty phase, defense counsel sought to strike the aggravating factor allegation that Mr. Howard had been convicted of a prior violent felony. 15 ROA 2478-82. Counsel argued that the State had chosen not to introduce evidence of the three alleged New York robberies noted in the supplemental notice. 15 ROA 2478. The prosecution, in response, argued that the California robbery had been brought in only for impeachment. 15 ROA 2479. They noted that they had to prove the conviction beyond a reasonable doubt and that they had to establish that the prior conviction actually involved the use of force or violence; Mr. Howard's admission of the nature of the conviction was not sufficient. 15 ROA 2480. ". . . [T]he mere fact of a weapon being present in the name of a charge under which the defendant is convicted, I don't think tells the jury enough about the nature of those acts to allow them to come to the conclusion that beyond a reasonable doubt the state has shown that there is a threat or use of violence." 15 ROA 2484. The prosecution

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[5] The district attorney's office later filed a supplemental notice contending that they would offer evidence of three additional robbery offenses where Edward Schwartz, John Tucillo and Mark Rothman were the victims. None of these offenses was alleged to have resulted in a conviction or alleged as an aggravating factor. 1 ROA 159-60.

also wanted to prove up the details of the New York conviction of the robbery of Dorothy Weisband. Id.

The State called Dorothy Weisband who testified about the robbery. 15 ROA 1464. The investigating officer also testified. 15 ROA 2507. State's Exhibit 69, a copy of the minutes of the New York court showing that the jury had returned a verdict of guilty against Mr. Howard for the robbery of Ms. Weisband, was admitted. 15 ROA 2515-16.

The following day, the prosecution informed the court that it intended to call the investigating officer from California and to move for introduction of the judgment of conviction from the state of California. 15 ROA 2521. The defense objected to the evidence arguing that Mr. Howard had been convicted of the California offense after the commission of the Nevada offense; the California offense was, thus, not a prior conviction. 15 ROA 2522. They also argued that the officer could not testify about his conversation with the victim who did not intend to come to Nevada to testify. 15 ROA 2524. Ultimately the trial court agreed and the evidence was excluded. 15 ROA 2533.[6] The State rested.[7]

The trial court instructed the jury, Instruction number 9, that a first degree murder could be aggravated if the murder was committed by a defendant who had been previously convicted of a felony involving the use or threat of violence to the person of another and if the murder had been committed while the defendant was engaged in the commission of any robbery. 15 ROA 2599. Robbery was also defined. 2 ROA 286.

In its argument to the jury, the prosecution referred to Instruction number 9 and the prior conviction. 15 ROA 2599.

> . . . When we consider Sam Howard, we're not talking about someone who committed his first offense in relation to George Monahan. . . in the morning of March 27, 1980. We are talking about someone who is now shown to have

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[6] The trial court stated that Mr. Howard had admitted being convicted in San Bernardino, California; that was not correct. He admitted only that he had been convicted in California. 15 ROA 2524.

[7] Mr. Howard testified at punishment about his psychiatric history, 15 ROA 2540-49; the State made no effort to elicit any additional details of his prior offenses.

> committed a violent felony against a nurse for which he has been convicted, and there was absolutely no provocation for that.

Id.. The prosecution then summarized the details of the Weisband robbery. 15 ROA 2599-2601.

> 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.

15 ROA 2601.

It is clear that the prosecution relied on the New York robbery of Ms. Weisband to satisfy its allegation of a prior violent felony conviction aggravating factor, a reliance legally inappropriate for two reasons. First, the robbery had not been alleged as the aggravating factor in the notice of intent to seek death. SCR 250(4)(c). ("The notice must allege all aggravating circumstances which the state intends to prove and allege with specificity the facts on which the state will rely to prove each aggravating circumstance.") See also Kirksey v. State, 107 Nev. 499, 503, 814 P.2d 1008, 1010 (1991). NRS 175.552.

Second, and more importantly, Mr. Howard was never convicted of the robbery in the State of New York. Because he failed to appear in court after the second day, only a jury verdict was received. A copy of the entire file of the New York robbery of Ms. Weisband was attached to the previous petition as Ex. 149. It shows only that a jury verdict was returned. No judgment of conviction was entered and no sentence pronounced. The prosecution admitted as much in their notice of intent to seek death when they informed the Court they had no judgment of conviction. 1 ROA 86 The prosecution, thus, alleged only the San Bernardino County California conviction as an aggravating factor to justify a death sentence; though they knew about the New York conviction, they chose not to allege it as an aggravating factor in their notice of intent to seek death.

In Bennett v. Eighth Judicial District Court, 121 Nev. 802, 121 P.3d 605 (2005), the Court confronted a similar problem though the effort to change course occurred before trial, rather than in the middle of it. There, 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 were invalidated under McConnell, immediately prior to trial. The State then sought to add three new aggravating factors to its notice of intent under SCR 250. The trial court permitted this new addition and Bennett sought a writ of mandamus to compel their dismissal. 121 Nev. At 805, 806, 121 P.3d at 607-08. The Nevada Supreme Court agreed with Bennett:

> 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.

Similarly, in the case at bar, the prosecution, prior to trial, chose not to allege the evidence of the New York criminal trial as an aggravating factor. Once the prior violent felony conviction 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 and the New York trial cannot save the case now. Because the only remaining aggravating factor before the Court to justify Mr. Howard's death sentence, the murder during the course of a robbery, an aggravating factor no longer valid after McConnell, the death sentence must be set aside.[8]

This resolution is supported, not just by state law, but by elements of due process, especially notice. The Nevada Supreme 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 177.552 and SCR 250, promulgated in 1990 and applicable to trials after its effective date, "are intended to ensure that defendants in capital cases receive notice sufficient to meet due process

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[8] 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 (1985), cert denied, 476 U.S. 1130 (1986). Thus, once the penalty phase had started in Mr. Howard's trial, the state was barred from altering its notice of intent to seek death.

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). Due process demands no less.

The Nevada Supreme Court has consistently and strictly applied the requirements of each procedure. Even technical compliance has been found to 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 federal equivalent is 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. 514 (1948); Lankford v. Idaho, 500 U.S. 110, 121, 127 fn.22 (1991) ("fair notice is the bedrock of any constitutionally fair procedure.").

Here, the State made no effort to amend its notice of intent, even after the penalty hearing had begun. It simply substituted evidence it had previously intended to use to demonstrate Mr. Howard's character. Because the trial court had already struck the San Bernardino County aggravating factor, no new allegation or amended allegation was made that would justify or support the use of the Queens County Supreme Court case, and 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.

B. 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 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 failed to reappear in court. The trial judge proceeded to submit the case to the jury and obtain a verdict of guilty from that jury.

The term "conviction" in 1983, at the time of Mr. Howard's trial, had a specific legal meaning. NRS 50.095 permitted the use of convictions to impeach a witness's credibility. The Nevada Supreme 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), in Boley v. State, 85 Nev. 466, 470, 456 P.2d 447, 449 (1969), and in Ruvelta v. State, 86 Nev. 224, 227, 467 P.2d 105 (1970).

In Ruvelta v. State, the Court ruled that no judgment of conviction can be complete without a sentence. In another context, the 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 had simply returned a verdict. In that context, the Nevada Supreme 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).[9]

To apply the amended NRS 200.033(1)(b) to this case retroactively would violate the ex post facto clause of the Fifth Amendment, because the amendment to the statute reduced the State's burden of proof: it no longer had to use a final conviction to prove the aggravating factor. See Carmell v. Texas, 529 U.S. 513 (2000).

Under then existing Nevada law, Mr. Howard had not been convicted in New York. Only a jury verdict of guilty had occurred. No sentence and no judgment of conviction was ever entered at any time. Thus, even if the prior Queens Supreme Court action were properly noticed, it was not enough. The death sentence should be set aside.

C. Reweighing weighs in Mr. Howard's favor.

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 may also excuse the procedural bars advocated by the District Attorney. Bejarano v. State, 122 Nev. at 1973, 146 P.3d at 270. Contrary to the State's assertion that new mitigating evidence cannot be considered,

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[9] 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.

see State's Motion to Dismiss, p. 42, the Nevada Supreme Court has in the past considered not just the evidence presented at trial but all of the mitigating evidence that Mr. Howard now contends 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.").

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 re-weighing the remaining aggravating factors and the mitigating evidence, if the Court finds a reasonable probability 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 the 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 State. 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, 424-32 (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.

Mr. Howard contends that, with the invalid aggravating factors and the vast amount of uninvestigated and unpresented mitigating evidence, he is innocent of the death penalty: that is, it is reasonably probable that Mr. Howard would not have been found eligible for a sentence of death. He thus has established a fundamental miscarriage of justice and the entirety of the evidence must be considered. Both the holdings of the Nevada Supreme Court and of the United States Supreme Court mandate it.

Mr. Howard has already set forth his remaining arguments on the issue of harm and the invalid aggravating factors in his first response; they need not be repeated again here. He simply asks this Court to take judicial notice of those arguments and consider them.

IV. Ineffective Assistance of Counsel

This Court must revisit the issue of trial counsel's ineffective penalty phase presentation because the law of that issue has changed and it is now clear that the previous decision of the Nevada Supreme Court was wrong. Mr. Howard challenged his trial counsel's conduct of his case in the pleadings currently before this Court. See Amended Petition, p. 19 et seq. When the Nevada Supreme 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. 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. 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. Counsel was appointed about one month before the penalty phase commenced but 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 his claims were rejected. "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, Id. at 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. 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 (9th Cir. 2009) ("A defendant's lack of cooperation does not eliminate counsel's duty to investigate."). Pinholster v. Ayers 2009 WL 4641748 (9th Cir., December 9, 2009) (en banc).

While clearly the Nevada Supreme Court has already addressed this issue, the law of the case doctrine is not a doctrine that enshrines a prior holding and 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."); and 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."). The decisions of the United States Supreme Court and the Ninth Circuit Court of Appeals clearly warrant revisiting this claim.

V. The Premeditation Instruction

The prosecution 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 and was overruled. The legal landscape left by the Nevada Supreme Court's ruling in Nika v. State, 125 Nev. ___, 198 P.3d 839 (2009) 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." Instruction 9 defined malice as "the intentional doing of a wrongful act without legal cause or what the law considers adequate provocation." 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." 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 of robbery."

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. 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.

2 ROA 228. 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 and with malice without any further

consideration.

A. Nika: A change in state law.

In Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000), the Nevada Supreme Court addressed its standard instructions on the issue of premeditation and 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). The 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. [10] The 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), the 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 the Nevada Supreme 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.

After Polk, the Nevada Supreme 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

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[10] In Greene v. State, the 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.

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), the 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. The 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.

The Court made it clear that neither Wong Fun nor Hern required a separate definition of each of the three elements. The Nika Court analyzed the Kazalyn opinion and concluded that it had not been asked to distinguish between premeditation and deliberation but only asked to decide whether the instruction given, one identical to the instruction in Mr. Howard's case, "sufficiently distinguished premeditation and malice aforethought." 198 P.3d at 846. The Court concluded that what is now known as the Kazalyn instruction was "sufficiently distinct." Id.. The Kazalynn instruction survived eight years of litigation until Byford.

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 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.[11]

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 P.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

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[11] 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.

that violated Polk's right to due process." 503 P.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. The 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 the Court justified by claiming that three other states made the same mistake in interpreting their first-degree murder statutes. Powell does not apply to Mr. Howard's case.

Powell was decided in 1992. Mr. Howard was tried in 1986 before Powell conflated the three culpable mental states into one concept. The Kazalyn instruction erroneously set forth the correct law at the time Mr. Howard's case was tried; the due process analysis of Polk still applies. Powell is inapplicable.

B. The Nevada Supreme 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 the Court said in Nika, Byford, and Hern as true, the 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 the Nevada Supreme 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, 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.

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

In the death penalty context, as noted, 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)[12] 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 the Nevada Supreme 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 was no rational distinction between first and second degree murder and where the Court has refused to recognize any constitutional problem in that use.

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

Further, the Nevada Supreme 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

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[12] "[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."

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.

E. 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.[13] In particular, judicial comments or instructions referring to the credibility of witnesses or the quality of the evidence violate the section.[14] 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 Constitutional guarantee of Due Process of Law.

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

The Nevada Supreme 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

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[13] 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).

[14] 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).

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).

The Nevada Supreme 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 which violated 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 the Nevada Supreme 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 the Nevada Supreme 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"). The Nevada Supreme 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.[15] The failure of the Nevada Supreme Court in Nika to apply the rule of Byford and its progeny as a substantive rule of law violates the federal constitutional guarantee of Due Process of Law.

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[15] 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).

G. The Supremacy Clause requires this Court to enforce federal law and deny the state's motion to dismiss.

Petitioner recognizes, of course, that the Nevada Supreme Court's unconstitutional decision in Nika, and its previous decisions in Mr. Howard's case, may make this Court conclude that the resolution of the issues here in favor of the state is required as a matter of state law. This Court, however, must answer to a higher authority, which is mandate of the federal constitution: "this Constitution . . . shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby any Thing in the Constitution or Laws of any State to the Contrary not withstanding." U.S. Const. Art. VI; see Nev. Const. Art. 1 § 2 ("paramount allegiance" to federal government "in the exercise of all its constitutional powers"). Petitioner Howard has shown that his conviction is invalid under the federal constitution, under the reasoning of Polk and under the controlling authority of the United State's Supreme Court's constitutional decisions interpreting the due process clause, the equal protection clause, and the Eighth Amendment. Under the Supremacy Clause, this Court must therefore deny the state's motion to dismiss, and grant Mr. Howard relief, "notwithstanding" the invalid decision in Nika

VI. Conclusion

For the reasons stated above, this Court must deny the state's motion to dismiss.

DATED this 18th day of December, 2009.

FRANNY A. FORSMAN
Federal Public Defender

MICHAEL B. CHARLTON
Assistant Federal Public Defender
Nevada Bar Number 11025C

MEGAN HOFFMAN
Assistant Federal Public Defender
Nevada Bar Number 9835

Attorneys for Petitioner

CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that pursuant to N.R.C.P. 5(b), on this 18th day of December, 2009, he deposited for mailing, in the United States mail, postage prepaid, a true and correct copy of the foregoing RESPONSE TO MOTION TO DISMISS addressed to counsel as follows:

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Clark County District Attorney
Nancy Becker
Chief Deputy District Attorney
Office of the District Attorney
Regional Justice Center, Third Floor
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Catherine Cortez Masto
Nevada Attorney General
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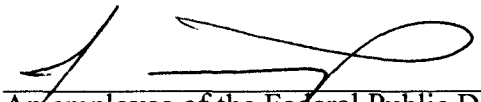

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DISTRICT COURT

CLARK COUNTY, NEVADA

SAMUEL HOWARD, Petitioner, v. E. K. McDANIEL, Warden of ELY STATE PRISON; CATHERINE CORTEZ MASTO, Attorney General, State of Nevada; and THE STATE OF NEVADA, Respondents.	Case No. C053867 Dept. No. XVII **NOTICE OF SUPPLEMENTAL AUTHORITY** Date of Hearing: January 28, 2010 Time of Hearing: 8:15 (Death Penalty Case)

COMES NOW, Petitioner, Samuel Howard (Howard), through his attorneys, Michael Charlton and Megan C. Hoffman, Assistant Federal Public Defenders, and files this Notice of

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Supplemental Authority. This Notice is based on the points and authorities attached hereto and all other papers, pleadings and exhibits on file in the instant matter.

DATED this 5th day of January, 2010.

FRANNY A. FORSMAN
Federal Public Defender

MICHAEL B. CHARLTON
Assistant Federal Public Defender

MEGAN C. HOFFMAN
Assistant Federal Public Defender

Attorneys for Petitioner

POINTS AND AUTHORITIES

A. Argument:

Petitioner files this notice to put on the record the decision in Porter v. McCollum, 558 U.S. __, 130 S. Ct. 447, decided November 30, 2009 (per curiam), attached. Porter held, in part, that although a defendant "may have been fatalistic or uncooperative, . . . that does not obviate the need for defense counsel to conduct *some* sort of mitigation investigation." Id. at 11 (citation omitted). The U.S. Supreme Court clarified that

> We do not require a defendant to show "that counsel's deficient conduct more likely than not altered the outcome" of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.

Id. at 15 (citation omitted). Lastly, Porter recognized that this country has a "long tradition of according leniency to veterans in recognition of their service . . ." Id. at 14.

Petitioner also files this notice to put on the record the decision in Hamilton v. Ayers, 583 F.3d 1100 (9th Cir. 2009), attached. In Hamilton, a pre-AEDPA case for a 1982 conviction and death penalty sentence, the Ninth Circuit concluded that even as far back as 1982, "A defendant's lack of cooperation does not eliminate counsel's duty to investigate." Id. at 1118. The court recognized that although the defendant failed to assist in his defense, trial counsel were not impeded by their client to investigate other avenues of mitigating evidence. The Ninth Circuit concluded that Hamilton suffered prejudice as a result of his trial counsel's ineffectiveness, and the court reversed the judgment denying penalty phase relief. Id. at 1134.

DATED this 5th day of January, 2010.

FRANNY A. FORSMAN
Federal Public Defender

MICHAEL B. CHARLTON
Assistant Federal Public Defender

MEGAN C. HOFFMAN
Assistant Federal Public Defender

Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on January 5, 2010, he deposited for mailing, in the United States mail, postage prepaid, a true and correct copy of the foregoing NOTICE OF SUPPLEMENTAL AUTHORITY to the United States District Court, who will e-serve the following addressee:

David K. Neidert
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Attorney General's Office
100 North Carson Street
Carson City, Nevada 89701-4717

Nancy Becker
Chief Deputy District Attorney
Office of the District Attorney
Regional Justice Center, Third Floor
200 Lewis Avenue
Las Vegas, Nevada 89155

An employee of the Federal Public Defender's Office

*130 S. Ct. 447, *; 175 L. Ed. 2d 398, **;*
*2009 U.S. LEXIS 8377, ***; 22 Fla. L. Weekly Fed. S 9*

GEORGE **PORTER,** JR. v. BILL **McCOLLUM,** ATTORNEY GENERAL OF FLORIDA, ET. AL.

No. 08-10537.

SUPREME COURT OF THE UNITED STATES

130 S. Ct. 447; 175 L. Ed. 2d 398; 2009 U.S. LEXIS 8377; 22 Fla. L. Weekly Fed. S 9

November 30, 2009, Decided

NOTICE:

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: [*1]**
ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.
Porter v. AG, 552 F.3d 1260, 2008 U.S. App. LEXIS 27122 (11th Cir. Fla., 2008)

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner prison inmate was convicted in state court of murder and sentenced to death but the inmate asserted that he received ineffective assistance of counsel at sentencing based on counsel's failure to present mitigating evidence. Upon the grant of a writ of certiorari, the inmate appealed the judgment of the U.S. Court of Appeals for the Eleventh Circuit which reversed a grant of a writ of habeas corpus.

OVERVIEW: At the sentencing phase of the inmate's trial, no evidence was presented concerning the inmate's heroic military service in horrific combat situations, his struggles to regain normality upon his return from war, his childhood history of physical abuse, and his brain abnormality, difficulty reading and writing, and limited schooling. The U.S. Supreme Court unanimously held that counsel's failure to uncover and present any evidence of the inmate's mental health or mental impairment, his family background, or his military service clearly constituted deficient performance of counsel, and that such deficient performance was prejudicial to the inmate. The sentencing evidence consisted almost entirely of the inmate's turbulent relationship with one victim and the inmate's crimes, and there was no evidence tending to humanize the inmate or allow an accurate assessment of his moral culpability. Further, the probability of a different sentence was indicated in weighing the omitted evidence in mitigation against the relatively insubstantial evidence in aggravation that, after a night of drinking, the inmate shot his former girlfriend and her boyfriend who attempted to intervene.

OUTCOME: The judgment reversing the grant of a writ habeas corpus was reversed, and the case was remanded for further proceedings.

CORE TERMS: murder, sentencing, veteran, postconviction, mitigation, mitigating evidence, military service, mitigating circumstances, mental health, per curiam, prejudiced, combat, battle, deficient, penalty phase, reasonable probability, death sentence, aggravating circumstances, penalty-phase, nonstatutory, childhood, night, deficient performance, aggravating factors, ineffective, mitigating, discounted, convicted, atrocious, sentence

LEXISNEXIS® HEADNOTES

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Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

Criminal Law & Procedure > Habeas Corpus > Review > Specific Claims > Ineffective Assistance

Criminal Law & Procedure > Habeas Corpus > Review > Standards of Review > Contrary & Unreasonable Standard > General Overview

HN1 To prevail in showing ineffective assistance of counsel, a petitioner must show that his counsel's deficient performance prejudiced him. To establish deficiency, the petitioner must show that his counsel's representation fell below an objective standard of reasonableness. To establish prejudice, he must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Finally, the petitioner is entitled to relief only if a state court's rejection of his claim of ineffective assistance of counsel was contrary to, or involved an unreasonable application of, the federal standard or it rested on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C.S. § 2254(d). More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Habeas Corpus > Review > Specific Claims > Ineffective Assistance

Criminal Law & Procedure > Habeas Corpus > Review > Standards of Review > General Overview

HN2 Where a state court did not decide whether a defendant's counsel was deficient, a federal habeas court reviews this element of a claim of ineffective assistance of counsel de novo. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance > Sentencing

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

HN3 Counsel in a capital case has an obligation to conduct a thorough investigation of the defendant's background. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

HN4 A defendant is prejudiced by his counsel's deficient performance if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

HN5 In Florida, a sentencing judge makes the determination as to the existence and weight of aggravating and mitigating circumstances and the punishment, Fla. Stat. § 921.141(3), but he must give the jury verdict of life or death great weight. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Criminal Law & Procedure > Habeas Corpus > Review > Specific Claims > Ineffective Assistance

HN6 A petitioner sentenced to death must show that, but for his counsel's deficiency, there is a reasonable probability he would have received a different sentence. To assess that probability, a habeas court considers the totality of the available mitigation evidence -- both that adduced at trial and the evidence adduced in the habeas proceeding -- and reweigh it against the evidence in aggravation. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN7 Under Florida law, mental health evidence that does not rise to the level of establishing a statutory mitigating circumstance in a capital case may nonetheless be considered by the sentencing judge and jury as mitigating. Indeed, the U.S. Constitution requires that the sentencer in a capital case must be permitted to consider any relevant mitigating factor. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: **Linda McDermott** argued the cause for petitioner.

Kenneth S. Nunnelley argued the cause for the respondents.

JUDGES: Roberts, Stevens, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor.

OPINION

[400]** **[*448]** PER CURIAM.

Petitioner George Porter is a veteran who was both wounded and decorated for his active participation in two major engagements during the Korean War; his combat service unfortunately left him a traumatized, changed man. His commanding officer's moving description of those two battles was only a fraction of the mitigating evidence that his counsel failed to discover or present during the penalty phase of his trial in 1988.

In this federal postconviction proceeding, the District Court held that Porter's lawyer's failure to adduce that evidence violated his Sixth Amendment right to counsel and granted his application for a writ of habeas corpus. The Court of Appeals for the Eleventh Circuit reversed, on the ground that the Florida Supreme Court's determination that Porter **[**401]** was not prejudiced by any deficient performance by his counsel was a reasonable application of *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Like the District Court, we are persuaded that it was objectively unreasonable to conclude there **[***2]** was no reasonable probability the sentence would have been different if the sentencing judge and jury had heard the significant mitigation evidence that Porter's counsel neither uncovered nor presented. We therefore grant the petition for certiorari in part and reverse the judgment of the Court of Appeals. [1]

FOOTNOTES

1 We deny the petition insofar as it challenges his conviction.

Porter was convicted of two counts of first-degree murder for the shooting of his former girlfriend, Evelyn Williams, and her boyfriend Walter Burrows. He was sentenced to death on the first count but not the second.

In July 1986, as his relationship with Williams was ending, Porter threatened to kill her and then left town. When he returned to Florida three months later, he attempted to see Williams but her mother told him that Williams did not want to see him. He drove past Williams' house each of the two days prior to the shooting, and the night before the murder he visited Williams, who called the police. Porter then went to two cocktail lounges and spent the night with a friend, who testified Porter was quite drunk by 11 p.m. Early the next morning, Porter shot Williams in her house. Burrows struggled with Porter **[***3]** and forced him outside where Porter shot him.

Porter represented himself, with standby counsel, for most of the pretrial proceedings and during the beginning of his trial. Near the completion of the State's case in chief, Porter pleaded guilty. He thereafter changed his mind about representing himself, and his standby counsel was appointed as his counsel for the penalty phase. During the penalty phase, the State attempted to prove four aggravating factors: Porter had been "previously convicted" of another violent felony (*i.e.*, in Williams' case, killing Burrows, and in his **[*449]** case, killing Williams); [2] the murder was committed during a burglary; the murder was committed in a cold, calculated, and premeditated manner; and the murder was especially heinous, atrocious, or cruel. The defense put on only one witness, Porter's ex-wife, and read an excerpt from a deposition. The sum total of the mitigating evidence was inconsistent testimony about Porter's behavior when intoxicated and testimony that Porter had a good relationship with his son. Although his lawyer told the jury that Porter "has other handicaps that weren't apparent during the trial" and Porter was not "mentally healthy," he did **[***4]** not put on any evidence related to Porter's mental health. 3 Tr. 477-478 (Jan. 22, 1988).

FOOTNOTES

2 It is an aggravating factor under Florida law that "[t]he defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." Fla. Stat. § 921.141 (5)(b) (1987). In Porter's case, the State established that factor by reference to Porter's contemporaneous convictions stemming from the same episode: two counts of murder and one count of aggravated assault. Tr. 5 (Mar. 4, 1988).

The jury recommended the death sentence for both murders. The trial court found that the State had proved all four aggravating circumstances for the murder of Williams but that only **[**402]** the first two were established with respect to Burrows' murder. The trial court found no mitigating circumstances and imposed a death sentence for Williams' murder only. On direct appeal, the Florida Supreme Court affirmed the sentence over the dissent of two justices, but struck the heinous, atrocious, or cruel aggravating factor. *Porter* v. *State*, 564 So. 2d 1060 (1990) *(per curiam)*. The court found the State had not carried its burden on that factor because the "record is consistent **[***5]** with the hypothesis that Porter's was a crime of passion, not a crime that was meant to be deliberately and extraordinarily painful." *Id.*, at 1063 (emphasis deleted). The two dissenting justices would have reversed the penalty because the evidence of drunkenness, "combined with evidence of Porter's emotionally charged, desperate, frustrated desire to meet with his former lover, is sufficient to render the death penalty disproportional punishment in this instance." *Id.*, at 1065-1066 (Barkett, J., concurring in part and dissenting in part).

In 1995, Porter filed a petition for postconviction relief in state court, claiming his penalty-phase counsel failed to investigate and present mitigating evidence. The court conducted a 2-day evidentiary hearing, during which Porter presented extensive mitigating evidence, all of which was apparently unknown to his penalty-phase counsel. Unlike the evidence presented during Porter's penalty hearing, which left the jury knowing hardly anything about him other than the facts of his crimes, the new evidence described his abusive childhood, his heroic military service and the trauma he suffered because of it, his long-term substance abuse, and his impaired **[***6]** mental health and mental capacity.

The depositions of his brother and sister described the abuse Porter suffered as a child. Porter routinely witnessed his father beat his mother, one time so severely that she had to go to the hospital and lost a child. Porter's father was violent every weekend, and by his siblings' account, Porter was his father's favorite target, particularly when Porter tried to protect his mother. On one occasion, Porter's father shot at him for coming home late, but missed and just beat Porter instead. According to his brother, Porter attended classes for slow learners and left school when he was 12 or 13.

To escape his horrible family life, Porter enlisted in the Army at age 17 and fought **[*450]** in the Korean War. His company commander, Lieutenant Colonel Sherman Pratt, testified at Porter's postconviction hearing. Porter was with the 2d Division, which had advanced above the 38th parallel to Kunu-ri when it was attacked by Chinese forces. Porter suffered a gunshot wound to the leg during the advance but was with the unit for the battle at Kunu-ri. While the Eighth Army was withdrawing, the 2d Division was ordered to hold off the Chinese advance, enabling the bulk of **[***7]** the Eighth Army to live to fight another day. As Colonel Pratt described it, the unit "went into position there in bitter cold night, terribly worn out, terribly weary, almost like zombies because we had been in constant -- for five days we had been in constant contact with the enemy fighting our way to the rear, little or no sleep, little or no food, literally as I say zombies." 1 Tr. 138 (Jan. 4, 1996). The next morning, the unit engaged in a "fierce hand-to-hand fight with the Chinese" and later that day received permission to **[**403]** withdraw, making Porter's regiment the last unit of the Eighth Army to withdraw. *Id.*, at 139-140.

Less than three months later, Porter fought in a second battle, at Chip'yong-ni. His regiment was cut off from the rest of the Eighth Army and defended itself for two days and two nights under constant fire. After the enemy broke through the perimeter and overtook defensive positions on high ground, Porter's company was charged with retaking those positions. In the charge up the hill, the soldiers "were under direct open fire of the enemy forces on top of the hill. They immediately came under mortar, artillery, machine gun, and every other kind of fire you can **[***8]** imagine and they were just dropping like flies as they went along." *Id.*, at 150. Porter's company lost all three of its platoon sergeants, and almost all of the officers were wounded. Porter was again wounded and his company sustained the heaviest losses of any troops in the battle, with more than 50% casualties. Colonel Pratt testified that these battles were "very trying, horrifying experiences," particularly for Porter's company at Chip'yong-ni. *Id.*, at 152. Porter's unit was awarded the Presidential Unit Citation for the engagement at Chip'yong-ni, and Porter individually received two Purple Hearts and the Combat Infantryman Badge, along with other decorations.

Colonel Pratt testified that Porter went absent without leave (AWOL) for two periods while in Korea. He explained that this was not uncommon, as soldiers sometimes became disoriented and separated from the unit, and that the commander had decided not to impose any punishment for the absences. In Colonel Pratt's experience, an "awful lot of [veterans] come back nervous wrecks. Our [veterans'] hospitals today are filled with people mentally trying to survive the perils and hardships [of] . . . the Korean War," particularly **[***9]** those who fought in the battles he described. *Id.*, at 153.

When Porter returned to the United States, he went AWOL for an extended period of time. [3] He was sentenced to six months' imprisonment for that infraction, but he received an honorable discharge. After his discharge, he suffered dreadful nightmares and would attempt to climb his bedroom walls with knives at night. [4] Porter's **[*451]** family eventually removed all of the knives from the house. According to Porter's brother, Porter developed a serious drinking problem and began drinking so heavily that he would get into fights and not remember them at all.

FOOTNOTES

[3] Porter explained to one of the doctors who examined him for competency to stand trial that he went AWOL in order to spend time with his son. Record 904.

[4] Porter's expert testified that these symptoms would "easily" warrant a diagnosis of posttraumatic stress disorder (PTSD). 2 Tr. 233 (Jan. 5, 1996). PTSD is not uncommon among veterans returning from combat. See Hearing on Fiscal Year 2010 Budget for Veterans' Programs before the Senate Committee on Veterans' Affairs, 111th Cong., 1st Sess., 63 (2009) (uncorrected copy) (testimony of Eric K. Shinseki, Secretary of Veterans Affairs (VA), **[***10]** reporting that approximately 23 percent of the Iraq and Afghanistan war veterans seeking treatment at a VA medical facility had been preliminarily diagnosed with PTSD).

In addition to this testimony regarding his life history, Porter presented an expert in neuropsychology, Dr. Dee, who had examined Porter and administered a number of psychological assessments. Dr. Dee concluded that Porter suffered from brain damage that could manifest in impulsive, **[**404]** violent behavior. At the time of the crime, Dr. Dee testified, Porter was substantially impaired in his ability to conform his conduct to the law and suffered from an extreme mental or emotional disturbance, two statutory mitigating circumstances, Fla. Stat. § 921.141(6). Dr. Dee also testified that Porter had substantial difficulties with reading, writing, and memory, and that these cognitive defects were present when he was evaluated for competency to stand trial. 2 Tr. 227-228 (Jan. 5, 1996); see also Record 904-906. Although the State's experts reached different conclusions regarding the statutory mitigators, [5] each expert testified that he could not diagnose Porter or rule out a brain abnormality. 2 Tr. 345, 382 (Jan. 5, 1996); 3 *id.*, at 405.

FOOTNOTES

[5] The **[***11]** State presented two experts, Dr. Riebsame and Dr. Kirkland. Neither of the State's experts had examined Porter, but each testified that based upon their review of the record, Porter met neither statutory mitigating circumstance.

The trial judge who conducted the state postconviction hearing, without determining counsel's deficiency, held that Porter had not been prejudiced by the failure to introduce any of that evidence. Record 1203, 1206. He found that Porter had failed to establish any statutory mitigating circumstances, *id.*, at 1207, and that the nonstatutory mitigating evidence would not have made a difference in the outcome of the case, *id.*, at 1210. He discounted the evidence of Porter's alcohol abuse because it was inconsistent and discounted the evidence of Porter's abusive childhood because he was 54 years old at the time of the trial. He also concluded that Porter's periods of being AWOL would have reduced the impact of Porter's military service to "inconsequential proportions." *Id.*, at 1212. Finally, he held that even considering all three categories of evidence together, the "trial judge and jury still would have imposed death." *Id.*, at 1214.

The Florida Supreme Court affirmed. **[***12]** It first accepted the trial court's finding that Porter could not have established any statutory mitigating circumstances, based on the trial court's acceptance of the State's experts' conclusions in that regard. *Porter* v. *State*, 788 So. 2d 917, 923 (2001) (*per curiam*). It

then held the trial court was cor[redacted]to find "the additional nonstatutory [redacted]gation to be lacking in weight because of the specific facts pres[redacted]ted." *Id.*, at 925. Like the postconviction court, the Florida Supreme Court reserved judgment regarding counsel's deficiency. *Ibid.* [6] Two justices dissented, reasoning **[*452]** that counsel's failure to investigate and present mitigating evidence was "especially harmful" because of the divided vote affirming the sentence on direct appeal -- "even without the substantial mitigation that we now know existed" -- and because of the reversal of the heinous, atrocious, and cruel aggravating factor. *Id.*, at **[**405]** 937 (Anstead, J., concurring in part and dissenting in part).

FOOTNOTES

6 The postconviction court stated defense counsel "was not ineffective for failing to pursue mental health evaluations and . . . [Porter] has thus failed to show sufficient evidence that any statutory mitigators could have **[***13]** been presented." Record 1210. It is not at all clear whether this stray comment addressed counsel's deficiency. If it did, then it was at most dicta, because the court expressly "decline[d] to make a determination regarding whether or not Defense Counsel was in fact deficient here." *Id.*, at 1206. The Florida Supreme Court simply paraphrased the postconviction court when it stated "trial counsel's decision not to pursue mental evaluations did not exceed the bounds for competent counsel." *Porter* v. *State*, 788 So. 2d 917, 923-924 (2001) *(per curiam)*. But that court also expressly declined to answer the question of deficiency. *Id.*, at 925.

Porter thereafter filed his federal habeas petition. The District Court held Porter's penalty-phase counsel had been ineffective. It first determined that counsel's performance had been deficient because "penalty-phase counsel did little, if any investigation . . . and failed to effectively advocate on behalf of his client before the jury." *Porter* v. *Crosby*, No. 6:03-cv-1465-Orl-31KRS, 2007 U.S. Dist. LEXIS 44025, 2007 WL 1747316, *23 (MD Fla., June 18, 2007). It then determined that counsel's deficient performance was prejudicial, finding that the state court's decision was contrary **[***14]** to clearly established law in part because the state court failed to consider the entirety of the evidence when reweighing the evidence in mitigation, including the trial evidence suggesting that "this was a crime of passion, that [Porter] was drinking heavily just hours before the murders, or that [Porter] had a good relationship with his son." 2007 U.S. Dist. LEXIS 44025, [WL] at *30.

The Eleventh Circuit reversed. It held the District Court had failed to appropriately defer to the state court's factual findings with respect to Porter's alcohol abuse and his mental health. 552 F.3d 1260, 1274, 1275 (2008) *(per curiam)*. The Court of Appeals then separately considered each category of mitigating evidence and held it was not unreasonable for the state court to discount each category as it did. *Id.*, at 1274. Porter petitioned for a writ of certiorari. We grant the petition and reverse with respect to the Court of Appeals' disposition of Porter's ineffective- assistance claim.

II

HN1 To prevail under *Strickland*, Porter must show that his counsel's deficient performance prejudiced him. To establish deficiency, Porter must show his "counsel's representation fell below an objective standard of reasonableness." 466 U.S., at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674. **[***15]** To establish prejudice, he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674. Finally, Porter is entitled to relief only if the state court's rejection of his claim of ineffective assistance of counsel was "contrary to, or involved an unreasonable application of" *Strickland*, or it rested "on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

HN2 Because the state court did not decide whether Porter's counsel was deficient, we review this element of Porter's *Strickland* claim *de novo*. *Rompilla* v. *Beard*, 545 U.S. 374, 390, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005). It is unquestioned that under the prevailing professional norms at the time of Porter's trial, HN3 counsel had an "obligation to conduct a thorough investigation of the defendant's background." *Williams* v. *Taylor*, 529 U.S. 362, 396, **[*453]** 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). The investigation conducted by Porter's counsel clearly did not satisfy those norms.

Although Porter had initially elected to represent himself, his standby counsel became his counsel for the penalty phase a little over a month prior to the **[***16]** sentencing proceeding before the jury. It was the first time this lawyer had represented a defendant during a penalty-phase proceeding. At the postconviction

hearing, he testified that he had one short meeting with Porter regarding **[**406]** the penalty phase. He did not obtain any of Porter's school, medical, or military service records or interview any members of Porter's family. In *Wiggins* v. *Smith*, 539 U.S. 510, 524, 525, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003), we held counsel "fell short of . . . professional standards" for not expanding their investigation beyond the presentence investigation report and one set of records they obtained, particularly "in light of what counsel actually discovered" in the records. Here, counsel did not even take the first step of interviewing witnesses or requesting records. *Cf. Bobby* v. *Van Hook*, *ante*, at 6-8 (holding performance not deficient when counsel gathered a substantial amount of information and then made a reasonable decision not to pursue additional sources); *Strickland*, 466 U.S., at 699, 104 S. Ct. 2052, 80 L. Ed. 674 ("[Counsel's] decision not to seek more character or psychological evidence than was already in hand was . . . reasonable"). Beyond that, like the counsel in *Wiggins*, he ignored pertinent **[***17]** avenues for investigation of which he should have been aware. The court-ordered competency evaluations, for example, collectively reported Porter's very few years of regular school, his military service and wounds sustained in combat, and his father's "over-disciplin[e]." Record 902-906. As an explanation, counsel described Porter as fatalistic and uncooperative. But he acknowledged that although Porter instructed him not to speak with Porter's ex-wife or son, Porter did not give him any other instructions limiting the witnesses he could interview.

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, supra*, at 534, 123 S. Ct. 2527, 156 L. Ed. 2d 471. 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, supra*, at 381-382, 125 S. Ct. 2456, 162 L. Ed. 2d 360.

III

Because we find Porter's counsel deficient, we must determine whether the Florida Supreme Court unreasonably applied *Strickland* in holding Porter was not prejudiced by that deficiency. Under *Strickland*, **[***18]** HN4 a defendant is prejudiced by his counsel's deficient performance if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S., at 694, 104 S. Ct. 2052, 80 L. Ed. 674. HN5 In Florida, the sentencing judge makes the determination as to the existence and weight of aggravating and mitigating circumstances and the punishment, Fla. Stat. § 921.141(3), but he must give the jury verdict of life or death "great weight," *Tedder* v. *State*, 322 So. 2d 908, 910 (Fla. 1975) *(per curiam)*. HN6 Porter must show that but for his counsel's deficiency, there is a reasonable probability he would have received a different sentence. To assess that probability, we consider "the totality of the available mitigation evidence -- both that adduced at trial, and the evidence adduced in the habeas proceeding" **[*454]** -- and "reweig[h] it against the evidence in aggravation." *Williams, supra*, at 397-398, 120 S. Ct. 1495, 146 L. Ed. 2d 389.

[407]** This is not a case in which the new evidence "would barely have altered the sentencing profile presented to the sentencing judge." *Strickland, supra*, at 700, 104 S. Ct. 2052, 80 L. Ed. 674. The judge and jury at Porter's original sentencing heard almost nothing that would humanize Porter or allow them **[***19]** to accurately gauge his moral culpability. They learned about Porter's turbulent relationship with Williams, his crimes, and almost nothing else. Had Porter's counsel been effective, the judge and jury would have learned of the "kind of troubled history we have declared relevant to assessing a defendant's moral culpability." *Wiggins, supra*, at 535, 123 S. Ct. 2527, 156 L. Ed. 2d 471. They would have heard about (1) Porter's heroic military service in two of the most critical -- and horrific -- battles of the Korean War, (2) his struggles to regain normality upon his return from war, (3) his childhood history of physical abuse, and (4) his brain abnormality, difficulty reading and writing, and limited schooling. See *Penry* v. *Lynaugh*, 492 U.S. 302, 319, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) ("'[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable'"). Instead, they heard absolutely none of that evidence, evidence which "might well have influenced the jury's appraisal of [Porter's] moral culpability." *Williams*, 529 U.S., at 398, 120 S. Ct. 1495, 146 L. Ed. 2d 389.

On the other side of the ledger, the weight **[***20]** of evidence in aggravation is not as substantial as the sentencing judge thought. As noted, the sentencing judge accepted the jury's recommendation of a death sentence for the murder of Williams but rejected the jury's death-sentence recommendation for the murder of Burrows. The sentencing judge believed that there were four aggravating circumstances related to the Williams murder but only two for the Burrows murder. Accordingly, the judge must have reasoned that the two aggravating circumstances that were present in both cases were insufficient to warrant a death sentence but that the two additional aggravating circumstances present with respect to the Williams

murder were sufficient to tip the balance in favor of a death sentence. But the Florida Supreme Court rejected one of these additional aggravating circumstances, *i.e.*, that Williams' murder was especially heinous, atrocious, or cruel, finding the murder "consistent with . . . a crime of passion" even though premeditated to a heightened degree. 564 So. 2d, at 1063-1064. Had the judge and jury been able to place Porter's life history "on the mitigating side of the scale," and appropriately reduced the ballast on the aggravating **[***21]** side of the scale, there is clearly a reasonable probability that the advisory jury -- and the sentencing judge -- "would have struck a different balance," *Wiggins*, 539 U.S., at 537, 123 S. Ct. 2527, 156 L. Ed. 2d 471, and it is unreasonable to conclude otherwise.

The Florida Supreme Court's decision that Porter was not prejudiced by his counsel's failure to conduct a thorough -- or even cursory -- investigation is unreasonable. The Florida Supreme Court either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing.[HN7] Under Florida law, mental health evidence **[**408]** that does not rise to the level of establishing a statutory mitigating circumstance may nonetheless be considered by the sentencing judge and jury as mitigating. See, *e.g.*, *Hoskins* v. *State*, 965 So. 2d 1, 17-18 (Fla. 2007) *(per curiam)*. Indeed, the Constitution **[*455]** requires that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor." *Eddings* v. *Oklahoma*, 455 U.S. 104, 112, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982). Yet neither the postconviction trial court nor the Florida Supreme Court gave any consideration for the purpose of nonstatutory mitigation to Dr. Dee's testimony regarding the existence of a brain abnormality **[***22]** and cognitive defects. [7] While the State's experts identified perceived problems with the tests that Dr. Dee used and the conclusions that he drew from them, it was not reasonable to discount entirely the effect that his testimony might have had on the jury or the sentencing judge.

FOOTNOTES

[7] The Florida Supreme Court acknowledged that Porter had presented evidence of "statutory and nonstatutory mental mitigation," 788 So. 2d, at 921, but it did not consider Porter's mental health evidence in its discussion of nonstatutory mitigating evidence, *id.*, at 924.

Furthermore, the Florida Supreme Court, following the state postconviction court, unreasonably discounted the evidence of Porter's childhood abuse and military service. It is unreasonable to discount to irrelevance the evidence of Porter's abusive childhood, especially when that kind of history may have particular salience for a jury evaluating Porter's behavior in his relationship with Williams. It is also unreasonable to conclude that Porter's military service would be reduced to "inconsequential proportions," 788 So. 2d, at 925, simply because the jury would also have learned that Porter went AWOL on more than one occasion. Our Nation has **[***23]** a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did. [8] Moreover, the relevance of Porter's extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on Porter. [9] The evidence that he was AWOL is consistent with this theory of mitigation and does not impeach or diminish the evidence of his service. To conclude otherwise reflects a failure to engage with what Porter actually went through in Korea.

FOOTNOTES

[8] See Abbott, The Civil War and the Crime Wave of 1865-70, 1 Soc. Serv. Rev. 212, 232-234 (1927) (discussing the movement to pardon or parole prisoners who were veterans of the Civil War); Rosenbaum, The Relationship Between War and Crime in the United States, 30 J. Crim. L. & C. 722, 733-734 (1940) (describing a 1922 study by the Wisconsin Board of Control that discussed the number of veterans imprisoned in the State and considered "the greater leniency that may be shown to ex-service men in court").

[9] Cf. Cal. Penal Code Ann. § 1170.9(a) **[***24]** (West Supp. 2009) (providing a special hearing for a person convicted of a crime "who alleges that he or she committed the offense as a result of post-traumatic stress disorder, substance abuse, or psychological problems stemming from service in a combat theater in the United States military"); Minn. Stat. § 609.115, Subd. 10 (2008) (providing for a special process at sentencing if the defendant is a veteran and has been diagnosed as having a mental illness by a qualified psychiatrist).

As the two dissenting justices in [redacted] Florida Supreme Court reasoned, "t[redacted] exists too much mitigating evidence that was not presented to now be ignored." *Id.*, at 937 (Anstead, J., **[**409]** concurring in part and dissenting in part). Although the burden is on petitioner to show he was prejudiced by his counsel's deficiency, the Florida Supreme Court's conclusion that Porter failed to meet this burden was an unreasonable application of our clearly established law. We do not require a defendant to show "that counsel's deficient conduct more likely than not altered the outcome" of his penalty proceeding, but rather that he establish "a probability sufficient to undermine **[*456]** confidence in [that] outcome." *Strickland*, 466 U.S., at 693-694, 104 S. Ct. 2052, 80 L. Ed. 2d 674. **[***25]** This Porter has done.

The petition for certiorari is granted in part, and the motion for leave to proceed *in forma pauperis* is granted. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

LEXSEE 583 F3D 1100

MICHAEL ALLEN HAMILTON, Petitioner-Appellant, v. ROBERT L. AYERS, Respondent-Appellee.

No. 06-99008

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

583 F.3d 1100; 2009 U.S. App. LEXIS 21107

January 20, 2009, Argued and Submitted, Pasadena, California
September 18, 2009, Filed

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Eastern District of California. D.C. No. CV-F-90-00363-OWW-P. Oliver W. Wanger, District Judge, Presiding. *Hamilton v. Ayers, 458 F. Supp. 2d 1075, 2006 U.S. Dist. LEXIS 94773 (E.D. Cal., 2006)*

DISPOSITION: AFFIRMED in part; REVERSED in part; and REMANDED.

COUNSEL: Katherine L. Hart, Law Offices of Katherine L. Hart, Fresno, California; Saor E. Stetler, Law Offices of Saor E. Stetler, Mill Valley, California, for petitioner Michael Allen Hamilton.

Catherine Chatman, Deputy Attorney General, Office of the California Attorney General, Sacramento, California, for respondent Robert L. Ayers.

JUDGES: Before: Kim McLane Wardlaw, William A. Fletcher, and Richard A. Paez, Circuit Judges. Opinion by Judge Wardlaw.

OPINION BY: Kim McLane Wardlaw

OPINION

[*1102] WARDLAW, Circuit Judge:

Michael Allen Hamilton, a California death row inmate, appeals from the district court's denial of his pre-AEDPA petition for a writ of habeas corpus challenging his 1982 conviction and death penalty sentence for multiple counts of first-degree murder. We deny Hamilton's claims for relief as to the guilt phase. However, we conclude that Hamilton's trial counsel was constitutionally ineffective at the penalty phase for failing to investigate and present to the jury the wealth of classic mitigating evidence that [**2] was available to him. Accordingly, we reverse and remand for issuance of the writ, unless the State elects to reprosecute the penalty phase. [1] Because we grant relief based on the ineffective assistance claim, we do not reach Hamilton's claim of prosecutorial misconduct at the penalty phase.

1 If the State opts against pursuing further penalty phase proceedings, Hamilton will automatically receive a sentence of life imprisonment without the possibility of parole. *See Cal. Penal Code § 190.2* (West 1978); *see also Belmontes v. Ayers, 529 F.3d 834, 837 n.1 (9th Cir. 2008).*

I. FACTUAL AND PROCEDURAL BACKGROUND

We recite verbatim the district court's statement of facts, which closely tracks the California Supreme Court's opinion, *see People v. Hamilton, 48 Cal. 3d 1142, 259 Cal. Rptr. 701, 774 P.2d 730, 733-35 (Cal. 1989)*, and which neither party disputes.

> In 1981, Hamilton, his wife Gwendolyn (Gwen) who was pregnant, and their four children, ages six, four, three and one, lived in Bakersfield. In March of that year, the Hamiltons purchased life insurance policies, $ 175,000 on Hamilton and $ 100,000 on Gwen, paying the initial premium for coverage until June. When they did not pay the second quarterly payment on time, the agent [**3] personally collected the payment from Hamilton, extending the policy into September. When the third premium was

not received, the agent again visited the Hamiltons on October 17, collecting payment for two months from Gwen, extending the policies into November.

In September, Hamilton began an extramarital relationship with Brenda Burns. In October, he called his sister Carolyn Hamilton to ask if she knew anyone who would do something illegal for money. Later he told Carolyn he wanted someone to kill Gwen and offered her $ 20,000 from the insurance on [*1103] Gwen's life if she would help find someone to do the killing. Hamilton told both Carolyn and his brother-in-law Lyle Palmer that he had a girlfriend, but if he left or divorced Gwen he wouldn't have his kids. Brenda's sister Sharon Burns also testified that Hamilton told her he didn't like the way Gwen was in bed, sexually, and he wanted to divorce her so he could live with Brenda.

Carolyn first asked another sister, Victoria (Vicki) Hamilton, who agreed to kill Gwen for $ 10,000 of the insurance money. However, Vicki moved to Texas a few days later. Carolyn then approached Gilbert Garay, a prior acquaintance she met when both worked as [**4] security guards for Porterville Private Patrol. Gilbert agreed to kill Gwen for $ 10,000.

On October 31, Hamilton and Brenda Burns went to K-Mart in Bakersfield and purchased a single-shot 12-gauge shotgun. Hamilton said he left his identification in the car, so Brenda purchased the gun and shells with money furnished by Hamilton.

That evening Hamilton, Gwen, and their children drove to Porterville to take their kids trick-or-treating with Carolyn's son. While accompanying the children trick-or-treating, Hamilton, Carolyn and Gilbert discussed plans for the murder. Hamilton told Carolyn he would start to drive his family home, but then stop on Highway 65 claiming one tire was flat, so that Carolyn and Gilbert could drive by and shoot Gwen. Carolyn and Gilbert left in Carolyn's truck a few minutes after Hamilton. As planned, Carolyn and Gilbert found Hamilton crouched down by the tire with Gwen standing beside him holding a flashlight. Although Carolyn drove by three to four times, Gilbert never pulled the trigger, so they eventually returned to Porterville.

Hamilton phoned Carolyn about an hour later to ask what happened. Carolyn made excuses and Hamilton said they would come back to [**5] Porterville the next day. The next day, Hamilton phoned Carolyn to say he would pretend to have lost his wallet while changing the tire. Hamilton and Gwen would stop at the same place on the pretext of looking for his wal-let. Carolyn and Gilbert would follow them and shoot Gwen as previously planned.

That evening, Hamilton and his family again visited Carolyn, his mother and stepfather, Jacqueline (Jackie) and Sam Piper, in Porterville. Carolyn and Gilbert followed Hamilton about a half-hour after he left, and found him and Gwen at the same place, looking for the "lost" wallet. Carolyn and Gilbert drove by several times, but again Gilbert did not shoot. Hamilton was mad when he called Carolyn about an hour later, and she made more excuses.

The following day Hamilton called Carolyn with a new plan. As part of this plan, Carolyn called Gwen and told her that Hamilton's wallet had been found. Hamilton and Gwen for the first time left their children with Gwen's sister, who also lived in Bakersfield, and drove a white pickup truck to Porterville. When they arrived, Hamilton surreptitiously gave Carolyn his wallet, so she could return it to him in front of the family. Hamilton and Carolyn [**6] went to pick up Gilbert, and Carolyn and Gilbert told Hamilton they weren't going to shoot Gwen. Hamilton said he would do it. Hamilton said he would be hitchhiking, and instructed Carolyn and Gilbert to pick him up and take him back to his pickup.

This time everything went according to the new plan. Carolyn gave Hamilton an icepick, which he used to jab a hole in one of his pickup's tires. Hamilton [*1104] stopped the pickup along the highway because one tire was going flat. He left Gwen in the truck and walked along the highway, ostensibly to find a place where he could phone for help. Carolyn and Gilbert picked him up in Carolyn's truck and drove him to a phone booth, where Hamilton called his mother

and asked her to come help him. Mrs. Piper said she could not come until Carolyn returned with the truck. Carolyn and Gilbert then drove Hamilton back to where Gwen was waiting in the pickup. Hamilton took the shotgun, walked over to the pickup, and shot Gwen. He returned to the truck and demanded another shell. After reloading, he went back and shot Gwen again.

Gilbert drove back to the phone booth where they left Hamilton. Carolyn returned home with the truck after she dropped Gilbert off at [**7] a friend's house. Carolyn called Hamilton back at the phone booth and said their mother and stepfather were on the way. The Pipers drove Carolyn's truck to pick up Hamilton at the phone booth, and then to where Hamilton "discovered" that Gwen had been killed.

An autopsy revealed the cause of Gwen's death was shotgun wounds to the throat and chest, fired at close range. The fetus was viable and died from anoxia caused by Gwen's death.

Hamilton first told the police that Gwen had been killed while he was hitch-hiking [sic] to the phone booth. The next day, however, he said that she was killed by a Canadian whom he refused to identify. Eventually Vicki told the police of the plan to kill Gwen. With Vicki's consent, the police taped two phone calls between her and Carolyn. Carolyn and Gilbert each confessed when they were arrested, and were each charged with two counts of first degree murder with special circumstances. Both Carolyn and Gilbert agreed to plead guilty to second degree murder with a dangerous-weapon enhancement, and be sentenced to 16 years to life, in return for their testimony against Hamilton at trial. Carolyn and Gilbert both testified at trial, identifying Hamilton as [**8] Gwen's killer.

At trial, the defense attempted to show that Gilbert might have been the actual killer. Lilly Bardsley, the clerk from K-Mart who testified for the prosecution that she sold the shotgun to Brenda and Hamilton, was recalled by the defense and testified instead that she sold the gun to Brenda's sister Sharon, who was accompanied by both Hamilton and Gilbert. Sharon, also recalled by the prosecution in rebuttal, denied purchasing the shotgun. The ATF form filled out at the time the gun was purchased was signed with Brenda's name, and the prosecutor presented expert testimony that the signature was in Brenda's, not Sharon's, handwriting. Vicki testified that when she first talked to Carolyn after the murder, she assumed Gilbert was the shooter. Another defense witness testified that prior to Gwen's murder, Hamilton told her he suspected Vicki and her boyfriend, Stephen Fitz-herbert (who was Canadian), were planning to kill him. Hamilton stated, "Well, you know my family, if they want anything bad enough, they'll kill for it." Hamilton did not testify.

The jury found Hamilton guilty as charged, and found true the charged special circumstances of intentional murder for financial [**9] gain, and two counts of multiple murder. The penalty trial was brief. The prosecutor presented documentary evidence that ten years previously Hamilton was convicted of grand theft. Defense counsel called Hamilton's mother, who testified that as a child Hamilton had been removed from the family home because of abusive conduct [*1105] by his father, and placed in a series of foster homes. Hamilton requested permission to read a statement telling the penalty jury he was not guilty, but for unspecified reasons beyond his control he was not permitted to testify or present exonerating evidence, and asking the jury to "return with the penalty described by law for the crime that you have me guilty of." Defense counsel objected, and the court refused to permit Hamilton to read the statement. After approximately four hours, the jury returned a verdict imposing the death penalty.

Hamilton v. Ayers, 458 F. Supp. 2d 1075, 1086-89 (E.D. Cal. 2006) (citations omitted).

On direct appeal, the California Supreme Court modified the judgment to set aside one of the multiple-murder special circumstances but otherwise affirmed Hamilton's conviction and sentence, *Hamilton, 774 P.2d at 758*, and denied his petition [**10] for rehearing. The U.S. Supreme Court denied certiorari. *Hamilton v. California, 494 U.S. 1039, 110 S. Ct. 1503, 108 L. Ed. 2d*

638 (1990).

In June 1991, Hamilton filed a habeas petition in the United States District Court for the Eastern District of California. The district court instructed him to exhaust his state court remedies. Hamilton then filed a habeas petition in the California Supreme Court in July 1994. Following a two-day evidentiary hearing on an allegation of juror misconduct, the California Supreme Court found that no misconduct had occurred, and summarily rejected Hamilton's other claims. *In re Hamilton, 20 Cal. 4th 273, 84 Cal. Rptr. 2d 403, 975 P.2d 600 (Cal. 1999).*

Hamilton filed an amended federal habeas petition in 2000. He requested an evidentiary hearing, which the district court granted only as to the issue of ineffective assistance of counsel at the penalty phase. A two-day hearing was held in December 2003, and reopened in September 2004. On October 30, 2006, the district court denied Hamilton's habeas petition in full. *Hamilton, 458 F. Supp. 2d at 1152.* Hamilton timely appeals from the district court's denial of his habeas petition. [2]

> 2 The district court granted a Certificate of Appealability ("COA") on Hamilton's *Brady/Napue* and ineffective [**11] assistance of counsel claims. We granted Hamilton's motion to broaden the COA to include his prosecu-torial and juror misconduct claims. *See Slack v. McDaniel, 529 U.S. 473, 482-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).*

II. JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction to entertain Hamilton's habeas petition under *28 U.S.C. § 2254.* We have jurisdiction over Hamilton's appeal under *28 U.S.C. § 2253.*

Because Hamilton's first federal habeas petition was filed before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), pre-AEDPA standards apply to his claims. *See Correll v. Ryan, 539 F.3d 938, 941-42 (9th Cir. 2008).* We review de novo the district court's denial of habeas relief, *Raley v. Ylst, 470 F.3d 792, 799 (9th Cir. 2006),* but review for clear error the district court's factual findings, *Frierson v. Woodford, 463 F.3d 982, 988 (9th Cir. 2006).* "Although less deference to state court factual findings is required under the pre-AEDPA law . . ., such factual findings are nonetheless entitled to a presumption of correctness unless they are not fairly supported by the record." *Silva v. Woodford, 279 F.3d 825, 835 (9th Cir. 2002)* (citing to *28 U.S.C. § 2254(d)(8)*) [**12] (internal quotation marks omitted).

We also review de novo "mixed questions of law and fact, whether decided by [*1106] the district court or the state courts." *Jackson v. Brown, 513 F.3d 1057, 1069 (9th Cir. 2008)* (*Brady/Napue* claim); *see Fields v. Brown, 503 F.3d 755, 770 (9th Cir. 2007)* (en banc) (juror bias claim); *Frierson, 463 F.3d at 988* (ineffective assistance of counsel claim).

III. DISCUSSION

A. *Guilt Phase Claims*

1. Juror Bias

Hamilton challenges his conviction on grounds of juror bias and misconduct. His allegations stem from a declaration prepared by investigators from the California Appellate Project ("CAP") in 1994, which juror Geneva Gholston signed. The 1994 declaration stated that (1) before trial, Gholston discussed with a neighbor Hamilton's "ridiculous" story that a Canadian had murdered his wife, and the two agreed that Hamilton was guilty; (2) Gholston "prayed" to sit on Hamilton's jury after the spirit of her deceased Uncle Frank, who had been a bank robber and killer, exhorted her to atone for his wrongs; (3) during trial, Gholston saw the "skinnier" of Hamilton's sisters watching her from a car in the alley behind Gholston's home, which prompted Gholston to request increased [**13] police patrols; and (4) Gholston collected newspaper articles about Hamilton during the trial. *In re Hamilton, 975 P.2d at 605-06, 617 n.21.* "None of these matters had been brought to the attention of [the] court or counsel at petitioner's trial." *Id. at 605.*

Responding to the 1994 declaration, the California Supreme Court ordered the Director of Corrections to show cause why Hamilton's conviction and death sentence "should not be vacated on grounds that Juror Geneva Gholston was actually biased and/or incompetent when sworn as a juror, and that she committed prejudicial misconduct by concealing her bias during the jury selection process." *Id. at 605.* In 1996, at the instigation of the California Attorney General, Gholston submitted a second declaration, which stated that (1) the CAP investigators did not identify themselves as working on behalf of Hamilton; (2) they did not record or take notes of their interview with Gholston; (3) Gholston did not read or receive a copy of the 1994 declaration; (4) the 1994 declaration was wrong in several material respects, particularly with regard to Uncle Frank; and (5) the encounter in the alley did not affect her participation as a juror. *Id. at 605-06.*

Confronted [**14] with these conflicting declarations, the California Supreme Court ordered an evidentiary hearing, which took place in November 1997. At the hearing, Gholston, one of the CAP investigators, and others testified extensively over two full days. *Id. at 606-12* (summarizing testimony). Reviewing the evidence presented at the 1997 hearing, the state court referee concluded that

> (1) petitioner has failed to show by a preponderance of evidence that Gholston either harbored or concealed pretrial bias, (2) any inaccurate responses by Gholston on voir dire were inadvertent, not deliberate, and (3) if Gholston saw petitioner's sister in the alley behind Gholston's home during the trial, the experience did not cause Gholston to prejudge petitioner's case.

Id. at 612. The California Supreme Court adopted the referee's findings and denied Hamilton's habeas petition. *See id. at 615-21.*

Hamilton challenges each of these determinations, arguing primarily that the referee's findings were erroneous. Generally, we review de novo the district court's [*1107] denial of pre-AEDPA claims of implied bias in habeas petitions, "because implied bias is a mixed question of law and fact." *Fields, 503 F.3d at 770.* To justify [**15] a new trial based on a claim of juror bias, Hamilton must demonstrate that a dishonest answer was given on voir dire to a material question and that the correct response would have provided a valid basis for a challenge for cause, *see McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984)*, or that his right to an impartial jury, guaranteed by the *Sixth* and *Fourteenth Amendments*, was otherwise violated by actual or implied juror bias, *see Fields, 503 F.3d at 766-68*; *see also Morgan v. Illinois, 504 U.S. 719, 726-27, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992)*; *Remmer v. United States, 347 U.S. 227, 229, 74 S. Ct. 450, 98 L. Ed. 654, 1954-1 C.B. 146 (1954)*. Hamilton must also surmount the "presumption of correctness" that we afford to the state courts' factual conclusions regarding the possibility of prejudicial misconduct. *28 U.S.C. § 2254(e)(1)*; *see Thompson v. Keohane, 516 U.S. 99, 111, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995)* (noting requirement that presumptive weight be accorded to a trial court's resolution of factual issues, including juror impartiality, because the resolution of such issues "depends heavily on the trial court's appraisal of witness credibility and demeanor"). For the reasons that follow, we affirm the district court's rejection of these claims.

a) *Implied or Concealed* [**16] *Bias*

i. *Pretrial Conversations*

Gholston omitted from her voir dire responses any mention of a pretrial conversation she had with a neighbor regarding Hamilton's suggestion that a Canadian had murdered his wife. In answering the voir dire questions, however, Gholston acknowledged her basic familiarity with the circumstances of the crime. In fact, when asked whether the material she had read caused her to form an opinion regarding the guilt or innocence of the defendant, she answered: "No, it really didn't." Moreover, the record confirms that "Gholston's omissions on voir dire were *inadvertent*, not intentional," and that "even if Gholston's voir dire answers understated her pretrial awareness and impressions about the case, particularly with respect to petitioner's claim of a Canadian killer, her omissions did not lead to the seating of a biased juror." *In re Hamilton, 975 P.2d at 616.*

ii. *Newspaper Clippings*

Gholston testified at the 1997 hearing that while her husband clipped some newspaper articles to be saved for her sister, she did not personally make any clippings. The California Supreme Court noted that the referee did not make a finding regarding whether Gholston actually clipped [**17] any articles during the trial, but concluded that even if such misconduct had occurred, "any presumption of prejudice is rebutted" because the "clippings contained mere neutral and evenhanded accounts of the trial." *Id. at 617 n.21.* We agree. Moreover, as the California Supreme Court observed, "[n]o strong inference of bias arises simply because a juror failed to resist the temptation to read news articles," and "[t]here is no evidence that Gholston discussed these articles with other jurors or otherwise employed them in her deliberations." *Id.* Therefore, the clippings do not support a claim of implied or concealed bias.

iii. *Uncle Frank*

Gholston testified at the 1997 hearing that as she was considering how to get out of serving on the Hamilton jury, she experienced a clearing of conscience, or a [*1108] clearing of the mind, that led her to conclude that she should not fabricate an excuse to avoid jury service. In her own words: "it was just my mind cleared up and I said well, I have no excuse." At another point, Gholston testified that Uncle Frank may have caused her to have this clearing of conscience, but she also stated that he never spoke to her and she never felt his presence. Any potential [**18] inconsistency in this testimony is easily resolved through the possibilities that Gholston attributed her clearing of mind to Uncle Frank after she experienced it, or that thinking about her uncle triggered her clearing of mind. Accordingly, the record fairly supports the California Supreme Court's finding that Gholston "experienced no direct encounter with her Uncle Frank's spirit," and that the fact that she in some sense "felt the uncle's presence, and was thereby reassured to serve and to render her verdicts, did not cause her to prejudge the case." *Id. at 618.*

iv. *The 1994 Declaration*

The referee did not resolve the question of whether Gholston actually reviewed and approved the 1994 declaration prepared by the CAP investigators, although the referee did determine, and the California Supreme

Court agreed, that the declaration's "extreme statements" regarding Uncle Frank did not "accurately convey the experience Gholston was trying to describe." *Id.*

Hamilton argues that the enthusiasm with which Gholston repudiated all signatures and initials attributed to her, even those from the 1996 declaration prepared by the California Attorney General, as well as her extreme position that she [**19] never even saw the 1994 declaration, indicates willful deceptiveness on Gholston's part. The scope of Gholston's repudiation may have been excessive, but her vehemence at the 1997 hearing does not necessarily lead to the conclusion that all of her testimony should be discredited. Further, while the testimony of CAP investigator Scarlet Nerad did conflict with Gholston's testimony, the record demonstrates why the referee credited Gholston's testimony over Nerad's. Specifically, the 1997 hearing transcript supports the conclusions that (1) Gholston did not understand the purpose of the investigators' 1994 visits; (2) Gholston did not pay attention to what she was signing; and (3) Gholston's 1997 testimony about her experiences in 1994 and during Hamilton's trial was generally reliable, though tinged at times by exaggerated, overemphatic denials.

The State accurately distinguishes the cases Hamilton offers in support of this claim. In *Dyer v. Calderon*, we explicitly found not only that "the facts were not properly developed by the state court," but also that the potentially biased juror had "plainly lied" in answering certain questions and that "no [**20] rational trier of fact could find otherwise." *151 F.3d 970, 979 (9th Cir. 1998)* (en banc). Specifically, the juror stated on voir dire that no member of her family had been the victim of a homicide, when in fact her brother had been murdered. *Id. at 972-73.* When questioned during trial about this omission, she stated she thought the killing was an accident, although the circumstances of the crime actually confirmed that the killing was deliberate. *Id. at 974.* Nonetheless, after a brief in camera hearing, the judge concluded the juror was not biased. *Id. at 975.* We disagreed, finding implied bias where a juror "chose to conceal a very major crime--the killing of her brother in a way that she knew was very similar to the way [the petitioner] was accused of killing his victims." *Id. at 982.* In contrast to *Dyer*, California provided Hamilton with a two-day evidentiary hearing on the issue of juror misconduct. Further, Gholston's incomplete voir dire answers were not "plain lies," and Hamilton has [*1109] failed to demonstrate the necessary "excess of zeal" that led the *Dyer* panel to infer the impermissible taint of bias. *Id.*

Similarly, in *Green v. White*, the allegedly biased juror did not disclose [**21] a prior assault conviction. We found it "hard to imagine that [the juror] could have forgotten about the six months he spent in the brig for the past assault, no matter how much time had passed." *232 F.3d 671, 676 (9th Cir. 2000).* In contrast, it is not hard to imagine that, several months after briefly discussing the Hamilton murder with a neighbor and reading about it in multiple newspapers, Gholston only recalled her primary source of information.

b) *Actual Bias from the "Encounter"*

So far as the potential impact on Gholston is concerned, it is irrelevant whether Vicki (the "skinnier" Hamilton sister) and her fiance were actually parked in the car that Gholston saw in the alley behind her home. Aside from conclusory allegations, Hamilton fails to explain how the supposed encounter engendered bias. In theory, an encounter of this nature could introduce the "kind of unpredictable factor into the jury room that the doctrine of implied bias is meant to keep out." *Dyer, 151 F.3d at 982.* Nonetheless, Hamilton fails to overcome the presumption of correctness we accord the state's findings on this issue. As the California Supreme Court found:

> The episode described by Gholston was brief, isolated, [**22] and ambiguous. The people Gholston saw parked in her alley did not approach or speak to her. Gholston mentioned no display of weapons or threatening gestures. According to Gholston, the two individuals simply sat in their car, and they drove away rapidly the instant they realized that Gholston had seen them. By Gholston's own account, "it never occurred to [her]" to report the incident to the trial court. She further insisted she never discussed the incident with other jurors, and there is no contrary evidence.

In re Hamilton, 975 P.2d at 621 (alteration in original). We agree with the California Supreme Court that the "episode affords no basis for relief," *id.*, and affirm the district court's conclusion that Hamilton has not shown, and the record does not reveal, that Gholston was biased against him. *Cf. United States v. Armstrong, 654 F.2d 1328, 1333 (9th Cir. 1981)* (finding no abuse of discretion in the district court's refusal to declare a mistrial as a result of phone calls received by a juror's husband, where the calls "did not refer to the merits," "did not articulate threats," and were not "identified with either side," and agreeing with the district court that any resulting [**23] irregularity did not compromise the "essential fairness of the process").

B. *Brady* and *Napue* Claims

Hamilton claims that the prosecution suppressed evidence that "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley, 514 U.S.*

419, 435, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); *see also Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*; *Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959)*. Specifically, he argues that the prosecution withheld evidence of certain terms of Gilbert's plea agreement and of his personal ties to one of the Sheriff's detectives who investigated the case, Detective Jay Salazar; that the prosecution ordered Gilbert to conform his testimony to a "scripted" statement and pressured him to "round up" alibi witnesses; and that the prosecution withheld evidence of concessions Vicki received in exchange for her testimony. The California Supreme Court summarily rejected Hamilton's *Brady* and *Napue* claims, and the district court denied them on the merits. The [*1110] district court also denied Hamilton's request for an evidentiary hearing on these claims pursuant to *Townsend v. Sain, 372 U.S. 293, 312, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963), overruled on other grounds by Keeney v. Tamayo-Reyes, 504 U.S. 1, 5-6, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992)*, [**24] and its progeny, *see, e.g., Insyxiengmay v. Morgan, 403 F.3d 657, 669-70 (9th Cir. 2005)*. We agree with the district court.

There are three components to a *Brady* violation: (1) exculpatory or impeaching evidence favorable to the accused; (2) suppressed by the State; (3) resulting in prejudice. *Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)*. To establish prejudice under *Brady*, Hamilton must demonstrate a " 'reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Id. at 280* (quoting *United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)*). In contrast, where the prosecution presents or fails to correct false evidence in violation of *Napue*, we assess whether there is " 'any reasonable likelihood that the false testimony *could* have affected the judgment of the jury.' " *Jackson, 513 F.3d at 1078* (quoting *Hayes v. Brown, 399 F.3d 972, 985 (9th Cir. 2005)* (en banc)). "The materiality of suppressed evidence is 'considered collectively, not item by item.' " *Id. at 1071* (quoting *Kyles, 514 U.S. at 436*). [3] Even viewed collectively, however, the suppressed evidence at issue does not reveal a reasonable probability that the [**25] result of Hamilton's trial would have been different. Indeed, compared to the overwhelming evidence of Hamilton's guilt, the allegedly suppressed evidence is relatively insignificant.

> 3 In *Jackson*, we described the analytical model for collectively assessing the materiality of *Brady* and *Napue* claims:
>
> > Although we must analyze *Brady* and *Napue* violations "collectively," the difference in the materiality standards poses an analytical challenge. The *Napue* and *Brady* errors cannot all be collectively analyzed under *Napue's* "reasonable likelihood" standard, as that would overweight the *Brady* violations. On the other hand, they cannot be considered in two separate groups, as that would fail to capture their combined effect on our confidence in the jury's decision. To resolve this conflict, we first consider the *Napue* violations collectively and ask whether there is "any reasonable likelihood that the false testimony *could* have affected the judgment of the jury." *Hayes, 399 F.3d at 985* (emphasis added). If so, habeas relief must be granted. However, if the *Napue* errors are not material standing alone, we consider all of the *Napue* and *Brady* violations collectively and ask whether "there is a reasonable [**26] probability that, but for counsel's unprofessional errors, the result of the proceeding *would* have been different." *Bagley, 473 U.S. at 682, 105 S. Ct. 3375* (emphasis added) (internal quotation marks omitted); *United States v. Zuno-Arce, 25 F. Supp. 2d 1087, 1117 (C.D. Cal. 1998)* (applying a two-step materiality analysis to combined *Brady* and *Napue* claims), *aff'd, 339 F.3d 886 (9th Cir. 2003)*. At both stages, we must ask whether the defendant "received . . . a trial resulting in a verdict worthy of confidence." *Kyles, 514 U.S. at 434, 115 S. Ct. 1555.*
>
> *513 F.3d at 1076* (alteration in original).

First, the jury received ample evidence of the connections between Gilbert's family and Detective Salazar. The significance of any additional evidence regarding these connections appears minimal and is unlikely to have altered the jury's assessment of the evidence.

Second, the State convincingly explains that Gilbert was not forced to conform his testimony to a "scripted" statement. The prosecution's treatment of Gilbert subsequent to Lilly Bardsley's identification of him as the

third participant in the purchase of the shotgun at K-Mart appears [*1111] consistent with a general and unsurprising concern [**27] that Gilbert might not have testified truthfully. Indeed, had Gilbert been unable to confirm his whereabouts on the Halloween evening the shotgun was purchased, the prosecution may well have been justified in withdrawing the plea agreement, which was conditioned on Gilbert's honest and truthful testimony at trial. Because Gilbert explained the conditions of his plea agreement in open court, it is clear that everyone, including the jury, knew full well that if Gilbert had lied on the stand, he would have violated the terms of his deal. Thus, as soon as Bardsley identified Gilbert and thereby controverted his testimony, it would have been apparent that Gilbert's plea agreement was imperiled. Defense counsel's failure to examine Gilbert on this issue cannot be attributed to the prosecution. Moreover, this situation is markedly distinct from *Smith v. Baldwin*, in which the "prosecutor informed [a witness] that if he insisted on testifying in accordance with his recantations, the state would seek to set aside his plea agreement in this case, subjecting [him] to capital murder charges." *510 F.3d 1127, 1136 (9th Cir. 2007)* (en banc). Unlike the witness in *Smith*, Gilbert never attempted to [**28] recant his testimony. On the contrary, after Bardsley testified that Gilbert was present at the shotgun purchase, he simply produced alibi witnesses to confirm his consistent statement that he spent the late afternoon and evening trick-or-treating. [4]

> 4 Hamilton argues that Gilbert's initial testimony that he was trick-or-treating with his child is inconsistent with the rebuttal testimony that provided the details of his excursions. However, Hamilton fails to identify any actual conflict, pointing at best to minor and unsurprising discrepancies regarding the timing of Gilbert's activities. Accordingly, the district court's factual finding that the "rebuttal witnesses' testimony was in fact consistent with Gilbert's testimony on direct examination" is not clearly erroneous.

Third, given that Gilbert faced the death penalty in the absence of his plea agreement, the prosecution's facilitation of Gilbert's release on bond during the trial appears insignificant. Moreover, Gilbert's testimony that his release on bail was not part of the plea agreement appears consistent with the statement in his declaration that "the prosecutor said he would not object to the court setting bail, and I accepted [**29] the plea bargain." After all, the court made the ultimate decision regarding bail, not the prosecution. Regardless, this additional inducement could not have affected the jury's scrutiny of Gilbert's testimony, given what the jury already knew about Gilbert's involvement in the murders and the other inducements he received to testify. Even assuming the prosecution's failure to correct this testimony at trial implicated *Napue*, there does not appear to be " 'any reasonable likelihood that the false testimony *could* have affected the judgment of the jury.'" *Jackson, 513 F.3d at 1078* (quoting *Hayes, 399 F.3d at 985*).

Fourth, while Hamilton argues that the facts are in dispute as to the threats and inducements provided to Gilbert to elicit his testimony, it appears that the only real dispute pertains to the significance of such threats and inducements. To the extent any factual disputes remain, the resolution of these disputes in Hamilton's favor does not alter the prejudice analysis.

Finally, although there is some conflict between Gilbert's description of the murders in his 1994 declaration and his trial testimony that he looked away when the shots were fired, [5] the fact that Gilbert [*1112] actually [**30] watched the shootings is not probative of who pulled the trigger, and it is undisputed that Gilbert and Carolyn were present during the murders. As the State observes, this graphic testimony may have made Gilbert's testimony even more damaging.

> 5 In a 1994 declaration, Gilbert described the shooting as follows: I remember Gwendolyn opening the window part-way, swatting away the barrel of the shotgun when it was put through the partially-open window, and after the door was opened the blast of the first shot knocking her in slow motion back and to the side. I can still see her as she fell over, but with her eyes still open and staring straight ahead. Then the second shot knocked her further over, and as she slumped down her hair was caught in the gun-rack and she could not fall any more.
>
> Hamilton argues that Gilbert's recollection of the shooting, which conflicts with his testimony at trial that he looked away when the shots are fired, shows that Gilbert was the shooter.

Assuming Hamilton has otherwise identified *Brady* and *Napue* violations, he fails to establish that those violations are material. *Cf. Jackson, 513 F.3d at 1075-79.* In *Jackson*, we found material violations of *Napue* where the [**31] prosecution's solicitation of perjured testimony bolstered the credibility of two "key" witnesses, "whereas the truthful testimony would have substantially impeached" those witnesses' credibility. *Id. at 1078.* Similarly, in *Hayes*, in which the "State knowingly presented false evidence to the jury and made false representations to the trial judge as to whether the State had agreed not to prosecute [a lead witness] on his pending felony charges," *399 F.3d at 978*, we also found violations of *Napue*, reasoning that the witness's credibility would have been affected if the jury had been informed of the "critical deal," *id. at 987.*

Gilbert's testimony was admittedly critical to the

prosecution's case against Hamilton. However, in contrast to both *Jackson* and *Hayes*, it is difficult to imagine Gilbert's credibility being even remotely affected by the correction or clarification of his testimony regarding the prosecution's involvement in his release on bail. The same is true of Vicki's possibly false testimony regarding additional benefits she and her fiance received in exchange for their testimony. Once again, in light of the benefits of which the jury was already aware, the additional benefits [**32] would have been cumulative and insignificant. Accordingly, the *Napue* violations are not collectively material.

Similarly, considering all the possible *Brady* and *Napue* violations together, there is no reasonable probability that the outcome of the guilt phase of Hamilton's trial would have been different. The suppressed evidence and possible false-hoods pertained to the details of collateral matters with which the jury was well acquainted. Accordingly, because Hamilton has not shown that his "allegations, if proved, would entitle him to relief," an evidentiary hearing on these claims was not required. *Insyxiengmay, 403 F.3d at 670* (internal quotation marks omitted).

The overwhelming evidence of Hamilton's guilt only strengthens our conclusion that he was not prejudiced by the alleged *Brady* and *Napue* violations. In light of this evidence, defense counsel's failure to prepare effectively for the penalty phase of Hamilton's trial is all the more egregious.

C. *Penalty Phase Claims*

Hamilton asserts two penalty phase claims. Because we grant relief as to Hamilton's claim of ineffective assistance of counsel, we do not reach his claim of prosecutorial misconduct.

To prevail on his claim of ineffective [**33] assistance of counsel, Hamilton must demonstrate that his trial counsel's penalty phase performance "fell below an objective standard of reasonableness" at the time of trial, *Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674* [*1113] *(1984)*, and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id. at 694.*

1. *Deficient Performance*

Although the Supreme Court "ha[s] declined to articulate specific guidelines for appropriate attorney conduct and instead ha[s] emphasized that 'the proper measure of attorney performance remains simply reasonableness under prevailing professional norms,' " *Wiggins v. Smith, 539 U.S. 510, 521, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)* (alteration omitted) (quoting *Strickland, 466 U.S. at 688*), "general principles have emerged regarding the duties of criminal defense attorneys that inform our view as to the 'objective standard of reasonableness' by which we assess attorney performance, particularly with respect to the duty to investigate," *Summerlin v. Schriro, 427 F.3d 623, 629 (9th Cir. 2005)* (en banc).

At the time of Hamilton's trial, his counsel had a duty to conduct "a thorough investigation of the defendant's background." [**34] *Williams v. Taylor, 529 U.S. 362, 396, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*; *see Ainsworth v. Woodford, 268 F.3d 868, 873-74 (9th Cir. 2001)*. Because "[t]he Constitution prohibits imposition of the death penalty without adequate consideration of factors which might evoke mercy," *Hendricks v. Calderon, 70 F.3d 1032, 1044 (9th Cir. 1995)* (citing *Deutscher v. Whitley, 884 F.2d 1152, 1161 (9th Cir. 1989))* (internal quotation marks omitted), "[i]t is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase," *Caro v. Calderon, 165 F.3d 1223, 1227 (9th Cir. 1999)*. To that end, trial counsel must inquire into a defendant's "social background, . . . family abuse, mental impairment, physical health history, and substance abuse history," *Correll, 539 F.3d at 943*; obtain and examine "mental and physical health records, school records, and criminal records," *id.; see Summerlin, 427 F.3d at 630*; consult with appropriate medical experts, *Mayfield v. Woodford, 270 F.3d 915, 927-28 (9th Cir. 2001)* (en banc); and pursue relevant leads, *Lambright v. Schriro, 490 F.3d 1103, 1117 (9th Cir. 2007)* (per curiam). Although "we must avoid the temptation to secondguess [counsel's] performance [**35] or to indulge 'the distorting effects of hindsight,' " *Mayfield, 270 F.3d at 927* (quoting *Strickland, 466 U.S. at 689*), we need not defer to counsel's choices at trial unless "those choices [were] made after counsel . . . conducted reasonable investigations or [made] a reasonable decision that makes particular investigations unnecessary," *Summerlin, 427 F.3d at 630* (third alteration in original) (internal quotation marks omitted).

Counsel also has an obligation to present and explain to the jury all available mitigating evidence. *Correll, 539 F.3d at 946*. Evidence about the defendant's background and character is relevant to the jury's determination "because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Boyde v. California, 494 U.S. 370, 382, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990)* (emphasis and internal quotation marks omitted). In a capital case, such evidence can be the difference between a life sentence and a sentence of death. *See Mak v. Blodgett, 970 F.2d 614, 619 (9th Cir. 1992)* (per curiam) ("[T]he issue for the jury is whether [**36] the defendant will live or die . . . . To fail to present important mitigating evidence in the penalty phase--if

there is no risk in doing so--can be as devastating as a failure [*1114] to present proof of innocence in the guilt phase." (second alteration in original)).

a) *Penalty Phase Investigation*

What little investigation Hamilton's counsel did for the penalty phase was revealed at the evidentiary hearing held before the district court in December 2003. Hamilton testified and presented testimony from his defense counsel and Philip Cherney, an expert on ineffective assistance of counsel claims. The State presented the testimony of the defense investigator, Danny Wells.

Defense counsel testified that Hamilton's case was the first capital case on which he had worked. However, counsel did not retain anyone other than Wells to assist with the penalty phase preparations. In fact, he never even thought about retaining a mitigation expert or a mental health expert. Moreover, he did not have the benefit of a more experienced attorney's advice, as he did not associate co-counsel for Hamilton's case. [6]

> 6 We need not decide whether the failure to associate co-counsel alone suffices to render counsel's [**37] performance deficient, *cf. Mayfield, 270 F.3d at 927* (citing *Keenan v. Superior Court, 31 Cal. 3d 424, 180 Cal. Rptr. 489, 640 P.2d 108 (Cal. 1982))*, as counsel's performance here was deficient without placing this fact into the mix.

Wells had never previously worked with Hamilton's counsel. At the time, Wells did not have any training in conducting an investigation for the penalty phase of a capital case. He could not specifically recall whether he had worked on any death penalty cases before Hamilton's.

Defense counsel testified that he began working on the penalty phase while preparing for the guilt phase. He acknowledged that Wells did the majority of the investigation for the guilt and penalty phases. Both defense counsel and Wells testified that the case file appeared to be incomplete, but neither could state definitively which, if any, documents were missing. Defense counsel explained that after the trial ended, he provided the entire case file to Hamilton's first appellate attorney, Betty Dawson. Neither defense counsel nor anyone in his office made copies of any of the documents before turning them over to Dawson.

According to the documents that were included in the file, the investigation consisted of at most [**38] five interviews: (1) Vicki (Hamilton's sister); (2) Marvin Hamilton (Hamilton's uncle); (3) Patti Ketchum (the foster sister of Hamilton's sister Carolyn); (4) Ron Stafford (Carolyn's then-boyfriend); and (5) John Stevens (an acquaintance of Carolyn's). The interviews took place shortly before jury selection began. Wells conducted all of the interviews on his own, except Vicki's. Defense counsel participated in Vicki's interview, during which he and Wells questioned her about Hamilton's "past including his childhood," according to Wells's notes. However, the notes from Vicki's interview in fact do not mention anything about Hamilton's childhood. Nor does Vicki's declaration in support of Hamilton's habeas petition clarify whether she was asked about his childhood during her interview. In light of Wells's evidentiary hearing testimony that if Vicki had relayed information about Hamilton's childhood, he would have included it in his notes, the district court's finding that defense counsel and Wells obtained such information about Hamilton's childhood from Vicki is clearly erroneous. As we discuss below, Vicki could have provided countless details about the physical and mental abuse Hamilton [**39] suffered as a child. Counsel thus acted deficiently in failing to interview this key witness about Hamilton's childhood background.

[*1115] That defense counsel did not adequately investigate the available mitigating evidence is even more apparent in his response to Well's interview with Marvin Hamilton, as documented. As noted above, in 1967 Hamilton was placed with Marvin after Carolyn disclosed to a relative that her father had been sexually abusing her for years and that her mother had acquiesced in the abuse. Wells's interview notes demonstrate that Marvin was well aware of the abuse: "[Marvin] said that [Hamilton's father, Bob,] was molesting Carolyn and he went to jail for it and so did thier [sic] mother because she knew about it and did nothing about it." Marvin also mentioned that Hamilton had "mov[ed] from one military base to another" throughout his childhood. Defense counsel specifically recalled that he reviewed Wells's report, but that he did not ask Wells to investigate further into the alleged abuse or Bob's military records. Counsel acted deficiently in failing to pursue such classic mitigating evidence. *See Lambright, 490 F.3d at 1117* ("[W]hen tantalizing indications in the [**40] record suggest that certain mitigating evidence may be available, those leads must be pursued." (internal quotation marks omitted)); *see also Wiggins, 539 U.S. at 525* ("[A]ny reasonably competent attorney would have realized that pursuing . . . leads [regarding the petitioner's traumatic childhood] was necessary to making an informed choice among possible defenses, particularly given the apparent absence of any aggravating factors in petitioner's background.").

The other three interviews unearthed no information about Hamilton's background, which is not surprising, given that each of them lasted only one to two minutes. Defense counsel likely never intended to obtain information from these witnesses for purposes of the penalty phase defense, as they barely knew Hamilton. They were involved in the case only because of their

knowledge of events that occurred shortly before and after the crime.

Most of the available witnesses who could have provided vital information about Hamilton's background were never contacted by anyone working on Hamilton's behalf at the time of trial. The district court thus clearly erred in finding that either defense counsel or Wells "did interview the available [**41] witnesses, and no better, available witness about Hamilton's background and social history other than his mother was uncovered." Counsel's failure "to contact persons who might have had more detailed information about [Hamilton's] past," when the initial investigation put counsel on notice that Hamilton "had a particularly difficult childhood," renders his performance deficient. *Douglas v. Woodford, 316 F.3d 1079, 1088 (9th Cir. 2003).*

There was also available documentary evidence at the time of trial that could and should have been investigated as part of the penalty phase investigation. Many of these documents were in fact in defense counsel's possession, but he never reviewed them. The existence of these documents came to light after the 2003 evidentiary hearing, when Hamilton's habeas counsel filed over two hundred pages of newly discovered documents that she had found in a file labeled "Hamilton Prior Record." The file contained the following:

> . March 1967 Kern County Juvenile Court Petition (alleges that Hamilton's home was unfit due to abuse and incest)
>
> . April 1967 Kern County Juvenile Department Report of Probation Officer (describes in detail the abuse and incest; recommends [**42] that Hamilton be declared a dependant child of the court)
>
> . April 1967 Kern County Juvenile Department Supplemental Report of Probation Officer (describes arrests of [*1116] Hamilton's father and mother for incest and contributing to the delinquency of a minor; notes that Hamilton's father was committed to Atascadero State Hospital and his mother was sentenced to thirty days' imprisonment and three years' probation)
>
> . April 1967 Kern County Juvenile Court Hearing (adjudges Hamilton a dependant child of the court)
>
> . April 1967 Kern County Juvenile Court Findings and Order of Referee (places Hamilton in the care of the Kern County Probation Department)
>
> . May 1967 Kern County Juvenile Court Home Placement Order (places Hamilton in Marvin's home)
>
> . April 1968 Kern County Juvenile Court Home Placement Order (places Hamilton in the care of the Kern County Welfare Department)
>
> . May 1968 Kern County Juvenile Court Medical Court Order (authorizes the undersigned doctor to perform surgery on Hamilton's fractured clavicle)
>
> . January 1969 Kern County Juvenile Court Findings and Order of Referee (declares Hamilton a ward of the court and places him in the care of the Kern County Probation Department)
>
> . February [**43] 1969 Kern County Juvenile Court Home Placement Order (places Hamilton in the home of foster parent Ruby Carter)
>
> . June 1969 Kern County Juvenile Court Home Placement Order (places Hamilton in his mother's home but leaves unchanged his status as a ward of the court)
>
> . October 1969 Kern County Juvenile Court Order Granting Consent to Marry (grants Hamilton's petition to marry Christine Grealish)
>
> . December 1969 Kern County Juvenile Court Request and Order for Dismissal of Juvenile Court Case (based on Hamilton turning eighteen and complying with probation requirements)
>
> . 1966-1970 Kern County Union High School District Permanent Record (lists Hamilton's classes and grades at Bakersfield High School and Foothill High School)
>
> . Kern County Criminal Record (includes juvenile and adult records for various offenses committed by Hamilton, including grand theft, burglary, and passing bad checks)
>
> . FBI Criminal Record (lists various offenses committed by Hamilton between 1970 and 1972, including grand theft, deserting the U.S. Army, a hold for going AWOL, failure to appear, and burglary) [7]

7 The file also contained a letter dated September 1982, written by Hamilton, in which he recounts his life history. [**44] As we briefly explain below, the authenticity of this letter is disputed.

It is undisputed that Wells obtained these documents prior to the penalty phase. Intermingled with the other documents was a two-page investigative report written by Wells on October 8, 1982, two days after the trial began. In the report, Wells notes that, on October 7, 1982, he went to the Bakersfield Welfare Department, Juvenile Probation Department, and Adult Probation Department to search for records, but was told that Hamilton's records had been destroyed. He was more successful at the Kern County Clerk's Office, where he obtained a certified copy of Hamilton's juvenile record. He also visited Bakersfield High School and Foothill High School, where he obtained all school records for Hamilton that had not already been destroyed. Wells's report is corroborated by the records themselves, most of which bear a certification stamp dated October 7, 1982. [8] Yet, some of the records [*1117] were not sent to Wells until November 16, 1982, [9] two days before Hamilton was sentenced to death.

8 The stamp reads: "The document to which this certificate is attached is a full, true and correct copy of the original on file and of record [**45] in my office." The stamp is signed by the Deputy County Clerk and Clerk of the Superior Court of Kern County.

9 These records bear a certified stamp dated November 16, 1982. A copy order form included in the file confirms this date; it is addressed to "Dan Wells" and notes that ten pages of certified documents are attached.

Defense counsel testified at the 2003 evidentiary hearing that he vaguely recalled asking Wells to obtain Hamilton's juvenile dependency records and other relevant documents. He admitted, however, that he never knew "what the outcome was of [Wells's search]." He believed that no records had been available, yet acknowledged that he had not used the subpoena power of the court to try to obtain them. In light of this testimony, the district court's finding that "counsel did obtain and review[ ] the records which were available" is clearly erroneous. Given the limited information about Hamilton's background that counsel already knew from Marvin's interview, he acted deficiently in not reviewing the records that Wells obtained or attempting to pursue other avenues of investigation. *See Correll, 539 F.3d at 943.*

Counsel also failed to investigate Hamilton's mental health [**46] history and mental state at the time of trial. *See Summerlin, 427 F.3d at 630* ("We have long recognized an attorney's duty to investigate and present mitigating evidence of mental impairment. This includes examination of mental health records." (citation and internal quotation marks omitted)); ted)); *see also Hendricks, 70 F.3d at 1043* ("Evidence of mental problems may be offered to show mitigating factors in the penalty phase, even though it is insufficient to establish a legal defense to conviction in the guilt phase." (citing *Cal. Penal Code § 190.3(d), (h)*). As we discuss below, then available documentary evidence revealed that Hamilton had suffered from serious mental illnesses throughout most of his life. Moreover, counsel was aware that Hamilton tried to commit suicide in prison shortly after his wife's death, and that he was taking antidepressant medication at the time of trial.

Defense counsel thus should have retained a mental health expert and provided the expert with the information needed to form an accurate profile of Hamilton's mental health. *See Caro v. Woodford, 280 F.3d 1247, 1254-55 (9th Cir. 2002); Mayfield, 270 F.3d at 927.* We have found ineffective assistance under [**47] similar circumstances. *See, e.g., Evans v. Lewis, 855 F.2d 631, 636 (9th Cir. 1988)* (holding that counsel was ineffective where he "conducted no investigation to ascertain the extent of any possible mental impairment" even though documents available to counsel prior to the sentencing hearing plainly indicated that the defendant had a history of mental problems and had even attempted suicide while in prison); *see also Hendricks, 70 F.3d at 1043* ("[W]here counsel is on notice that his client may be mentally impaired, counsel's failure to investigate his client's mental condition as a mitigating factor in a penalty phase hearing, without a supporting strategic reason, constitutes deficient performance.").

Although the district court did not think it dispositive or even make a finding on the issue, the State places much reliance on Hamilton's asserted lack of cooperation. The State contends that further efforts by defense counsel would have been unavailing because there is "no indication that Hamilton would have cooperated" with the investigation. The extent to which Hamilton refused to assist in the investigation was disputed at the evidentiary hearing. Defense counsel testified that Hamilton [**48] refused [*1118] to answer questions or provide relevant sources of information, which Wells confirmed. Yet, this testimony was undermined by defense counsel's admission that he did not even ask Hamilton to complete a basic biographical information form at the outset of his investigation. In fact, defense counsel could not recall which specific information he asked Hamilton to provide. Further, Hamilton testified that he supplied counsel with an "extraordinary amount of information." He admitted being "antagonistic at times," but claimed that, overall, he had been "more than cooperative." Counsel also testified that Hamilton insisted on receiving

the death penalty if he were found guilty. The State suggests that this testimony is corroborated by the statement Hamilton tried to read to the jury at the outset of the penalty phase. [10] Most fairly read, however, this statement reveals only Hamilton's insistence on his innocence and his belief that presenting mitigating evidence would be tantamount to admitting guilt.

> 10 The statement that Hamilton wanted to read at trial is similar to a letter he wrote to defense counsel on October 19, 1982, shortly after trial began. In the letter, which was introduced [**49] at the evidentiary hearing, Hamilton states:
>
> > I don't want to live the rest of my life in prison knowing I was there for something I didn't do. I would rather receive the Death Penalty that way on my automatic appeal, some other attorney may do what you failed too [sic]; and prove I am not guilty. No, if it gets [as] far [as the penalty phase] I won't have you pleading for my life or fabricating any mitigating circumstances to a crime I didn't commit. The only thing I will want is for the press to be at the penalty phase to hear a brief statement I will write up for you to read to them and the jury.
>
> Hamilton does not dispute that he wrote the letter. He argues, however, that we should consider it in conjunction with a nine-page letter he allegedly wrote defense counsel on September 20, 1982, in which he recounts his life history. The district court reopened the evidentiary hearing in September 2004, for the limited purpose of evaluating the authenticity of this letter. The district court expressed "grave doubts" about whether Hamilton had in fact written it at the time of trial, but did not make a finding as to the letter's authenticity. Given our conclusion that defense counsel was deficient [**50] even assuming Hamilton failed to cooperate, we need not resolve whether Hamilton wrote the letter at the time of trial or during his habeas proceedings.

Even if we accept defense counsel's version of the events, we would nevertheless find his investigation deficient. A defendant's lack of cooperation does not eliminate counsel's duty to investigate. *See* 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1980) ("The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty."). On the contrary, "if a client forecloses certain avenues of investigation, it arguably becomes even more incumbent upon trial counsel to seek out and find alternative sources of information and evidence, especially in the context of a capital murder trial." *Silva, 279 F.3d at 847*; *see, e.g., Karis v. Calderon, 283 F.3d 1117, 1136 (9th Cir. 2002)* (determining that the defendant's lack of cooperation did not excuse counsel from further investigating mitigating evidence, especially given that "counsel was aware [that the defendant suffered] childhood abuse and there was essentially no other significant mitigating [**51] evidence to present to the jury").

We recognize that both the Supreme Court and we have found that a defendant's refusal to cooperate in the penalty phase may render counsel's limited investigation and presentation of mitigating evidence reasonable under the circumstances. *See, e.g., Schriro v. Landrigan, 550 U.S. 465, 475-77, 127 S. Ct. 1933, 167 L. Ed. 2d* [*1119] *836 (2007)*; *Jeffries v. Blodgett, 5 F.3d 1180, 1197-98 (9th Cir. 1993)*. These cases, however, are readily distinguishable. In *Landrigan*, a post-AEDPA case, the defendant actively obstructed counsel's investigation and outright refused to allow counsel to present any mitigating evidence. *550 U.S. at 468-70*. For example, the defendant explicitly instructed his mother and ex-wife not to testify. *Id. at 469*. Counsel tried to make a proffer of the witnesses' testimony, but the defendant repeatedly interrupted his presentation to the court to reiterate that he did not want mitigating evidence presented. *Id. at 470*. When the judge asked the defendant if he wanted to make a statement at the conclusion of the penalty phase, he responded: "I think if you want to give me the death penalty, just bring it right on. I'm ready for it." *Id.* Similarly, the defendant in *Jeffries* refused [**52] to allow his counsel to present any mitigating evidence other than his brother's brief testimony regarding his artistic abilities. *5 F.3d at 1197*. The defendant made his decision not to present a mitigation defense "after a weekend of discussions with his brother and with counsel." *Id.* After the defendant explained the various reasons underlying his decision to the trial court, counsel told the court he believed that the defendant "made [his decision] knowingly, voluntarily and intelligently" "after a weekend of soul searching." *Id.*

By contrast, even if we credit counsel's testimony here, at most Hamilton refused to assist in his defense; he did not impede the many other avenues of mitigating evidence available to counsel. That counsel somehow learned of five people to interview and his investigator managed to obtain over two hundred pages of relevant documents undermines the State's argument that Hamilton obstructed the investigation. Moreover, unlike the defendant in *Landrigan*, Hamilton did not threaten to obstruct the presentation of any mitigating evidence that

counsel found. Instead, after the trial court denied his request to read a statement to the jury, Hamilton allowed the [**53] penalty phase to proceed uninterrupted. Last, unlike the defendant in *Jeffries*, he did not make a knowing and informed decision not to present mitigating evidence. In any event, because counsel disregarded any alleged instructions to the contrary and presented a mitigation defense, albeit an insufficient one, we need not analyze the effect of Hamilton's alleged refusal to cooperate. *See Douglas, 316 F.3d at 1089.*

b) *Penalty Phase Presentation*

Defense counsel compounded the errors he committed during the investigative stage of the penalty phase by presenting almost none of the little mitigating evidence he had discovered. The penalty phase began on November 18, 1982, at 10:00 a.m. By 3:30 p.m. that day, after deliberating for only four hours, the jury had fixed Hamilton's sentence as death. Of the 2423-page trial transcript, the entire penalty phase spans just 39 pages. Counsel's anemic presentation resulted from a number of unjustifiable errors, which, taken together, render his performance deficient.

First, counsel waived his opening statement, as he had done during the guilt phase. He offered no explanation as to why he forfeited "his first opportunity to explain the significance of [**54] the mitigating evidence to the jury." *Mayfield, 270 F.3d at 928* (internal quotation marks omitted); *see Ainsworth, 268 F.3d at 874.*

Second, counsel presented only one witness--Hamilton's mother, Jackie--whose testimony occupies less than 5 pages of the transcript. Although Jackie had firsthand knowledge of the hardships Hamilton endured during his childhood, almost none of [*1120] that information was presented to the jury, largely due to counsel's scant questioning. The following exchange is illustrative:

> Q: All right. Now, Mrs. Piper, a number of years ago some problems developed in your home; is that correct?
>
> A: That is.
>
> Q: And at that time was Michael taken from you?
>
> A: He was.
>
> Q: And was that by court? Can you explain that?
>
> A: It was by court order.
>
> Q: Okay. And for how long did Michael remain outside your home?
>
> A: I don't remember exactly.
>
> Q: Was it more than a year?
>
> A: Yes, it was.
>
> . . . .
>
> Q: Okay. And did he to your knowledge go from foster home to foster home?
>
> A: Yes, he did.
>
> Q: Okay. And the reason that he was removed was there were problems between you and your husband; is that correct?
>
> A: That's right.
>
> Q: Okay. And can you indicate to the ladies and gentlemen of the jury some of those problems [**55] regarding his drinking or whatever the problem was?
>
> A: I'd rather not. I don't believe this has anything to do with this at all.
>
> Q: But there were problems; is that correct?
>
> A: There are -- there were.
>
> Q: There were problems with abuse?
>
> A: Yes.
>
> Q: And those are the things that led to Michael's -- the removal of Michael from your home?
>
> A: Yes.

Counsel asked no further questions about the court order, why Hamilton moved "from foster home to foster home," or the nature of the "problems" with drinking and abuse, although he was aware--at least to some extent--of this mitigating evidence. Instead, counsel asked questions such as "[Hamilton and Gwen's] marriage was good as far as you knew?" Given that only three days before Hamilton had been found guilty of murdering his wife by the same jury, this question epitomizes counsel's deficient performance.

Counsel's subsequent questioning about Hamilton's father was similarly lacking:

> Q: [W]as there ever a relationship [between Hamilton and his father]?
>
> A: Not that I know of.
>
> Q: All right. And in part Michael's father was put in prison, was he not, or in

a state hospital?

A: In a state hospital, yes.

Q: Thank you.

Because counsel failed to develop her answers, [**56] Jackie's testimony left the false impression that Hamilton's childhood, while unhappy, was not unusual. Indeed, the most detail Jackie offered was a superficial statement that Hamilton was kind to "stray animals and stray people" and loved his children. Jackie's reluctance to volunteer information about Hamilton's childhood is hardly surprising. Given her involvement in the abuse suffered by Hamilton and his siblings, which we discuss further below, and the fact that she testified for the prosecution during the guilt phase, Jackie was one of the worst witnesses that defense counsel could have presented to the jury.

Jackie's reticence can also be explained by counsel's failure to prepare her adequately. Even assuming counsel had planned to elicit from Jackie the details of Hamilton's childhood background--including the incest and abuse--as he testified at [*1121] the evidentiary hearing, the effectiveness of that plan was severely undercut by not sharing it with Jackie. The record shows that counsel spent either little or no time preparing Jackie to testify. Counsel was "pretty sure" he met with Jackie before putting her on the stand and that she had been "reluctant" to talk. Counsel recalled [**57] Jackie being difficult on the stand as well, although he conceded that the transcript undermined his recollection. Jackie, by contrast, stated in a declaration filed in support of Hamilton's habeas petition that she did not recall meeting with Hamilton's defense counsel or anyone working on his behalf prior to or during the trial. She remembered being confused during the penalty phase and not knowing why defense counsel was asking her questions about her son's upbringing. Jackie's testimony corroborates her recollection and undermines defense counsel's. The most telling example is her response to counsel's question about the problems regarding Hamilton's father's drinking: "I don't believe [that information] has anything to do with this at all."

Additional preparation would have made a difference. Jackie stated in her declaration that she would have testified in detail about the physical and sexual abuse if she had been asked to do so. Defense counsel's assertion that he tried to elicit this information is not supported by the record. As we previously have held, the failure to prepare a witness adequately can render a penalty phase presentation deficient. *See, e.g., Belmontes, 529 F.3d at 851*; [**58] *Douglas, 316 F.3d at 1087*. This is especially true when the insufficiently prepared witness is the *only* penalty phase witness called to testified.

Counsel exacerbated the damage done during Jackie's testimony by not explaining the significance of the meager mitigating evidence during closing. *See Belmontes, 529 F.3d at 846 n.3* ("Our cases make clear that in addition to presenting witnesses to testify about mitigating circumstances, defense counsel must also explain the significance of the mitigating testimony in his closing statement."). Counsel mentioned Jackie's testimony only once in passing. Moreover, rather than challenging the prosecutor's characterization of Hamilton's childhood as "unfortunate" but neither unusual nor extreme, [11] he effectively validated it. In addressing whether any circumstances extenuated the gravity of the crime, counsel explained: "Michael did come from a broken home. He was placed in foster home after foster home. I'm not telling you that's an excuse, because we know others have come from homes and have also grown up." Counsel drastically understated and mischaracterized Hamilton's home in referring to it as merely "broken." As we explain later, the environment [**59] in which Hamilton grew up was extraordinarily abusive and atypical in almost every sense. Yet, the jury remained unaware of this significant mitigating evidence. Having provided the jury with no reason to show mercy, defense counsel's naked pleas to spare Hamilton's life were futile. While "[b]egging for mercy is not incompetence per se," *Hendricks, 70 F.3d at 1043*, this [*1122] strategy was unreasonable under the circumstances here.

11 During his closing argument, the prosecutor stated:

> Now, I would suspect that counsel will argue that testimony that came from his mother Jacqueline Piper that he was taken away from his family for a period of time when he was young. And I'm not trying to be facetious, that is unfortunate. And that happens to so many people in our society. I think anyone sitting here can probably think of something bad that's happened in their childhood. But it's certainly not any justification for a crime as heinous as a crime that we have here today.

The State contends that presenting the mitigating evidence that it acknowledges was available would have done more harm than good. There is nothing in the record that supports this assertion. A decision not to present mitigating [**60] evidence to the jury can be considered tactical only if counsel is aware of that

information and how it could fit into a penalty phase defense. *See Mayfield, 270 F.3d at 927* ("Judicial deference to counsel is predicated on counsel's performance of sufficient investigation and preparation to make reasonably informed, reasonably sound judgments."). Defense counsel failed to pursue the relevant information provided to him by the five people he and Wells did interview, and did not even review the records unearthed during Wells's investigation. The record belies the State's assertion that defense counsel "would never have been able to obtain much of the evidence that Hamilton has submitted in support of his [habeas] petition . . . no matter what efforts he made."

Moreover, like counsel in *Wiggins*, defense counsel here "uncovered no evidence in [his] investigation to suggest that a mitigation case, in its own right, would have been counterproductive, or that further investigation would have been fruitless." *539 U.S. at 525.* The evidence here was not a "basket of cobras"--there were no "obvious countervailing tactical dangers for petitioner." *Gerlaugh v. Stewart, 129 F.3d 1027, 1035 (9th Cir. 1997)* [**61] (internal quotation marks omitted). For example, contrary to his testimony, counsel had no tactical reason for not presenting Marvin, Hamilton's uncle, as a penalty phase witness. While Marvin did express some negative opinions about Hamilton during his interview with Wells, none of them would have done more harm than the failure to provide the jury with the evidence of the extreme sexual and physical abuse endured by Hamilton and his siblings. Defense counsel cited as one reason for not calling Marvin was his statement that Hamilton cheated on his wife and had been primarily interested in the insurance money after her death. Only a few days before the penalty phase began, however, the jury had found that Hamilton cold-bloodedly killed his pregnant wife for financial gain. Thus, the potential damage that Marvin's testimony might have caused had already been inflicted. Marvin's belief that Hamilton did not pay attention to his children was also relatively innocuous, since the jury had already heard testimony that Hamilton initially planned to kill Gwen in front of his four children. In any event, limiting the scope of a penalty phase presentation to evidence that the defendant is a [**62] good person who has done good deeds is, in and of itself, unreasonable where there is an extreme unlikelihood that any testimony about the defendant's character would be sufficient to humanize him. *Correll, 539 F.3d at 945-46.* Marvin could have testified about the countless difficulties Hamilton endured as a child, which would have removed Hamilton from the category of those who have experienced "unfortunate" circumstances and placed him squarely in the realm of "unusual or extreme" childhood suffering. Instead, the jury heard only Jackie's vague and terse testimony, which can hardly be considered a mitigation defense, much less a strategically reasonable one.

Nor did counsel offer a legitimate reason for not trying to elicit the details of Hamilton's background from his sister Vicki. *See id. at 948* ("A decision by counsel not to present mitigating evidence cannot be excused as a strategic decision unless it is supported by reasonable investigations."); *cf. Williams v. Woodford, 384 F.3d 567, 616-624 (9th Cir. 2004)* (listing four legitimate reasons that supported counsel's tactical decision not to present certain penalty [*1123] phase evidence). On the contrary, counsel admitted that he never [**63] considered presenting Vicki as a penalty phase witness, even though she could have painted a portrait of Hamilton's childhood that would have greatly aided the jury as she had direct knowledge of the extensive abuse endured by Hamilton and his siblings.

Counsel also acted deficiently in not contacting Hamilton's other sister, Carolyn, who could have provided the most poignant and revealing mitigating evidence, as her declaration demonstrates. The district court clearly erred in finding that counsel could not talk to Carolyn because she was an "adverse part[y] represented by counsel," which was the reason defense counsel gave for not interviewing her. Carolyn was not an adverse party; she was Hamilton's codefendant. Moreover, defense counsel could have subpoenaed Carolyn to interview her about Hamilton's background. The district court's conclusion that counsel made a reasonable tactical decision to present only one witness is therefore clearly erroneous.

c) *Available Mitigating Evidence*

Counsel would have learned extensive information about Hamilton's background if he had conducted a reasonably thorough investigation. Various family members, physicians, and others could have testified [**64] about the abusive environment in which Hamilton grew up and his ongoing mental health problems. [12] This information could have been corroborated and supplemented by available records. [13] Because of counsel's [*1124] deficient performance, however, the jury heard almost none of the following mitigating evidence.

12 Hamilton presented the declarations of the following twenty-seven people at the 2003 evidentiary hearing:

. Jackie Piper (Hamilton's mother)

. Carolyn Hamilton (Hamilton's sister)

. Vicki Fitzherbert (Hamilton's sister)

. Christine Woods [nee

Grealish] (Hamilton's ex-wife)

. Donna Borgerding (Hamilton's maternal aunt)

. Patricia Johnson (Hamilton's maternal aunt)

. Carol Hamilton (Hamilton's paternal aunt; Marvin's wife)

. Elaine Honor (Hamilton's paternal aunt)

. Jack Hamilton (Hamilton's paternal uncle)

. Sandi Clark (Hamilton's cousin)

. Janel Daniels (Hamilton's cousin)

. Kristine Daniels (Hamilton's cousin)

. Patricia Ketchum Ortega (Carolyn's foster sister and Gilbert Garay's girlfriend at the time of the crime)

. Lillian Cagle (ex-wife of Hamilton's father, Bob)

. Marian Anderson (ex-wife of Hamilton's cousin, Roy Hamilton)

. Patricia Hamilton (second wife of Roy Hamilton)

. Bill Underwood (son [**65] of Ernest and Nellie Underwood, Hamilton's foster parents)

. Nina Huff (neighbor of the Underwoods)

. James Beasely (nephew of Ruby and Oliver Cater, Hamilton's foster parents)

. Floyd Daniel (Hamilton's former employer)

. Lawrence McInerney (Hamilton's former employer)

. Mosetta Mangrum (Hamilton's former landlady)

. William Karwacki (retired school psychologist; evaluated Hamilton in 1964 at the request of his teacher)

. Dr. James W. Wilkins (retired clinical psychologist; evaluated Hamilton in 1965)

. Dr. James R. Merikangas (psychiatrist and neurologist; evaluated Hamilton in 1992)

. Shirley A. Reece, M.S.W. (clinical social worker; evaluated Hamilton in 1993)

. Dr. George Woods (psychiatrist; evaluated Hamilton in 1994).

13 In addition to the "Prior Record" materials that counsel failed to review at the time of trial, Hamilton presented almost two hundred pages of other readily available documents that counsel never discovered. These documents include numerous psychological evaluations of Hamilton and recommendations for treatment, starting at the age of twelve; Bob's U.S. Air Force record (includes a discharge request due to Jackie's and Hamilton's "mental problems"; notes that Bob attempted [**66] suicide); Bob's criminal record for the incest offense (includes the complaint, arrest warrant, transcripts of proceedings, guilty-plea conviction, commitment to Atas-cadero State Hospital, and probation report); Atascadero State Hospital records (note Bob's diagnosis as a mentally disordered sex offender); Jackie's criminal record for contributing to the delinquency of a minor (includes the complaint, transcripts of proceedings, psychological evaluations, conviction, sentence, and probation report).

i. *Family Background and Social History*

For most of his childhood, Hamilton lived with his father, Bob, his mother, Jackie, and his younger sisters, Carolyn and Vicki. The family moved eleven times over a fourteen-year period due to Bob's service in the U.S. Air Force. Bob began drinking heavily when Hamilton was only six months old. As his drinking worsened, Bob became an increasingly "mean and vicious" man. He physically abused Jackie throughout their marriage. He also attempted to control her and the children at all times. He killed any pets to which the children grew attached. He also frequently terrorized the children by forcing them to watch as he battered and degraded their mother, [**67] often threatening to kill her. If the children attempted to flee, Bob would drag them back by their limbs or hair. At times, he and Jackie wielded butcher knives at one another while the children watched. They both regularly beat Hamilton using either a paddle,

switch, belt, or closed fists, but otherwise ignored him.

Hamilton's parents engaged in inappropriate sexual behavior as well. Both parents walked around the home naked, fondling each other and making lewd comments in front of their children. On at least two occasions, Bob ritualistically lined up Hamilton and his sisters and made them watch as he forced Jackie to copulate him orally. Bob also sexually abused Carolyn for approximately four years. The abuse, which began when Carolyn was only ten years old, happened two to three times per week and included sexual intercourse and oral copulation. All of this occurred with the full knowledge of Hamilton's mother. Rather than protecting Carolyn from the abuse, she at times guarded the door to prevent Hamilton and Vicki from disturbing Bob and Carolyn in the bedroom. Jackie was also frequently present in the bed with her husband and daughter. On several occasions, Jackie pinned Carolyn [**68] to the bed and covered her mouth so that Hamilton and Vicki would not hear her crying. Other times, Jackie participated in a "three-way deal" with her husband and Carolyn; Jackie would engage in mutual foreplay and intercourse with Bob before he penetrated Carolyn. Jackie also bought contraceptive jelly for her. Hamilton was aware of his father's sexual abuse and of his mother's acquiescence in it. He tried to defend his sister, but his father beat him and threatened to kill him.

The sexual abuse extended beyond Hamilton's immediate family. Bob's father had sexually abused both of Bob's sisters, and had tried to molest Carolyn. Two of Bob's brothers, Marvin and Don, sexually abused their daughters as well. Unbeknownst to Hamilton at the time, Marvin also sexually abused Carolyn. That abuse began after Bob's abuse was discovered, and continued sporadically for seven years until Carolyn was twenty-one.

Carolyn told Marvin and her aunt Karen about her father's abuse in March 1967, when she was fourteen and Hamilton was fifteen. Marvin and Karen in turn reported the abuse to the police. Bob was arrested [*1125] immediately, and Jackie was arrested three days later. Hamilton and his siblings were [**69] then taken into protective custody. In a dependency petition filed in the Kern County Juvenile Court the following day (one of the documents in defense counsel's possession at the time of trial), [14] a probation officer described Hamilton's home as "an unfit place for him by reason of neglect, cruelty, or depravity" and "detrimental to said minor's moral upbringing in that said minor was present in the family home when incestuous acts occurred between said minor's sister, Carolyn Hamilton, and her father; further, said minor's mother, who had knowledge of the above mentioned incestuous activity, did nothing to inhibit these acts." A ten-page report filed by another probation officer approximately two weeks later contains additional detail about the sexual abuse and family history. The report also includes statements by Hamilton, Carolyn, and Jackie. The Kern County Juvenile Court adopted the report's recommendation and declared Hamilton a dependent of the court and placed him temporarily in shelter care.

> 14 As already discussed, most of the Kern County Juvenile Court records pertaining to Hamilton's removal from his parents' home and his subsequent placement in foster care were in counsel's [**70] possession at the time of trial, but he never reviewed them.

Approximately a month after his arrest, Bob pled guilty to the charge of "willfully, unlawfully, feloniously, knowingly and incestuously hav[ing] sexual intercourse with [his daughter] Carolyn Marie Hamilton, of the age of fourteen years old." After several psychiatric evaluations, Bob was adjudged a mentally disordered sex offender and committed to Atas-cadero State Hospital. He was released less than a year later and sentenced to five years' probation. He was also required to register as a sex offender and to avoid any contact with his wife and children.

Jackie was charged with a misdemeanor violation of contributing to the delinquency of a minor. She also underwent psychiatric evaluation. One examiner noted that Jackie demonstrated "no great remorse" for her role in the abuse. The court ultimately determined that Jackie was not a mentally disordered sex offender. She was sentenced to thirty days' imprisonment and three years' probation. She was later sentenced to another year in prison for violating her condition of probation that she not see her children without court permission.

Hamilton spent the next few years moving [**71] from one foster home to another. In May 1967, shortly after his parents' arrests, he was placed with his uncle Marvin, with whom he had a "friendly relationship." This relationship ended after a few months, however, when Carolyn moved in and Hamilton witnessed his uncle molesting her. Marvin was convicted of grand theft shortly thereafter, and Hamilton and his sister returned to shelter care. Hamilton was then placed with the Rogers, with whom he had difficulty adjusting. His placement was terminated after a few months for unspecified reasons.

In January 1968, at the age of sixteen, Hamilton was placed in the foster home of Ernest and Nellie Underwood. In his declaration, the Underwoods' son, Bill, stated that Hamilton "had two sides to his personality. One side was a quiet, helpful, shy, obedient, and introverted child. The other was an irritable and agitated individual who did things on impulse. Most of these dark periods came after [Hamilton] had either personal or telephone contact with family members." Bill

also noted that Hamilton "was a loner who had no close friends and few if any acquaintances." In December 1968, Hamilton was sent to juvenile hall on two separate occasions [**72] for using the Underwoods' truck and [*1126] for attending his high school prom, both without their permission. On January 10, 1969, the Kern County Juvenile Court adjudged Hamilton a ward of the court. Hamilton remained in juvenile hall until February 7, 1969, when he was placed in his third foster home. The home was run by Ruby and Oliver Carter, who were known for physical punishment. According to their nephew, James Beasely, Hamilton was beaten by Ruby with a belt. Hamilton requested that his case worker remove him from their home. His placement with the Carters was terminated after only four months. Hamilton returned to his mother's home in June 1969.

As he had complied with the terms of his probation, Hamilton's wardship was dismissed on December 19, 1969, shortly after he married Christine Grealish. On April 23, 1970, their son was born. Hamilton's union with Christine was short-lived, however; they separated after a year and divorced in July 1973. During their marriage, Hamilton had a difficult time retaining a job and committed a number of relatively minor crimes. In April 1974, Hamilton married Gwen, whom he had been dating since his divorce. Between 1975 and 1980, he and Gwen had [**73] four children together. His employment and legal troubles continued during their marriage.

ii. *Mental Health History*

Even a cursory investigation would have revealed that Hamilton has suffered from serious mental health problems throughout most of his life. The problems were first discovered when Hamilton was twelve years old, around the time he became aware of his father's sexual abuse of Carolyn. In February 1964, William Karwacki, then a school psychologist, conducted a clinical examination of Hamilton at the request of one of his middle school teachers. Karwacki noted that his 1964 report observed that Hamilton's feelings of "resentment and isolation" have caused him to react negatively and antisocially in some instances, and violently and destructively in others. [15] Karwacki also noted Hamilton's feeling that "his life and efforts have generally ended in failure." Hamilton appeared "well trained to offer a positive account of his home environment to outsiders, and although acknowledging frequent physical punishment, he hastened to add that he always 'had it coming.' " After evaluating Hamilton, Karwacki concluded that Hamilton was "in critical need of immediate therapeutic intervention, [**74] through treatment by either a child psychiatrist or a psychiatric social worker." Karwacki attempted to conference with Hamilton's parents, but they were evasive and "expressed ignorance of any reasons for [Hamilton's] psychological distress."

15 Hamilton submitted Karwacki's 1964 report at the evidentiary hearing held by the district court, along with a declaration prepared by Karwacki in July 1994 at the request of Hamilton's habeas counsel. Karwacki notes in his declaration that he was available and willing to testify at the time of trial but was never contacted by anyone working on Hamilton's behalf.

Approximately a year later, Hamilton took a personality test used to assess mental, emotional, and psychological pathology, which was administered by the Juvenile Court for the Grant County Superior Court in Ephrata, Washington, where Hamilton's family lived at the time. James Wilkins, a clinical psychologist, examined the results of that test. Wilkins diagnosed Hamilton as suffering from schizophrenic paranoid disturbances and feelings of depression and hopelessness. In a letter written to the Juvenile Probation Officer, [16] Wilkins noted that Hamilton's [*1127] results demonstrated "unpre-dictability [**75] in behavior and attitude" and "[i]nner conflicts regarding sexual matters . . . [that] relate to feelings generated within the family." Based on his psychological assessment, Wilkins determined that Hamilton was "in immediate need of intensive psychological and/or psychiatric evaluation and treatment." The Juvenile Probation Officer agreed with Wilkins's recommendation and informed the Juvenile Department that Hamilton "is in definite need of either professional psychological help and [sic] possibly psychiatric care."

16 This letter, dated May 10, 1965, was submitted at the evidentiary hearing, as was a declaration prepared by Wilkins in July 1994. Wilkins was also available and willing to testify at the time of trial but was never contacted by anyone working on Hamilton's behalf.

Hamilton's parents were aware of his mental health problems. In April 1967, Bob and Jackie requested that the Grant County Juvenile Department provide "professional help" for Hamilton due to his "adjustment problems." The following month, Bob requested a discharge from the Air Force on the ground that both his wife and son were suffering from mental health problems. In his request letter, Bob states that Hamil-ton [**76] "has a mental problem . . . [and] needs special schooling and psychiatric care." Although Bob's discharge request was granted, Hamilton never received any treatment.

By age eighteen, Hamilton's condition had worsened. According to Shirley Reece, a clinical social worker who evaluated him in 1994, [17] Hamilton recalled feeling hopeless and despondent about his life at the

time. Hamilton's mental health further deteriorated after he joined the Army at nineteen. Shortly after enlisting, he went AWOL and attempted suicide by slashing his wrists with a pen knife. Hamilton's then-wife Christine recalled Hamilton being severely depressed. Between January 1971 and July 1972, Hamilton went AWOL five more times. During one of his absences, he shot himself in the leg and refused hospital attention for fear of being arrested.

> 17 Reece prepared a thirty-two page declaration, which was submitted at the district court's evidentiary hearing, detailing Hamilton's social history and family background. To reach her conclusions, she interviewed Hamilton, Carolyn, Jackie, and one of Hamilton's aunts, and reviewed over 1200 pages of relevant documents.

Mental health problems, like sexual abuse, were rampant [**77] in Hamilton's immediate and extended family as well. Prior to being discharged, Bob had threatened to commit suicide on several occasions. A clinical report prepared by Army medical examiners notes that, on one occasion in July 1964, Bob "made out a will in a local tavern, handed it to the tavern owner and stated he was going to commit suicide." In April 1965, Bob discharged a shotgun in his home while Hamilton and his siblings were there. Although Bob later said to the Army officials that it was an accident, he had initially told Jackie that it was a suicide attempt. He confirmed his statement to Jackie at the time of his arrest for incest. Carolyn later reported that Bob tried to kill himself on at least one other occasion when he was home alone with her.

Jackie also experienced mental health problems. In October 1965, she voluntarily admitted herself to the Agnews Devel-opmental Center in San Jose. According to her record of admission, which Hamilton submitted at the evidentiary hearing, Jackie complained of experiencing depression for several months. She cried frequently and reportedly threatened "to harm her husband and children." Jackie was discharged with a diagnosis of "Psychoneurotic [**78] Reaction" and "Depressive Reaction." Although further treatment was recommended, there is no record of any follow-up.

[*1128] Members of Hamilton's extended family suffered from depression and suicidal thoughts as well. His paternal great-grandm other spent time in a mental institution and later committed suicide. More recently, his cousin Roy, the son of Bob's brother Don, committed suicide in 1989. Roy's sister, Sandi, stated in her declaration that Roy was antisocial, moody, and paranoid in the years before his death.

iii. *Mental Health at the Time of Trial*

Hamilton's mental health showed no signs of improvement two decades after his initial psychiatric evaluations. Rather, the available documentary evidence reveals he was still suffering from depression at the time of trial. Hamilton testified that he had attempted suicide in prison in December 1981, shortly after his wife's death, by injecting toilet bowl cleaner into his arm. Defense counsel was aware of the incident before trial began but disputed that it was a legitimate suicide attempt. Hamilton allegedly told counsel that he faked the attempt so he could sleep in a better bed, eat a good meal, and try to escape. Hamilton unequivocally [**79] denied making this statement.

Approximately five months after the alleged attempt, Hamilton was treated for depression while awaiting trial. The attending psychologist diagnosed him as having "[a]djustment disorder, with depressed mood subsequent to being incarcerated and charged with murder." A physician thereafter prescribed an antidepressant medication, Tofranil. On October 18, 1982, one month before the penalty phase, Hamilton wrote defense counsel a note telling him that he was taking Tofranil. Hamilton provided a telephone number followed by the words, "Mental Health"; beneath the number, Hamilton wrote, "Ask to speak to someone concerning my medication." Counsel testified at the evidentiary hearing that he never investigated the specific effects of Tofranil. It is undisputed that defense counsel was not a physician or otherwise qualified to evaluate Hamilton's mental health at the time of trial.

When Hamilton was reevaluated for purposes of his habeas petition by Shirley Reece, George Woods (a psychiatrist), and James Merikangas (a psychiatrist and neurologist), [18] they all agreed that his abusive childhood had adversely impacted his mental health and that the negative effects [**80] had worsened over time. These effects were explained in the declarations that these doctors submitted at the evidentiary hearing. Reece summarizes her evaluation of Hamilton as follows:

> To know and understand Michael Hamilton, one must consult many first hand sources, most important of which are the family into which he was born. By all current measures, he was raised in an environment of intergenerational alcoholism, child abuse, and domestic violence . . . . [Y]et, tragically no individual, agency, nor military authorities ever intervened to protect the children . . . . There is abundant evidence that all of the children in the Hamilton family were severely deprived in every sense of the word and lacked the normal affectional bonds and guidance which foster healthy development and prosocial behavior . . . . Michael was repeatedly

> subjected to gross maltreatment and incredible psychological abuse; and surely by all reasonable standards his parents' behavior was both deviant and depraved.

18 Like Reece, Woods both interviewed Hamilton and reviewed over one thousand pages of relevant documents as part of his evaluation. Although Merikangas did not interview Hamilton, he did review all [**81] the available medical records and other relevant documents.

[*1129] Woods's declaration corroborates Reece's assessment of Hamilton's background and supplements it with medical opinions. Woods observes that Hamilton's "sense of hopelessness, learned helplessness and chronic anxiety have their roots in those times he was forced to witness sadistic attacks against family members and was unable to help them." Woods concludes that, throughout his life, Hamilton has endured "environmental, developmental and traumagenic factors beyond his control," which have resulted in "serious psychiatric disorders that substantially altered his ability to understand and function in the world around him." Woods determines that these disorders "compromise [Hamilton's] ability fully to appreciate the nature and consequences of his acts or to conform his conduct to the requirement of law." Woods adds that the medication Hamilton was taking during trial "exacerbated preexisting mental disorders and made it extremely unlikely that he would have been able to weigh and consider such issues as the advantages and disadvantages to testifying." Merikangas's review of the relevant records similarly led him to conclude that [**82] "Hamilton in all likelihood has significant neurological dysfunction and psychiatric impairments that affected his behavior both at the time of the offense and subsequently." The State offered no testimony or declarations to rebut the conclusions of Reece, Woods, and Merikangas.

"We realize that the duty to investigate and prepare a defense is not limitless," and that "it does not necessarily require that every conceivable witness be interviewed or that counsel must pursue every path until it bears fruit or until all conceivable hope withers." *United States v. Tucker, 716 F.2d 576, 584 (9th Cir. 1983)* (quoting *Lovett v. Florida, 627 F.2d 706, 708 (5th Cir. 1980))* (internal quotation marks omitted). We impose nowhere near that standard of perfection here. Defense counsel did not even exhaust the few sources of information of which he was aware. Rather, he effectively abandoned his investigation "after having acquired only rudimentary knowledge of [the defendant's] history from a narrow set of sources." *Wiggins, 539 U.S. at 524*. Given the abundance of classic mitigating evidence that was available, we conclude that counsel's investigation fell far below the constitutional floor.

d) *1982* [**83] *Standard*

In reaching its conclusion that defense counsel's performance was not deficient, the district court went astray by holding counsel to a lesser standard of performance than existed in 1982. As the Supreme Court has long recognized, the ABA Standards for Criminal Justice provide guidance as to what constitutes a "reasonable" performance. *Strickland, 466 U.S. at 688-89*; *see Rompilla v. Beard, 545 U.S. 374, 387, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005)*; *Wiggins, 539 U.S. at 524*; *Williams, 529 U.S. at 396*. The standards in effect at the time of Hamilton's trial recognized that "[i]t is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore *all* avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1980) (emphasis added). Fulfilling these obligations was as crucial in 1982 as it is today "in order to assure individualized sentencing and the defendant's right to a fair and reliable capital penalty proceeding." *Ainsworth, 268 F.3d at 877*. We thus have held that trial counsel falls below these standards by failing to investigate adequately and present available mitigating [**84] evidence to the jury. *See, e.g., Summerlin, 427 F.3d at 629-33 (1982 trial)* (holding that counsel performed deficiently where [*1130] he failed to investigate and present available mitigating evidence that the defendant was severely abused as a child and had suffered from ongoing mental health problems); *see also, e.g., Karis, 283 F.3d at 1139 (1982 trial)* (holding that counsel's performance was not reasonable under the circumstances where he was aware of evidence that the defendant was severely beaten as a child and yet failed to investigate the evidence further or to present it to the jury); *Silva, 279 F.3d at 847 (1982 trial)* (holding that counsel was deficient in failing to meet his "duty to determine what evidence was out there in mitigation in order to make an informed decision as to how to best represent his client"); *Ainsworth, 268 F.3d at 877 (1980 trial)* ("[C]ounsel's deficient performance resulted from the failure to prepare and present mitigating evidence, interview witnesses, and investigate available documents and other available information.").

The district court made much of the fact that the "[s]tandard practice in death penalty defense in Tulare County in 1982, the time of [**85] Hamilton's trial, was different from today['s]." In focusing on the particular ways in which the "standard practice" has changed, however, the district court failed to recognize the ways it has remained the same. For example, we need not decide whether standard practice at the time of trial included retaining a "mitigation expert"-- someone specially

trained in investigating and presenting mitigating evidence at the penalty phase of a capital trial-- because the deficient performance here did not result from counsel's failure to hire a specialized investigator. Rather, it resulted from counsel's failure to pursue obvious leads provided by the people he did interview, to review relevant documents that were in his possession, and to present to the jury the mitigating evidence of which he was aware, among the other errors we have chronicled above. Similarly, we need not decide whether standard capital practice in Tulare County in 1982 included preparing a "social history" report per se. It is undisputed that counsel was required to obtain the type of available information that a social history report would contain, such as family and social background and mental health, which Hamilton's [**86] counsel failed to do.

The district court clearly erred in relying on the testimony of Hamilton's trial counsel as to the "standard capital practice" at the time of trial and rejecting the testimony of Hamilton's *Strickland* expert. Trial counsel had never before worked on a death penalty case, had never attended a death penalty seminar, and did not recall looking into the ABA standards before or during his representation of Hamilton. By contrast, the *Strickland* expert's testimony as to the minimal steps that counsel was required to take in 1982 is consistent with our established case law and that of the Supreme Court. The district court's finding that defense counsel satisfied these minimal obligations is clearly erroneous. The jury "saw only glimmers of the defendant's history, and received no evidence about its significance vis-a-vis mitigating circumstances." *Ainsworth, 268 F.3d at 874* (alterations and internal quotation marks omitted). Moreover, as in *Ainsworth*, "[a] reasonable investigation would have uncovered a substantial amount of readily available mitigating evidence that could have been presented to the jury." *Id.* Because both the investigation and presentation of mitigating [**87] evidence at the penalty phase were unreasonable under the prevailing professional norms at the time of trial, we hold that counsel's performance was deficient.

2. *Prejudice*

Deficiency and prejudice questions, although distinct, are closely related. *Correll, 539 F.3d at 951.* To establish [*1131] prejudice, Hamilton "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland, 466 U.S. at 694*; *see Belmontes, 529 F.3d at 863* (clarifying that the reasonable probability standard is "less than the preponderance more-likely-than-not standard" (internal quotation marks omitted)). Accordingly, "[i]n establishing prejudice under *Strickland*, it is not necessary for the habeas petitioner to demonstrate that the newly presented mitigation evidence would necessarily overcome the aggravating circumstances." *Correll, 539 F.3d at 951-52* (citing *Williams, 529 U.S. at 398*); *see Rompilla, 545 U.S. at 393* ("[A]lthough we suppose it is possible that the jury could have heard . . . all [the mitigating evidence] and still [**88] decided on the death penalty, that is not the test.").

Instead, in assessing prejudice, we must "compare the evidence that actually was presented to the jury with the evidence that might have been presented had counsel acted differently," *Bonin v. Calderon, 59 F.3d 815, 834 (9th Cir. 1995)*, and "evaluate whether the difference between what was presented and what could have been presented is sufficient to 'undermine confidence in the outcome' of the proceedings," *Lambright, 490 F.3d at 1121* (quoting *Strickland, 466 U.S. at 694*). This requires us to "evaluate the totality of the available mitigation evidence--both that adduced at trial, and the evidence adduced in the habeas proceeding" and "re-weigh [ ] it against the evidence in aggravation." *Williams, 529 U.S. at 397-98.* "Prejudice is established if 'there is a reasonable probability that at least one juror would have struck a different balance' between life and death." *Belmontes, 529 F.3d at 863* (quoting *Wiggins, 539 U.S. at 537*).

Defense counsel failed to investigate and present a substantial amount of classic mitigating evidence. The portrait painted at the evidentiary hearing before the district court "was far different from the [**89] unfocused snapshot handed the superior court jury." *Bean v. Calderon, 163 F.3d 1073, 1081 (9th Cir. 1998).* The jury that recommended the penalty of death heard only that Hamilton had been placed temporarily in foster care due to unspecified problems at home, that he was kind to stray animals and stray people, and that he loved his children. It had no knowledge of the indisputably horrific treatment Hamilton and his siblings suffered at the hands of his mother, father, and various extended family members. It did not hear that Hamilton had been diagnosed with mental health problems as early as age twelve, and that he had ongoing depression and suicidal thoughts through trial.

Both the Supreme Court and we have found the failure to investigate and present similar--and even less compelling-- evidence to be highly prejudicial. *See, e.g., Rompilla, 545 U.S. at 390-93* (failure to discover and present evidence that defendant was raised in a slum; was beaten by his parents; witnessed his father's frequent abuse of his mother; quit school at sixteen; had no indoor plumbing; and may have had schizophrenia or another mental disorder); *Williams, 529 U.S. at 369, 370* (failure to investigate and present [**90] evidence that defendant had been abused and neglected during his

childhood, and that he was " 'borderline mentally retarded,' had suffered repeated head injuries, and might have mental impairments organic in origin"); *Belmontes, 529 F.3d at 861-63* (counsel ignored tantalizing leads indicating that defendant had suffered rheumatic fever and other illnesses [*1132] as a child; suffered depression after the death of his sister; had an antisocial personality disorder; had a history of substance abuse; and had struggled academically until he dropped out of school); *Douglas, 316 F.3d at 1088* (counsel failed to discover and present evidence that defendant was abandoned as a child and raised by foster parents, including an abusive alcoholic foster father who frequently locked him in a closet; rarely had enough food; and was beaten and raped in jail at the age of fifteen); *Karis, 283 F.3d at 1139* (failure to present any evidence of the substantial abuse suffered by defendant; available records showed that defendant's father and stepfather "viciously beat" him and his mother on a regular basis).

The district court clearly erred in relying on the State's argument that the mitigating evidence could not [**91] have made a difference in the outcome of the penalty phase because the crime Hamilton committed was not "attributable to" his disadvantaged background or mental health problems. As a matter of law, the trial court could not have excluded the mitigating evidence on this ground. Doing so would have directly violated the Supreme Court's longstanding instruction that "a State cannot preclude the sentencer from considering any relevant mitigating evidence that the defendant proffers in support of a sentence less than death," as "virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." *Payne v. Tennessee, 501 U.S. 808, 822, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)* (internal quotation marks omitted); *see Tennard v. Dretke, 542 U.S. 274, 285-88, 124 S. Ct. 2562, 159 L. Ed. 2d 384 (2004)* (holding that evidence of impaired mental functioning is inherently mitigating, and that a defendant need not demonstrate a "nexus" between his mental capacity and the crime committed).

Counsel's failure to retain an expert to explain the mitigating value of Hamilton's traumatic childhood was all the more prejudicial because obtaining the evidence and calling an expert to explain its relationship to [**92] Hamilton's murder of his Wife--as opposed to a random act of violence aimed at society in general--could very well have altered the outcome. *See Belmontes, 529 F.3d at 869* ("A lay juror is not trained to identify the specific psychological and behavioral consequences of the traumas that [the defendant] experienced . . . . Accordingly, expert testimony should have been presented with respect to these issues."); *see also Richter v. Hickman, No. 06-15614, 578 F.3d 944, 2009 U.S. App. LEXIS 17821, 2009 WL 2425390, at *15 (9th Cir. Aug. 10, 2009)* (holding that the "primary source of prejudice lay . . . in counsel's failure to consult, and subsequently to call, an expert in blood spatter," where the blood spatter testimony was "the linchpin of the defense"). For example, Reece declares that Hamilton "is both a product and a victim of a very unstable and abusive home environment, characterized by [his] father's alcoholism, ongoing domestic violence, and the shared family 'secret' of the father's incestuous relationship with his oldest daughter." She adds that "several major studies (following subjects for more than 20 years) confirm the strongly negative impact of such environmental influences." Wilkins concludes that the "severity [**93] of the life-threatening violence, parental combat, and personal physical abuse to which [Hamilton] was exposed, was of the type recognized by clinicians as capable of producing thought disturbances, delusional thinking and dissociative behavior as defenses to immediate psychological trauma." Merikangas similarly observes that

> mization as a child has catastrophic and permanent effects on those who, like [Hamilton], survive it. It has a severe impact on the child's mental development and maturation. Sustained feelings of terror, panic, confusion, and [*1133] abandonment as a child have long term consequences for adult behavior. Psychosis, dissociative states, depression, disturbed thinking and alcohol and drug dependency are directly related to child victimization.

He also notes that "[p]hysical and emotional childhood trauma is especially devastating when the injuries are inflicted by those whom the child must rely on for protection."

While Woods agrees with the others experts' conclusions, he adds a different perspective as well:

> Michael responded to his father's abusive accesses and pathology by developing counter phobic reactions. Early on in his life, he vowed that he would not repeat the actions [**94] of his father or mother . . . . He overcame multigenerations of alcohol and drug abuse and did not drink alcoholic beverages or use drugs . . . . He resisted urges to fight or strike back, even when attacked by peers at school or his father at home, and was resolute in his desire to not become violent. He consciously devoted himself to not duplicating the behavior of

his father.

The prosecutor repeatedly argued during his penalty phase closing argument that the death penalty should be imposed because Hamilton was a danger to society. Defense counsel could have rebutted this argument by demonstrating that the ongoing pattern of intergenerational abuse and the psychological damage inflicted on Hamilton by his family made it unlikely that he would have abused or killed anyone other than a family member, and thus was not a danger to society at large.

Because counsel knew almost none of the relevant mitigating evidence, however, he committed errors during his closing argument that compounded the prejudice caused by his failure to investigate. The prosecution had reviewed each of the eleven statutory factors that the jury was required to weigh in assessing the appropriateness of the death [**95] penalty. *See Cal. Penal Code § 190.3* (West 1978). In addressing *subsection (d)*, "whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance," the prosecution stated that "[t]here's no evidence certainly of any extreme mental or emotional disturbance." [19] The prosecution's statement was accurate in light of defense counsel's meager penalty phase preparation and presentation, and defense counsel had no basis on which to rebut it. Instead, he caused far more damage to his client than the prosecution with only three short statements: "Mental disease and intoxication is never an issue. It's not a factor. It does not need to be considered." Defense counsel thus abruptly shut the door on one of Hamilton's strongest mitigation defenses because he did not even know it existed.

> 19 Although we do not reach Hamilton's claim that errors committed by the prosecution during the penalty phase constitute prosecutorial misconduct, we note that the prosecution's incorrect characterization of some of the *§ 190.3* factors likely added to the prejudice that Hamilton suffered on account of defense counsel's mistakes.

We therefore place on one [**96] side of the scale the mitigating evidence adduced at trial and at the evidentiary hearing before the district court. Weighed against this evidence is at most two aggravating factors: Hamilton's prior felony conviction for grand theft, [20] and the circumstances of the crime. These factors alone do not tip the [*1134] scale so far that no reasonable juror could have voted against the death penalty. *See Silva, 279 F.3d at 849* ("[I]n spite of the undeniably horrific circumstances surrounding [the crime], 'this is not a case in which a death sentence was inevitable because of the enormity of the aggravating circumstances.' " (quoting *Bean, 163 F.3d at 1081*)). The prosecution conceded that the prior felony should not "enter into the jury's consideration." Regardless, this relatively minor offense would have been significantly outweighed by the available mitigating evidence.

> 20 Other than the record of this conviction, to which defense counsel had stipulated, the prosecution presented no aggravating evidence at the penalty phase.

Turning to the second factor, we do not dispute that the circumstances of Hamilton's crime were cold and calculating, motivated by personal desire and greed. Yet, even the gruesome [**97] nature of a crime does "not necessarily mean the death penalty [i]s unavoidable." *Douglas, 316 F.3d at 1091*; *Hendricks, 70 F.3d at 1044* (rejecting the argument that the substantial amount of aggravating evidence rendered the presentation of mitigating evidence futile, and noting that the fac-tfinder in California has broad latitude to weigh the worth of the defendant's life). We have found that the defendant was prejudiced by counsel's deficient penalty phase investigation and presentation in cases involving comparable or even far more brutal crimes posing a greater threat to the public at large. *See, e.g., Douglas, 316 F.3d at 1082-83, 1091* (the defendant raped, tortured, and killed two teenage girls and buried them in the desert); *Lambright, 490 F.3d at 1106-07, 1127-28* (the defendant watched as his codefendant repeatedly raped the victim; the defendant then killed the victim by stabbing her multiple times and smashing her head with a rock); *Hovey v. Ayers, 458 F.3d 892, 898, 930 (9th Cir. 2006)* (the defendant abducted and killed an eight-year old girl; she was found with numerous depressed skull fractures and laceration wounds); *Smith v. Stewart, 189 F.3d 1004, 1006, 1013-14 (9th Cir. 1999)* [**98] (the defendant raped two women; both victims were stabbed repeatedly, punctured with needles, bound with rope, suffocated by having dirt forced in their mouths, which were then taped shut; the victims were left naked in the desert to die, and one of them did). Given the compelling evidence of Hamilton's "excruciating life history" that could have been placed "on the mitigating side of the scale," *Wiggins, 539 U.S. at 537*, we conclude that " 'there is a reasonable probability that at least one juror would have struck a different balance' between life and death," *Belmontes, 529 F.3d at 863* (quoting *Wiggins, 539 U.S. at 537*); *see also Summerlin, 427 F.3d at 643-44*.

Our precedent does not direct us to a contrary conclusion. In *Allen v. Woodford*, we held that counsel's failure to present any mitigating evidence was not prejudicial because the "heinous nature" of the defendant's crimes--murdering three people and conspiring to murder four others while already serving a

life sentence for yet another murder--was not outweighed by the available mitigating evidence. *395 F.3d 979, 1010 (9th Cir. 2005)*. Yet, unlike the evidence pertaining to Hamilton's abusive childhood and mental illness since [**99] at least the age of twelve, the available mitigating evidence in *Allen* was "entirely bereft of explanatory or exculpatory attributes." *Id. at 1005*. Instead, it "consisted primarily of testimony that at some points in his life Allen had been nice to some people and that some people cared for him." *Id. at 1007*. In *Allen*, we distinguished cases in which the jury was not presented with mitigating evidence concerning an abusive childhood or other traumatic experiences. *Id. at 1005-07* (discussing *Douglas*, *Silva*, *Wiggins*, and *Mayfield*).

[*1135] *Woodford v. Visciotti, 537 U.S. 19, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002)* (per curiam), is similarly inapposite. There, the defendant was convicted of "a cold-blooded execution-style killing of one victim and attempted execution-style killing of another, both during the course of a preplanned armed robbery." *Id. at 26*. His prior offenses included "the knifing of one man, and the stabbing of a pregnant woman as she lay in bed trying to protect her unborn baby." *Id.* Viewing the ineffective assistance claim through the deferential lens of AEDPA, *id. at 21*, the Supreme Court held that the state court's conclusion that the defendant failed to demonstrate prejudice was not objectively unreasonable, [**100] *id. at 26-27*. The Court emphasized the relative weakness of the available mitigating evidence. *Id. at 26*. The defendant showed only that, as a child, he had been berated, lacked self-esteem, moved frequently, and possibly had a seizure disorder. His "troubled family background" did not include any evidence of physical abuse or severe deprivation. *Id.* Because, unlike here, the defendant's childhood was not marked by unimaginable horrors of which the jury should have been made aware, *Visciotti* is readily distinguishable. *See also Bible v. Ryan, 571 F.3d 860, 872 (9th Cir. 2009)* (acknowledging that "significant aggravating circumstances do not preclude a conclusion of prejudice," but finding no prejudice where the mitigating evidence unearthed at the evidentiary hearing was either speculative or cumulative of the evidence presented at sentencing); *Brown v. Ornoski, 503 F.3d 1006, 1016 (9th Cir. 2007)* ("To be sure, horrific facts do not preclude a finding of prejudice . . . . But giving the state court decision the deference it is due under AEDPA, we cannot say that the California Supreme Court was objectively unreasonable in concluding that Brown had not satisfied both prongs of *Strickland*." [**101] (citations omitted)).

The State has failed to demonstrate that the aggravating circumstances so outweighed the mitigating evidence as to render the death penalty inevitable. As in *Wiggins*, "there is a reasonable probability that at least one juror would have struck a different balance" between life and death "[h]ad the jury been able to place petitioner's excruciating life history on the mitigating side of the scale." *539 U.S. at 537*. Counsel's failure to investigate and present the ample mitigating evidence thus "undermine[s] confidence in the outcome." *Strickland, 466 U.S. at 694*. Therefore, we hold that Hamilton has satisfied his burden of establishing prejudice.

IV. CONCLUSION

Hamilton was constitutionally entitled to effective representation at the penalty phase of his capital trial, but he did not receive it. His counsel failed to investigate a substantial amount of available mitigating evidence concerning Hamilton's horrific childhood and mental illness, and thus could not possibly have made a strategic decision as to a mitigation defense. Counsel compounded these errors by presenting only one witness, Hamilton's mother, whose testimony was likely more harmful than helpful. "[C]ounsel's [**102] duty is not discharged merely by presenting some limited evidence. Rather, a penalty phase ineffective assistance claim depends on the magnitude of the discrepancy between what counsel did investigate and present and what counsel could have investigated and presented." *Stankewitz v. Woodford, 365 F.3d 706, 716 (9th Cir. 2004)*. It is difficult to imagine a more significant discrepancy than that between the portrait painted at the penalty phase of a man whose childhood was "unfortunate" but [*1136] largely unmarred, and that of a child who was raised in the presence of incest, rape, and violence, suffered from mental illness, and was shuffled from home to home. Although this classic mitigating evidence was available to defense counsel at the time of trial, it was only revealed years after Hamilton was sentenced to death. We therefore hold that Hamilton was denied effective assistance of counsel. Accordingly, we reverse the district court's judgment and remand with instructions to issue the writ and return the case to the Tulare County Superior Court to reduce Hamilton's sentence to life imprisonment without the possibility of parole, unless the State pursues a new sentencing proceeding within [**103] a reasonable amount of time, as determined by the district court. We affirm the district court's denial of habeas relief as to guilt phase issues.

AFFIRMED in part; REVERSED in part; and REMANDED.

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

SAMUEL HOWARD,

Defendant.

CASE NO. C053867

DEPT. XVII

BEFORE THE HONORABLE MICHAEL VILLANI, DISTRICT COURT JUDGE

THURSDAY, FEBRUARY 4, 2010

TRANSCRIPT OF PROCEEDINGS

DEFENDANT'S PRO PER PETITION FOR WRIT OF HABEAS CORPUS/ STATE'S MOTION TO DISMISS

APPEARANCES:

For the State: NANCY A. BECKER, ESQ., Chief Deputy District Attorney

For the Defendant: MICHAEL CHARLTON, ESQ., MEGAN HOFFMAN, ESQ., Assistant Federal Public Defenders

RECORDED BY: MICHELLE RAMSEY, COURT RECORDER

THURSDAY, FEBRUARY 4, 2010 AT 8:21 A.M.

THE COURT: This is C053867, Samuel Howard. Good morning.

MR. CHARLTON: Good morning, Your Honor.

MS. BECKER: Your Honor, there's a preliminary matter that I'd like to bring to the Court's attention that I discussed with Mr. Charlton outside. Has the Court received a copy of our opposition to the amended petition and if would have been entitled motion to dismiss amended -- or amended motion to dismiss the petition? We --

THE COURT: And there's a lot of different names here. Let me just make sure I have here --

MS. BECKER: There is.

THE COURT: I have State's notice of motion, a motion to dismiss, Defendant's amended petition for writ. Is that what you -- and reply to opposition.

MS. BECKER: Yes.

THE COURT: Okay.

MS. BECKER: All right.

THE COURT: All right.

MS. BECKER: Does it have a file-stamp on it or is that your courtesy copy, if I might ask?

THE COURT: It's not stamped with courtesy copy and there's no file-stamp on it.

MS. BECKER: It appears that, although we served the Public Defender with the motion -- Federal Public Defender with the motion and you, for some reason it did not get filed; at least it's still not in Blackstone. And so, with the Court's

permission and the Federal Public Defender's permission, we will actually file it today but it was prepared and served both on the Court and on the Federal Public Defender in October and, in fact, we have continued the matter on several occasions so that they could file their opposition to that motion. And so, since the Court has a copy of it --

THE COURT: Right.

MS. BECKER: -- we're all prepared --

THE COURT: Okay.

MS. BECKER: -- to go this morning, but.

THE COURT: All right. And I'm going to handle the State's motion to dismiss the writ first.

MS. BECKER: Correct.

THE COURT: So, go ahead.

MS. BECKER: All right. Your Honor, this is Mr. Howard's fourth state petition. As such, it's procedurally barred under NRS 34.726, NRS 34.800 and certain aspects of it under NRS 34.810 either as successive abusive or waived.

So, in order for the Court to consider any of the claims, you must find as to that claim, that the procedural bars have been overcome and that means they must demonstrate either good cause and prejudice or actual innocence. So, I'm going to address that general issue first and then I'll go into the McConnell issue, their arguments about the New York aggravator and the Nika, Polk, Byford, Kazalyn issue.

In order to overcome the procedural bars, they're alleging ineffective assistance of trial, post-conviction and appellate counsel. But all of those claims are in and of themselves barred and under Hathaway, a barred claim cannot resurrect

or be good cause either for itself or for any other claim.

And, in addition to that, Mr. Howard falls in that group of individuals who were not entitled to appointment of post-conviction counsel at the time that his first petition for post-conviction relief was filed. And as such, therefore, he cannot make an ineffective assistance of post-conviction claim. Now, those issue have been previously litigated in the third petition for post-conviction relief which was previously denied and affirmed on appeal by the Nevada Supreme Court.

There was also an allegation of a Brady claim, but there are no specifics as to a Brady claim in the petition. So, that could not excuse anything and in and of itself without any allegations, a Brady claim can't be good cause for procedural bar unless you can show that you didn't know about the claim or could reasonably have known about the claim at an earlier date.

So, the real crux of the petition is actual innocence. Actual innocence is not as quoted by Mr. Howard's counsel. It's not just a colorable claim. The actual definition in Pellegrini that they go into when they talk about what's a colorable claim of actual innocence and manifest unjustice, is the standard set forth by the United States Supreme Court in Sawyer v. Whitley, which is either the -- as to guilt, that no -- that there is a reasonable likelihood that no reasonable juror would have found him guilty; that is that there's a reasonable likelihood that he would have been acquitted. And as to the death penalty, it's by clear and convincing evidence that no reasonable juror would have found him death eligible or sentenced him to death.

So, in this case and mitigating circumstances, the new evidence about mitigating circumstances is not under United States Supreme Court case law considered when you determine actual innocence. The Nevada Supreme Court has yet to issue any specific opinion on that regard. But given the fact that Pellegrini

follows Sawyer, it's logical to think that it would follow Sawyer even in a weighing state with regard to that. And the reason for that is how can anyone say: Well, based upon this new mitigation evidence that no reasonable juror would have found him death eligible, when the State -- in considering that you also have to consider well, what other evidence would the State have been able to present to rebut that mitigating evidence, the other act evidence that normally can't be considered in weighing for death eligibility can be considered as rebuttal against mitigation evidence. And so, the uncertainties are there, are such that the United States Supreme Court has said you may not consider the new mitigating evidence in an actual innocents procedural bar context.

So in this case then, you have to look at what new evidence has been presented about something other than mitigation, and the answer is none. There has been no new evidence presented other than the mitigation evidence and, therefore, they can't meet the actual innocence standard of overcoming the procedural bars.

Now, there is a second concept of actual innocence under Nevada law that goes to aggravators and that's under Leslie. And under Leslie, which is a very fact-specific case and limited I think in its application, in Leslie the Supreme Court was faced with new evidence that, in fact, its previous interpretations of the random and apparent -- no apparent motive was in direct conflict with the legislative history and the legislative intent. And because of that the Court said, well, if it were correctly interpreted in accordance with the legislature's wishes, then there is no evidence in the case that would meet that aggravator. Therefore, Mr. Leslie is actually innocent of that aggravator and the procedural bars have been overcome as to that aggravator. The Court then went on to strick the aggravator and conduct a

re-weighing. And when you strike an aggravator pursuant to Leslie and you re-weigh, the new mitigating is not considered and the Federal Public Defender's Office frequently strikes -- cites to Haverstroh but ignores footnote 23 in Haverstroh which specifically talks about the fact that it's what occurred at trial that we're re-weighing on. Because it's a harmless error analysis, so you have to look at what occurred during the trial not the additional mitigating evidence.

So in this instance then, if the McConnell claim is not barred and we strike the robbery aggravator, and we re-weight the remaining aggravator, which is the New York conviction for a prior crime of robbery against the mitigating evidence that was presented at trial.

Now, let's turn to the issue of McConnell. Under McConnell, the Supreme Court has yet to deal with the specific issue that's raised here and that's when -- how much time do you have after the McConnell decision was issued to file a petition based upon a McConnell claim? And their argument is, well, you have at least one year from Bejarano, which is the decision that made McConnell retroactive. Our position is that if it was retroactive for the reason stated in Bejarano, then the claim was reasonably available to you and could have been raised within one year of McConnell itself or a reasonable time after McConnell. There's no -- the Court in Pellegrini talked about one year being a reasonable time under the circumstances of that case, but they have not yet said that one year is the absolute standard.

So, if the Court is to find that I think it should be one year from Bejarano or a reasonable period of time from Bejarano, then you would have to decide if it's not one year, what's a reasonable period of time and whether or not the McConnell claim is procedurally barred, because it wasn't raised in a timely fashion.

If you find that it was not barred, that, you know, I think a reasonable period of time is one year from when the Supreme Court said McConnell is retroactive, then you would have to strike the robbery aggravator and perform the appropriate re-weighing analysis.

Turning to the New York aggravator, this is not a Leslie situation. There is nothing to indicate that in interpreting the word conviction in our statutes for purposes of an aggravating circumstance, that a conviction must be the same as a final conviction for purposes of appeal; that is, not only a jury verdict but a sentence.

In this instance, he was convicted by a jury of robbery in New York. He absconded and, therefore, has never been sentenced on that robbery and had not been sentenced at the time of trial. But it is still a conviction under Nevada law and that's re-established by the fact that the legislature -- the Nevada Supreme Court has found that's what conviction means under Nevada law and the legislature later clarified the statute saying, yes, that's right and we'll put that specific language in the statute so that there's no issue about that. So, this is not a Leslie situation.

It's not a situation where you have new evidence that would invalidate factually or legally the aggravator. So, under the circumstances, that issue of the validity of the New York aggravator has been previously litigated, it's previously been affirmed by the Nevada Supreme Court, and you can't use Leslie in a sense as an end run around the procedural bars that prohibit relitigating it. And so, I think it's clearly distinguishable for Leslie. Leslie is not controlling and there's no actual innocence of that aggravator and it's still valid for purposes of weighing analysis.

Finally on the Nika, Byford, Kazalyn, Polk issue, as you know, the Nevada Supreme Court has said in Nika that the Byford decision is not retroactive. It was a change in Nevada law and it applies only to those cases that were not final

as of the date the opinion was issued. Mr. Howard's case was final many years before the Byford decision was issued and, therefore, he has no claim with regard to that. He cannot allege a Byford claim. And the fact that the Ninth Circuit in Polk, even they -- the language, the footnote in Polk talks about that same thing, that the reason Polk was entitled to raise the issue was because his conviction was not final at the time that Byford was issued. It was -- he was pending at the same time as Byford.

So based upon Neko, which is the controlling law in Nevada, and if the Ninth Circuit disagrees with it, then we'll have a difference of opinion between the Nevada Supreme Court and the Ninth Circuit and the United States Supreme Court can sort that out at some future time. But you, I think, are bound by the Neko decision. And since that claim is not retroactive, it's procedurally barred and cannot be brought.

So, I think that's in a nutshell the arguments and if the Court has no questions, I'll sit down.

THE COURT: All right. Thank you, counsel.

MR. CHARLTON: May I proceed, Your Honor?

THE COURT: Yes.

MR. CHARLTON: Your Honor, I'm Mike Charlton from the Federal Defender's Office on behalf of Mr. Howard and I'm here with Megan Hoffman, also of the Federal Defender's Office.

We don't think the Sawyer standard applies. There's no Nevada Supreme Court case that applies the Sawyer standard of clear and convincing evidence and we think it's the colorable showing.

But in reality, it doesn't matter. It doesn't matter which standard you

apply to this case because under any reasonable construction of the aggravators in this case, they all fail. There's not a single valid aggravator to sustain this dissidents.

There are -- when this case went to trial, there were -- the aggravators that were alleged were murder in the course of another felony, the robbery and, I think, burglary, which are now invalid under McConnell. There was another aggravator, a prior violent felony, which alleged a conviction out of California -- out of San Bernardino, California, for robbery. At trial, the judge disallowed that aggravator. He struck that aggravator.

The State introduced a conviction from the State of New York, but it was never pled in the motion, in the notice of intent to seek death, as an aggravator. It was pled as additional evidence that the State intended to introduce to support their claim for a death sentence, but it's never stated as an aggravator. It's never listed as an aggravator. And the only other aggravator is the prior violent felony conviction from San Bernardino, California.

There is no violent aggravator before this Court. Whatever standards you apply, we've met the actual innocent standard and this case has to proceed to a discussion on the merits. I mean, that's the really at the heart of this claim and it's not any more complicated than that.

So, whatever standard that you choose to apply, whether it's clear and convincing, or whether it's a colorable showing, we meet that standard. The McConnell aggravator -- you know, it's clearly more than a year after McConnell. I don't think that that standard applies because there's never been a Nevada Supreme Court case that applies that one-year standard to a new legal development. But be that as it may, we still overcome the procedural bars because

of the failure of the aggravators to sustain the conviction.

The -- you know, I -- there's really at this point, you know, once we've met that colorable standard, that colorable showing standard, or the clear and convincing standard, you have to proceed on the merits. And when you -- if you ultimately disagree with us on the merits about the two aggravators and you invalidate only one, then you must re-weigh. And what evidence that you choose to re-weigh you'll have to decide by the authorities that we've cited in our opinion.

It is admittedly contradictory. The Nevada Supreme Court has come down on both sides of the issue about what evidence that you have to consider when you re-weigh. That's just simply what you'll have to decide. We both cited the cases and we'll just have to -- you know, somebody's going to have to let the Nevada Supreme Court work that out if you get to the re-weigh. We don't think you have to get there. We think those claims fail and we think you should proceed to the merits and, ultimately, grant relief.

THE COURT: All right.

MR. CHARLTON: Thank you.

THE COURT: Thank you.

Anything further?

MS. BECKER: Only one and that's that in order to get to the notice issue of the New York as being an aggravator, you would have to overcome the procedural bars to get to that substantive claim and, of course, the Nevada Supreme Court has upheld that aggravator against similar arguments.

Thank you, Your Honor.

THE COURT: All right. The Court's going to further consider the arguments here and prepare an order on this particular matter. I should have the order out to

everybody within the next two weeks. All right? Thank you for your time.

MS. BECKER: Thank you, Your Honor.

MR. CHARLTON: May we be excused?

THE COURT: Yes.

MR. CHARLTON: Thank you.

[Proceedings concluded at 8:40 a.m.]

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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/visual recording in the above-entitled case.

Cheryl Carpenter,
Court Transcriber

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Finding of Fact and Conclusions of Law
1039704

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

SAMUEL HOWARD,
#0624173

Defendant.

CASE NO: 81C053867

DEPT NO: XVII

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: 2/4/10
TIME OF HEARING: 8:30 A.M.

THIS CAUSE having come on for hearing before the Honorable MICHAEL VILLANI, District Judge, on the 4th day of February, 2010, the Petitioner not being present, and his presence having been waived by Counsel, MICHAEL CHARLTON, Assistant Federal Public Defender, the Respondent being represented by DAVID ROGER, District Attorney, by and through NANCY A. BECKER, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

PROCEDURAL HISTORY

On May 20, 1981 defendant Samuel Howard was indicted on one count of Robbery With Use of a Deadly Weapon involving a Sears security officer named Keith Kinsey on

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March 26, 1980; one count of Robbery With Use Of A Deadly Weapon involving Dr. George Monahan and one count of Murder With Use Of A Deadly Weapon involving Dr. Monahan, both committed on March 27, 1980. With respect to the murder count, the State alleged two theories: willful, premeditated and deliberate murder or murder in the commission of a robbery.

Howard was arrested in California where he was serving time for a robbery committed on or about April 1, 1980. He was extradited in November of 1982 and an initial appearance was set for November 23, 1982. At that time the matter was continued for appointment of counsel, the Clark County Public Defender's Office.

On November 30, 1982, Terry Jackson of the Public Defender's Office represented to the district court that Howard qualified for the Public Defender's services; however, Mr. Jackson indicated he had a personal conflict as he was a friend of the victim. The district judge determined that the relationship did not create a conflict for the Public Defender's Office, barred Mr. Jackson from involvement with the case and appointed another deputy public defender to Howard's case.

Howard's counsel requested a one week continuance to consult with Howard about the case. Howard objected, insisted on being arraigned and demanded a speedy trial. After discussion, the district court accepted a plea of not guilty and set a trial date of January 10, 1983.

Howard filed a motion in late in December asking for his counsel to be removed and substitute counsel appointed. Counsel filed a response addressing issues raised in the motion. After a hearing, the district court determined there were no grounds for removing the Clark County Public Defender's Office.

A motion for a psychiatric expert was filed. At a hearing, the district court inquired if this was for competency and Howard's counsel indicated it was not, but it was to help evaluate Howard's mental status at the time of the events. The district court granted the motion and appointed Dr. O'Gorman to assist the defense.

At a status check on January 4, 1983, defense counse indicated the defense could not

be ready for the January 10th trial date due to the need to conduct additional investigation and discovery. In addition, counsel noted Howard was refusing to cooperate with counsel. Howard objected to any continuance with knowledge that his attorneys' could not complete the investigations by that date. Given Howard's objections, the district court stated the trial would go forward as scheduled.

On the day of trial, defense counsel moved to withdraw stating that Mr. Jackson's conflict created mistrust in Howard and he therefore refused to cooperate. This motion was denied. Defense counsel then moved for a continuance as they did not feel comfortable proceeding to trial in this case, given the issues involved, with only six weeks to prepare. After extensive argument and a recess so that counsel could discuss the issue with Howard, the district court granted the continuance over Howard's objections.

The guilt phase of the trial began on April 11, 1983 and concluded on April 22, 1983. The jury returned a verdict of guilty on all three counts. The penalty phase was set to begin on May 2, 1983. In the interim, one of the jurors tried to contact the trial judge about a scheduling problem. Because the district judge was on vacation, someone referred the juror to the District Attorney's Office. That Office referred the juror to the jury commissioner. Howard moved for a mistrial or elimination of the death penalty as a sentencing option based upon this contact. After conducting an evidentiary hearing, the district court denied Howard's motions.

Defense counsel made an oral motion to withdraw indicating they had irreconcilable differences with Howard over the conduct of the penalty phase. Counsel indicated they had documents and witnesses in mitigation, but that Howard had instructed them not to present any mitigation evidence. Howard also instructed them not to argue mitigation and they would not follow that directive, but would argue mitigation. Counsel also indicated that Howard told them he wished to testify, but would not tell them the substance of his testimony. Finally counsel indicated they had attempted to get military and mental health records but were unsuccessful because the agencies possessing the records would not send copes without a release signed by Howard and Howard refused to sign the releases. The

district court canvassed Howard if this was correct and Howard confirmed it was true and that he did not want any mitigation presented. The district court found Howard understood the consequences of his decision and denied the motion to withdraw concluding defense counsel's disagreement with Howard's decision was not a valid basis to withdraw.

The penalty phase began on May 2, 1983 and concluded on May 4, 1983. The State originally alleged three aggravating circumstances: 1) the murder was committed by a person who had previously been convicted of a felony involving the use of violence - namely Robbery With Use Of A Deadly Weapon in California, 2) prior violent felony - a 1978 New York conviction in absentia for Robbery With Use Of A Deadly Weapon; and 3) the murder occurred in the commission of a robbery. Howard moved to strike the California conviction because the conviction occurred after the Monahan murder and the New York conviction because it was not supported by a Judgment of Conviction. The district court struck the California conviction but denied the motion as to the New York conviction, noting that the records reflected a jury had convicted Howard and the lack of a formal judgment was the result of Howard's absconding in the middle of trial.

The State presented evidence of the aggravating circumstances and Howard took the stand and related information on his background. During a break in the testimony, Howard suddenly stated he didn't understand what mitigation meant and that he would leave it up to his attorneys to decide what to do. The district court asked Howard if he was now instructing his attorneys to present mitigation and he refused to answer the question. Howard did indicate that he wanted his attorney's to argue mitigation and defense counsel asked for time to prepare which was granted. The jury found both aggravating circumstances existed and that no mitigating circumstances outweighed the aggravating circumstances. The jury returned a sentence of death.

Howard appealed to the Nevada Supreme Court. Elizabeth Hatcher represented Howard on Direct Appeal. Howard raised the following issues on direct appeal: 1) ineffective assistance of counsel based on actual conflict arising out of Jackson's relationship with Dr. Monahan; 2) denial of a motion to sever the Sears' count from the Monahan counts;

3) denial of an evidentiary hearing on a motion to suppress Howard's statements and evidence derived therefrom; 4) refusal to instruct the jury that accomplice testimony should be viewed with mistrust; 5) refusal to instruct the jury that Dawana Thomas was an accomplice as a matter of law; 6) denial of a motion to strike the felony robbery and New York prior violent felony aggravators; and 7) the giving of a anti-sympathy instruction and refusal to instruct the jury that sympathy and mercy were appropriate considerations.

The Nevada Supreme Court affirmed Howard's conviction and sentence. Howard v. State, 102 Nev. 572, 729 P.2d 1341 (1986) (hereinafter "Howard I"). The Supreme Court held that the relationship of two members of the Public Defender's Office with Monahan did not objectively justify Howard's distrust and there was no evidence that those attorneys had any involvement in his case. Therefore no actual conflict existed and the claim of ineffective assistance of counsel on this basis had no merit. The Court further concluded the district court did not abuse its discretion by refusing to sever the counts and by not granting an evidentiary hearing on the suppression motion. The Court noted that the record reflected proper Miranda warnings were given and the statements were admitted as rebuttal and impeachment after Howard testified. The Court also found that the district court did not error in rejecting the two accomplice instructions; the anti-sympathy language in one of the instructions was not err in light of the totality of the instructions and the record supported the district court's refusal to instruct on certain mitigating circumstances for lack of evidence. The Court concluded by stating it had considered Howard's other claims of error and found them to be without merit. Howard filed a petition for rehearing which was denied on March 24, 1987. Remitittur was stayed pending the filing of a petition for Writ of Certiorari to the United States Supreme Court on the anti-sympathy issues. John Graves, Jr. was appointed to represent Howard on the writ petition. The petition was denied on October 5, 1987 and remitittur issued on February 12, 1988.

On October 28, 1987, Howard filed his first State petition for post-conviction relief. John Graves Jr. and Carmine Colucci originally represented Howard on the petition. They withdrew and David Schieck was appointed. The petition raised the following claims for

relief: 1) ineffective assistance of trial counsel – guilt phase - failure to present an insanity defense and Howard's history of mental illness and commitments; 2) ineffective assistance of trial counsel – penalty phase – failure to present mental health history and documents; failure to present expert psychiatric evidence that Howard was not a danger to jail population; failure to rebut future dangerousness evidence with jail records and personnel; failure to object to improper prosecutorial arguments involving statistics regarding deterrence, predictions of future victims, Howard's lack of rehabilitation, aligning the jury with "future victims," comparing victim's life with Howard's life, diluting jury's responsibility by suggesting it was shared with other entities, voicing personal opinions in support of the death penalty and its application to Howard, references to Charles Manson, voice of society arguments and referring to Howard as an animal; 3) ineffective assistance of appellate counsel – failure to raise prosecutorial misconduct issues.

An evidentiary hearing was held on August 25, 1988. George Franzen, Lizzie Hatcher, John Graves and Howard testified. Supplemental points and authorities were filed on October 3, 1988. The district court entered an oral decision denying the petition on February 14, 1989. The district court concluded that trial counsel performed admirably under difficult circumstances created by Howard himself. As to the failure to present an insanity defense and present mental health records, the court found that Howard was canvassed throughout the proceedings about his refusal to cooperate in obtaining those records, particularly his refusal to sign releases. Howard knew what was going on, was competent and was trying to manipulate the proceedings and that there was no evidence to support an insanity defense, therefore counsel were not ineffective in this regard.

On the issue of failure to object to prosecutorial misconduct, the district court found that defense counsel did object where appropriate and the arguments that were not objected to did not amount to misconduct and were a fair comment on the evidence. Even if some of the comments were improper, the district court concluded that they would not have succeeded on appeal as they were harmless beyond a reasonable doubt. Formal Findings Of

Fact And Conclusions Of Law were filed on July 5, 1989.[1]

The Nevada Supreme Court affirmed the district court's denial of Howard's first State petition for post-conviction relief. Howard v. State, 106 Nev. 713, 800 P.2d 175 (1990) (hereinafter "Howard II"). David Schieck represented Howard in that appeal. On appeal Howard raised ineffective assistance of trial and appellate counsel regarding the prosecutorial misconduct issues. The Supreme Court found three comments to be improper under Collier v. State, 101 Nev. 473, 705 P.2d 1126 (1985)[2]: 1) a personal opinion that Howard merited the death penalty, 2) a golden rule argument – asking the jury to put themselves in the shoes of a future victims and 3) an argument without support from evidence that Howard might escape. The Court found that counsel were ineffective for failing to object to these arguments but concluded there was no reasonable probability of a contrary result absent these remarks and therefore no prejudice. The Court rejected Howard's other contentions of improper argument.

With respect the mitigation evidence issues, the Nevada Supreme Court upheld the district court's findings that this was a result of Howard's own conduct and not ineffective assistance of counsel.[3]

Howard proceeded to file a second Federal habeas corpus petition on May 1, 1991. This proceeding was stayed for Howard to exhaust his state remedies on October 16, 1991.

Howard then filed a second State petition for post-conviction relief on December 16, 1991. Cal J. Potter, III and Fred Atcheson represented Howard in the second State petition. In that petition, Howard alleged denial of a fair trial based on prosecutorial misconduct, namely: 1) jury tampering based on the prosecutor's contact with the juror between the guilt

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[1]During the pendency of the first State petition for post-conviction relief, Howard filed his first Federal petition for habeas relief. That petition was dismissed without prejudice on June 23, 1988.

[2] Collier was decided two years after Howard's trial.

[3] The State filed a petition for rehearing with respect to sanctions imposed on the prosecutor because his remarks violated Collier. The State noted that Howard's trial occurred before Collier therefore the Court should not sanction counsel for conduct that occurred before the Court issued the Collier opinion. Rehearing was denied February 7, 1991.

and penalty phases; 2) expressions of personal belief and a personal endorsement of the death penalty; 3) reference to the improbability of rehabilitation, escape, future killings; 3) comparing Howard's life with Dr. Monahan's and 4) a statement that the community would benefit from Howard's death. The petition also asserted an ineffective assistance of trial counsel claim for failing to explain to Howard the nature of mitigating circumstances and their importance. Finally the petition raised a speedy trial violation and cumulative error.

The State moved to dismiss the second State petition as procedurally barred or governed by the law of the case on February 10, 1992. In his reply, Howard dropped his speedy trial claim as unsubstantiated and indicated if the other claims were barred, then they had been exhausted and Howard could proceed in Federal court.

The district court denied the petition on July 7, 1992. The district court found that the claims of prosecutorial misconduct and ineffective assistance of counsel relating thereto as well as the claims relating to mitigation evidence had been heard and found to be without merit or failed to demonstrate prejudice. Such claims were therefore barred by the law of the case. The district court further concluded that any claim of cumulative error and any issues not raised in previous proceedings were procedurally barred. Finally the district court found the speedy trial violation was a naked allegation, frivolous and procedurally barred.

Howard appealed the denial of his second State petition to the Nevada Supreme Court, which dismissed his appeal on March 19, 1993. The Order Dismissing Appeal found that Howard's second State petition was so lacking in merit that briefing and oral argument was not warranted. Howard filed a petition for Writ of Certiorari challenging the summary affirmance and the United States Supreme Court denied the request on October 4, 1993.

On December 8, 1993, Howard returned to federal court and filed a new pro se habeas petition rather than lifting the stay in the previous petition. After almost three years, on September 2, 1996, the federal district court dismissed the petition as inadequate and ordered Howard to file a second amended federal petition that contained more than conclusory allegations. Thereafter Howard, now represented by Patricia Erickson, filed a Second Amended Petition for Writ of Habeas Corpus on January 27, 1997. After almost five years,

on September 23, 2002, the Second Amended Federal petition was stayed for Howard to again exhaust his federal claims in state court.

Howard filed his third State petition for post-conviction relief on December 20, 2002. Patricia Erickson represented him on this petition. The petition asserted the following claims, phrased generally as denial of a fundamentally fair trial or assistance of counsel under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution or as cruel and unusual punishment under the Eighth Amendment: 1) failure to sever Sears robbery count from Monahan robbery/murder counts; 2) failure to suppress Howard's statements to LVMPD and physical evidence derived therefrom; 3) speedy trial violation; 4) trial counsel actual conflict of interest – Jackson issue; 5) failure to give accomplice as a matter of law and accomplice testimony should be viewed with distrust instructions – Dwana Thomas; 6) improper jury instructions – diluting standard of proof - reasonable doubt, second degree murder as lesser included of first degree murder, premeditation, intent and malice instructions; 7) improper jury instructions – failure to clearly define first degree murder as specific intent crime requiring malice and premeditation; 8) improper premeditation instruction blurred distinction between first and second degree murder; 9) improper malice instruction; 10) improper anti-sympathy instruction; 11) failure to give influence of extreme mental or emotional disturbance mitigator instruction; 12) improper limitation of mitigation by giving only "any other mitigating circumstance" instruction; 13) failure to instruct that mitigating circumstances findings need not be unanimous; 14) prosecutorial misconduct – jury tampering, stating personal beliefs, personal endorsement of death penalty, improper argument regarding rehabilitation, escape and future killings; comparing Howard and victim's lives, comparing Howard to notorious murder (Charles Manson) and improper community benefit argument; 15) use of felony robbery as aggravator and basis for first degree murder; 16) improper reasonable doubt instruction; 17) ineffective assistance of trial counsel – inadequate contact, conflict of interest, failure to contact California counsel to obtain records, failure to obtain Patton and Atescadero hospital records, failure to obtain California trial transcripts, failure to review Clark County Detention Center

medical records, failure to challenge competency to stand trial, failure to obtain suppression hearing, failure to present legal insanity, failure to object to reasonable doubt instruction, failure to view visiting records and call witnesses based upon same, failure to call Pinkie Williams and Carol Walker in penalty phase, failure to investigate and call Benjamin Evans in penalty phase, failure to obtain San Bernardino medical records regarding suicide attempt, failure to obtain military records, failure to adequately explain concept of mitigation evidence, failure to object to prosecutorial misconduct in closing arguments, failure to refute future dangerousness argument, failure to object to trial court's limitation of mitigating circumstances and failure to object to instructions which allegedly required unanimous finding of mitigating circumstances; 18) ineffective assistance of appellate counsel – failed to raise claims 3, 4, 6-9, 12, 13, 15, 16, 20 and 21 on appeal; 19) ineffective assistance of post-conviction counsel – failure to adequately investigate and develop all trial and appeal claims; 20) cumulative error; 21) Nevada's death penalty is administered in an arbitrary, irrational and capricious fashion; 22) lethal injection constitutes cruel and unusual punishment and 23) the death penalty violates evolving standards of decency.

The State filed a motion to dismiss Howard's third State petition on March 4, 2001. The State argued that the entire petition was procedurally barred under NRS 34.726(1) (one year limit) and NRS 34.800 (five year laches) and that Howard had not shown good cause for delay in raising the claims to overcome the procedural bars. The State also analyzed each claim and noted what issues had already been raised and decided adversely to Howard or should have been raised and were waived under NRS 34.810..

Howard filed an amended third State petition. The amended petition expanded the factual matters under Claim 17 regarding Howard's family background that Howard asserted should have been presented in mitigation.

On August 20, 2003, Howard filed his opposition to the State's motion to dismiss his third State petition. As good cause for delay, Howard alleged Nevada's successive petition and waiver bar (NRS 34.810) is inconsistently applied and Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) is not controlling. Howard contended NRS 34.726 did not apply because

any delay was the fault of counsel not Howard and NRS 34.726 is unconstitutional and cannot be applied to successive petitions Pellegrini notwithstanding. Howard argued the Due process and Equal Protection clauses of the Federal Constitution bar application of NRS 34.726, NRS 34.800 and NRS 34.810 to Howard. In addition, Howard asserted NRS 34.800 did not apply because the State had not shown prejudice and the presumption of prejudice was overcome by the allegations in the petition.

The State filed a reply to the opposition on September 24, 2003. The district court issued an oral decision on October 2, 2003 dismissing the third State petition as procedurally barred under NRS 34.726 and finding Howard had failed to overcome the bar by showing good cause for delay. The district court also independently dismissed the claims under NRS 34.810. Written findings were entered on October 23, 2003.

Howard appealed the dismissal to the Nevada Supreme Court, which affirmed the district court's dismissal of the third State petition on December 4, 2004. The High Court addressed Howard's assertions that he had either overcome the procedural bars or they could not constitutionally be applied to him and rejected them. Among its conclusions, the Court noted that the record reflected Howard was aware that all his claims challenging the conviction or imposition of sentence must be joined in a single petition and that Howard had no right to post-conviction counsel at the time of the filing of his first and second State petitions for post-conviction relief and hence ineffectiveness of post-conviction counsel could not be good cause for delay.[4]

Howard then returned to Federal district court where he filed his Third Amended Petition for Writ of Habeas Corpus on October 23, 2005. Subsequently, without seeking approval from the Federal Court, the Federal Public Defender's Office filed, on Howard's behalf, the current Fourth State Post-Conviction Petition on October 27, 2007. The State filed a motion to dismiss the Fourth State Petition on April 8, 2008. The parties agreed to stay this case for several months while Howard sought permission from the Federal District

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[4] See 1987 Nev. Stat., ch. 539, § 42 at 1230 (providing that appointment of counsel was discretionary not mandatory).

Court to hold his federal petition for post-conviction habeas corpus in abeyance pending exhaustion of the claims already filed in the Fourth State Petition and of new claims he wished to file in State court as a result of the Ninth Circuit's decision in Polk v. Sandoval, 503 F.3d 903, 910 (9th Cir. 2007).

The United States District Court denied Howards' motion for stay and abeyance on January 9, 2009. Thereafter, Howard filed an Opposition to the State's original motion to dismiss and an Amended Petition on February 24, 2009. The State responded to Howard's opposition to the original motion to dismiss and additionally moved to dismiss the Amended Fourth Petition on October 7, 2009.[5] Howard filed an Opposition to the Amended Motion to Dismiss on December 18, 2009. Howard filed supplemental authorities on January 5, 2010.

Argument on the State's motion to dismiss was heard on February 4, 2010. The matter was taken under advisement so the district court could review the extensive record. A Minute Order Decision was issued on May 13, 2010 dismissing the Fourth State Petition as procedurally barred.

STATEMENT OF FACTS

On March 26, 1980, around noon, a Sears' security officer, Keith Kinsey, observed Howard take a sander from a shelf, remove the packing and then claim a fraudulent refund slip from a cashier. Kinsey approached Howard and asked him to accompany Kinsey to a security office. Kinsey enlisted the aid of two other store employees. Howard was cooperative, alert and indicated there must be some mistake. In the security office, Kinsey observed Howard had a gun under his jacket and attempted to handcuff Howard for safety reasons. A struggle broke out and Howard drew a .357 revolver and pointed it at the three men. Howard had the men lay face down on the floor and took Kinsey's security badge, ID and a portable radio (walkie-talkie). Howard threatened to kill the three men if they

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[5] Although both defense counsel and this Court received a copy of the Opposition and Amended Motion to Dismiss, for some reason it was not filed. This Court authorized the District Attorney's Office to file a Notice of Errata and attach a copy of the previously distributed Opposition and Amended Motion to Dismiss. This was filed on February 4, 2010. Subsequently, the missing document was located and the original Amended Motion to Dismiss was officially filed on May 11, 2010.

followed him and he fled to his car in the parking lot. A yellow gold jewelry ID bracelet was found at the scene and impounded. It was later identified as Howard's. The Sears in question was located at the corner of Desert Inn Road and Maryland Parkway at the Boulevard Mall in Las Vegas, Nevada.

Dawana Thomas, Howard's girlfriend, was waiting for him in the car. Howard had told her to wait for him and she was unaware of his intentions to obtain money through a false refund transaction. Fleeing from the robbery, Howard hopped into the car, a 1980 black Oldsmobile Cutlass with New York plates 614 ZHQ and sped away from the mall. While escaping, Howard rear-ended a white corvette driven by Stephen Houchin. Houchin followed Howard when Howard left the scene of the accident. Howard pointed the .357 revolver out the window of the Olds and at Houchin's face, telling Houchin to mind his own business.

Howard drove to the Castaways Motel on Las Vegas Boulevard South and parked the car for a few hours. Thomas and Howard walked about and Howard made some phone calls. Later that evening Howard left for a couple of hours. When he returned he told Thomas that he had met up with a pimp, but the pimps' girls were with him so he couldn't rob him. Howard indicated he had arranged to meet with the "pimp" the next morning and would rob him then.

Howard and Thomas drove to the Western Six motel located on the Boulder Highway near the intersection of Desert Inn Road. The couple had stayed at this motel before and Howard instructed Thomas to register under an assumed name, Barbara Jackson. The motel registration card under that name was admitted into evidence and a documents' examiner compared handwriting on the card with Thomas' and indicated they matched.

Around 6:00 a.m. on March 27, 1980, Thomas and Howard left the motel and went to breakfast. After breakfast, Thomas dropped Howard off in the alley behind Dr. George Monahan's office. This was at approximately 7:00 a.m. Thomas went back to the motel room. Approximately an hour later, Howard returned to the motel. Howard had a CB radio with him that had loose wires and a gold watch she had never seen before. Howard told

Thompson that he was tired of Las Vegas and to pack up their things as they were leaving for California.

Dr. Monahan was a dentist with a practice located on Desert Inn Road within walking distance of the Boulevard Mall. He was attempting to sell a uniquely painted van and would park the van in the parking lot of the mall, at the Desert Inn and Maryland intersection and near the Sears store, then walk to his office. The van had a sign in it listing Dr. Monahan's home and business phone numbers and the business address.

About 4:00 p.m. on March 26, 1980, the afternoon of the Sears robbery, Dr. Monahan's wife, Mary Lou Monahan, received a phone call at her home inquiring about the van. The caller was a male who identified himself as "Keith" and stated he was a Security Guard at Caesar's Palace. He indicated he was interested in purchasing the van and wanted to know if someone could meet him at Caesar's during his break time at 8:00 p.m. Mrs. Monahan indicated the caller would have to talk to her husband who was expected home shortly. A second call was made around 4:30 p.m. and Dr. Monahan made arrangements to meet "Keith" at Caesar's later that night.

The Monahans and two relatives, Barbara Zemen and Mary Catherine Monahan, met "Keith" that evening at the appointed time and place. Howard was identified as the man who called himself "Keith". Howard was carrying a walkie-talkie radio at the time. Howard talked to Dr. Monahan for about ten minutes about purchasing the van and looked inside the van but did not touch the door handle while doing so. Howard arranged to meet Dr. Monahan the next morning to take a test drive. The Monahan's left Caesar's and parked the van at Dr. Monahan's office before returning home in another vehicle.

The next day, March 27, 1980, Dr. Monahan left his home at about 6:50 a.m. He took with him his wallet, a gold Seiko watch, daily receipts and the van title. When Mrs. Monahan arrived at the office at about 8:00 a.m. Dr. Monahan was not there and a patient was waiting for him. Dr. Monahan's truck was in the parking lot to the rear of the office. Dr. Monahan had not entered the office. A Black man wearing a radio or walkie-talkie on his belt came into the office at about 7:00 a.m. that morning looking for Dr. Monahan and

stating that he had an appointment with the doctor.

Mrs. Monahan called Caesar's Palace and learned no "Keith" fitting the description she gave worked security. After obtaining this information, Mrs. Monahan called the police to report her husband as a missing person. This occurred at about 9:00 a.m.

Charles Marino owned the Dew Drop Inn located near the corner of Desert Inn and Boulder Highway, just a few blocks from Dr. Monahan's office and almost across the road from the Western Six motel. Early on the morning of March 27, 1980, as he approached his business, he observed the Monahan van backing into the rear of the bar. When he arrived at the Inn, he looked in the driver's side and saw no one. He asked patrons if they knew anything about the van and no one spoke up. Marino remained at the business until the early afternoon. The van was still there and had not been moved. Later that day, at around 7:00 p.m. he received a call to return to the bar as a dead body had been found in the van.

In response to television coverage, the police learned the Monahan van was behind the Dew Drop Inn around 6:45 p.m. Dr. Monahan's body was found in the van under an overturned table and some coverings. He had been shot once in the head. The bullet went through Dr. Monahan's head and a projectile was recovered on the floor of the van. The projectile was compared to Howard's .357 revolver. Because the bullet was so badly damaged; forensic analysis could not establish an exact match. It was determined that the bullet could have come from certain makes and models of revolvers, Howard's included. The van's CB radio and a tape deck had been removed. Dr. Monahan's watch and wallet were missing. A fingerprint recovered from one of the van's doors matched Howard's.

Homicide detectives were aware of the Sears robbery that had occurred on March 26th. The description of the Sears suspect matched that given by Mrs. Monahan of the man calling himself Keith at Caesar's Palace. Based upon that, the use of the name Keith, the walkie-talkie in possession of the suspect, the close proximity of the dental office to the Sears and the fact that the van had been parked in the Sears' parking lot, the police issued a bulletin to state and out-of-state law enforcement agencies describing the suspect and the car used in the Sears' robbery.

On March 27, 1980, while the police were searching for Dr. Monahan, Howard and Thompson drove to California. They left the motel between 8:00 a.m. and 9:00 a.m. and on the way they stopped for gas. At that time Howard had a brown or black wallet that had credit cards and photos in it. Howard went to the gas station rest room and when he returned he no longer had the wallet.

On March 28, 1980, Howard and Thompson went to a Sears in San Bernadino, California. Once again Howard left Thompson in the car while he entered the Sears, picked up merchandize and tried to obtain a refund on it. This time he used the stolen Kinsey Sears security badge in the attempt. The Sears personal were suspicious and left Howard at the register while they called Las Vegas. When they returned Howard had left. Howard had returned to the car and Thompson and Howard ducked down when the people from Sears stepped outside to view the parking lot.

On or about April 1, 1980, at around noon, Howard went to the Stonewood Shopping Center in Downey, California. He entered a jewelry store and talked to a security agent, Manny Velasquez. Another agent in the store, Robert Slater, who also worked as a police officer in Downey, saw Howard and noticed the grip of a gun under Howard's jacket. Slater talked to Velasquez and decided to call the Downey Police. Howard left the jewelry store went to the west end of the mall near a Thrifty drugstore. Downey Police officers observed Howard walking up and down the aisles of the drugstore, picking items up and replacing them on shelves. Howard was stopped on suspicion of carrying a concealed weapon. No gun was found on him nor was he carrying the walkie-talkie. A search of the aisles he had been in revealed a .357 magnum revolver and the walkie-talkie and Sears' security badge stolen from Kinsey.

Howard was arrested for carrying a concealed weapon and then identified and booked for a San Bernadino robbery. Howard was given his Miranda rights by Downey Police officers. Disputed evidence was presented regarding his response and whether he invoked his right to silence. Based on information in the all-points bulletin, the California authorities contacted the Las Vegas Metropolitan Police Department about Howard. On April 2, 1980,

LVMPD Detective Alfred Leavitt went to California and, after reading Howard his Miranda rights, which Howard indicated he understood, interviewed Howard regarding the Sears robbery and Dr. Monahan's murder. Howard did not invoke his right to remain silent or to counsel at this time.

Howard told Detective Leavitt he recalled being at the Sears department store but no details about what happened and that he did not remember anything about March 27, 1980. He stated he could have killed Dr. Monahan but he didn't know.

Ed Schwartz was working as a car salesman in New York on October 5, 1979. When he arrived at work at approximately 9:00 a.m. Howard entered the agency and was looking at an Oldsmobile car. Howard showed Schwartz a New York driver's license and checkbook and told Schwartz that he worked for a security firm in New York. Howard asked if they could take a demonstration ride and Schwartz drove the car for a few blocks while Howard was the passenger. Howard asked if he could drive the car and the men switched seats. After driving for a short time, Howard pulled over and pointed an automatic pistol at Schwartz. Schwartz was told to get down on the floor of the car and remove his shoes and pants. Schwartz complied and Howard took Schwartz' watch, ring and wallet. Schwartz got out of the car when ordered to do so and Howard drove off. The car was later found abandoned.[6]

Howard called witnesses who testified they saw the Monahan van being driven by a Black man who did not match Howard's description, in particular the man had a large afro and Howard had short hair. John McBride state that he saw the van around 8:30 to 8:45 a.m. in his apartment complex which is located about five miles from Desert Inn and Boulder Highway. Lora Mallek was employed at a Mobile gas station at the corner of DI and Boulder Highway and she stated serviced the van when it pulled into the station between 3:00 p.m. and 4:00 p.m. Mallek testified that a Black man with a large afro was driving, a Black woman who did not match Thomas' description was in the passenger seat and a white

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[6] This evidence was admitted to show identity and motive for the Monahan murder.

man was sitting in the back.

Howard testified over the objection of counsel. He indicated he did not recall much about March 26, 1980. He remembered being in Las Vegas in general on and off and that at one point Dwana Thomas' brother, who was about Howard's height, age and weight, and had a large afro, visited them. Howard said he remembers incidents, not dates and Kinsey could have been telling the truth about the Sears store. Howard indicated he wasn't sure because when the Sears people gathered around him, it reminded him of Vietnam and he kind of had a flashback. Howard said he thinks he left Las Vegas immediately after the Sears incident. Howard also stated that he did not meet Dr. Monahan, rob or kill him as he couldn't be that callous.

On cross-examination, Howard admitted he left New York in the middle of his robbery trial and was asked about statements he made to Detective Leavitt. Howard also acknowledged he has used a number of aliases including Harold Stanback. Howard indicated he was taking the blame for Dawana and her brother Lonnie.

Dawana Thomas was called in rebuttal and indicated her brother Lonnie had not been in Las Vegas in March of 1980.

In the penalty phase, the State presented evidence on the details of Howard's 1979 New York conviction for Robbery. A college nurse who knew Howard, Dorothy Weisband, testified that Howard robbed her at gunpoint taking her wallet and car. He forced her into a closet and demanded she removed her clothes. She refused and he left. After the robbery, Howard called Weisband trying to get more cash from her in return for her car and threatened her.

Howard testified regarding his military, family and mental health histories. Howard discussed his military service and stated he had suffered a concussion and received a purple heart.[7] Howard also stated he was on veteran's disability in New York.[8] He said he was in

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[7] The military records attached to the current Fourth Petition do not reflect any such injury or award.

[8] Howard's military records do not support this and there is nothing in the record substantiating any admission to a veteran's hospital. The record reflects Howard was never

various mental health facilities in California including being housed in the same facility as Charlie Manson. He testified he had been diagnosed as a schizophrenic, but that some of the doctors thought he was malingering. When asked about his childhood, Howard became upset. He indicated he didn't want to talk about the death of his mother and sister. Howard indicated he was not mentally ill and knew what he was doing at all times.

FINDINGS OF FACT

1. The Court adopts the above Procedural History as its first Finding of Fact.

2. The Court adopts the above Statement of Facts as its second Finding of Fact.

3. This is Howard's fourth state petition for post-conviction relief.

4. The current Petition for Post-Conviction Relief was filed on October 27, 2007, approximately twenty-one years after Howard's conviction and nineteen years after remittitur was issued on direct appeal from the Judgment of Conviction.

5. The following claims raised in the original Fourth State Petition are time-barred under NRS 34.726 as they were filed more than one year from the remittitur on direct appeal: Claims 2(1) conflict of interest, 2(2) ineffective assistance of trial counsel – mitigation evidence, 2(3) polygraphing policy; Claim 3 – competency and validy of mitigation evidence waiver; Claim 4 – insufficiency of the evidence, failure to conduct neuro-psychological testing, failure to develop post-traumatic stress disorder evidence; Claim 5 – invalidity of New York Robbery conviction; Claim 6 – denial of motion to sever counts; Claim 7 – denial of evidentiary hearing to suppress statements; Claim 8 – speedy trial violation; Claim 9 – denial of motions to dismiss counsel and motions to withdraw; Claim 10 - failure to give accomplice instruction; Claims 11(A) – reasonable doubt instruction, 11(B) – lesser-included Second Degree Murder instruction, 11(C) – premeditation and malice instructions; Claim 12 – validity of Instruction # 20; Claim 13 – *Kazalyn* instruction; Claim 14 – improper malice instructions; Claim 15 – anti-sympathy instruction; Claim 16 – failure to instruct on mental.emotional disturbance mitigating

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actually admitted to a hospital in New York because it required identification and he could not identify himself due to existing warrants for his arrest.

circumstance; Claim 17 – improper limitation of mitigating circumstances; Claim 18 – forms and instructions implied mitigating circumstances must be unanimous finding; Claim 19 – prosecutorial misconduct; Claim 21 – ineffective assistance of trial counsel; Claims 22 – ineffective assistance of appellate counsel; Claim 23 – ineffective assistance of post-conviction counsel; Claim 24 – Nevada's death penalty scheme is arbitrary and capricious in application; Claim 25 – Nevada Supreme Court fails to adequately review death penalty cases; Claim 26 – lethal injection; Claim 27 – elected judiciary; Claim 28 – restrictive death row conditions; Claim 29 – international law; Claim 30 – Nevada's death penalty scheme unconstitutional; Claim 31 – evolving standards of decency; Claim 32 – cumulative errors.

6. The following claims in the original Fourth State Petition involve issues that either were, or could have been, raised at trial, on direct appeal or in a previous timely post-conviction petition. They are therefore procedurally barred under NRS 34.810 as either waived, successive or an abuse of the writ. Claims 2(1) conflict of interest, 2(2) ineffective assistance of trial counsel – mitigation evidence, 2(3) polygraphing policy; Claim 3 – competency and validy of mitigation evidence waiver; Claim 4 – insufficiency of the evidence, failure to conduct neuro-psychological testing, failure to develop post-traumatic stress disorder evidence; Claim 5 – invalidity of New York robbery conviction; Claim 6 – denial of motion to sever counts; Claim 7 – denial of evidentiary hearing to suppress statements; Claim 8 – speedy trial violation; Claim 9 – denial of motions to dismiss counsel and motions to withdraw; Claim 10 - failure to give accomplice instruction; Claims 11(A) – reasonable doubt instruction, 11(B) – lesser-included second degree murder instruction, 11(C) – premeditation and malice instructions; Claim 12 – validity of Instruction # 20; Claim 13 – *Kazalyn* instruction; Claim 14 – improper malice instructions; Claim 15 – anti-sympathy instruction; Claim 16 – failure to instruct on mental.emotional disturbance mitigating circumstance; Claim 17 – improper limitation of mitigating circumstances; Claim 18 – forms and instructions implied mitigating circumstances must be unanimous finding; Claim 19 – prosecutorial misconduct; Claim 21 – ineffective assistance of trial counsel; Claims 22 – ineffective assistance of appellate counsel; Claim 23 – ineffective assistance of

post-conviction counsel; Claim 24 – Nevada's death penalty scheme is arbitrary and capricious in application; Claim 25 – Nevada Supreme Court fails to adequately review death penalty cases; Claim 26 – lethal injection; Claim 27 – elected judiciary; Claim 28 – restrictive death row conditions; Claim 29 – international law; Claim 30 – Nevada's death penalty scheme unconstitutional; Claim 31 – evolving standards of decency; Claim 32 – cumulative errors.

7. In its Motion to Dismiss the original Fourth State Petition, the State alleged laches under NRS 34.800. The Fourth State Petition was filed over twenty years after the entry of the Judgment of Conviction. Therefore the rebuttable presumption of prejudice to the State under NRS 34.800 applies.

8. The legal and factual issues surrounding the claims raised in the original Fourth State Petition are intertwined and the State is likely to have difficulty with memories, location and availability of witnesses from the 1980's creating actual prejudice.

9. Howard failed to meet his burden to prove facts by a preponderance of the evidence to rebut the presumption of prejudice.

10. The following claims in the original Fourth State Petition are procedurally barred pursuant to NRS 34.800: Claims 2(1) conflict of interest, 2(2) ineffective assistance of trial counsel – mitigation evidence, 2(3) polygraphing policy; Claim 3 – competency and validy of mitigation evidence waiver; Claim 4 – insufficiency of the evidence, failure to conduct neuro-psychological testing, failure to develop post-traumatic stress disorder evidence; Claim 5 – invalidity of New York robbery conviction; Claim 6 – denial of motion to sever counts; Claim 7 – denial of evidentiary hearing to suppress statements; Claim 8 – speedy trial violation; Claim 9 – denial of motions to dismiss counsel and motions to withdraw; Claim 10 - failure to give accomplice instruction; Claims 11(A) – reasonable doubt instruction, 11(B) – lesser-included second degree murder instruction, 11(C) – premeditation and malice instructions; Claim 12 – validity of Instruction # 20; Claim 13 – *Kazalyn* instruction; Claim 14 – improper malice instructions; Claim 15 – anti-sympathy instruction; Claim 16 – failure to instruct on mental.emotional disturbance mitigating

circumstance; Claim 17 – improper limitation of mitigating circumstances; Claim 18 – forms and instructions implied mitigating circumstances must be unanimous finding; Claim 19 – prosecutorial misconduct; Claim 21 – ineffective assistance of trial counsel; Claims 22 – ineffective assistance of appellate counsel; Claim 23 – ineffective assistance of post-conviction counsel; Claim 24 – Nevada's death penalty scheme is arbitrary and capricious in application; Claim 25 – Nevada Supreme Court fails to adequately review death penalty cases; Claim 26 – lethal injection; Claim 27 – elected judiciary; Claim 28 – restrictive death row conditions; Claim 29 – international law; Claim 30 – Nevada's death penalty scheme unconstitutional; Claim 31 – evolving standards of decency; Claim 32 – cumulative errors.

11. Claims 1 and 20 of the original Fourth State Petition involve a claim under McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004). McConnell was decided in 2004 and the instant petition was filed in 2007, over two years after issuance of the decision. The claim was available in 2004 and nothing prevented Howard from raising the claim prior to 2007 and arguing McConnell should be retroactively applied. Howard acted unreasonably in waiting until the Nevada Supreme Court addressed the issue of retroactivity before raising this claim. Thus the decision in Bejarno v. State, 122 Nev. 1066, 146 P.3d 265 (2006) does not constitute good cause for the delay in raising the claim. Accordingly, Claims 1 and 20 are time-barred under NRS 34.726.

12. Howarded filed an Amended Petition for Writ of Habeas Corpus on February 24, 2009. For purposes of applying the procedural bars, the original petition filing date of October 27, 2007 still applies. Thus the claims in the Amended Petition were raised approximately twenty-one years after Howard's conviction and nineteen years after remittitur was issued on direct appeal from the Judgment of Conviction.

12. The following claims in the Amended Fourth State Petition are time-barred under NRS 34.726: Claim 1 – validity of New York prior felony aggravator; Claim 2(1) – actual conflict of interest, Claim 2(2) – ineffective assistance of counsel (mitigation issues), Claim 2(3) – polygraph/resources allegations, Claim 2(4) – failure of trial court grant motions for new counsel; Claim 3 – *Kazalyn* instruction fails to distinguish first and second

degree murder and violates *Byford*; Claim 4 – Nevada statutes permit the death penalty to be imposed for second degree murder; Claim 5 – instructions and verdict form implied mitigating circumstances must be unanimous finding; Claim 6 – prosecutorial misconduct; Claim 7 – ineffective assistance of appellate counsel; Claim 8 – Nevada Supreme Court fails to conduct fair and adequate review of death cases; Claim 9 – Nevada's capital system is arbitrary and capricious; Claim 10 – cumulative error.

13. Claim 1 of the Amended Petition also asserts a McConnell claim which is also time-barred under NRS 34.726 for the reasons set forth in Finding # 11.

14. The State's motion to dismiss the Amended Fourth State Petition asserted laches under NRS 34.800. As noted in Findings # 8 and # 9, the State has suffered actual as well as presumptive prejudice and Howard has not overcome that presumption.

15. The following claims of the Amended Fourth State Petition are barred under NRS 34.800: Claim 1 – validity of New York prior felony aggravator; Claim 2(1) – actual conflict of interest, Claim 2(2) – ineffective assistance of counsel (mitigation issues), Claim 2(3) – polygraph/resources allegations, Claim 2(4) – failure of trial court grant motions for new counsel; Claim 3 – *Kazalyn* instruction fails to distinguish first and second degree murder; Claim 4 – Nevada statutes permit the death penalty to be imposed for second degree murder; Claim 5 – instructions and verdict form implied mitigating circumstances must be unanimous finding; Claim 6 – prosecutorial misconduct; Claim 7 – ineffective assistance of appellate counsel; Claim 8 – Nevada Supreme Court fails to conduct fair and adequate review of death cases; Claim 9 – Nevada's capital system is arbitrary and capricious; Claim 10 – cumulative error.

16. The following claims in the Amended Fourth State Petition involve issues that either were, or could have been, raised at trial, on direct appeal or in a previous timely post-conviction petition. They are therefore procedurally barred under NRS 34.810 as with waived, successive or an abuse of the writ: Claim 2(1) – actual conflict of interest, Claim 2(2) – ineffective assistance of counsel (mitigation issues), Claim 2(3) – polygraph/resources allegations, Claim 2(4) – failure of trial court grant motions for new counsel; Claim 3 –

Kazalyn instruction fails to distinguish first and second degree murder; Claim 4 – Nevada statutes permit the death penalty to be imposed for second degree murder; Claim 5 – instructions and verdict form implied mitigating circumstances must be unanimous finding; Claim 6 – prosecutorial misconduct; Claim 7 – ineffective assistance of appellate counsel; Claim 8 – Nevada Supreme Court fails to conduct fair and adequate review of death cases; Claim 9 – Nevada's capital system is arbitrary and capricious; Claim 10 – cumulative error.

17. As good cause to execuse the procedural delays, in the original or amended petitions, Howard asserts: 1) ineffective assistance of trial, appellate and post-conviction counsel; 2) inconsistent application of procedural bars; 3) delay was not the result of any direct fault of Howard; 4) Howard was litigating in Federal court; 5) as to the *Kazalyn* claim, the Ninth Circuit decision Polk v. Sandoval, 503 F.3d 903 (2007).

18. Howard's claims of ineffective assistance of trial and appellate counsel are, in themselves, procedurally barred.

19. Under the Statutes of Nevada in 1987, Howard was not entitled to the appointment of post-conviction counsel on his first state petition for post-conviction relief.

20. Even if Howard had been entitled to counsel during his first state petiton, any claim of ineffective assistance of post-conviction counsel is, in itself, procedurally barred.

21. Actions of Howard's counsel are attributable to Howard.

22. Nothing in Polk v Sandoval indicates it is retroactive to cases that were final when the Nevada Supreme Court issued its opinion in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

23. Howard's conviction became final when remittitur issued on his direct appeal on February 12, 1988. Neither Byford nor Polk are applicable to Howard's conviction.

24. None of allegations raised to explain the delays in bringing these claims constitute good cause.

25. Howard also asserts a claim of "actual innocence" of the death penalty as justification for excusing the procedural bars.

26. Howard has not demonstrated clear and convincing evidence that the

Legislature intended the prior felony aggravator to apply only to cases in which a judgment of conviction was entered as opposed to a jury verdict.

27. Howard has not produced any evidence or factual allegations let alone, clear and convincining evidence that he is innocent of the New York robbery.

28. To the extent that anything in the pleadings is intended to assert a claim of "actual innocence" with respect to guilt, Howard has not produced any evidence or factual allegations, let alone clear and convincing evidence, that he is not the killer of Dr. Monahan.

29. The only allegations of "new evidence" involve mitigating circumstances.

30. Even if Howard's McConnell claim is not untimely, Howard has failed to establish prejudice. Without the "in the commission of a robbery" aggravator, the jury still heard evidence that Howard committed a violent robbery with a gun in New York only one year before he committed the instant crimes. The facts of that robbery indicated he terrorized a nurse who was trying to help him, forcing her to remove her clothes and locking her in closet before stealing her car. The mitigation evidence consisted of Howard's own statements concerning his service in Vietnam, the time spent in some California mental health facilities until doctors concluded he was malingering and his expression of sympathy to Dr. Monahan's family while maintaining his innocence. Given this evidence, this Court concludes, beyond a reasonable doubt, that the jury would still have determined the aggravating circumstances were not outweighed by the mitigating circumstances without the "in the commission of the robbery" aggravator.

31. In considering the effect of the aggravator on the ultimate sentence of death, the Court concludes, beyond a reasonable doubt, that the jury would have sentenced Howard to death absent that aggravator. In addition to the facts of the Sears robbery and Monahan murder, the jury heard evidence Howard committed two violent robberies in New York. All these crimes were committed within a two year period.

32. To the extent that any conclusion of law stated below can also be considered a finding of fact, it shall be so treated.

CONCLUSIONS OF LAW

1. Under NRS 34.810(1)(b) every challenge to a conviction that could have been raised at trial or on direct appeal cannot be raised in a post-conviction habeas proceeding. In addition, under NRS 34.810(2), all claims of ineffective assistance of trial and appellate counsel are required to be raised in a first petition for post-conviction relief and any claims of ineffective assistance of post-conviction are required to be filed in a second petition for post-conviction relief. Failure to do so constitutes either a successive petition or an abuse of the writ. Any claims in a post-conviction petition that fail to comply with the statute are procedurally barred.

2. NRS 34.810(2) incorporates the concept that where a subsequent petition raises new or different grounds for relief and those grounds could have been asserted in a prior petition, it is an abuse of the writ. In essence, it encompasses the same concerns as NRS 34.810(1)(b), the waiver provision, except that it applies to all petitions, not just those arising from trial. It also reflects the policy behind the Law of the Case Doctrine; rulings on previous issues cannot be avoided by a more detailed or precisely focused argument. Hogan v. State, 109 Nev. 952, 860 P.2d 710 (1993). In other words, if the information or argument was previously available, it is an abuse of the writ to wait to assert it in a second or subsequent petition. McClesky v. Zant, 499 U.S. 457, 497-498 (1991).

3. As noted in Findings # 6 and # 16, all of Howard's claims and sub-claims were either raised in previous proceedings and denied on their merits (or found to be procedurally barred) or could have been raised in previous proceedings and were not. Thus they are barred under NRS 34.810.

4. Under NRS 34.726, any challenge to Howard's conviction based upon a substantive claim of ineffective assistance of trial and/or appellate counsel was required to be filed within one year of the remittitur, which was February 12, 1988. However, pursuant to Pellegrini v. State, 117 Nev. 860, 34 P.3d 519, 537 (2001), that period would be extended to January 1, 1994. The instant petition was filed in 2007, thus, as noted in Findings # 5, # 11, # 12 and #13, all claims and subclaims are untimely and procedurally barred under NRS

34.726.

5. NRS 34.726 is strictly enforced. In Gonzales v. State, 118 Nev. 61, 590 P.3d 901 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two days late, pursuant to the "clear and unambiguous" mandatory provisions of NRS 34.726(1).

6. Besides the provisions of NRS 34.726, NRS 34.800 recognizes that a post-conviction petition should be dismissed when delay in presenting issues would prejudice the State in responding to the petition or in retrial. NRS 34.800(1)(a)(b).

7. NRS 34.800(2) creates a rebuttable presumption of prejudice to the State where a period of five years has elapsed between the filing a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction. To invoke the presumption, the statute requires that the State plead laches in its motion to dismiss the petition. NRS 34.800(2). Once the presumption is invoked, the petitioner has the burden of pleading specific facts to overcome the presumption.

8. The decision on direct appeal was rendered in 1987. The instant petition was filed in 2007. The State plead laches in its motion to dismiss, therefore the presumption of prejudice applies.

9. Because Howard failed to plead or prove factual allegations to overcome the presumption of prejudice all claims and sub-claims, except the McConnell claim, are procedurally barred under NRS 34.800.

10. To overcome the procedural bars under NRS 34.726, NRS 34.800 and NRS 34.810, Howard must show either show good cause and prejudice for the delay or manifest injustice.

11. Good cause means an impediment external to the defense that prevented petitioner from complying with the state procedural default rules. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); citing Pellegrini v. State, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001); Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994); Passanisi v. Director, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989); see also Crump v. Warden, 113 Nev. 293, 295, 934 P.2d 247, 252 (1997); Phelps v. Director, 104 Nev. 656, 764 P.2d

1303 (1988).

12. An external impediment exists if the factual or legal basis for a claim was not reasonably available to counsel, or where some interference by officials' made compliance impracticable. Hathaway, 71 P.3d at 506; quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645 (1986); see also Gonzales, 118 Nev. at 595, 53 P.3d at 904; citing Harris v. Warden, 114 Nev. 956, 959-60 n. 4, 964 P.2d 785 n. 4 (1998).

13. Fault of the petitioner encompasses not only a petitioner's own actions, but also actions of a petitioner's counsel or agents. For example, trial counsel's failure to forward a copy of the file to a petitioner is not good cause for excusing a delay in filing. See Phelps, 104 Nev. at 660; Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995). Other than implying that any "fault" in the delay was that of his attorneys, Howard presented no evidence of an external impediment.

14. A claim of ineffective assistance of counsel that is procedurally barred cannot constitute good cause for excusing the procedural bars, for itself or any other claim. State v. District Court (Riker), 121 Nev. 225, 112 P.3d 1070 (2005). See also Edwards v. Carpenter, 529 U.S. 446, 453 (2000) (procedurally barred ineffective assistance of counsel claim is not good cause). See generally Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506-07 (2003) (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing).

15. As Howard fails to show good cause for not bringing his ineffective assistance of counsel claims in a timely manner, they are procedurally barred and do not constitute good cause for overcoming the procedural bars. Moreover, as to the claims of ineffective assistance of counsel that were brought in prior petitions and decided on their merits, these claims would be successive and new arguments in support of the claims would be an abuse of the writ, so they are also procedurally barred under NRS 34.810 and cannot constitute good cause for delay. Any claims that were not previously raised in the first or second post-conviction petitions would be waived and barred under NRS 34.810(1)(b) and likewise cannot establish good cause for delay.

16. Because Howard was not entitled to post-conviction counsel at the time of his first post-conviction petition, he cannot maintain a claim of ineffective assistance of post-conviction counsel and thus this cannot constitute good cause for any delays. See Pellegrini, 117 Nev. at 888, 34 P.3d at 538, fn. 125.

17. The Nevada Supreme Court has gone to great lengths to refute claims that it arbitrarily and inconsistently applies the procedural default rules. See State v. Dist.Ct. (Riker), 121 Nev. 225, 112 P.3d 1070 (2005). Nevada does not inconsistently apply its procedural bars and this allegation does not demonstrate good cause for the delay in the filing of Howard's claims in the instant petition.

18. Howard claims Polk v. Sandoval constitutes good cause for the delay in raising his challenge to the *Kazalyn* instruction. As noted in Nika v. State, 198 P.3d 839 (2008), Polk v. Sandoval misconstrues the Nevada Supreme Court's decision in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). Further Nika notes that Byford would only apply to cases that were not final when Byford was issued. Howard's case was final in 1988 and Byford was issued in 2000. Thus Byford and Polk are not applicable to Howard and cannot constitute good cause for the delay in raising the *Kazalyn* issue in the instant petition.

19. Generally, a defendant who has procedurally defaulted on a claim may subsequently raise the claim in a habeas petition upon a showing of manifest injustice which is defined as "actual innocence". Bousley v. State, 523 U.S. 614, 1611, 118 S.Ct. 1604, 1611 (1998). Courts have consistently found "actual innocence" to be a miscarriage of justice sufficient to overcome any procedural post-conviction time bar or default without analyzing good cause and prejudice. See Sawyer v. Whitley, 505 U.S. 333, 338-39, 112 S.Ct. 2514, 2518-19 (1992). In other words, actual innocence acts as a "gateway" for innocent defendants to present constitutional challenges to a court years after the procedural defaults and bars have ran. See Sawyer at 315.

20. A claim of actual innocence requires both an allegation that the defendant's constitutional rights were violated and the presentation of newly discovered evidence. The Eighth Circuit Court of Appeals has "rejected free-standing claims of actual innocence as a

basis for habeas review stating, '[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.'" Meadows v. Delo, 99 F.3d 280, 283 (8th Cir. 1996) (citing Herrera v. Collins, 506 U.S. 390, 400, 113 S. Ct. 853, 860 (1993)).

21. Furthermore, the newly discovered evidence suggesting the defendant's innocence must be "so strong that a court cannot have confidence in the outcome of the trial." Id. at 316, at 861. Actual innocence focuses on actual not legal innocence, and therefore, a defendant who only challenges the validity of evidence presented at trial has not sufficiently claimed actual innocence to overcome the procedural bars and defaults. See Sawyer, 112 U.S. at 339, 505 S. Ct. at 2519. The United States Supreme Court has held that, "Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of the barred claim." Schlup v. Delo, 513 U.S. 298, 316, 115 S. Ct. 851, 861 (1995).

22. The applicable standard applied to the actual innocence analysis depends upon whether the defendant is challenging his conviction or his death ineligibility:

> To avoid application of the procedural bar to claims attacking the *validity of the conviction*, a petitioner claiming actual innocence *must show that it is more likely than not* that no reasonable juror would have convicted him absent a constitutional violation. Where the petitioner has argued that the procedural default should be ignored because he is *actually ineligible for the death penalty*, he must show by *clear and convincing evidence* that, but for a constitutional error no reasonable juror would have found him death eligible. (Emphasis added).

Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

23. Once a defendant has made such a showing, he may then use the claim of actual innocence as a "gateway" to present his constitutional challenges to the court and require the court to decide them on the merits. Schlup, 513 U.S. at 315, 115 S. Ct. at 861.

24. As a matter of federal constitutional law, the Sawyer Court also indicated that to qualify for "actual innocence" sufficient to overcome the procedural bars, a petitioner

must eliminate all aggravating circumstances.

> "Thus, a petitioner may make a colorable showing that he is actually innocent of the death penalty by presenting evidence that an alleged constitutional error implicates *all* of the aggravating factors found to be present by the sentencing body. That is, but for the alleged constitutional error, the sentencing body *could not* have found *any* aggravating factors and thus the petitioner was ineligible for the death penalty. In other words, the petitioner must show that absent the alleged constitutional error, the jury would have lacked the discretion to impose the death penalty; that is, that he is *ineligible* for the death penalty." *Johnson v. Singletary,* 938 F.2d, at 1183 (emphasis in original).

Sawyer, 505 U.S. at 347, 112 S.Ct. at 2523.

25. In addition, any new evidence regarding mitigating factors is not considered in an "actual innocence" death eligibility determination. The United States Supreme Court has indicated that the "actual innocence" standard is a very narrow and limited method of overcoming procedural bars and should be based on objective standards, not subjective issues relating to the weight to be given to mitigating evidence. Sawyer, 505 U.S. at 345-46, 112 S.Ct. at 2522.

26. Because the Nevada Supreme Court relied upon Sawyer in Pelligrini, the limitations on the "actual innocence" doctrine discussed in Sawyer also apply to Howard's petition and State law procedural bars.

27. The Nevada Supreme Court recognizes one other form of "actual innocence" involving aggravating circumstances. Leslie v. Warden, 118 Nev. 773, 59 P.3d 440 (2002). In Leslie, which involved a timely filed first state petition for post-conviction relief, the Nevada Supreme Court received evidence that the legislative history did not support the previous interpretation of the "random and no apparent motive" aggravator.[9] Based on this evidence, the Court examined the trial record and concluded that there was insufficient evidence in the record to support that aggravator, as correctly interpreted. The Supreme Court then struck the aggravator and conducted a reweighing analysis. Concluding that there was a reasonable probability the jury would not have given a death sentence without that

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[9] The claim was procedurally barred under NRS 34.810(1)(b) waiver provision. It was not barred under NRS 34.726 or NRS 34.800.

aggravator, the Supreme Court found Leslie met the actual innocence standard and that the procedural bar was excused. After considering the merits of the claims, a new sentencing hearing was ordered.

28. The Nevada Supreme Court in Leslie relied upon its earlier decision in Pelligrini, which recognized the "actual innocence" standard set forth in Sawyer. See Pellegrini, 117 Nev. at 887, 34 P.3d at 537. When read with Pellegrini and Sawyer, Leslie makes it clear that to be "actually innocent" of an aggravating circumstance under Leslie a defendant must demonstrate, by clear and convincing evidence, that: 1) the Legislative History demonstrates a previous interpretation of an aggravating circumstance was actually incorrect and in direct contradiction to legislative intent; and 2) under the correct interpretation, based upon the evidence presented at trial, no reasonable juror would have found the existence of that aggravating factor beyond a reasonable doubt. If the defendant can meet this standard, then the defendant is actually innocent of that aggravating circumstance and it is stricken.

However, after striking the aggravating circumstance, a court must still reweigh the remaining valid aggravators with the mitigating factors derived from the evidence at trial. If it is clear the remaining aggravating circumstance(s) are not outweighed by the mitigating circumstances, then the defendant is still death qualified and the claim of gateway "actual innocence" fails. If the court cannot make such a determination, then Defendant has demonstrated sufficient evidence that Defendant is actually innocent of the death penalty and a new penalty hearing is ordered. Leslie, 118 Nev. at 783, 59 P.3d at 447.

29. Howard alleges that he is actually innocent of the death penalty because the two aggravators in his case, the murder was committed during a robbery and he had been previously convicted of a violent felony are invalid

30. With respect to the felony robbery *McConnell* aggravator, Leslie is inapplicable. As noted in Findings # 31 and # 32, even if Howard's McConnell claim is timely, stiking that aggravator would not result in actual innocence. The Court concludes beyond a reasonable doubt that the jury would still have found the aggravating circumstance

was not outweighed by any mitigating circumstances. The violent nature of the New York robbery conviction, the fact that it occurred one year before the robberies and murders in the instant case and the self-serving and inconsistent nature of the mitigation evidence demonstrate this.

31. Given the calculated manner in which Howard planned his robberies; lured Dr. Monahan; shot Dr. Monahan execution style in the head; terrorized or threatened to kill his robbery victims in New York and Las Vegas as well as considering his activities in California prior to his arrest, this Court also concludes beyond a reasonable doubt, that absent the *McConnell* aggravator, the jury would still have sentenced Howard to death.

32. With respect to the New York prior violent felony robbery, Howard presented to evidence that it falls within the narrow holding of Leslie and the Supreme Court already held the New York jury verdict was sufficient to satisfy the prior crime of violence aggravator. Therefore Howard has not demonstrated he is actually innocent of that aggravator. As that aggravator remains, he is not actually innocent of the death penalty and he cannot, therefore, overcome the procedural bars on this ground.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Fourth State Petition for Post-Conviction Relief shall be, and it is, hereby denied.

DATED this 5 day of November, 2010.

DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY
NANCY A. BECKER
Deputy District Attorney
Nevada Bar #00145

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing, was made this 4th day of November, 2010, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

MICHAEL B. CHARLTON
Assistant Federal Public Defender
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101

Eileen Davis

Employee for the District Attorney's Office

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*** TX REPORT ***
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Telephone No. (702) 671-2750

TO: Michael Charlton FAX#: (702) 388-5819

FROM: Nancy A. Becker NAB

SUBJECT: Samuel Howard, 81C053867, Proposed Findings

DATE: October ~~19~~ 20, 2010 1 of 2

Mr. Charlton,
The following Findings will be submitted to the Judge on November 2, 2010.
Sincerely,

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*** TX REPORT ***
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TRANSMISSION OK

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RESULT	OK

OFFICE OF THE DISTRICT ATTORNEY
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2 of 2

Mr. Charlton,
The following Findings will be submitted to the Judge on November 2, 2010.
Sincerely.

FILED

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CLERK OF COURT

NOED

DISTRICT COURT

CLARK COUNTY, NEVADA

SAMUEL HOWARD,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: 81C053867
Dept No: XVII

NOTICE OF ENTRY OF DECISION AND ORDER

PLEASE TAKE NOTICE that on November 6, 2010, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on December 6, 2010.

STEVEN D. GRIERSON, CLERK OF THE COURT

By: _____
Heather Lofquist, Deputy Clerk

CERTIFICATE OF MAILING

I hereby certify that on this 6 day of December 2010, I placed a copy of this Notice of Entry of Decision and Order in:

The bin(s) located in the Office of the District Court Clerk of:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division

☑ The United States mail addressed as follows:

Samuel Howard # 18329
P.O. Box 1989
Ely, NV 89301

Michael B. Charlton
411 E. Bonneville Ave., Ste. 250
Las Vegas, NV 89101

_____
Heather Lofquist, Deputy Clerk

NOTC
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DISTRICT COURT

CLARK COUNTY, NEVADA

SAMUEL HOWARD, Petitioner, v. E. K. McDANIEL, Warden of ELY STATE PRISON; CATHERINE CORTEZ MASTO, Attorney General, State of Nevada; and THE STATE OF NEVADA, Respondents.	Case No. C053867 Dept. No. XVII **NOTICE OF APPEAL** (Death Penalty Case)

NOTICE is hereby given that Petitioner, Samuel Howard, appeals to the Nevada Supreme Court from the Findings of Fact, Conclusions of Law and Order which was filed in this action on

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November 6, 2010, and entered and served on December 6, 2010, by Notice of Entry of Decision and Order.

DATED this 21st day of December 2010.

FRANNY A. FORSMAN
Federal Public Defender

/s/ Michael Charlton
MICHAEL CHARLTON
Assistant Federal Public Defender

/s/ Megan Hoffman
MEGAN HOFFMAN
Assistant Federal Public Defender

Attorneys for Petitioner

CERTIFICATE OF SERVICE

In accordance with EDCR 7.26(a)(1) of the Nevada Rules of Civil Procedure, the undersigned hereby certifies that on this 21st day of December 2010, I deposited for mailing in the United States mail, first-class postage prepaid, a true and correct copy of the foregoing NOTICE OF APPEAL addressed to the parties as follows:

Nancy Becker
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Catherine Cortez-Masto
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David K. Neidert
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/s/ Jeremy Kip
An employee of the Federal Public Defender