

IN THE SUPREME COURT OF THE STATE OF NEVADA

DALE EDWARD FLANAGAN,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Electronically Filed
Feb 19 2014 08:32 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

Docket No. 63703

Appeal from the Denial of a Post-Conviction Petition
District Court, Clark County
The Honorable Michelle Leavitt, District Judge
District Court No. 85-C069269-1

APPELLANT'S APPENDIX
Volume 7

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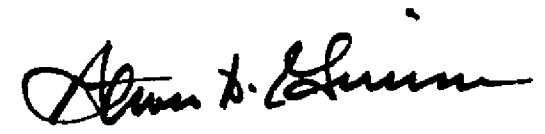
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DISTRICT COURT

CLARK COUNTY, NEVADA

11 / 15 / 12

DALE EDWARD FLANAGAN,

Petitioner,

v.

THE STATE OF NEVADA and JACK
PALMER, Warden, Northern Nevada
Correctional Center,

Respondents.

Case No. C069269
Dept. No. XII
Docket "S"

8 : 30 a m

**PETITION FOR WRIT OF HABEAS
CORPUS (POST-CONVICTION)**

DEATH PENALTY CASE

Petitioner, Dale Edward Flanagan, by and through counsel, hereby files this petition for writ of habeas corpus post-conviction pursuant to Nev. Rev. Stat. sections 34.724 and 34.820. Petitioner is being held in custody in violation of the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States of America, and Article I, Sections 3, 6, 8 and 9 and Article IV, Section 21 of the Constitution of the State of Nevada.

I. INTRODUCTION

Petitioner previously challenged his convictions and death sentence in this Court in part because the State manufactured the incriminating evidence used against him at trial for the

1 alleged murder of his grandparents. Citing a lack of supporting evidence, this Court concluded
2 that Petitioner's "naked allegations [were] unsubstantiated by facts." Findings of Fact,
3 Conclusions of Law & Order at 4, *Flanagan v. State*, No. C69269 (Aug. 9, 2002). Following an
4 unsuccessful appeal to the Nevada Supreme Court, Petitioner instituted habeas corpus
5 proceedings in the federal district court. *Flanagan v. Baker*, No. 2-09-cv-00085 (D. Nev.). After
6 obtaining funding for investigation, Petitioner filed an Amended Petition for Writ of Habeas
7 Corpus containing 31 claims for relief, 30 of which were previously presented to the Nevada
8 Supreme Court in the direct appeal and the appeal from this Court's denial of Petitioner's state
9 habeas corpus petition. Amended Petition for Writ of Habeas Corpus, *Flanagan v. Baker*, No. 2-
10 09-cv-00085 (D. Nev. Feb. 11, 2011), ECF No. 46.¹

11 Claim 1 of the federal petition—which Petitioner acknowledged contained factual
12 allegations not previously presented to the Nevada state courts²—detailed the State's egregious
13 misconduct in manufacturing the prosecution's case through the actions and testimony of Angela
14 Saldana. Ms. Saldana, a stripper and prostitute, engaged in a sexual relationship with Petitioner
15 and later another co-defendant, Tom Akers, in an effort to implicate Petitioner in the killing of
16 his grandparents. Ms. Saldana's testimony at trial proved to be the cornerstone of the
17 prosecution's case, not only because she testified that Petitioner had confessed his guilt, but also
18 because, unlike the other "witnesses" to the crime, she was not involved in the conspiracy or
19 "diabolical plot" to commit the crimes. Reporter's Transcript of Jury Trial 1466 (17 Record on
20 Appeal ("AA") from *Flanagan v. State*, No. C69269, 2492)³ (prosecutor's closing argument);

21 ¹ The federal documents in Federal Judiciary's Electronic Case Filing ("ECF") system are
22 available at www.pacer.gov.

23 ² Claim 1 was supported by declarations from two key witnesses who were unavailable
24 during the state proceedings, despite Petitioner's diligent efforts to locate and interview them.

25 ³ For the Court's and parties' convenience, this Petition contains citations to the original
26 page numbers of the record and to the corresponding pages contains in the Appellant's Appendix
("AA") in the Nevada Supreme Court proceedings in *Flanagan v. State*, No. 40232, from this
Court's denial of the first state habeas corpus petition.

1 *see also* Reporter's Transcript of Jury Trial 835-949 (8 AA 1745 - 9 AA 1859) (Angela
2 Saldana's testimony). Indeed, during closing arguments, the prosecutors cited Ms. Saldana's
3 testimony—that Petitioner confessed to planning the crimes in an effort to obtain his
4 grandparents' inheritance, to his and others actions inside the house, to his replacing the knife
5 that he lost on the night of the crime, and to killing his grandmother—and her trustworthiness as
6 unimpeachable evidence of Petitioner's guilt. *See, e.g.*, Reporter's Transcript of Jury Trial 1480-
7 81 (12 AA 2506-07), 1486 (12 AA 2512), 1495 (12 AA 2521), 1496 (12 AA 2522), 1498 (12
8 AA 2524), 1513 (12 AA 2539), 1520-21 (12 AA 2546-47), 1652-53 (12 AA 2678-79), 1667-68
9 (12 AA 2693-94), 1676 (12 AA 2702).

10 What defense counsel at trial, the jurors, the trial judges, and this Court during
11 Petitioner's first habeas corpus proceedings did not know was that Ms. Saldana's testimony was
12 false, manufactured by her uncle Robert Peoples in concert with law enforcement officials.
13 When trial defense counsel moved to exclude her testimony because she was acting as an agent
14 of the police because of her contacts with law enforcement officials, the court stated:
15 "Concerning the theory of agency, I find the testimony does not substantiate that. Miss Saldana
16 indicated she was acting on her own volition." Reporter's Transcript of Jury Trial 63 (4 AA
17 819). Indeed, defense counsel at each of the three trials had no information to suspect that Mr.
18 Peoples was operating as a law enforcement agent or the architect of Ms. Saldana's false
19 testimony. This information, which is extensively detailed in this Petition, was first provided to
20 anyone associated with Petitioner's defense by Wendy Peoples (nee Mazaros) and her daughter
21 Amy Hanley-Peoples after they were located in July 2010. Declaration of Jon Frappier, Exhibits
22 in Support of Petition for Writ of Habeas Corpus (Post-Conviction) ("Exhibits"), submitted
23 herewith, 181. Thereafter, Petitioner undertook an investigation into Mr. Peoples' background,
24 criminal history, and extensive relationship with law enforcement officials and actions as a
25 police agent and promptly filed the claim in the federal court.

26 After the State refused to waive the exhaustion doctrine, the federal district court issued

1 an order staying the federal proceedings and ordering Petitioner to present the new allegations to
2 this Court. Order, *Flanagan v. Baker*, No. 2:09-cv-00085 (D. Nev. Aug. 23, 2012), ECF No.
3 100. In so ruling, the court held that:

4 The allegations supporting Claim One, if taken as true, arguably present a
5 meritorious challenge to his conviction or sentence. As noted, Flanagan contends,
6 among other things, that the State failed to disclose material evidence that would
7 have undermined the credibility of a witness that testified against him and that the
8 State knowingly offered false or misleading testimony and evidence. Claim One
9 contains factual allegations sufficient to raise colorable grounds for relief under
10 *Giglio v. United States*, 405 U.S. 150 (1972) and *Napue v. Illinois*, 360 U.S. 264
11 (1959).

12 *Id.* at 4. The court further concluded that there was “no indication” that Petitioner engaged in
13 any dilatory litigation tactics, *id.*; indeed; the court found that “Flanagan has demonstrated that
14 he made a good faith effort to develop this specific claim in state court by directing his
15 investigator to locate [Wendy] Peoples and by seeking leave to conduct discovery related to
16 Angela Saldana,” *id.* at 3.

17 In accordance with the federal district court’s Order, Petitioner presents the factual
18 allegations support Claim 1 in this Petition. As these allegations relate to additional claims
19 raised in the first state habeas corpus proceeding, Petitioner represents those claims to permit full
20 consideration of the extent and prejudicial effects of the State’s misconduct.

21 II. PROCEDURAL ALLEGATIONS

22 A. Petitioner is in the custody of the Nevada Department of Corrections, pursuant to
23 a state court judgment of convictions and sentences of death entered by the Eighth Judicial
24 District Court, Clark County, in Case No. C69269. Jack Palmer, the Warden of the Northern
25 Nevada Correctional Center, is sued in his official capacity. Petitioner temporarily is housed at
26 the Northern Nevada Correctional Center. Petitioner regularly is housed at Ely State Prison in
27 Ely, Nevada, where Renee Baker is the Warden.

28 B. On November 5, 1984, Colleen and Carl Gordon, Petitioner’s grandparents, were
29 killed in their Las Vegas home. Petitioner and five other teenage boys were charged with their

1 murders.

2 C. Petitioner was charged by Information with conspiracy to commit burglary,
3 conspiracy to commit robbery, conspiracy to commit murder, burglary, robbery with the use of a
4 deadly weapon and First Degree murder with the use of a deadly weapon. Petitioner entered a
5 plea of not guilty.

6 D. The Clark County Public Defender's Office was appointed to represent Petitioner
7 and did so until immediately prior to a hearing on in-limine motions in August 1985. At that
8 time, the Clark County Public Defender declared a conflict of interest, and attorney Randall Pike
9 was appointed to represent Petitioner. Mr. Pike thereafter represented Petitioner during the
10 hearing, trial, and sentencing.

11 E. Trial began in September 1985, and on October 11, 1985, the jury convicted
12 Petitioner on all charges. On October 17, 1985, the jury sentenced Petitioner to death. The jury
13 found the existence of the following aggravating circumstances: knowing creation of a great risk
14 of death to more than one person by means of a weapon, device or course of action which would
15 normally be hazardous to the lives of more than one person; the murders were committed while
16 Defendant was engaged in the commission of or an attempt to commit or flight after committing
17 or attempting to commit any burglary; the murders were committed while Defendant was
18 engaged in the commission of or attempt to commit or flight after committing or attempting to
19 commit any robbery; and the murders were committed by Defendant for the purpose of receiving
20 money or any other thing of monetary value. The jury found no mitigating circumstances and
21 returned death verdicts for the First-Degree murder convictions.

22 F. The convictions and sentences were entered on December 10, 1985, in the Eighth
23 Judicial District Court of and for Clark County, Nevada, by the Honorable Donald Mosley in
24 Case No. C69269. Petitioner was sentenced to one year for conspiracy to commit burglary
25 (Count I); six years for conspiracy to commit robbery (Count II); six years for conspiracy to
26 commit murder (Count III); 10 years for burglary (Count IV); 15 years for robbery and a

1 consecutive term of 15 years for use of a deadly weapon (Count V); death by lethal injection for
2 first degree murder and a consecutive term of death by lethal injection for use of a deadly
3 weapon (Count VI); death by lethal injection for first degree murder and a consecutive term of
4 death by lethal injection for use of a deadly weapon (Count VII).

5 G. On December 19, 1985, Petitioner filed a timely notice of appeal from the
6 judgment. Attorney Robert L. Miller of the Clark County Public Defender's Office represented
7 Petitioner during his direct appeal to the Nevada Supreme Court.

8 H. On May 18, 1988, the Nevada Supreme Court issued an opinion affirming
9 Petitioner's convictions, but reversing his death sentences. *Flanagan v. State*, 104 Nev. 105, 754
10 P.2d 836 (1988).

11 I. In July 1989, Petitioner was retried for sentencing before a jury, the Honorable
12 Donald Mosley again presiding. Without any resolution of the conflict of interest raised during
13 the first trial, Petitioner was represented in that proceeding by Stephen J. Dahl of the Clark
14 County Public Defender's Office. On July 14, 1989, the jury returned death verdicts. The jury
15 found the same four aggravating circumstances as the first jury. In addition, it found two
16 mitigating circumstances: no significant history of prior criminal activity and any other
17 mitigating circumstance. The judgment and warrant of execution were entered on July 31, 1989.

18 J. At his sentencing hearing on July 31, 1989, Petitioner, against the advice of
19 counsel, attempted to waive all appeals and proceed to execution. The trial court allowed
20 Stephen Dahl to withdraw. Because the Nevada Supreme Court was required by statute to
21 review the death sentence even in the absence of appeal, that court stayed the execution and
22 ordered the trial court to appoint independent counsel to brief the issue of whether Petitioner
23 validly waived his appeal rights. Lee Elizabeth McMahon was appointed to perform this task on
24 October 9, 1989, and she continued to represent Petitioner in his direct appeal to the Nevada
25 Supreme Court.

26 K. On April 30, 1991, Petitioner's death judgment was affirmed by the Nevada

1 Supreme Court. *Flanagan v. State*, 107 Nev. 243, 810 P.2d 759 (1991).

2 L. On July 29, 1991, Petitioner filed a timely petition for writ of certiorari to the
3 United States Supreme Court. He was represented on that petition by attorney Michael
4 Laurence. On March 23, 1992, the United States Supreme Court granted the petition for writ of
5 certiorari, vacated the Nevada Supreme Court's judgment, and remanded the matter to the
6 Nevada Supreme Court for further consideration. *Flanagan v. Nevada*, 503 U.S. 931, 112 S. Ct.
7 1464 (1992).

8 M. On February 10, 1993, the Nevada Supreme Court vacated Petitioner's death
9 sentences and remanded the case for a third penalty trial. *Flanagan v. State*, 109 Nev. 50, 846
10 P.2d 1053 (1993).

11 N. In June 1995, Petitioner appeared before a third jury for retrial of his sentence, the
12 Honorable Addelias D. Guy III, presiding. He was represented in that hearing by Rebecca
13 Blaskey (nee Mounts) and Steven Wall of the Clark County Public Defender's Office. On June
14 23, 1995, the jury returned death verdicts. As the previous juries had found, this jury found the
15 existence of four aggravating circumstances: knowing creation of a great risk of death to more
16 than one person by means of a weapon, device or course of action which would normally be
17 hazardous to the lives of more than one person; the murders were committed while Defendant
18 was engaged in the commission of or an attempt to commit or flight after committing or
19 attempting to commit any burglary; the murders were committed while Defendant was engaged
20 in the commission of or attempt to commit or flight after committing or attempting to commit
21 any robbery; and the murders were committed by Defendant for the purpose of receiving money
22 or any other thing of monetary value. This jury also found three mitigating circumstances: no
23 significant history of prior criminal activity, youth of the defendant at the time of the crime, and
24 other mitigating circumstance. The judgment was entered on July 11, 1995.

25 O. Petitioner timely appealed the judgment to the Nevada Supreme Court. He was
26 represented during that appeal to the Nevada Supreme Court by attorney Michael Miller of the

1 Clark County Public Defender's Office.

2 P. On December 20, 1996, Petitioner's judgment was affirmed by the Nevada
3 Supreme Court. *Flanagan v. State*, 112 Nev. 1409, 930 P.2d 691 (1996).

4 Q. On February 17, 1998, Petitioner filed a timely petition for writ of certiorari to the
5 United States Supreme Court. He was represented on that petition by attorney Michael Miller of
6 the Clark County Public Defender's Office. On April 20, 1998, the United States Supreme Court
7 denied Petitioner's petition for writ of certiorari. *Flanagan v. Nevada*, 523 U.S. 1083, 118 S. Ct.
8 1534 (1998).

9 R. On May 6, 1998, Petitioner served a pro per petition for post-conviction relief and
10 request for appointment of counsel on the Warden of Ely State Prison, the Nevada Attorney
11 General, and the Clark County District Attorney by delivering the pro per petition in accordance
12 with the Ely State Prison mail procedures. The pro per petition for post-conviction relief and
13 request for appointment of counsel was filed in the District Court for the Eighth Judicial District
14 on May 28, 1998. On June 5, 1998, the District Court appointed Cal J. Potter, III, and Robert D.
15 Newell of Davis Wright Tremaine LLP, to represent Petitioner in the state post-conviction
16 proceedings and to supplement his petition. On November 30, 1999, counsel for Petitioner filed
17 a Supplemental Petition for Writ of Habeas Corpus.

18 S. The Supplemental Petition for Writ of Habeas Corpus contained thirty-six claims
19 for relief. The grounds raised in this proceeding included:

20 1. Claim One: Mr. Flanagan's conviction and death sentence are invalid under the
21 state and federal constitutional guarantees of freedom of speech, the rights to associate,
22 separation of church and state, due process, equal protection and a reliable sentence due to
23 the substantial and injurious effect of pervasive and outrageous government misconduct and
24 overreaching, and the State's failure to disclose material exculpatory and impeachment
25 evidence, which distorted the fact-finding process and rendered the trial and sentencing
26 hearing fundamentally unfair. U.S. Const. Amends. I, V, VI, VIII and XIV; Nev. Const. Art.

1 I, Secs. 3, 6, 8 and 9; Art IV, Sec. 21.

2 2. Claim Two: Mr. Flanagan's conviction and death sentence are invalid under the
3 state and federal constitutional guarantees of due process, equal protection and a reliable
4 sentence, as the result of the substantial and injurious effect produced by the State's payment
5 of money and other inducements to key witnesses, whose testimony was inherently
6 incredible and rendered the trial and sentencing fundamentally unfair. U.S. Const. Amends.
7 V, VI, VIII and XIV; Nev. Const. Art. I, Secs. 3, 6 and 8; Art IV, Sec. 21.

8 3. Claim Three: Mr. Flanagan's conviction and death sentence are invalid under the
9 state and federal constitutional guarantees of freedom of speech, freedom of religion, due
10 process of law, equal protection, trial by an impartial jury, and a reliable sentence because the
11 State used his actions, statements and writings regarding witchcraft, alleged satanic writings,
12 abstract philosophy and other constitutionally-protected materials at trial and during
13 sentencing even though such evidence was irrelevant to any of the issues decided in these
14 proceedings. U.S. Const. Amends. I, V, VI, VIII and XIV; Nev. Const. Art. I, Secs. 3, 6 and
15 8; Art IV, Sec. 21.

16 4. Claim Four: Mr. Flanagan's conviction and death sentence are invalid under the
17 state and federal constitutional guarantees of effective assistance of counsel, due process of
18 law, equal protection of the laws, cross-examination and confrontation and a reliable
19 sentence due to the failure of trial counsel to provide reasonably effective assistance. U.S.
20 Const. Amends. V, VI, VIII and XIV; Nev. Const. Art. I, Secs. 3, 6 and 8; Art IV, Sec. 21.

21 5. Claim Five: Mr. Flanagan's conviction and death sentence are invalid under the
22 state and federal constitutional guarantees of due process, equal protection, trial before an
23 impartial jury, reliable sentence and effective assistance of counsel because he was
24 incompetent to stand trial. U.S. Const. Amends. V, VI, VII and XIV; Nev. Const. Art. I,
25 Secs. 3, 6 and 8; Art. IV, Sec. 21.

26 6. Claim Six: Mr. Flanagan's conviction and death sentence are invalid under the

1 state and federal constitutional guarantees of due process, equal protection, trial before an
2 impartial jury and a reliable sentence due to the unfairly prejudicial atmosphere in which his
3 trial and sentencing hearing took place, and due to the trial court's failure to change the
4 venue of the trial to a location where a fair trial would have been possible. U.S. Const.
5 Amends. V, VI, VII and XIV; Nev. Const. Art. I, Secs. 3, 6 and 8; Art. IV, Sec. 21.

6 7. Claim Seven: Mr. Flanagan's death sentence is invalid under the state and federal
7 constitutional guarantees of due process, equal protection, the right to an impartial jury
8 drawn from a fair cross section of the community, and a reliable sentence due to this trial,
9 conviction and sentencing by an all white jury from which African Americans were
10 systematically excluded and unrepresented. U.S. Const. Amends. V, VI, VIII and XIV; Nev.
11 Const. Art. I, Secs. 3, 6 and 8; Art. IV, Sec. 21.

12 8. Claim Eight: Mr. Flanagan's conviction and death sentence are invalid under the
13 state and federal constitutional guarantees of due process, equal protection, and trial before
14 an impartial jury because counsel for Mr. Flanagan was forced to agree with co-counsel on
15 the exercise of a limited number of peremptory challenges to prospective jurors despite the
16 fact that they could not agree on which jurors to challenge peremptorily. U.S. Const.
17 Amends. V, VI, VIII and XIV; Nev. Const. Art. I, Secs. 3, 6, and 8; Art. IV, Sec. 21.

18 9. Claim Nine: Mr. Flanagan's conviction is invalid under the state and federal
19 constitutional guarantees of due process, equal protection, a public trial, the effective
20 assistance of counsel, and a reliable sentence because the trial judge directed that certain
21 defense objections and motions must be made directly to the court reporter, rather than to the
22 trial judge, and outside the presence of the jury and Petitioner. U.S. Const. Amends. V, VI,
23 VIII, and XIV; Nev. Const. Art. 1, Secs. 1, 3, and 8; Art. IV, Sec. 21.

24 10. Claim Ten: Mr. Flanagan's conviction and death sentence are invalid under the
25 state and federal constitutional guarantees of due process, equal protection of the laws,
26 effective assistance of counsel and a reliable sentence because Petitioner was not afforded

1 effective assistance of counsel on appeal. U.S. Const. Amends. V, VI, VIII and XIV; Nev.
2 Const. Art. I, Secs. 3, 6 and 8; Art IV, Sec. 21.

3 11. Claim Eleven: Mr. Flanagan's conviction and death sentence are invalid under
4 the state and federal constitutional guarantees of due process, equal protection and a reliable
5 sentence due to the failure of the Nevada Supreme Court to conduct fair and adequate
6 appellate review. U.S. Const. Amends. V, VI, VIII and XIV; Nev. Const. Art. I, Secs. 3, 6
7 and 8; Art IV, Sec. 21.

8 12. Claim Twelve: Mr. Flanagan's conviction and death sentence are invalid under
9 the state and federal constitutional guarantees of due process, equal protection, trial before an
10 impartial jury and a reliable sentence because the jurors were misinformed about their
11 responsibilities during trial. U.S. Const. Amends. V, VI, VIII and XIV; Nev. Const. Art. I,
12 Secs. 3, 6 and 8; Art IV, Sec. 21.

13 13. Claim Thirteen: Mr. Flanagan's death sentence is invalid under the state and
14 federal constitutional guarantees of due process, equal protection, and a reliable sentence,
15 because the finding of the aggravating circumstance that the killing was committed by
16 someone who "knowingly created a great risk of death to more than one person by means of
17 a weapon, device or course of action that would normally be hazardous to the lives of more
18 than one person" is invalid. U.S. Const. Amends. V, VI, VIII and XIV; Nev. Const. Art. I,
19 Secs. 3, 6 and 8; Art IV, Sec. 21.

20 14. Claim Fourteen: Mr. Flanagan's death sentence is invalid under the state and
21 federal constitutional guarantees of due process, equal protection, and a reliable sentence,
22 because the finding of the aggravating circumstance that the killing was committed "in the
23 commission of a burglary" is invalid. U.S. Const. Amends. V, VI, VIII and XIV; Nev.
24 Const. Art. I, Secs. 3, 6 and 8; Art IV, Sec. 21.

25 15. Claim Fifteen: Mr. Flanagan's death sentence is invalid under the state and
26 federal constitutional guarantees of due process, equal protection, and a reliable sentence,

1 because the finding of the aggravating circumstance that the killing was committed “in the
2 commission of a robbery” is invalid. U.S. Const. Amends. V, VI, VIII and XIV; Nev. Const.
3 Art. I, Secs. 3, 6 and 8; Art IV, Sec. 21.

4 16. Claim Sixteen: Mr. Flanagan’s death sentence is invalid under the state and
5 federal constitutional guarantees of due process, equal protection, the prohibition against
6 double jeopardy, and a reliable sentence due to the state’s use of the same felony charges
7 both to support his conviction on a felony murder theory and to support one of the
8 aggravating factors. U.S. Const. Amends. V, VI, VIII and XIV; Nev. Const. Art. I, Secs. 3, 6
9 and 8; Art IV, Sec. 21.

10 17. Claim Seventeen: Mr. Flanagan’s death sentence is invalid under the state and
11 federal constitutional guarantees of due process, equal protection, and a reliable sentence
12 because of the trial court’s failure to properly instruct the jury during the sentencing hearing.
13 U.S. Const. Amends. V, VI, VIII and XIV; Nev. Const. Art. I, Secs. 3, 6, and 8; Art. IV, Sec.
14 21.

15 18. Claim Eighteen: Mr. Flanagan’s death sentence is invalid under the state and
16 federal constitutional guarantees of due process of law, equal protection of the laws, trial by
17 an impartial jury and a reliable sentence because of the trial court’s refusal to grant a
18 challenge for cause against a juror who did not meet constitutional standards of impartiality.
19 U.S. Const. Amends. V, VI, VIII and XIV; Nev. Const. Art. I, Secs. 3, 6 and 8; Art. IV, Sec.
20 21.

21 19. Claim Nineteen: Mr. Flanagan’s death sentence is invalid under the state and
22 federal constitutional guarantees of due process of law, equal protection of the laws, effective
23 assistance of counsel, trial by an impartial jury, and a reliable sentence due to the removal of
24 a prospective juror based on her views concerning the death penalty, even though those
25 views could not have substantially impaired that juror’s ability to follow Nevada law. U.S.
26 Const. Amends. V, VI, VIII and XIV; Nev. Const. Art. I, Secs. 3, 6 and 8; Art. IV, Sec. 21.

1 20. Claim Twenty: Mr. Flanagan's conviction and death sentence are invalid under
2 the state and federal constitutional guarantees of due process, equal protection, a fair tribunal
3 and a reliable sentence due to the lack of an impartial tribunal. U.S. Const. Amends. V, VI,
4 VIII and XIV; Nev. Const. Art. I, Secs. 3, 6 and 8; Art IV, Sec. 21.

5 21. Claim Twenty-One: Mr. Flanagan's conviction and death sentence are invalid
6 under the state and federal constitutional guarantees of due process, equal protection, a fair
7 tribunal and a reliable sentence due to the lack of an impartial tribunal. U.S. Const. Amends.
8 V, VI, VIII and XIV; Nev. Const. Art. I, Secs. 3, 6 and 8; Art IV, Sec. 21.

9 22. Claim Twenty-Two: Mr. Flanagan's conviction and death sentence are invalid
10 under the state and federal constitutional guarantees of due process of law, equal protection,
11 the right to be informed of the nature and cause of a criminal accusation and a reliable
12 sentence because the charging document prepared by the State did not specifically apprise
13 Mr. Flanagan of those acts he was alleged to have committed. U.S. Const. Amends. V, VI,
14 VIII and XIV; Nev. Const. Art. I, Secs. 3, 6 and 8; Art IV, Sec. 21.

15 23 Claim Twenty-Three: Mr. Flanagan's conviction and death sentence are invalid
16 under the state and federal constitutional guarantees of due process, equal protection, the
17 effective assistance of counsel and a reliable sentence because of Petitioner's absence during
18 critical stages of this proceeding. U.S. Const. Amends. V, VI, VIII and XIV; Nev. Const.
19 Art. I, Secs. 3, 6 and 8; Art. IV, Sec. 21.

20 24. Claim Twenty-Four: Mr. Flanagan's conviction and death sentence are invalid
21 under the state and federal constitutional guarantees of due process, equal protection, a public
22 trial, freedom of the press, and a reliable sentence because the trial court failed to conduct all
23 proceedings in public and failed to ensure creation of a concrete record of the trial by having
24 such proceedings reported or otherwise recorded. U.S. Const. Amends. V, VI, VIII and XIV;
25 Nev. Const. Art. I, Secs. 3, 6 and 8; Art IV, Sec. 21.

26 25. Claim Twenty-Five: Mr. Flanagan's conviction and death sentence are invalid

1 under the state and federal constitutional guarantees of due process, equal protection, the
2 effective assistance of counsel, a fair tribunal, an impartial jury, and a reliable sentence due
3 to the cumulative errors in the admission of evidence and instructions, gross misconduct by
4 state officials and witnesses, and the systematic deprivation of Mr. Flanagan's right to the
5 effective assistance of counsel. U.S. Const. Amends. V, VI, VIII and XIV; Nev. Const. Art.
6 I, Secs. 3, 6 and 8; Art IV, Sec. 21.

7 26. Claim Twenty-Six: Mr. Flanagan's death sentence is invalid under the state and
8 federal constitutional guarantees of due process, equal protection, and a reliable sentence
9 because execution by lethal injection violates the constitutional prohibition against cruel and
10 unusual punishments. U.S. Const. Amends. VIII and XIV; Nev. Const. Art. I, Secs. 3, 6, and
11 8; Art. IV, Sec. 21.

12 27. Claim Twenty-Seven: Mr. Flanagan's death sentence is invalid under the state
13 and federal constitutional guarantees of due process, equal protection, and a reliable sentence
14 because the death penalty is cruel and unusual punishment. U.S. Const. Amends. VIII and
15 XIV; Nev. Const. Art. I, Secs. 3, 6, and 8; Art. IV, Sec. 21.

16 28. Claim Twenty-Eight: Mr. Flanagan's sentence of death is invalid under the state
17 and federal constitutional guarantees of due process, equal protection and a reliable sentence
18 because Petitioner may become incompetent to be executed. U.S. Const. Amends. V, VI,
19 VIII and XIV; Nev. Const. Art. I, Secs. 3, 6, and 8; Art. IV, Sec. 21.

20 29. Claim Twenty-Nine: Mr. Flanagan's conviction and death sentence are invalid
21 under the state and federal constitutional guarantees of due process, equal protection, trial
22 before an impartial jury and a reliable sentence because the trial court failed to sever Mr.
23 Flanagan's trial from his codefendants which resulted in the use of inadmissible evidence to
24 convict Mr. Flanagan of first degree murder. U.S. Const. Amends. V, VI, VIII and XIV;
25 Nev. Const. Art. I, Secs. 3, 6 and 8; Art. IV, Sec. 21.

26 30 Claim Thirty: Mr. Flanagan's death sentence is invalid under the state and federal

1 constitutional guarantees of due process, equal protection, trial by an impartial jury and a
2 reliable sentence because Nevada effectively has no mechanism to provide for clemency in
3 capital cases. U.S. Const. Amends. V, VI, VIII and XIV; Nev. Const. Art. I, Secs. 3, 6 and 8;
4 Art. IV, Sec. 21.

5 31. Claim Thirty-One: Mr. Flanagan's conviction and death sentence are invalid
6 under the state and federal constitutional guarantees of due process, equal protection, trial
7 before an impartial jury and a reliable sentence because he was seen by the jurors in shackles
8 and because of the presence of armed guards in the courtroom during trial. U.S. Const.
9 Amends, V, VI, VIII and XIV; Nev. Const. Art. I, Secs. 3, 6, and 8; Art. IV, Sec. 21.

10 32. Claim Thirty-Two: Petitioner's conviction and sentence of death are invalid
11 under the state and federal constitutional guarantees of due process, equal protection and a
12 reliable sentence because Petitioner was not tried before a fair and impartial tribunal in that
13 the trial and appellate judges were elected, were subject to re-election and therefore beholden
14 to the electorate, thereby making it impossible to be impartial. U.S. Const. Amends. V, VI,
15 VIII and XIV; Nev. Const. Art. I, Secs. 3, 6, and 8; Art. IV, Sec. 21.

16 33. Claim Thirty-Three: Mr. Flanagan's death sentence is invalid under the state and
17 federal constitutional guarantees of due process of law, equal protection of the laws, effective
18 assistance of counsel, trial by an impartial jury, and a reliable sentence by the failure of his
19 attorney to challenge for cause jurors who did not meet constitutional standards of
20 impartiality. U.S. Const. Amends. V, VI, VII, VIII and XIV; Nev. Const. Art. I, Secs. 3, 6
21 and 8; Art. IV, Sec. 21.

22 34. Claim Thirty-Four: Mr. Flanagan's conviction and death sentence are invalid
23 under the state and federal constitutional guarantees of due process, equal protection, trial
24 before an impartial jury and a reliable sentence because the proceedings against him violated
25 international law. U.S. Const. Amends. V, VI, VIII and XIV; Nev. Const. Art. I, Secs. 3, 6
26 and 8; Art. IV, Sec. 21.

1 35. Claim Thirty-Five: Mr. Flanagan's conviction and death sentence are invalid
2 under the state and federal constitutional guarantees of due process, equal protection, trial
3 before an impartial jury and a reliable sentence because the proceedings against him violate
4 international law. U.S. Const. Amends. V, VI, VIII and XIV; Nev. Const. Art. I, Secs. 3, 6
5 and 8; Art. IV, Sec. 21.

6 36. Claim Thirty-Six: Mr. Flanagan's death sentence is invalid under the state and
7 federal constitutional guarantees of due process, equal protection and a reliable sentence
8 because, as a direct result of the state's egregious misconduct, he has been required to go
9 through two trials and appeals ending in reversals of his sentence, thus leaving him on death
10 row for nearly 15 years, which constitutes cruel and unusual punishment. U.S. Const.
11 Amends. V, VI, VIII and XIV; Nev. Const. Art. I, Secs. 3, 6 and 8, Art. IV, Sec. 21.

12 T. Petitioner sought leave to conduct discovery and for funds necessary to conduct
13 an adequate investigation and hire experts to develop all potentially meritorious claims for relief.
14 In addition, Petitioner requested an evidentiary hearing on his claims.

15 U. On August 16, 2000, the District Court denied Petitioner's motion for discovery.
16 With only minor exceptions, the District Court also denied the motions for funds necessary to
17 develop and present potential meritorious claims. On February 14, 2002, this Court held a
18 limited evidentiary hearing on a minor aspect of Petitioner's claim that he was deprived of
19 effective representation at the 1995 retrial.

20 V. On August 8, 2002, this Court entered Findings of Fact, Conclusions of Law and
21 ordered the Petition denied. On August 16, 2002, the District Court mailed Notice of Entry of
22 Decision and Order. Petitioner timely filed his Notice of Appeal to the Nevada Supreme Court
23 on September 12, 2002.

24 W. Cal J. Potter, III, and Robert D. Newell of Davis Wright Tremaine LLP,
25 represented Petitioner in his appeal to the Nevada Supreme Court. Petitioner appealed each of
26 the claims presented to the district court. On February 22, 2008, the Nevada Supreme Court

1 issued an order denying relief. *Flanagan v. State*, No. 40232.

2 X. On January 13, 2009, Petitioner timely filed a Petition for Writ of Habeas Corpus
3 in the federal district court for the District of Nevada. Petition for Writ of Habeas Corpus,
4 *Flanagan v. Baker*, No. 2-09-cv-00085 (D. Nev. Jan. 13, 2011), ECF No. 5. On February 19,
5 2009, the district court appointed Mark Olive to represent Petitioner. Order, *Flanagan v. Baker*,
6 No. 2-09-cv-00085 (D. Nev. Feb. 11, 2011), ECF No. 12. Thereafter, on February 11, 2011,
7 counsel filed an Amended Petition for Writ of Habeas Corpus. Amended Petition for Writ of
8 Habeas Corpus, *Flanagan v. Baker*, No. 2-09-cv-00085 (D. Nev. Feb. 11, 2011), ECF No. 46.
9 On August 23, 2012, the federal district court issued an order staying the federal proceedings to
10 permit exhaustion of state remedies. Order, *Flanagan v. Baker*, No. 2:09-cv-00085 (D. Nev.
11 Aug. 23, 2012), ECF No. 100.

12 Y. This Petition contains three claims that were presented in the first state habeas
13 corpus proceedings: Claims 2, 3, 4, and 5, *infra*.

14 Z. Statement Regarding Nevada Revised Statutes Section 34.726. Although this
15 Petition is not filed within one-year of the Nevada Supreme Court's issuance of the remittitur in
16 the direct appeal from the entry of judgment, Nev. Rev. Stat. section 34.726 permits its filing
17 because good cause exists for its delayed presentation.

18 1. The delay was not Petitioner's fault. As detailed below and as found by the
19 federal district court, Petitioner diligently investigated the potential bases for Claim 1.
20 Despite Petitioner's diligence, and as a direct result of the State's concealment of the factual
21 support of the claim, Petitioner was unable to present it in a timely fashion.

22 a. Portions of Claim 1 were timely presented in Petitioner's original state
23 habeas proceeding. The Supplemental Petition for Writ of Habeas Corpus alleged:

24 Law enforcement improperly elicited incriminating statements and
25 physical evidence from Petitioner by employing Angela Saldana as a
26 police agent, who had had sexual relations with officers of the Las Vegas
Metropolitan Police Department. In order to obtain information for law
enforcement, Ms. Saldana engaged in sexual relations and began living

1 with Petitioner. In exchange for her assistance as a police agent, Ms.
2 Saldana was not prosecuted for prostitution and other crimes. Such
benefits were not disclosed to the defense.

3 Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) at 8-9, *Flanagan v.*
4 *State*, No. C69269 (Nov. 30, 1999). In particular, the issue of law enforcement's
5 coaching of Ms. Saldana to testify in the false manner that she did was expressly
6 presented:

7 The State improperly and unconstitutionally coached and influenced the
8 testimony of numerous prosecution witnesses, encouraged witnesses to
9 hear the testimony and accounts of other prosecution witnesses and to
shape their testimony in accordance with other's accounts, and instructed
witnesses not to reveal exculpatory or impeachment evidence to the
defense or the court.

10
11

12 The State improperly and unconstitutionally presented false testimony
regarding the "planning" of the crime, including false evidence that
13 Petitioner discussed killing his grandparents in order to obtain an
inheritance.

14 Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) at 9, *Flanagan v.*
15 *State*, No. C69269 (Nov. 30, 1999). Similarly, the Supplemental Petition alleged specific
16 facts concerning the payments made to Ms. Saldana and her expectations of further
17 undisclosed benefits. Supplemental Petition for Writ of Habeas Corpus (Post-
18 Conviction) at 9, 16, *Flanagan v. State*, No. C69269 (Nov. 30, 1999).

19 b. Prior to locating and interviewing Wendy Peoples and her daughter Amy
20 Hanley-Peoples, however, Petitioner was unable to allege or document the full extent of
21 the government misconduct detailed in this Petition. Despite Petitioner's diligent
22 attempts to document the full circumstances surrounding Saldana's fabricated testimony,
23 through no fault of his own, he was unable to present completely the facts in support of
24 the Claim 1 because the State withheld the evidence from him. Moreover, when
25 petitioner alleged in the state court habeas corpus proceedings the information he did
26 possess, the State falsely asserted that petitioner's allegations of misconduct were

1 “unsupported,” that Petitioner’s claim that the witnesses were “scripted is simply refuted
2 by the record,” and that “the jury heard all this impeaching evidence regarding
3 inducements for testimony.” State’s Response to Defendant’s Petition for Writ of Habeas
4 Corpus (Post-Conviction), at 8, 9, 10, *Flanagan v. State*, No. C69269 (Mar. 29, 2000).

5 c. Nonetheless, Petitioner sought leave to conduct discovery in this Court,
6 seeking, *inter alia*, access to information concerning the development and presentation of
7 the false evidence against petitioner. Petitioner’s Motion for Discovery, *Flanagan v.*
8 *State*, No. C69269 (May 17, 2000). Petitioner urged this Court to grant the motion in
9 light of the “clear *Brady* violations” with respect to the testimony of Saldana and other
10 witnesses, and evidence that Saldana “was acting as a police agent throughout this
11 investigation.” Reporter’s Transcript of Proceedings on August 16, 2000, at 14, 29,
12 *Flanagan v. State*, No. C69269 (Aug. 16, 2000). Counsel argued that “until we get
13 discovery on it, we don’t know the extent to which there were *Brady* violations
14 committed.” Reporter’s Transcript of Proceedings on August 16, 2000, at 15, *Flanagan*
15 *v. State*, No. C69269 (Aug. 16, 2000). The State responded by characterizing petitioner’s
16 discovery request as “a blatant [sic] fishing expedition,” and this Court denied the
17 discovery motion. Reporter’s Transcript of Proceedings on August 16, 2000, at 27, 34,
18 36, *Flanagan v. State*, No. C69269 (Aug. 16, 2000).

19 d. Finally, deprived of any ability to obtain the corroborating evidence from
20 the state, petitioner attempted to locate Ms. Saldana’s aunt, Wendy Peoples, by
21 employing the services of a private investigator, Jon Frappier. Declaration of Jon
22 Frappier, Exhibits 181. Mr. Frappier “searched numerous records in public and
23 proprietary databases,” sought the services of “Las Vegas investigators and their
24 sources,” and visited previous addresses for her. Exhibits 181. Despite his “exhaustive
25 efforts,” he was unable to locate her until current counsel retained him and then only by
26 reviewing a recent court filing. Exhibits 181.

1 e, Despite these diligent efforts, Petitioner was unable to locate Wendy
2 Peoples, and subsequently her daughter Amy Hanley-Peoples, until July 2010.
3 Declaration of Jon Frappier, Exhibits 181. Prior to that time, Ms. Mazaros “intentionally
4 made [herself] difficult, if not impossible, to locate.” Declaration of Wendy C. Mazaros,
5 Exhibits, 180. Upon interviewing Ms. Mazaros and her daughter, Petitioner learned for
6 the first time that Robert Peoples, in concert with law enforcement officials, orchestrated
7 and compelled Angela Saldana’s fabricated testimony. With these triggering facts and
8 information from Ms. Mazaros and Ms. Hanley-Peoples, Petitioner began the
9 investigation of Robert Peoples, located the information contained in Claim 1 of this
10 Petition, and promptly presented it to the federal court, requesting plenary review of the
11 claim without the need to comply with the exhaustion doctrine.

12 f. After the State refused to waive exhaustion, and following the federal
13 district court’s Order, Petitioner promptly filed this Petition.

14 2. Dismissal of this Petition as untimely will unduly prejudice Petitioner. Petitioner
15 fully satisfies the second requirement to excuse an untimely filing. As detailed below and as
16 found by the federal district court, the state’s misconduct constitutes serious constitutional
17 violations that, if proved, require the granting of a new trial.

18 AA. Statement Regarding Nevada Revised Statutes Section 34.800. This Court may
19 not dismiss this Petition pursuant to Nev. Rev. Stat. section 34.800.

20 1. Respondent will suffer no prejudice in responding to the Petition.

21 2. As alleged above and found by the federal district court, “petitioner could not
22 have had knowledge” of the grounds alleged herein “by the exercise of reasonable diligence
23 before the circumstances prejudicial to the state occurred.” Nev. Rev. Stat. § 34.800(1)(a).

24 3. The State of Nevada will not be prejudiced in its ability to conduct a retrial and
25 the grounds upon which Petitioner seeks relief constitute a “fundamental miscarriage of
26 justice.” Nev. Rev. Stat. § 34.800(1)(b).

1 4. Application of Nev. Rev. Stat. section 34.800 would unfairly and
2 unconstitutionally deprive Petitioner of redress, access to the courts, and vindication of his
3 constitutional rights because the state misconduct caused the delay in the filing of this
4 Petition.

5 AB. Statement Regarding Nevada Revised Statutes Section 34.810. This Court may
6 not dismiss this Petition pursuant to Nev. Rev. Stat. section 34.810.

7 1. The new claims presented in this Petition could not have been previously
8 presented. Nev. Rev. Stat. § 34.810(1)(b). To the extent that Respondent contends
9 otherwise, the failure of trial, appellate, and/or habeas corpus counsel to raise the claims
10 prejudicially deprived of his rights to effective representation.

11 2. Good cause exists for the representation of Claims 2, 3, 4, and 5. Although these
12 claims previously were presented to the state courts, the new allegations in Claim 1 require
13 this Court's reconsideration of their merits. As alleged below, state misconduct permeated
14 this case at trial, which is further supported by the previously unavailable facts alleged in
15 Claim 1. In addition, the merits of Claim 1 must be considered within the totality of the
16 record, including the previously alleged state misconduct and the failure of trial and appellate
17 counsel to protect Petitioner's constitutional rights. Thus, the failure of this Court to
18 reconsider the previously presented claims would result in actual prejudice to Petitioner.
19 Nev. Rev. Stat. § 34.810(3).

20 AC. Statement with Respect to the Application of any Procedural Default Provisions.
21 Any procedural bars that the District Attorney may assert do not apply for the following reasons:
22 Such procedural bars would be unfairly and retroactively applied without notice to Petitioner's
23 trial or state habeas counsel of their applicability; Respondent has waived the application of such
24 procedural bars; the application of such procedural bars was neither adequate (they were not
25 clear, firmly established, and regularly followed), nor independent (the bars were not applied
26 independent of the assessment of the merits of the claims); there was good cause for Petitioner to

1 raise his claims at the time and manner in which they were raised, and he would be prejudiced by
2 the application of procedural bars in this case; and/or the application of procedural bars in this
3 case would constitute a fundamental miscarriage of justice.

4 1. The failure to raise any of the claims asserted in this Petition that were susceptible
5 to decision on direct appeal was the result of ineffective assistance of counsel on appeal.

6 2. The failure to raise any of the claims asserted in this Petition that were susceptible
7 of being raised in the first state post-conviction proceeding and appeal was the result of
8 ineffective assistance of counsel, in a proceeding in which Petitioner had a right to effective
9 assistance of counsel under state law and under federal law; was the result of representation
10 by counsel that violated federal constitutional due process standards; and was induced by the
11 state court's refusal to permit appointed counsel adequate time or resources to identify and
12 present all of the available constitutional claims in violation of the right to an adequate
13 opportunity to be heard guaranteed by the Due Process Clause of the Fourteenth Amendment.
14 The failure of a state to afford effective assistance of counsel in an initial post-conviction
15 proceeding where such claims could and should have been raised precludes the application of
16 any procedural bar.

17 3. Petitioner and previous counsel were prevented from discovering and alleging all
18 of the claims raised in this Petition by the state's action in failing to disclose all material
19 evidence in possession of its agents; and by the representation of the Clark County District
20 Attorney's office that it maintained an "open file" policy, upon which Petitioner and counsel
21 relied as a representation that all material information had been disclosed.

22 4. Petitioner and previous counsel were prevented from discovering and alleging all
23 of the claims raised in this Petition by the state courts' actions in failing to grant Petitioner's
24 requests for discovery, including all material evidence in possession of Clark County District
25 Attorney's office, its agents, and by law enforcement officials.

26 5. Petitioner and previous counsel were prevented from discovering and alleging all

1 of the claims raised in this Petition by the state courts' actions in failing to grant Petitioner's
2 requests for funding for investigative and expert assistance to develop and present fully all
3 potentially meritorious claims for relief.

4 6. The Nevada Supreme Court has deemed counsel's failure to raise claims in prior
5 proceedings or in a timely manner as sufficient cause to allow new claims to be considered
6 and has disregarded such failures and addressed constitutional claims in the cases of
7 similarly-situated litigants. Barring consideration of the merits of Petitioner's claims would
8 violate the Equal Protection and Due Process clauses of the Fourteenth Amendment to the
9 United States Constitution.

10 a. The Nevada Supreme Court has exercised complete discretion to address
11 constitutional claims, when an adequate record is presented to resolve them, at any stage
12 of the proceedings, despite the default rules contained in Nev. Rev. Stat. sections 34.726,
13 34.800, and 34.810. A purely discretionary procedural bar is not adequate to preclude
14 review of the merits of constitutional claims.

15 b. The Nevada Supreme Court has complete discretion to address
16 constitutional claims, when an adequate record is presented to resolve them, at any stage
17 of the proceedings, despite the default rules contained in Nev. Rev. Stat. sections 34.726;
18 34.800; and 34.810. The Nevada Supreme Court has disregarded default rules and
19 addressed constitutional claims in the exercise of its complete discretion to do so.

20 c. The Nevada Supreme Court has failed to apply the one-year rule of Nev.
21 Rev. Stat. section 34.726 to bar its review of constitutional claims contained in successive
22 capital habeas petitions.

23 d. The Nevada Supreme Court also routinely disregards the procedural bar
24 arising from failure to raise claims in earlier proceedings.

25 e. The Nevada Supreme Court has failed to apply the rebuttable presumption
26 of Nev. Rev. Stat. section 34.800(2) to capital habeas petitioners.

1 f. The Nevada Supreme Court has entertained the merits of claims raised in
2 briefs that were returned unfiled by the court pursuant to its own order.

3 g. The Nevada Supreme Court has issued inconsistent rulings on whether
4 technical defects in a petition may be cured by amendment.

5 h. The Nevada Supreme Court has entertained the merits of constitutional
6 claims that were improperly incorporated from the briefing in the trial court in violation
7 of Nev. R. App. P. 28(e).

8 i. The State has admitted that the Nevada Supreme Court disregards
9 procedural default rules on grounds that cannot be reconciled with a theory of consistent
10 application of procedural default rules.

11 j. The Nevada Supreme Court has found certain constitutional claims
12 procedurally defaulted before those claims could even be raised.

13 k. The Nevada Supreme Court has also applied inconsistent rules when
14 deciding whether a petitioner can demonstrate “cause” to excuse a procedural default.

15 l. The Nevada Supreme Court inconsistently applies the “cause” standard to
16 excuse the filing of untimely petitions under Nev. Rev. Stat. section 34.726(1)(a). The
17 fact that the definition of “cause” under Nev. Rev. Stat. section 34.726 is treated
18 differently in published versus unpublished dispositions further shows that this statutory
19 provision is not a “rule” that is clearly and consistently followed.

20 m. The Nevada Supreme Court has reached diametrically opposite
21 conclusions on whether an erroneous court ruling establishes “cause” to review the merits
22 of a constitutional claim on post-conviction.

23 n. The Nevada Supreme Court has reached inconsistent results on the issue
24 of whether a procedural rule that does not exist at the time of a purported default may
25 preclude the review of the merits of meritorious constitutional claims.

26 7. Default bars that can be “graciously waived,” or disregarded out of “frustration,”

1 are not “rules” that bind the actions of courts at all, but are the result of mere exercises of
2 unfettered discretion; and such impediments cannot constitutionally bar review of
3 meritorious claims. The Nevada Supreme Court’s practices make review of the merits of
4 constitutional claims a matter of “grace and favor,” and they cannot constitutionally be
5 applied to bar consideration of Petitioner’s claims.

6 8. This Court may not apply any supposed default rules to bar consideration of
7 Petitioner’s claims when the Nevada Supreme Court has failed to apply those rules to
8 similarly-situated petitioners, and thus has failed to provide notice of what default rules will
9 be enforced, without violating the Equal Protection and Due Process clauses of the
10 Fourteenth Amendment.

11 9. This Court may not apply any supposed default rules to bar consideration of
12 Petitioner’s claims because the trial court improperly refused to allow trial counsel to present
13 objections in open court, conduct proceedings on the record, and ensure that Petitioner was
14 present at and aware of the non-reported proceedings.

15 10. Petitioner exercised due diligence in presenting the factual and legal bases for
16 each of his claims. Petitioner’s efforts to do so, however, were thwarted by the state
17 officials’ refusal to honor their constitutional obligations to disclose exculpatory information
18 and provide discovery, funding, and fact-finding in the post-convictions proceedings.

19 AD. Statement Regarding the Right to an Evidentiary Hearing. Each issue of fact to
20 be considered at an evidentiary hearing on the claims presented in this Petition has not been
21 determined in any prior evidentiary hearing in either a state or federal court. Moreover, the
22 limited hearing previously conducted by this Court was not a full and fair consideration of the
23 issues presented. In addition to denying Petitioner’s motions for discovery and to expand the
24 scope of the hearing, the Court deprived Petitioner of the funds necessary to investigate and
25 present facts supporting his claims. Finally, the Court abdicated its responsibility as an impartial
26 and fair decision-maker by adopting verbatim the State’s proposed Findings of Fact and

1 Conclusions of Law.

2 **III. PRELIMINARY STATEMENT OF THE FACTS**

3 A. On November 5, 1984, Colleen and Carl Gordon, Petitioner's grandparents, were
4 killed in their Las Vegas, Nevada home. The police suspected 19-year-old Petitioner, who lived
5 in a trailer on the property, as the prime suspect in the killings. Petitioner's girlfriend at the time
6 was a young woman named Angela Saldana, who worked as a stripper and a prostitute. She was
7 living with her aunt and uncle, Wendy and Robert Peoples. Robert Peoples was a felon and a
8 longtime snitch who needed to maintain a positive relationship with authorities. He immediately
9 recognized an opportunity to further ingratiate himself with the police by using Saldana to
10 "solve" the crime.

11 B. Beecher Avants, then Chief Investigator for the District Attorney's Office, was a
12 friend of the Peoples, and he provided Peoples with police reports and information about the case
13 that he used to force Peoples to construct a "confession" from Petitioner to Saldana. Threatened
14 by Peoples, Saldana fulfilled her part by continuing to be involved with Petitioner and eventually
15 reporting to authorities his alleged admission to having killed his grandmother. Her statement
16 implicated not just Petitioner, but also four other teenage friends of Petitioner mentioned in
17 police reports—Randy Moore, Johnny Ray Luckett, Mike Walsh, and Tom Akers. Saldana later
18 testified at trial and at two resentencing proceedings, but, unbeknownst to the defense, she only
19 testified to what she was forced to testify to under threat of herself being subjected to the death
20 penalty.

21 C. When Saldana provided the information to the police, she was sleeping with both
22 Petitioner and Akers. At trial, she said she was doing so in an attempt to solve the case.
23 Saldana's account of what Petitioner told her minimized Akers' role in the offense. Soon
24 thereafter, Akers provided a statement to police that largely corresponded to Saldana's statement
25 while also implicating two other teenagers in the events of November 5th, John Lucas and Roy
26 McDowell. Lucas, in turn, provided a statement to police after the police informed him of a

1 reward available from Secret Witness, told him about Saldana's statement and threatened him
2 with charges. Lucas denied being present at the Gordon residence but claimed to have overheard
3 conversations planning the killings and various post-crime admissions by the other parties.

4 D. Following the arrests of Petitioner, Akers, Moore, Lockett, McDowell and Walsh,
5 Akers was released from jail and given a job by Saldana's uncle, Robert Peoples. Shortly before
6 trial, he pleaded guilty to voluntary manslaughter and received a sentence of five years in prison.
7 He was placed on probation, however, and served none of the sentence. Also before trial, Walsh
8 pleaded guilty to two counts of murder with a deadly weapon. The deal allowed for parole and
9 no testimony at the upcoming trial of Petitioner, Moore, Lockett, and McDowell. Lucas was
10 never charged with anything even though in one statement to police he admitted being present
11 during the disposal of two of the weapons used in the offense. Saldana, Akers, and Lucas each
12 testified against the four remaining defendants. And each received significant compensation for
13 their testimony—\$2000 apiece—as well as other benefits. Their testimony provided the
14 foundation for the prosecution's theory at trial that the killings were motivated by Petitioner's
15 expectation of some inheritance and that Petitioner shot and killed Mrs. Gordon after which
16 Moore shot and killed Mr. Gordon.

17 5. These additional facts fully support—and are in turn supported by—Petitioner's
18 previously presented claims demonstrating that the trials were replete with manifest
19 constitutional error, including repeated outrageous prosecutorial misconduct by Dan Seaton and
20 Mel Harmon, who engaged in such behavior in Clark County for over twenty years without
21 serious repercussions. The juries that convicted and sentenced Petitioner to death heard nothing
22 about the extent to which the prosecution coerced and cajoled witnesses to tailor their testimony
23 to the prosecution's theory. Instead, these juries' passions were inflamed by repeated allegations
24 that Petitioner and the other defendants had engaged in adolescent witchcraft and were in fact
25 "devil worshipers." Judge Donald Mosley, who was ultimately removed from the case for
26 obvious prejudice against the defendants, denied defense counsel the right to object in open

1 court, insisting that any objections be made outside his and the jury's presence.

2 6. The quality of the representation on the other side of the table was no better.
3 Petitioner was first represented by the Clark County Public Defender's office from his arrest in
4 December 1984 through August 1985, during which time no work was performed on Petitioner's
5 behalf. Then, on the eve of trial, the Public Defender's office developed a "conflict of interest"
6 that has never been explained and which left Petitioner with new and inexperienced counsel who
7 had no time or resources to mount even a minimally competent defense. The representation at
8 the penalty retrials was equally deficient, and as a result, the jury never heard any of the readily
9 available and compelling mitigation about the circumstances of the crime or Petitioner's
10 character and background.

11 7. This Petition seeks to redress the State's intentional use of false evidence, the
12 suppression of material exculpatory evidence at trial, the State's failure to accord Petitioner with
13 reasonably competent counsel, and the State's refusal to properly instruct the jury. As detailed in
14 this Petition, had the juries learned how evidence against Petitioner may have been outright
15 fabricated, and certainly was completely unreliable, and learned the truth of Petitioner's difficult
16 life history, there is a reasonable probability that the result of the proceedings would have been
17 dramatically different.

18 IV. GROUNDS FOR RELIEF

19 A. CLAIM 1: THE STATE KNOWINGLY PRESENTED IMPEACHABLE 20 AND FALSE EVIDENCE AGAINST PETITIONER THAT WAS 21 PROCURED/CREATED BY A POLICE AGENT USING COERCION, 22 THREATS, PROMISES, AND MONEY, IN VIOLATION OF STATE AND 23 FEDERAL CONSTITUTIONAL RIGHTS.

24 Petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, a fair
25 trial, effective assistance of counsel, present a defense, confrontation, compulsory process, a
26 reliable and accurate guilt and penalty assessment based on accurate rather than false testimony

1 and evidence, a fair, reliable, non-arbitrary sentencing determination, and be free of the
2 imposition of a cruel and unusual punishment were violated by the State knowingly presenting
3 impeachable and false testimony in each of his trials and failing to disclose exculpatory
4 information about the creation of that testimony.

5 In support of this claim, Petitioner alleges the following facts, among others to be
6 presented after full discovery, investigation, adequate funding, access to this Court's subpoena
7 power, and an evidentiary hearing:

8 1. Those facts and allegations set forth in each paragraph of this Petition and the
9 exhibits are incorporated by reference as if fully set forth herein to avoid unnecessary duplication
10 of relevant facts.

11 2. Robert Peoples, a lifetime criminal—from bad checks to murder—and constant
12 police agent and informant, created damning and false evidence against Petitioner that resulted in
13 his conviction and sentences. Peoples committed multiple offenses as a juvenile, then as an adult
14 in California, then murder in Nevada. When he was paroled from prison after serving ten years
15 of a “life without parole” sentence for premeditated murder, he was hired by the Public Defender
16 in Las Vegas as an investigator. He became a double agent for the Chief Homicide Detective for
17 the Las Vegas police department, Beecher Avants, and became Avants' chief witness in a mob-
18 hit murder case. This left him in need of protection.

19 3. Thereafter, Peoples married Wendy Hanley, whom he had essentially earlier framed
20 (she had been married to one of the defendants in the mob-hit).⁴ Wendy Hanley's niece, Angela
21 Saldana, was Petitioner's girlfriend in early November 1984. She was staying with Wendy and
22 Robert Peoples. When the murders in this case occurred, Robert Peoples colluded with Beecher
23 Avants, who was then Chief Investigator for the Clark County District Attorney's Office, to

24 ⁴ Peoples was married at least three times by age thirty. His first marriage was in 1953 and
25 ended in 1955 when he was arrested under the Dyer Act. He was married twice more (as of
26 1961) once while still married. The second and third wives were professional dancers. Exhibits
1-2.

1 obtain/create false and/or highly suspect and impeachable testimony from Saldana and others
2 against Petitioner. Avants provided police reports to Peoples who studied them and instructed
3 Saldana what to do and to say.

4 4. This material exculpatory evidence was concealed from Petitioner and his counsel
5 throughout the state trial, sentencing, and appellate proceedings. Because Saldana was the
6 lynchpin for the state's case, this new evidence undermines confidence in the proceedings
7 against Petitioner. When the state suppresses material exculpatory evidence, and/or relies upon
8 perjured testimony, due process is violated. There is a reasonable likelihood the jurors relied
9 upon perjured testimony at each of Petitioner's trials/resentencings, and a reasonable probability
10 that, but for the suppression of material exculpatory evidence, the results would have been
11 different. The state action also violated Petitioner's Eighth Amendment right to a reliable
12 sentencing proceeding and to be free from cruel and unusual punishment.⁵

13 **Robert Peoples Career—Sociopath and Lifelong Criminal**

14 5. According to a 1961 probation report in Los Angeles, California, Peoples walked
15 into a liquor and pizza store in Glendale, California, on August 3, 1960, with a .45 caliber
16 automatic pistol and held it up for \$263.00. He later was stopped by police while driving a
17 stolen car. Found in the car was the .45 caliber pistol. Following his conviction for robbery, the
18 probation officer prepared a report that revealed the following about Robert Peoples. Probation
19 Report in *People v. Robert Gino Peoples*, Los Angeles Superior Court No. 232298, Exhibits 1-8.

20 6. Robert Peoples was born on November 21, 1931, and lived in the Seattle area until
21 he was about sixteen years old when he moved to Los Angeles. In 1943, when he was twelve
22 years old, he was arrested for robbing a store, but there was no disposition. In 1951, at twenty,
23 he was convicted on federal marijuana charges and was given three years probation. In 1952 he
24 was arrested for a firearm violation with no disposition, and in 1954 he was arrested for larceny

25 _____
26 ⁵ Petitioner could not have previously raised this claim as the witnesses to the facts were
either unknown or avoided being located, despite Petitioner's diligence. Exhibits 180-81.

1 by conversion with the District Attorney recommending dismissal. In 1954 he was arrested for
2 driving while under the influence of alcohol and convicted. Also in 1954 he was convicted of
3 attempted extortion and received a five-year probationary sentence, to serve the first year in the
4 custody of San Diego County. Probation Report in *People v. Robert Gino Peoples*, Los Angeles
5 Superior Court No. 232298, Exhibits 4.

6 7. While serving this sentence, Peoples escaped. He was arrested in 1955 and
7 convicted under the Dyer Act for transporting stolen vehicles across state lines. He received a
8 three-year federal sentence, which he served in federal prison at La Tuna Texas, Terminal Island,
9 and McNeil Island. When he was released, he served a year for the escape from the San Diego
10 jail and then was released with five years of probation on his attempted extortion conviction.
11 Probation was to expire in December, 1964. Probation Report in *People v. Robert Gino Peoples*,
12 Los Angeles Superior Court No. 232298, Exhibits 2-4.

13 8. Peoples then worked with his brother in construction in Palm Springs, a job that
14 required him to be bonded. To secure the bond, he gave an alias. When he later got into a fight
15 in 1958 and his name appeared in the newspaper, along with his record, he lost that job. He
16 served 90 days in the county jail. Upon release, he went to the Los Angeles area. Around 1960,
17 he went to work with his brother-in-law in Phoenix. He left there having embezzled \$3,500.00
18 and with checks and credit cards from the company. "After going through \$6,000.00 he became
19 involved in the present offense [the liquor store robbery] and has been in custody since 8-9-60."
20 Probation Report in *People v. Robert Gino Peoples*, Los Angeles Superior Court No. 232298,
21 Exhibits 3.

22 9. On August 9, 1960, he was arrested for the liquor store robbery. At the time of the
23 probation report, he had two felony holds, one from San Diego for theft and one from Arizona
24 for grand theft. As the preparer of the probation report for the liquor store robbery noted, "[i]t
25 would appear that defendant is in violation of his probation." Probation Report in *People v.*
26 *Robert Gino Peoples*, Los Angeles Superior Court No. 232298, Exhibits 4.

1 10. Peoples told the probation officer that “I’ve been around and [am] considered to be
2 a ‘con man.’” Probation Report in *People v. Robert Gino Peoples*, Los Angeles Superior Court
3 No. 232298, Exhibits 6. According to the probation officer:

4 It is not felt that defendant is a suitable candidate for probation at this time. In the
5 first place, the present offense is a very serious offense and there seem to be no
6 mitigating circumstances. Secondly, presently defendant is in violation of
 probation from San Diego County. Still further, there are two holds on Defendant,
 once from San Diego and another in Arizona for grand theft.

7 Probation Report in *People v. Robert Gino Peoples*, Los Angeles Superior Court No. 232298,
8 Exhibits 7.

9 11. On December 12, 1960, following Peoples’ testimony, the judge read into the record
10 a portion of a mental health expert’s report:

11 This defendant tends to exaggerate and distort, and, occasionally, to minimize if
12 the responses are detrimental to him. In other words his narrative is unreliable.

13 He has grandiose ideas which he attempts to fulfill by illegal means; is *probably a*
14 *pathological liar and is almost certainly a sociopathic personality*. Despite the
15 evidence of the victim’s identification of him, of the license number and
 automobile associated with him at his apprehension, the presence of the 45 caliber
 gun in his bigamist wife’s purse, he claims he cannot remember.

16 Examination of Robert People by Marcus Crahan, M.D., in *People v. Robert Gino Peoples*, Los
17 Angeles Superior Court No. 232298, Exhibits 22-23 (emphasis added); *see also* Letter from
18 Associate Superintendent R.P. Feigen to Judge R.R. Roberts and Judge A.P. Peracca, dated
19 October 20, 1967, and Diagnostic Study and Evaluation of Ira Sacks, filed in *People v. Sacks,*
20 *Sanders, Peoples, and McCoy*, Los Angeles Superior Court No. 304102, Exhibits 32-33.

21 12. Before he went to prison for a 1965 murder, Peoples was the leader of a fraud
22 scheme orchestrated in California. One set of indictments (Case No. 319201) involved
23 \$200,000.00 in fraud occurring in Los Angeles between March 6 and June 17, 1963. A
24 probation report for a co-defendant, Sacks, describes the offenses as follows:

25 Defendant passing, or causing to be passed, a number of nonsufficient funds
26 checks between March 31 and May 4, 1965. To accomplish this purpose
 Defendant induced innocent persons (two registered nurses, Dallas Cook and
 Valeri Willats) to either use existing bank accounts or open bank accounts (seven

1 in all) and transfer nonsufficient funds checks between accounts; and to cause
2 checks to be circulated between the codefendants and pass to various persons,
merchants and banks. The total amount involved in the information is \$9,730.40.

3 Letter from Associate Superintendent R.P. Feigen to Judge R.R. Roberts and Judge A.P. Peracca,
4 dated October 20, 1967, and Diagnostic Study and Evaluation of Ira Sacks, filed in *People v.*
5 *Sacks, Sanders, Peoples, and McCoy*, Los Angeles Superior Court No. 304102, Exhibits 36-37.

6 Sacks explained why he did this:

7 I was involved in this crime because of the person now dead told me that *Mr.*
8 *Peoples, alias Mr. Robert Wilson, who is in Nev. for murder, was going to kidnap*
my little boy and kill him if I did not participate in the conspiracy.

9 Exhibits 38 (emphasis added); *see also* Exhibits 43.

10 **Peoples' Life Without Parole Murder And Parole In Ten Years**

11 13. Peoples murdered his girlfriend and was sentenced to life without the possibility of
12 parole. He ultimately served only ten years of this sentence. The facts of this crime were
13 recounted by the Ninth Circuit Court of Appeal:

14 On June 10, 1965 Peoples arrived in Beatty, Nevada, and was met by one Dillard
15 R. Morton and the two children of Sharon Wilson, the decedent. Peoples was
16 driven to the El Portal Motel where he left his luggage in the room occupied by
17 Sharon Wilson. Peoples, Morton, and the children then drove to the Oasis Bar
18 where Sharon was employed. While Peoples was talking with her in the bar a
19 pistol which he was carrying was discharged through his pocket and the bullet
20 struck the floor near Sharon. Peoples then ushered the girl and her two children
21 into Morton's car and they returned to the motel. In the bar, Peoples was
22 overheard threatening Sharon by saying he was going to kill her.⁶ At the motel,
23 Peoples, Morton and Sharon were alone in the room. A shot was fired which
passed through Sharon's shoulder, crossed her chest cavity piercing her heart, and
came out on the right side of her body. Peoples and Morton carried her out to
Morton's car where she was wedged between the front and back seats of the car.
Her two children were put in the front seat and the car was driven back to the
Oasis Bar. As it arrived behind the Oasis the occupants were approached by a
deputy sheriff who was investigating the shot that had been fired inside the bar.
When the deputy had questioned Peoples and Morton about the earlier shot, he
looked inside the car and saw the woman in the back and an automatic pistol on
the front floor. The children were still seated in the front seat.

24 _____
25 ⁶ See "Convict May Leave Prison Thanks to Judge's Interest," Nevada State Journal, Jan.
26 31, 1969, Exhibits 47 ("Miss Wilson's 7-year-old daughter, Debbie, testified at the trial that
Peoples threatened to kill the woman and an eyewitness in the bar said he heard a similar
remark.").

1 *Peoples v. Hocker*, 423 F.2d 960, 962 (9th Cir. 1970). The prosecutor sought the death penalty.
2 “Murder Trial Begins,” Nevada State Journal, May 12, 1966, Exhibits 49. Peoples was
3 convicted of premeditated murder and sentenced to life without the possibility of parole.

4 14. The Nevada Supreme Court affirmed. *Peoples v. State*, 83 Nev. 115, 423 P.2d 883
5 (1967), with Justice David Zenoff’s concurrence.⁷

6 15. Peoples then sought federal habeas corpus relief. *Peoples v. Hocker*, 423 F.2d at
7 962. On August 8, 1968, a federal district court judge denied habeas corpus relief and
8 “respectfully refer[ed] this case to the Honorable Paul Laxalt, Governor of the State of Nevada,
9 and the State Board of Pardons for Appropriate consideration.” *Robert Peoples v. Hocker*,
10 Order, Case No. Civil 2025-R (D. Nev. Aug. 8, 1968), Exhibits 54. Thereafter, the State Board
11 of Pardons held a hearing at which Peoples protested his innocence:

12 Board Chairman Gov. Paul Laxalt and some of the other board members agreed
13 there were holes in the case record but the commission agreed to wait until
14 Peoples exhausted his appeals through the federal courts.

15 Laxalt said he “had a bad feeling about the case.” He suggested an independent
investigation be made to ensure there had not been “a gross miscarriage of
justice.”

16 “Pardon Board Withholds Action on Robert Peoples,” filed in *Robert Peoples v. Hocker*, Ninth
17 Circuit Case No. 23208, Exhibits 55; see also “Convict May Leave Prison Thanks to Judge’s
18 Interest,” Nevada State Journal, Jan. 31, 1969, Exhibits 47 (“Gov. Paul Laxalt ... expressed
19 concern last year that Peoples may have received a raw deal. Peoples had appeared before the
20 pardons board and told it, in an emotional voice, he was innocent. He said he did not want a
21 reduction in sentence but that the criminal conviction should be wiped off the books. Some
22 members were impressed with the presentation.”).

23 ⁷ Justice Zenoff previously had written an opinion affirming the denial of habeas corpus
24 relief for co-defendant Morton who argued that there was no probable cause that he committed
25 the offense. *Morton v. Nevada*, No. 5091 (June 2, 1966) (“the victim sustained a broken neck
26 along with the gunshot wound which might suggest that there was physical assistance given to
the killer by holding the deceased.”). *Dillard Morton v. State of Nevada*, Nevada Supreme Court
Case No. 5091 (June 2, 1966), Exhibits 51.

1 16. Supposedly based upon these concerns, Justice David Zenoff conducted “an
2 extensive investigation” and wrote a memo to “the state pardons board of which he is a member
3 to meet to consider reducing the penalty.” “Convict May Leave Prison Thanks to Judge’s
4 Interest,” Nevada State Journal, January 31, 1969, and filed as Exhibit R-19 in *Robert Peoples v.*
5 *Hocker*, Order, Case No. Civil 2025-R (D. Nev.), Exhibits 47. A hearing was thereafter held:

6 Justice David Zenoff of the Nevada Supreme Court had conducted a personal
7 investigation into the case of Peoples and concluded he should have been found
 guilty of involuntary manslaughter instead of first degree murder.

8 Judge Zenoff, however, voted for denial on grounds it was for a full pardon
9 instead of a reduction in the degree of the crime.

10 District Attorney William P. Beko of Nye County told the Pardons Board Peoples
11 received a “fair trial” and he added “I don’t have any trouble living with the
 degree of the crime.” He said he had asked for the death penalty and there was
 ample evidence to justify it.

12 “Robert Peoples Stays in Prison,” filed as Exhibit R-21 in *Robert Peoples v. Hocker*, Order, Case
13 No. Civil 2025-R (D. Nev.), Exhibits 56.

14 17. Peoples then filed a petition for post-conviction relief in the state trial court, the
15 denial of which was affirmed. Justice Zenoff, dissenting, wrote that the penalty of life
16 imprisonment without possibility of parole is not justified: “Peoples is serving a sentence for a
17 premeditation that is not at all established by the evidence in the record.” *Peoples v. Warden*, 87
18 Nev. 610, 613, 491 P.2d 719, 720 (1971). He contended that “[p]erhaps this is more properly a
19 case for the Board of Pardons. That body has refused to act until the legal avenues have been
20 exhausted, but, nevertheless, I now, as previously, desire that my views be know. Under our
21 powers provided by NRS 177.265, I would modify the judgment to life with possibility of
22 parole.” *Id.* at 614, 491 P.2d at 721.

23 18. On April 23, 1974, the Board commuted Peoples’ sentence to life with possibility of
24 parole. Nevada Board of Pardons, Order Commuting Sentence and/or Remitting Fine for Robert
25 Peoples, April 23, 1974, Exhibits 58. In September 1976, Peoples was paroled to California.
26 Ten years after facing the death penalty, he was back on the streets.

Peoples, the Police Double Agent – “I Played Bogart”

19. After returning to Nevada, Peoples worked as an investigator at the Clark County Office of Public Defender. However, he ultimately was fired and became a private investigator.

20. On March 17, 1977, Al Bramlet’s body was found in the desert. Tom Hanley (age 61) and his son Andy Hanley (who went by his middle name Gramby) were charged with the execution-style slaying of Bramlet who was a Culinary Union leader. Wendy Hanley (age 21), Tom’s wife, was charged as an accessory to the murder.

21. Robert Peoples had met Andy Gramby Hanley when Peoples was serving time for murder; Gramby was also serving time. Peoples was a natural to enter the Hanley case.

22. Detective Beecher Avants later testified about how Peoples became involved in the case against the Hanleys. Avants was then a homicide detective with the Las Vegas Metropolitan Police Department. He testified that Peoples had socialized with Tom and Gramby at the Horseshoe Club in early April 1977. When Tom Hanley was arrested, Peoples went with Hanley’s defense attorney to visit him. During this jail visit, Hanley held up a piece of paper on which he had written instructions for Peoples to go with Hanley’s wife Wendy to dig up Bramlet’s jewelry that had been buried near the Hanley trailer compound. According to Avants, Hanley’s attorney made it clear that he wanted no part of evidence tampering, and then Peoples “became a double agent.” “Hanley Defense Attacks Agent Use,” Las Vegas Sun, January 7, 1978, Exhibits 59. “Peoples led the Hanleys to believe he was working for them when, in fact, he was now working for homicide detectives.” “Hanley Defense Attacks Agent Use,” Las Vegas Sun, January 7, 1978, Exhibits 59

23. At Gramby Hanley’s preliminary hearing, Peoples testified that, in January of 1977, Tom Hanley told him that he wanted Bramlet out of the way because he wanted to unionize the dealers of Las Vegas. “Hanley ‘Agent’ Testifies,” Las Vegas Review-Journal, Exhibits 64. After the murder, Peoples led Tom Hanley and his attorneys to believe he was working for Hanley. In reality, he operated as a double agent and went with Wendy Hanley to dig up

1 Bramlet's clothing at one location and his jewelry at another, while Avants watched from an
2 aircraft. In return for his assistance, Peoples was paid. "Hanley Defense Attacks Agent Use,"
3 Las Vegas Sun, January 7, 1978, Exhibits 59.

4 24. According to Peoples, he seduced Wendy Hanley in a hotel room that was wired
5 with listening devices by the police. This rendezvous "lasted all day May 31 and into the early
6 morning hours of June 1" and resulted in "Wendy directing Peoples out the Blue Diamond Road
7 where the pair dug up clothes and jewelry belonging to the dead Bramlet." "I Played Bogart:
8 Hanley Informer," Las Vegas Sun, Jan. 6, 1978, Exhibits 60. He had trouble remembering dates
9 and testified "to the best of my regulection [sic]." "I Played Bogart: Hanley Informer," Las
10 Vegas Sun, Jan. 6, 1978, Exhibits 60.

11 25. Once Tom Hanley was convicted, Peoples married Wendy. Avants left the police
12 department and became chief investigator at the prosecutor's office. When the crimes occurred
13 in this, Petitioner's, case, Peoples informed Avants the connection between Peoples, Saldana,
14 and Petitioner. Peoples, as a police agent, and with Avants' active assistance, then set about
15 contriving Saldana's evidence and forcing her to testify.

16 **The State's Theory of How Angela Saldana Learned and Testified about the Crime**

17 *Saldana "breaks" the case*

18 26. On December 7, 1984, Angela Saldana gave a statement to the police implicating
19 Petitioner and others in the crime in this case. She said that it was committed for insurance
20 purposes, that a knife was used to cut a screen, and other details. All of this was supposedly told
21 to her by Petitioner. However, as is discussed, *infra*, Robert Peoples actually told Saldana what
22 to say, relying on police reports. With the police reports that Avants provided to him, Robert
23 Peoples was in the perfect position to fabricate a "confession" by Petitioner to Saldana. The
24 initial reports concerning the crime scene and autopsies allowed Peoples to learn details about
25 the killings that were not necessarily available through media reports. *See* Clark County Coroner
26 materials and Las Vegas Metropolitan Police Department materials, Exhibits 81-131. Interviews

1 conducted shortly after the killings included references to Petitioner's belief that he would inherit
2 something should anything happen to his grandparents. This permitted creation of a motive for
3 the murders that Saldana could use. The initial police reports described how the screen was cut
4 and the window then broken. In the "confession" Saldana reported, these details were included.

5 27. By November 15, 1984, the police knew that at least two separate firearms had been
6 used in the killings. But they lacked any evidence indicating who the perpetrators were,
7 although the police reports indicated that Petitioner, Tom Akers, and Randy Moore were
8 considered suspects. On November 24, 1984, not long before Saldana reported Petitioner's
9 alleged confession to her, Michael Walsh's step-brother, Ron Davis, informed police about
10 rumors on the street about the killings and phone calls he had received from Walsh. In some of
11 the conversations, Walsh claimed that the police were trying to pin the murders on him, Moore,
12 Petitioner, and Akers. Walsh denied involvement, leaving the police with only more suspicions,
13 but no solid evidence. Davis also recounted running into an old acquaintance, Bob, at Circus
14 Circus Casino. Bob repeated some of the rumors that were going around about the killings. Bob
15 initially mentioned Roy McDowell in connection with the Gordon murders, but then stated that it
16 was actually a different Roy. In naming who he believed were involved in the actual killings,
17 Davis did not include McDowell. Las Vegas Metropolitan Police Department Statement of
18 Ronald Anthony Davis, November 24, 1984, Exhibits 120-31. Notably, McDowell's name was
19 also omitted from Saldana's December 7th report of Petitioner's alleged confession about the
20 events of November 5th.

21 28. As will be shown, Saldana, through Peoples, was privy to all of the above
22 information at the time she reported Petitioner's "confession" to the police. By providing the
23 police with the "confession" Saldana was given a large share of the credit for solving the case, in
24 addition to \$2000.⁸

25
26 ⁸ After Saldana said Petitioner confessed, Akers, who Saldana also was sleeping with and
who Peoples eventually hired, gave a statement. In his statement, Akers implicated a number of

1 29. Following Saldana's statement, the police interviewed Petitioner's close friend,
2 Wayne Wittig. Las Vegas Metropolitan Police Department Statement of Wayne Eric Alan
3 Wittig, December 7, 1984, Exhibits 132-38. Wittig informed the police that Petitioner admitted
4 being present the night of the killings, but Petitioner stated that Moore was the instigator of what
5 occurred. Further, Petitioner denied having shot his grandmother. As for the motive provided by
6 Saldana, the suspected inheritance, Wittig explained that Petitioner had indeed believed he might
7 receive part of the house. This was consistent with what Petitioner himself had told the police
8 the day the Gordons' bodies were discovered. Las Vegas Metropolitan Police Department
9 Statement of Dale Edward Flanagan, November 6, 1984, Exhibits 105. But Wittig told the
10 police that any such inheritance meant nothing to Petitioner. Wittig was not called by the
11 prosecution during the guilt-innocence phase of the trial.

12 30. The police then turned to Akers who provided them with a new statement. At this
13 time, Saldana was sleeping with both Akers and Petitioner. While she claimed in her testimony
14 that her motivation in doing so was solving the crime, her allegiance to Akers is evidenced by
15 Peoples hiring Akers following his release from custody. Akers' self-serving statement
16 established himself as the victim of circumstances he had allegedly claimed to be in
17 conversations with Saldana. Las Vegas Metropolitan Police Department Statement of Thomas
18 Lewis Akers, December 7, 1984, Exhibits 149-57.

19 31. Armed with the Saldana and Akers statements, the police arrested Petitioner. To
20 bolster the case against him and the other suspects, the police then turned to Lucas, whose prior
21 statement had been unhelpful. Before getting a second statement from him, the police informed
22 Lucas of the \$2000 available from Secret Witness, told him about Saldana's statement, and

23 _____
24 people, including Petitioner, but painted himself as a victim of circumstance. Las Vegas
25 Metropolitan Police Department Statement of Thomas Lewis Akers, December 7, 1984, Exhibits
26 149-57. Petitioner was arrested based on the statements of Saldana and Akers. Then John Lucas
was told about Saldana's statement before he was reinterviewed and he implicated others. All
three testified at the guilt phase of the co-defendants' trial.

1 threatened him with charges.⁹

2 *Saldana the witness*

3 32. Saldana testified at the guilt innocence proceedings that she had been Petitioner's
4 girlfriend and that she moved into his trailer shortly after the offense. She said she was present
5 when an officer came to the trailer and spoke with Petitioner.¹⁰ After their discussion, which
6 Saldana said she did not hear, Petitioner "was a little upset" because the officer said he had found
7 Petitioner's knife "by the broken window" at the crime scene. Reporter's Transcript of Jury
8 Trial 841 (8 AA 1751). She said she had seen and, in court, said she recognized, Petitioner's
9 knife. She also said that two weeks after the discussion between Petitioner and the officer,
10 Petitioner told her he had found his knife and showed it to her. She testified that she responded
11 "No, that's not your knife. That one looks new," and Petitioner said "Yes, but no one else will
12 know that. And now the cops don't have anything on me." Reporter's Transcript of Jury Trial
13 843 (8 AA 1753).

14 33. Saldana also testified that later, when Petitioner was upset about her and an old
15 boyfriend, he stated "How do you like this, I did it. I killed my grandparents." Reporter's

16 ⁹ One of the things that Saldana had been pressured to do was to find out what had
17 happened to the murder weapons. Lucas led the authorities to the rifles that had been used, but
18 no one was able to locate the pistol that was associated with the death of Mrs. Gordon. Perhaps
19 in an effort to ratchet up her perceived assistance in the case, in early January 1985, Saldana
20 brought the trial prosecutor a wooden pole wrapped in electrical tape. She told prosecutor
21 Seaton that Akers had called her from jail and asked her to hide the pole, which was in
22 Petitioner's trailer, because it was the instrument used to break the window and gain entry to the
23 Gordon residence. Las Vegas Metropolitan Police Department Report of Detective Geary, dated
24 January 3, 1985, Exhibits 168-70.

25 Although this pole became an exhibit at trial, it appears to be yet another piece of
26 fabricated evidence. When the pole was examined, it was devoid of glass shards or fingerprints.
Las Vegas Metropolitan Police Department Report of Laboratory Examination by L.T.
Errichetto, dated January 7, 1985, Exhibits 171. It was also inconsistent with Lucas' description
of a white closet pole that had been in Moore's apartment that Walsh allegedly unsuccessfully
used to break the window. Indeed, when Walsh pleaded guilty, he stated he had brought a little
white pole to the Gordon residence that he tried to use to break the window.

10 In the voluminous police reports provided to the defense in this case, there is no report
documenting any such contact with Petitioner by the detectives investigating the murders.

1 Transcript of Jury Trial 844 (8 AA 1754). He said that “they planned to make it look like a
2 robbery” and committed the crime “for the will and the insurance money.” Reporter’s Transcript
3 of Jury Trial 846 (8 AA 1756). She said that Petitioner named all of the other people involved,
4 that they planned the crime, that Petitioner “had a handgun,” that he broke the window to the
5 house “with a stick,” and that “he went into the bedroom of his grandmother’s, and she woke up
6 screaming. And he wrestled her to the bed, put his hand over her mouth, and shot her.”
7 Reporter’s Transcript of Jury Trial 863-65 (8 AA 1773-75). She said that Petitioner said that
8 “Johnny Ray and Randy Moore had shot” his grandfather. Reporter’s Transcript of Jury Trial
9 865 (8 AA 1775). She said that Petitioner said he then took his grandmother’s purse and they all
10 left. Reporter’s Transcript of Jury Trial 867 (8 AA 1777). She said that she and Petitioner and
11 Petitioner’s sister, mother, and aunt looked for a will “every day for about a week,” but did not
12 find one. Reporter’s Transcript of Jury Trial 869 (8 AA 1779).

13 34. The prosecutors referred to Saldana’s testimony repeatedly, in opening statement,
14 Reporter’s Transcript of Jury Trial 13 (5 AA 1187), 17 (5 AA 1191), and closing argument,
15 Reporter’s Transcript of Jury Trial 1486 (12 AA 2512), 1496 (12 AA 2522), 1520 (12 AA 2546),
16 1552 (12 AA 2578), 1652-53 (12 AA 2678-79), 1667 (12 AA 2693), 1668 (12 AA 2694).
17 According to the state, she was especially important because she was not a conspirator and other
18 testimony was from individuals involved in the offense:

19 There was one other person who wasn’t present [at the crime] who took the stand
20 and told you.

21 That was Angela Saldana. And she told you what happened in that last
22 conspiratorial meeting through what she had heard from Dale Flanagan in the
23 trailer that day. Dale had told her the whole deal and she wasn’t there.

24 She just heard this secondhand, what is typically hearsay but allowed in because it
25 is a co-conspirator statement. It is the act of one that binds all or the statement of
26 one which binds all.

27 So we have four people who were there and heard the words spoken. Actually, a
28 fifth, Dale Flanagan, as told through the sixth, Angela Saldana.

29 Reporter’s Transcript of Jury Trial 1485-86 (12 AA 2511-12).

1 35. Saldana testified consistent with this testimony at subsequent trials.

2 **How Saldana Actually Came to Say What She Said**

3 36. Robert Peoples made Saldana say what she said. In their declarations, Wendy C.
4 Mazaros (formerly Peoples) and Wendy's daughter Amy Hanley Peoples explain how.
5 Declaration of Wendy C. Mazaros, Exhibits 175-80; Declaration of Amy Hanley-Peoples,
6 Exhibits 172-75.

7 37. In the mid-1970s Wendy was involved with Tom Hanley with whom she had a
8 daughter, Amy.¹¹ In 1977, Tom became a suspect in the murder of Al Bramlet. During the
9 investigation of this murder, Wendy first met Beecher Avants, who was the head of homicide at
10 Las Vegas Metro Police. Looking for Tom Hanley, Avants came to Wendy's house and
11 harassed her about the Bramlet murder. Exhibits 175.

12 38. It was also in connection with the Bramlet murder that Wendy met Robert Peoples
13 who was working as an investigator for her husband. She later learned that Peoples was working
14 undercover for the police. Tom instructed her to take Peoples to Pahrump, Nevada, and show
15 him where evidence connected to the Bramlet killing was buried. Together, they went to a motel
16 in Pahrump, Nevada and had sex. She later realized that Peoples started a relationship with her
17 in an attempt to get additional information from her that would further implicate Tom. Tom
18 eventually pled guilty to the Bramlet murder and was sentenced to life without possibility of
19 parole. Exhibits 175.

20 39. Wendy states that before they met, Peoples had been sentenced to life without
21 parole for killing a girlfriend during a fight in Beatty, Nevada. According to Peoples, the
22 girlfriend had been angry with Peoples because he had taken her baby boy and given the baby to
23 his sister, Mary. Peoples told Wendy that at the time of the murder he had been working for the
24 mob running money for them and traveling between California, Nevada, and New York. He was

25 _____
26 ¹¹ Although Amy's father was Tom Hanley, she was raised primarily by her step-father, Robert Peoples.

1 in Beatty with mob money from New York to start a casino there to launder money. Exhibits
2 175-76.

3 40. While Peoples was in prison, he became friends with Gramby Hanley, Tom
4 Hanley's son. Gramby was also convicted of the murder of Al Bramlet. It was through Gramby
5 that Peoples met Tom Hanley. Exhibits 176.

6 41. Although Peoples was sentenced to life without parole for killing his girlfriend, he
7 managed to get paroled in 1975. He explained to Wendy that he was able to get out because he
8 started working undercover in the prison on gambling and drug operations for the Governor's
9 Office. He bragged that he had made a leather briefcase for former Governor Paul Laxalt that
10 the Governor carried around. Exhibits 176.

11 42. Peoples and Wendy married in 1978. They were married twice because the first
12 time they married, Peoples was still married to Jo Ann Blakenship. The primary reason that
13 Wendy married him was he had convinced her that she could somehow get in trouble for things
14 Tom Hanley had done unless she married him. She felt under his control, and he told her that he
15 was the only one who could save her. Exhibits 176.

16 43. As Wendy explains, after they were married, Peoples constantly was trying to get on
17 the good side of law enforcement, and he worked with the police as a snitch. Before Peoples was
18 released from prison for murder, his sister Marlena had dated Beecher Avants. After Wendy
19 began her relationship with Peoples, Beecher Avants and his then-wife Gisela became friends of
20 theirs and they socialized with them frequently. When Beecher ran for sheriff in 1982, Peoples
21 and Wendy worked on his campaign. Exhibits 176.

22 44. In 1984, Peoples and Wendy lived in Las Vegas, along with Amy. Wendy has a
23 half-sister named Caren, who had several children, including a daughter, Angela Saldana.
24 Saldana's father was involved with the Gents motorcycle gang in Las Vegas. Saldana was a very
25 troubled, mixed up girl. She had at least once run away from home, and she spent time in
26 juvenile facilities. Wendy felt sorry for Saldana and let her come live with them when she was

1 about 20 years old. Exhibits 176-77.

2 45. When Saldana was living there she had a baby boy named Myles whose name later
3 was changed to Mike. Saldana did not take care of him. Wendy was very fond of Saldana's
4 baby boy and bonded with him. Wendy states that because of Peoples' and her histories she did
5 not think social services would allow her to adopt the baby. She was surprised when they said
6 that she could and she met with an attorney about the adoption. Before she could proceed with
7 the adoption, Peoples took the baby and gave him to his brother. When Wendy learned what he
8 had done, they had a terrible fight. She never saw the baby again. Saldana received \$5,000 for
9 giving up the baby. Exhibits 177; Exhibits 172.

10 46. Saldana was a stripper. Wendy went to strip clubs with Amy in the car to try to talk
11 Saldana into coming back to the house and stop stripping. Exhibits 172.

12 47. Saldana had been seeing Petitioner several weeks before his grandparents were
13 murdered. Wendy had met Petitioner and saw him on various occasions when he came to the
14 house to visit Saldana. Exhibits 178.

15 48. The day after the Gordons were killed, Peoples, Amy and Wendy drove up to Mt.
16 Charleston Lodge. Shortly after they arrived Saldana called and asked them to come home
17 because Petitioner's grandparents had been killed. Exhibits 178.

18 49. Very soon after this, Peoples told Beecher Avants that Saldana was Petitioner's
19 girlfriend. Beecher had left the Las Vegas Metro police department and was Chief Investigator
20 for the Las Vegas District Attorney's office. Within a day, Beecher came over to the Peoples'
21 house. Beecher had already made up his mind that Petitioner was involved in the killings.
22 Peoples realized that this case posed an opportunity to keep in good standing with the authorities
23 and planned with Beecher to have Saldana "solve" the case. Peoples always took every
24 opportunity to cooperate with law enforcement because it paid off for him. He set about
25 manipulating and controlling Saldana just as he had done with Wendy when he was secretly
26 working with the police in the Bramlet case. Peoples told Saldana that if she did not cooperate

1 with him and Beecher, Saldana could be charged with conspiracy and be executed. Exhibits
2 178-79.

3 50. According to Wendy and Amy, after the crime Saldana continued to spend time
4 with Petitioner at his trailer. Contrary to Saldana's testimony, she never lived at the trailer.
5 Exhibits 172, 179.

6 51. Beecher came to the Peoples house several times to talk about the investigation with
7 Peoples. Sometimes the two of them would sit in the house at the red counter top island bar to
8 talk, sometimes they would go outside to talk and other times they would meet elsewhere or talk
9 by telephone. Beecher told Peoples that they needed to find the gun and to get a confession.
10 Exhibits 179.

11 52. Peoples was provided with all of the police reports about the case and reviewed
12 them carefully. During the investigation, Peoples had long conversations with Saldana. He told
13 Saldana exactly what to say to the police and at trial. Peoples coerced Saldana to say anything
14 Beecher wanted her to say. Wendy heard Peoples tell Saldana, "You're going to do this Angie,"
15 and then tell her exactly what to say. Peoples did what Beecher told him to do. This is how
16 Beecher operated and used Peoples. Exhibits 179.

17 53. After his grandparents were killed and before Petitioner's first trial, Amy went with
18 Robert Peoples and Saldana to Petitioner's trailer when Petitioner was not there. Peoples took
19 Saldana there to get everything straight with her and to look for things in the trailer that Saldana
20 could use to support a "confession." In particular, he was looking for weapons and signs of devil
21 worship. Robert Peoples pointed to a picture and said to Saldana that it was a picture of the devil
22 and told Saldana that she had to testify against Petitioner and say that Petitioner was a devil
23 worshiper. Exhibits 172, 179-80. Robert Peoples instructed Saldana "how to testify and
24 rehearsed her testimony." Exhibits 172.

25 54. Wendy got fed up with what Peoples was doing and told him he could not coerce
26 Saldana into what to say. He did not listen, and Wendy left him shortly after that and moved to

1 Pahrump on a 5-acre ranch. After that, she moved to Reno. Peoples and Wendy were officially
2 divorced in 1989. Exhibits 180.

3 55. Before Petitioner's second trial in 1989, Amy was living with her aunt. Robert
4 Peoples was staying in a one-bedroom apartment near the Maryland Parkway and Swenson area.
5 He was not paying rent. The rent was just being "taken care of." Exhibits 172.

6 56. Robert Peoples often picked Amy up at her aunt's house and took her to the
7 apartment. There were boxes of paperwork in his room with the name "Flanagan" on papers in
8 the boxes. Robert Peoples caught Amy looking through these files, became very angry, and
9 yelled "get the f*** out of the room." Exhibits 172-73.

10 57. During Amy's visits to the apartment, she heard Robert Peoples talking to Saldana
11 on the telephone for hours at a time. Robert Peoples constantly talked to Saldana about what was
12 contained in the reports from the Flanagan boxes. He also told Saldana over and over how she
13 had testified at the first trial and that she had to do so again. Robert Peoples threatened her over
14 and over. He said "You have to do this. You got paid, if you don't do it you're going to fry.
15 They will put you in the electric chair." Robert Peoples said "that dirty little wh*** is not doing
16 what she is supposed to be doing." Exhibits 173.

17 58. During that same time period, Beecher Avants and Robert Peoples frequently met
18 and discussed the Flanagan case. Amy went to the Gold Coast Casino with Robert Peoples,
19 where she got free dinners and Robert Peoples got free rooms. They met there many times with
20 Beecher Avants and police officer Bob Hilliard and had dinner. Avants, Hilliard, and Robert
21 Peoples talked about the case against Petitioner. During one of the dinners, Avants told Peoples
22 "you better get that little b**** under control" referring to Saldana. Exhibits 173.

23 59. Before Petitioner's third trial, Saldana showed up in Reno. She said that she was
24 expecting \$10,000 for testifying. Saldana told Wendy that she did not get the \$10,000.00, and
25 wanted Wendy to pay to send her back to Las Vegas. Exhibits 180.

26 60. Several years after Petitioner's third trial, Saldana telephoned Amy and asked for

1 \$500.00. Amy told her she did not have that kind of money available. Six months later Saldana
2 showed up at Amy's house and asked where Robert Peoples was. Saldana said that he owed her
3 a lot of money for the work that she did on the Flanagan case. Amy made her leave. Exhibits
4 173.

5 61. Amy reports that Robert Peoples told her many things about his criminal activities
6 and connections. He said he worked for the Drug Enforcement Administration in Las Vegas. He
7 said that Judge Zenoff was a good friend of his and loved him, as did Paul Laxalt. He said if he
8 ever needed help from them all he had to do was call them because they "had his back." He said
9 that he had many attorneys and never had to pay any of them. It was just taken care of. He was
10 always breaking the law. She remembers he took vehicles out of state to hide assets. He used at
11 least two different social security numbers. His parole officer told her that Robert Peoples "had
12 organized crime in his jacket." Exhibits 173-74.

13 62. Amy states Robert Peoples was addicted to drugs and alcohol and was under the
14 influence when he testified against defendants. Once she saw him drink a fifth of whiskey in the
15 courthouse parking lot before he went in to testify. He could not walk into a courthouse without
16 being loaded. His testifying against people and being a snitch sometimes got him into trouble.
17 For example, when he would go to prison for parole violations or new offenses, he had problems
18 with other inmates for being a rat and a snitch and had to be put in a safety zone. When he went
19 to prison for stabbing Larry Wilch around 1987, he only served six months but he had to be put
20 in isolation because he was a known snitch. Exhibits 174.

21 63. For the past decade or so, Wendy intentionally made herself difficult, if not
22 impossible, to locate. She had no interest in involving herself with Saldana's or Peoples' messes.
23 She was extremely surprised when an investigator for Petitioner found her. Given the passage of
24 time, she decided to finally reveal what she knew about what Saldana, Peoples, and Beecher
25 Avants did to ensure Petitioner's conviction and death sentence. Exhibits 180.

26 64. The jurors at trial and in subsequent re-sentencings did not know that the

1 prosecution in this case was contrived. Petitioner's Fifth, Sixth, Eighth and Fourteenth
2 Amendment rights were violated by the state creating false evidence, forcing a witness to testify
3 to it repeatedly, and not disclosing its unconstitutional antics to the defense. Had the jury learned
4 of the nature of Saldana's relationship with law enforcement, the manufacturing of her
5 testimony, and the multiple reasons why she testified falsely, it likely would have believed that
6 her testimony and the state's remaining evidence—from persons receiving benefits for their
7 testimony—was insufficient to convict Petitioner beyond a reasonable doubt or sentence him to
8 death. Thus, it is reasonably likely the jurors considered the state's manufactured evidence and
9 there is a reasonable probability the result in this case would have been different, at
10 guilt/innocence and/or sentencing absent the wrongly obtained and presented testimony.

11 65. To the extent that the information contained in the claim is found to have been
12 available at the time of Petitioner's trials, Petitioner's trial counsel were constitutionally and
13 prejudicially ineffective in failing to develop and present the information.

14 **B. CLAIM 2: THE STATE ENGAGED IN OUTRAGEOUS GOVERNMENT**
15 **MISCONDUCT AND OVERREACHING AND FAILED TO DISCLOSE**
16 **MATERIAL EXCULPATORY AND IMPEACHMENT EVIDENCE.**¹²

17 Petitioner's First, Fifth, Sixth, Eighth, and Fourteenth Amendment rights to freedom of
18 speech, due process, rights to association, separation of church and state, a fair trial, the effective
19 assistance of counsel, present a defense, confrontation, compulsory process, a reliable and
20 accurate guilt and penalty assessment based on accurate rather than false testimony and evidence,
21 a fair, reliable, non-arbitrary sentencing determination, and be free of the imposition of a cruel
22 and unusual punishment were violated when the prosecutors in each of his trials engaged in
23 pervasive and egregious misconduct and systematically engaged in campaigns to deprive

24 _____
25 ¹² Petitioner previously raised this claim as Claim 1 in the Supplemental Petition for Writ of
26 Habeas Corpus. Petitioner re-presents it here because it is further supported by the previously
unavailable allegations contained in, and evidence proffered in support of, Claim 1, *supra*.

1 Petitioner of any semblance of a fair trial or reliable guilt and penalty determinations. Two
2 veteran Clark County prosecutors, Dan Seaton and Mel Harmon, both of whom have long
3 records of prosecutorial misconduct, drew upon their vast arsenal of unlawful and unethical
4 tactics to convict Petitioner and sentence him to death. Mr. Seaton and Mr. Harmon, who
5 throughout their careers have displayed a callous disregard for a fair judicial process and have
6 engaged in innumerable instances of misconduct, manufactured the State's case, and orchestrated
7 witness testimony that tainted each of the three trials. The misconduct in this case included
8 witness intimidation, coerced and false testimony influenced by promises of cash payments or
9 other benefits, withholding of critical, material information concerning the evidence presented at
10 trial and the treatment of potential witnesses, and government overreaching and deprived
11 Petitioner of his constitutional rights during each of the three trials. Indeed, the prosecutors'
12 pervasive and egregious misconduct during the three trials resulted in convictions and sentences
13 based not on a dispassionate and fair application of the law, but rather on false testimony,
14 religious fervor, bias, misinformation, non-record information, and improper and erroneous legal
15 standards. As a direct result of the misconduct, Petitioner was deprived of a jury that considered
16 and weighed only materially accurate, non-prejudicial, relevant evidence of which Petitioner had
17 notice and a fair opportunity to test and refute, nor did it give full effect to all evidence in
18 mitigation of penalty, to the privilege against self-incrimination, to the effective assistance of
19 counsel, due process, or equal protection.

20 The violations of these rights, individually and cumulatively, prejudicially affected and
21 distorted the investigation, discovery, presentation, and consideration of evidence as well as each
22 and every factual and legal determination made by trial counsel, the state courts and the jurors at
23 all stages of the proceedings from the time of Petitioner's arrest through and including the
24 rendering of the judgment of death.

25 In support of this claim, Petitioner alleges the following facts, among others to be
26 presented after full discovery, investigation, adequate funding, access to this Court's subpoena

1 power, and an evidentiary hearing:

2 1. Those facts and allegations set forth in each paragraph of this Petition and the
3 exhibits are incorporated by reference as if fully set forth herein to avoid unnecessary duplication
4 of relevant facts.

5 2. Prosecutorial misconduct is the law of this case. The Nevada Supreme Court
6 reversed the death penalty in the first trial of this case as a direct result of the pervasive
7 prosecutorial misconduct engaged in by the State. *See Flanagan v. State*, 104 Nev. 105, 755
8 P.2d 836 (1988). The Nevada Supreme Court, however, rejected the equally invidious
9 prosecutorial misconduct that pervaded the guilt phase of the trial with the statement that the
10 evidence of defendant's guilt was "overwhelming."

11 3. The Nevada Supreme Court's conclusion, however, was made without either the full
12 facts of the prosecutors' misconduct or the true facts of the crime, as documented in this Petition.
13 The record in this case establishes beyond peradventure that Petitioner's constitutional rights
14 were eviscerated by the systematic misconduct of Mr. Seaton and Mr. Harmon, acting on behalf
15 of the State.

16 4. Misconduct has marked the careers of both Mr. Seaton and Mr. Harmon. Their
17 ethical and unlawful conduct represents a pattern and practice of their intention to violate the
18 statutory and constitutional rights of criminal defendants, particularly those charged in capital
19 proceedings.

20 a. Nevada appellate cases document the repeated and callous disregard shown by
21 both these prosecutors for the rights of criminal defendants. *See, e.g., Howard v. State*, 106 Nev.
22 713, 722 n.1, 800 P.2d 175 (1990) (noting that Seaton had a "history of persistent disregard for
23 established rules of professional conduct regarding improper argument before the jury" and
24 citing seven other cases as examples of Seaton's egregious and unprofessional action); *see also*
25 *Downey v. State*, 103 Nev. 4, 731 P.2d 350 (1987); *Browning v. State*, 104 Nev. 269, 757 P.2d
26 351 (1988); *Pelligrini v. State*, 104 Nev. 625, 764 P.2d 484 (1988); *Collier v. State*, 101 Nev.

1 473, 705 P.2d 1126 (1985); *Santillanes v. State*, 104 Nev. 699, 765 P.2d 1147 (1988); *Yates v.*
2 *State*, 103 Nev. 200, 734 P.2d 1252 (1987); *Valerio v. State*, Nev. Supreme Ct. Case No. 200
3 (1987) (unpublished).

4 b. Similarly, the Nevada Supreme Court has found that Harmon has engaged in
5 misconduct and flouts his professional and constitutional obligations. *See, e.g., Jimenez v. State*,
6 112 Nev. 610, 918 P.2d 687 (1996); *D'Agostino v. State*, 112 Nev. 417, 915 P.2d 264 (1996).

7 c. Although the Nevada Supreme Court has recognized the pervasive nature of
8 their misconduct, the Court's failure to purge the taint of such state-sanctioned constitutional
9 violations by reversing convictions so that there will be genuine consequences for the disregard
10 of a defendant's rights has only encouraged the misconduct. Indeed, Seaton and Harmon have
11 publicly joked about which of them holds the record for prosecutorial misconduct.

12 d. The continued misconduct of these two prosecutors, in light of the cases cited
13 above, indicate that Seaton and Harmon suffer from "prosecutorial recidivism"—the tendency of
14 the same prosecutor or office to engage in prosecutorial misconduct repeatedly—despite
15 admonishments from the court. This pattern of prosecutorial recidivism provides a firm basis
16 and incentive for this Court to infer that the misconduct is intentional, or at least knowing.

17 5. The gross misconduct here infused both the guilt and the penalty phases of the trial.
18 Throughout the process, the State unconstitutionally withheld critical information from the
19 defense concerning the evidence presented at trial and the treatment of potential witnesses,
20 presented coerced and false testimony and testimony influenced by promises of cash payments or
21 other benefits, and systematically engaged in campaigns to deprive Petitioner of any semblance
22 of a fair trial or reliable guilt or penalty verdict.

23 6. Witness intimidation, coerced and false testimony, and government over-reaching
24 are the cornerstones of the investigation and prosecution of Petitioner. The numerous instances
25 of misconduct during the investigation and prosecution of Petitioner include, but are not limited
26 to, the following:

1 a. From the moment that the crimes were discovered, law enforcement officials
2 engaged in a campaign of witness intimidation and coercion in order to create a case against
3 Petitioner and his co-defendants. Several prosecution witnesses were threatened with criminal
4 prosecution if they did not cooperate with law enforcement and were coerced into testifying.
5 John Lucas, a critical prosecution witness, was threatened with prosecution if he did not
6 cooperate. Declaration of John Lucas, III (Lucas Dec.), ¶6 (30 AA 7138).¹³ Rusty Havens
7 recounts the fear that he experienced when police questioned him, despite his having been in
8 custody during the time of the crimes. Declaration of Rusty Havens (“Havens Dec.”) ¶8 (30 AA
9 7145). Similarly, police threatened Wayne Wittig with “charges of contempt and withholding
10 information.” Declaration of Wayne Eric Alan Wittig (“Wittig Dec.”) ¶¶32, 34 (30 AA 7170).

11 b. Law enforcement improperly employed as a police agent Angela Saldana, a
12 young woman who had previously had sexual relations with officers of the Las Vegas
13 Metropolitan Police Department, in an effort to obtain or be in a position to claim that she had
14 obtained incriminating statements and physical evidence from Petitioner. Reporter’s Transcript
15 of Jury Trial 835-949 (8 AA 1745 - 9 AA 1859) (Angela Saldana’s testimony); Declaration of
16 Debora L. Samples Smith (“Samples-Smith Dec.”) ¶¶10 (1130 AA 7168); Declaration of Angela
17 Saldana Ficklin (“Saldana-Ficklin Dec.”) ¶¶5, 8, 9, 10 (30 AA 7194). In order to obtain
18 information for law enforcement, Saldana engaged in sexual relations with Mr. Flanagan.
19 Reporter’s Transcript of Jury Trial 909 (8 AA 1819). In exchange for her assistance as a police
20 agent, Saldana was not prosecuted for prostitution and other crimes. Declaration of Michelle
21 Gray Thayer (“Thayer Dec.”) ¶¶9, 10; (30 AA 7191); Samples-Smith Dec. ¶¶2, 11 (30 AA
22 7168). Neither Saldana’s status nor the benefits she received were disclosed to the defense.

23 c. The prosecution improperly and unconstitutionally induced the testimony of
24

25 ¹³ The declarations and other exhibits contained in the Appellant’s Appendix in *Flanagan v.*
26 *State*, Nev. Supreme Ct. Case No. 40232, were initially filed in support of the Supplemental
Petition for Writ of Habeas Corpus in this Court.

1 critical prosecution witnesses, including Lucas, Havens, and Saldana, with promises of cash
2 payments, immunity from prosecution, and other benefits in exchange for their testimony against
3 Mr. Flanagan. Lucas Dec. ¶¶6, 11, 12 (30 AA 7138); Saldana-Ficklin Dec. ¶5; 7 (30 AA 7194);
4 Havens Dec. ¶¶8, 9 (30 AA 7145); Declaration of Roy George McDowell (“McDowell Dec.”)
5 ¶10 (30 AA 7158); Reporter’s Transcript of Jury Trial 798 (7 AA 1708) (John Lucas’s
6 testimony), 940 (8 AA 1848) (Angela Saldana’s testimony). The prosecution then coached and
7 influenced the testimony of numerous prosecution witnesses, encouraged witnesses to hear the
8 testimony and accounts of other prosecution witnesses and to shape their testimony in
9 accordance with other’s accounts, and instructed witnesses not to reveal exculpatory or
10 impeachment evidence to the defense or the court. Lucas Dec. ¶¶8, 9 (30 AA 7138); Havens
11 Dec. ¶¶8, 9 (30 AA 7145); Wittig Dec. ¶40 (30 AA 7170); McDowell Dec. ¶14 (30 AA 7158);
12 Thayer Dec. ¶11 (30 AA 7191); Reporter’s Transcript of Jury Trial 769 (7 AA 1679) (John
13 Lucas’s testimony). Thus, the State improperly and unconstitutionally presented false testimony
14 regarding the “planning” of the crime, including false evidence that Petitioner discussed killing
15 his grandparents in order to obtain an inheritance. Reporter’s Transcript of Jury Trial 846-47 (8
16 AA 1756-57) (Angela Saldana’s testimony); Saldana-Ficklin Dec. ¶2 (30 AA 7194);, Lucas Dec.
17 ¶23 (30 AA 7138); Wittig Dec. ¶36 (30 AA 7170).

18 7. The State possessed substantial amounts of material, exculpatory, impeachment and
19 mitigation evidence in this case, which would have been favorable to the defense, and which was
20 never disclosed.

21 a. The prosecutors in Clark County, Nevada, and Mr. Seaton in particular, have
22 routinely failed to comply with constitutionally-mandated discovery obligations by withholding
23 exculpatory and impeachment evidence from criminal defendants. Mr. Harmon has openly
24 disparaged the disclosure requirements imposed by *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct.
25 1555 (1995), as “very fine for judges to write about but ... a legal fiction.” February 8, 1996
26 Transcript of Proceedings in *State v. Rippo*, Eighth Judicial District Court Case No. 106784. In

1 two other capital cases, the Nevada Supreme Court has found that Mr. Harmon refused to
2 disclose exculpatory and/or impeachment evidence to the defense. *E.g., Jimenez v. State*, 112
3 Nev. 610, 918 P.2d 687 (1996); *D'Agostino v. State*, 112 Nev. 417, 915 P.2d 264 (1996). In
4 several other cases, deputy district attorneys in Clark County, including Mr. Harmon, have
5 acknowledged that they are not even familiar with the United States Supreme Court's decision in
6 *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763 (1972). April 19, 1993 Transcript in *State v.*
7 *Jimenez*, Eighth Judicial District Court Case No. C77955; July 30, 1996 Transcript in *State v.*
8 *Bailey*, Eighth Judicial District Court Case No. C129217.

9 b. Sworn testimony from a Nevada capital habeas corpus case that was then-
10 pending before the United States District Court for the District of Nevada confirms the fact that
11 Clark County Officials do not comply with their constitutionally-mandated discovery
12 obligations. Lorne Lomprey, the defense investigator for Richard Haberstroh, testified under
13 oath that it was "quite, quite common" for police to withhold exculpatory evidence. *Haberstroh*
14 *v. McDaniel*, CV-N-94-009 (D. Nev.), Exhibit 162 in the *Haberstroh* case at 35, 86. Mr.
15 Lomprey was in a position to know this type of information: He served for approximately 16
16 years as a law enforcement officer in Clark County—eight years as a Fire Investigator with Clark
17 County Fire Department, and eight years as a detective with the Henderson, Nevada Police
18 Department. *Id.* at 62-64.

19 c. In this case, the prosecution unlawfully and prejudicially did not reveal to
20 Petitioner exculpatory or mitigating evidence, including the numerous instances in which the
21 prosecution shaped and obtained the testimony of critical prosecution witnesses, including the
22 circumstances outlined in paragraph six, *supra*. During its investigation and prosecution of
23 Petitioner, State officials interviewed numerous individuals who provided critical information
24 contrary to the State's theory of the case. In each instance, law enforcement unconstitutionally
25 withheld such material information. For example, John Lucas's statement to the prosecutors that
26 the killings were not planned was never disclosed to Petitioner. Lucas Dec. ¶23 (30 AA 7138).

1 The State similarly did not disclose the critical statements of Robert Ramirez who was
2 interviewed numerous times by law enforcement and whose statements provided evidence of
3 Petitioner's actual innocence. Declaration of Robert Ramirez ("Ramirez Dec.") ¶19 (30 AA
4 7186). Like Ramirez, a number of other witnesses described to law enforcement Petitioner's
5 good character, his inability to harm anyone, and his domination by others. Wittig Dec. ¶¶34,
6 35, 36 (30 AA 7170); Lucas Dec. ¶23 (30 AA 7138). Yet the prosecution repeatedly portrayed
7 Petitioner as the ringleader of the conspiracy. Reporter's Transcript of Opening Statements
8 1219-36 (5 AA 1176-93); Reporter's Transcript of Jury Trial 1465-534, 1650-80 (11 AA 2491-
9 2560, 2676-2706); Reporter's Transcript of Jury Trial 1810, 1864 (12 AA 2882, 2936).

10 d. The prosecution unlawfully and prejudicially did not disclose that the physical
11 evidence and condition of the crime scene conflicted with its theory of the crimes, the versions
12 proffered by prosecution witnesses, and the prosecution's description of Petitioner's culpability
13 for the crimes.

14 e. The prosecution unlawfully and prejudicially did not disclose material,
15 exculpatory information that demonstrated that Petitioner lacked the specific intent to kill Mr.
16 Gordon, including the statements of Robert Ramirez, who provided evidence of Petitioner's
17 actual innocence. Ramirez Dec. ¶19 (30 AA 7186). Had the information withheld by the
18 prosecution been revealed, defense counsel could have used it to demonstrate Petitioner's actual
19 innocence of the aiding and abetting charge, and the jury would not have convicted him.

20 f. The prosecution unlawfully and prejudicially did not disclose material,
21 exculpatory information that demonstrated that Petitioner did not participate in any conspiracy to
22 commit the charged crimes.

23 g. The prosecution unlawfully and prejudicially did not disclose material,
24 exculpatory information that demonstrated that Petitioner did not possess the intent required of
25 the charged crimes because of his mental condition prior to and during the crimes.

26 h. The prosecution unlawfully and prejudicially did not disclose material,

1 exculpatory information that demonstrated that Petitioner has a far less culpable role in the
2 events preceding, during, and after the charged crimes. In addition, the prosecution unlawfully
3 and prejudicially did not disclose material, exculpatory information that demonstrated that
4 Petitioner's actions were governed and influenced by others, particularly as a result of his mental
5 condition prior to, during, and after the crimes.

6 i. The prosecution unlawfully and prejudicially did not disclose material,
7 exculpatory information that demonstrated that Petitioner was not competent to stand trial and
8 was not mentally present at critical stages of the proceedings.

9 j. The prosecution unlawfully and prejudicially did not disclose the existence of
10 Petitioner's will until the first penalty phase, thus precluding the defense from preparing for its
11 use. Reporter's Transcript of Jury Trial 1783 (12 AA 2855). In addition, the prosecution did not
12 reveal to Petitioner's counsel, nor did Petitioner independently understand the significance of the
13 fact that he met over a period of several days with agents of the State from an agency called
14 PROBE to assist in a program designed to discourage youth from participation in witchcraft.
15 Affidavit of Randall H. Pike ("Pike Aff.") ¶5 (30 AA 7148). The prosecution further unlawfully
16 and prejudicially withheld mitigating evidence about Petitioner's character, background, drug
17 use, and mental condition, including his susceptibility to the influence of others. Such evidence
18 would have been highly material as compelling mitigation at Petitioner's sentencing hearing. As
19 a result of its unlawful withholding of this information, the State was able falsely to portray
20 Petitioner as a black-hearted devil worshipper, intent on murder and theft. *See, e.g.*, Reporter's
21 Transcript of Jury Trial 1466 (11 AA 2492); Reporter's Transcript of Jury Trial 1855 (12 AA
22 2927); Pike Aff. ¶13 (30 AA 7148).

23 k. All of the withheld evidence would have been favorable to Petitioner's
24 defense, whether viewed individually or as a whole. The withholding of this material
25 exculpatory and impeachment evidence rendered Petitioner's judgment of convictions and
26 sentences untrustworthy, because the jury's verdicts were based on incomplete information. Had

1 the information withheld by the prosecution been revealed, defense counsel could have used
2 these materials to cast serious doubt on the prosecution's case, cross-examine the prosecution's
3 witnesses and secure a more favorable result for Petitioner. There is a reasonable probability,
4 sufficient to undermine the confidence in the outcome, that had all of this evidence been
5 disclosed, the result of these proceedings would have been different. The suppression of this
6 crucial evidence substantially and injuriously affected the process to such an extent as to render
7 Petitioner's convictions and sentences fundamentally unfair and unconstitutional. The State
8 accordingly cannot show, beyond a reasonable doubt, that the suppression of this evidence did
9 not affect the convictions and sentences.

10 8. The prosecution engaged in outrageous and unconstitutional misconduct during jury
11 selection in the three trials. In particular, the prosecutors used their peremptory challenges in a
12 racially discriminatory manner so as to violate Petitioner's federal constitutional right to equal
13 protection of the law and his constitutional right to a jury drawn from a representative cross-
14 section of the community.

15 a. During Petitioner's trials, the prosecutor used his peremptory challenges to
16 exclude members of cognizable ethnic or racial groups. For example, during the second penalty
17 trial, in violation of Petitioner's constitutional rights, the prosecution utilized its peremptory
18 challenges in an intentionally gender-discriminatory manner by excluding all but one woman
19 from the jury panel. Three of the peremptory challenges utilized by the prosecution were used to
20 exclude Laura J. Jacobs (Reporter's Transcript of Jury Trial 3706 (15 AA 3612)), Joleen J.
21 Melton (Reporter's Transcript of Jury Trial 3749 (15 AA 3655)), and Alverta N. Colonna
22 (Reporter's Transcript of Jury Trial 3766 (15 AA 3672)).

23 b. Moreover, the prosecution improperly and unlawfully used law enforcement
24 resources to investigate the backgrounds of potential jurors and deprive Petitioner of the fruits of
25 such investigation and thereby distorted the adversarial process and deprived Petitioner of his
26 statutory and constitutional rights. For example, during voir dire, Mr. Seaton admitted that he

1 had run a “police scope” on one of the prospective jurors, Mr. Youngberg, without sharing the
2 results with defense counsel, contrary to his prior agreement with them. Mr. Seaton explained
3 his action as follows: “And simply out of curiosity I did run that one name. Didn’t tell defense
4 counsel because I knew it was really a waste of time because he was one of our first
5 peremptories.” Reporter’s Transcript of Jury Trial 382 (5 AA 1138). The prosecution’s
6 improper and unlawful use of law enforcement resources to investigate the backgrounds of
7 potential jurors, and the prosecution’s failure to inform Petitioner of that action, distorted the
8 adversarial process and deprived Petitioner of statutory and constitutional rights.

9 c. The prosecution similarly violated Petitioner’s rights to an impartial jury and
10 jury drawn from a fair cross section of the community at the 1985 guilt trial and the third penalty
11 trial. The state’s interference with Petitioner’s right to discovery and a complete record of the
12 proceedings continues to prevent Petitioner from demonstrating that the prosecution exercised
13 peremptory challenges on constitutionally impermissible bases, including race and gender, and
14 engaged in other methods of skewing jury selection in Clark County. These methods included
15 training district attorneys to strike jurors for constitutionally impermissible reasons and
16 concealing such unconstitutional behavior from judicial review.

17 9. The prosecutors’ misconduct intensified during each of the three trials, with the
18 prosecution successfully introducing irrelevant and prejudicial material that inflamed the jury’s
19 passions and overrode its considered and fair review of the evidence and application of the law,
20 injecting personal opinions and evaluations of the case and Petitioner, and depriving Petitioner of
21 a fair guilt determination. The record is replete with such misconduct, including but not limited
22 to the following examples:

23 a. Mr. Harmon argued during the guilt phase, in an obvious attempt to condemn
24 all four defendants because of their associations, “Four men charged with these crimes. Four
25 men who had as their friends gang members. These people were school dropouts. They were
26 drug users. They were devil worshippers.” Reporter’s Transcript of Jury Trial 1466 (11 AA

1 2492). None of those characteristics are criminal, yet they were used by the prosecution to paint
2 the defendants as evil people and therefore worthy of condemnation. He later referred to
3 Petitioner's "devil worshipping buddies." Reporter's Transcript of Jury Trial 1475 (11 AA 2501.
4 Seaton also commented on Petitioner's motive and speculated that he intended to "divvy it up
5 [the estate] in the middle of a coven proceeding or something." Reporter's Transcript of Jury
6 Trial 1485 (11 AA 2511). He discussed Petitioner's role in the conspiracy, saying "they didn't
7 only lead the coven, they let their black and their white magic spill over into this conspiracy and
8 it was they who did all of the planning of the things that we have talked about before."
9 Reporter's Transcript of Jury Trial 1483 (11 AA 2519). And again, "These people were one and
10 the same. They were buddies and partners as well as conspirators. And they did everything
11 together. They shared drugs, they partied, they shared beer, they shared witchcraft." Reporter's
12 Transcript of Jury Trial 1523 (11 AA 2549). All of these comments were made by the State
13 during closing argument in the guilt phase.

14 b. The prosecution repeatedly and unlawfully referred to prejudicial matters
15 outside of the record, including stating during the closing argument of the guilt trial that
16 Petitioner believed that he was going to inherit his grandparents' property, which he would split
17 with the co-defendants "in the middle of a coven proceeding or something." The prosecution
18 continually invited the jury to speculate possible future actions by Petitioner, exhorting the jurors
19 to conclude that Petitioner was an evil person. *See, e.g.,* Reporter's Transcript of Jury Trial 1507
20 (11 AA 2533).

21 c. The prosecutor intentionally, improperly, and prejudicially penalized Petitioner
22 for exercising his right to remain silent by commenting on his failure to take the stand in his own
23 defense. The prosecutor argued, "[a]nd the last point to be made about whether or not
24 conspiracies occurred is that the conspiracies, the agreements, the meetings go uncontradicted.
25 No one has taken the stand in this case that I remember, no one has taken the stand and said,
26 'wait a minute. Those people are lying. Those meetings didn't take place.'" Reporter's

1 Transcript of Jury Trial 1488-89 (11 AA 2513-14). Judge Mosley, without justification or even
2 explanation, ignored the violation when it was called to his attention. Reporter's Transcript of
3 Jury Trial 1489 (11 AA 2514).

4 d. Seaton and Harmon also injected their own personal opinion (*see, e.g.*,
5 Reporter's Transcript of Jury Trial 1497, 1498, 1520 (11 AA 2523, 2525, 2546), in violation of
6 established state and federal law and ethical rules.

7 e. Mr. Harmon made blatant attempts to appeal to the passion and prejudice of
8 the jury by emphasizing the evil of the defendants and the benevolence (kindly grandparents) of
9 the victims. Reporter's Transcript of Jury Trial 1466, 1475, 1485, 1492 1523, 1651, 1658, 1696,
10 1702 (11 AA 2492, 2501, 2511, 2518, 2549, 2677, 2684; 12 AA 2876, 2882).

11 f. Mr. Harmon similarly violated Petitioner's right to a fair trial and due process
12 by calling upon the authority of his office and his experience in expressing his personal opinion
13 to sway the jury when he said "I can't think of a case which more clearly establishes that it was
14 First Degree murder, because of the felony murder rule and also because of the clear plan and
15 design to murder two human beings." Reporter's Transcript of Jury Trial 1672-73 (11 AA 2698-
16 99).

17 g. The prosecutor intentionally misled the jury to impose a death penalty based
18 on capricious considerations of biblical dogma and pedantic exploitation of divine law, thereby
19 interjecting unconstitutionally impermissible factors into the sentencing decision. Specifically,
20 Harmon invoked the Bible in an attempt to exhort the jury to condemn Petitioner. Reporter's
21 Transcript of Jury Trial 1677 (11 AA 2703). The prosecutor's biblical arguments were
22 calculated to exploit the emotions and scruples of jurors schooled in the Christian religion to
23 disregard their duty to weigh the evidence before them and render a fair and impartial decision.

24 10. The prosecution intentionally, unlawfully, and prejudicially sought to introduce
25 evidence of witchcraft and satanic worship at the guilt and penalty trials in an effort to have the
26 jury convict and sentence Petitioner on the basis of constitutionally protected beliefs and

1 associations, which were irrelevant to the crime and penalty.

2 a. Although the prosecution knew or reasonably should have known that
3 evidence of witchcraft and satanic worship was irrelevant to the crimes charged, the prosecutors
4 sought to inject such evidence at both the guilt and penalty trials.

5 b. The State's use of such evidence was an intentional effort to deprive Petitioner
6 of his constitutional rights to freedom of religion, association, and thought.

7 c. The admission and use of evidence of witchcraft and satanic worship at the
8 guilt phase by the State, evidence which gave the crime its notoriety and which caused everyone
9 who heard about it to be repulsed, was designed to create in the jury such a powerful feeling of
10 repugnance that the only proper response would be the imposition of the death penalty. That
11 cannot help but improperly influence the jury's deliberations on the question of guilt, and the
12 only appropriate response is to vacate the convictions and order a new trial.

13 11. Despite the prosecutors' repeated and intentional misconduct, the trial court failed to
14 undertake any steps to protect Petitioner's statutory and constitutional rights.

15 12. The resulting deprivations of Petitioner's fundamental federal constitutional rights
16 was prejudicial, had a substantial and injurious effect or influence on the jury's determination of
17 the verdicts at the guilt and penalty phases, and require the granting of habeas corpus relief from
18 the judgment of convictions and the sentences of death.

19 13. The state court previously improperly deprived Petitioner of the resources necessary
20 to fully develop the facts in support of this claim, including funding for investigation and
21 experts, discovery, and an evidentiary hearing.

22 14. To the extent that Respondents assert that trial and/or appellate and/or post-
23 conviction counsel should have raised these issues earlier or that Petitioner otherwise failed to
24 comply with any state procedures, trial and/or appellate counsel and/or post-conviction counsel's
25 failure to do so constitutes deficient and prejudicial representation that deprived Petitioner of his
26 statutory and constitutional rights to effective representation and timely and effective review of

1 these claims. Had such challenges been made, the prejudicial effects of the unlawful action
2 would have been ameliorated and Petitioner's rights would have been protected.

3 **C. CLAIM 3: THE STATE'S IMPROPER PAYMENT OF MONEY AND**
4 **OTHER INDUCEMENTS TO KEY WITNESSES PRODUCED UNRELIABLE**
5 **TESTIMONY AND RENDERED THE TRIALS FUNDAMENTALLY UNFAIR.¹⁴**

6 Petitioner's convictions and death sentences are invalid under the federal constitutional
7 guarantees of due process, equal protection, trial by an impartial jury, and a reliable sentence,
8 guaranteed by the Fifth, Sixth, Eighth, and Fourteenth amendments to the United States
9 Constitution as the result of the substantial and injurious effect produced by the State's payment
10 of money and other inducements to key witnesses. To secure Petitioner's conviction, the State
11 promised and paid key witnesses an excessive amount in exchange for their testifying against
12 Petitioner and withheld full payment until after the witnesses testified to the State's satisfaction.
13 Lucas Dec. ¶9 (30 AA 7138); Reporter's Transcript of Jury Trial 706 (7 AA 1696); Reporter's
14 Transcript of Jury Trial 938 (8 AA 1848). The State did not fully disclose the terms of its
15 agreement with the witnesses to the jury or to Petitioner in violation of the federal constitutional
16 requirements to disclose exculpatory and/or impeachment information. Nor was the jury given a
17 cautionary instruction regarding the weight of the testimony. This testimony was inherently
18 unreliable and rendered the trial and sentencing fundamentally unfair and unconstitutional.

19 The violations of these rights, individually and cumulatively, prejudicially affected and
20 distorted the investigation, discovery, presentation, and consideration of evidence as well as each
21 and every factual and legal determination made by trial counsel, the state courts and the jurors at
22 all stages of the proceedings from the time of Petitioner's arrest through and including the
23 rendering of the judgment of death.

24 ¹⁴ Petitioner previously raised this claim as Claim 2 in the Supplemental Petition for Writ of
25 Habeas Corpus. Petitioner re-presents it here because it is further supported by the previously
26 unavailable allegations contained in, and evidence proffered in support of, Claim 1, *supra*.

1 In support of this claim, Petitioner alleges the following facts, among others to be
2 presented after full discovery, investigation, adequate funding, access to this Court's subpoena
3 power, and an evidentiary hearing:

4 1. Those facts and allegations set forth in each paragraph of this Petition and the
5 exhibits are incorporated by reference as if fully set forth herein to avoid unnecessary duplication
6 of relevant facts.

7 2. The State promised to pay and in fact paid several of the key witnesses, including
8 conditioning the payments on specific testimony.

9 a. John Lucas, Rusty Havens, and Angela Saldana were the State's key witnesses
10 used to build the case that resulted in Petitioner's convictions and death sentences. These
11 witnesses each received \$2,000 in exchange for their testimony, an excessive sum of money for
12 teenagers in the mid-1980s. In Mr. Lucas's case, the money was conditional not only on his
13 testifying, but on what he said on the stand. The concessions offered went beyond mere
14 treatment of leniency, rendering the payments unlawful.

15 b. Two witnesses (Lucas and Saldana) testified that they expected to receive
16 additional money after the completion of his or her testimony. 7 AA 1708; 8 AA 1848.

17 c. Mr. Lucas and Mr. Havens each also received special favors from the
18 prosecutor in exchange for their testimony, including agreements that they would not be
19 prosecuted.

20 d. The state's interference with Petitioner's right to discovery and a complete
21 record of the proceedings continues to prevent Petitioner from demonstrating that the prosecution
22 provided additional rewards to these witnesses and similar incentives to other witnesses.

23 e. The State's withholding of the terms of these agreements was particularly
24 egregious in the case of Mr. Lucas, who admitted that the testimony he gave at the preliminary
25 hearing and trial was inconsistent with statements he previously had given to the police. 7 AA
26 1696-97. The State paid Lucas \$1,000 before the evidentiary hearing, and then an additional

1 \$1,000 after trial. *Id.*; 7 AA 1708. After these payments, Lucas altered his testimony. 7 AA
2 1714. Lucas testified that he was given a copy of his statement, put in a room by himself, and
3 directed to memorize it. Lucas Dec. ¶8 (30 AA 7138). Lucas also was required to rehearse his
4 testimony. *Id.* at ¶9. Lucas received his \$2,000 in two payments, once after he testified at the
5 evidentiary hearing and once after he testified at trial. *Id.* Based on the timing of these
6 payments, and on the State's actions forcing Lucas to memorize his testimony, the testimony was
7 particularized and amounted to the following of a script.

8 f. The record establishes that the State also did not bargain in good faith for
9 Saldana's testimony. Saldana admitted that she had sex with Petitioner for the purpose of
10 eliciting information from him. 8 AA 1819. During this time, Saldana was meeting with police
11 officers and giving them the information she allegedly retrieved from Petitioner. 8 AA 1842-
12 1843. Although Saldana testified that the case investigators did not ask her to exchange sex for
13 information, they knew that she was pretending to be his girlfriend and exhorted her to exploit her
14 relationship for the state's benefit. 8 AA 1846.

15 3. The payments violated Petitioner's federal constitutional rights first because the
16 payments were in violation of established, binding state precedent, which held that the State
17 "may not bargain for testimony so particularized that it amounts to following a script." *Sheriff,*
18 *Humboldt County v. Acuna*, 819 P.2d 197, 819 P.2d 197 (1991). This state law created a
19 federally protected liberty interest in having the jury be provided with a cautionary instructions
20 when the prosecution promises consideration in exchange for testifying. Thus, Petitioner is
21 entitled to federal relief because the state law created a protected liberty interest that is
22 enforceable by the Due Process Clause of the Fourteenth Amendment.

23 4. Petitioner's federal due process rights were similarly violated. Testimony for which
24 the State pays or offers a more lenient sentence is admissible only where the jury is informed of
25 the exact nature of the agreement, defense counsel is permitted to cross examine the witness
26 about the agreement, and the jury is instructed to weigh this testimony with care.

1 5. The resulting deprivations of Petitioner's fundamental federal constitutional rights
2 were prejudicial, had a substantial and injurious effect or influence on the jury's determination of
3 the verdicts at the guilt and penalty phases, and require the granting of habeas corpus relief from
4 the judgment of convictions and the sentences of death.

5 6. The state court previously improperly deprived Petitioner of the resources necessary
6 to fully develop the facts in support of this claim, including funding for investigation and
7 experts, discovery, and an evidentiary hearing.

8 7. To the extent that Respondents assert that trial and/or appellate and/or post-
9 conviction counsel should have raised these issues earlier or that Petitioner otherwise failed to
10 comply with any state procedures, trial and/or appellate counsel and/or post-conviction counsel's
11 failure to do so constitutes deficient and prejudicial representation that deprived Petitioner of his
12 statutory and constitutional rights to effective representation and timely and effective review of
13 these claims. Had such challenges been made, the prejudicial effects of the unlawful action
14 would have been ameliorated and Petitioner's rights would have been protected.

15 **D. CLAIM 4: PETITIONER WAS DEPRIVED OF HIS FEDERAL**
16 **CONSTITUTIONAL GUARANTEE OF EFFECTIVE ASSISTANCE OF**
17 **COUNSEL.¹⁵**

18 The convictions and sentences of death were rendered in violation of Petitioner's rights to
19 a fair and impartial jury, a reliable, fair, non-arbitrary, and non-capricious determination of guilt
20 and penalty, to the effective assistance of counsel, present a defense, confrontation and
21 compulsory process, to the enforcement of mandatory state laws, a trial free of materially false
22 and misleading evidence, and to due process of law as guaranteed by the First, Fourth, Fifth,
23 Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because Petitioner's

24 ¹⁵ Petitioner previously raised this claim as Claim 4 in the Supplemental Petition for Writ of
25 Habeas Corpus. Petitioner re-presents it because it is further supported by the previously
26 unavailable allegations contained in, and evidence proffered in support of, Claim 1, *supra*.

1 trial counsel rendered constitutionally deficient representation at all critical stages of the criminal
2 proceedings.

3 Trial counsel unreasonably failed to conduct a timely or adequate investigation of the
4 potential guilt and penalty phase issues, did not develop or present coherent trial strategies, and
5 were unable to make informed and rational decisions regarding potentially meritorious defenses
6 and tactics. Trial counsel's errors and omissions were such that a reasonably competent attorney
7 acting pursuant to prevailing professional norms would not have performed in such a fashion.
8 Reasonably competent counsel handling a capital case at the time of Petitioner's trial knew that a
9 thorough investigation of the prosecution's theories of guilt, independent analyses of the physical
10 evidence supporting those theories, and potential defenses were essential to the development and
11 presentation of a defense at trial. Reasonably competent counsel also recognized that a thorough
12 investigation of Petitioner's background and family history, including, but not limited to,
13 Petitioner's medical, mental health, academic, and social history, was essential to the adequate
14 preparation of both the guilt and penalty phases. See ABA Guidelines for the Appointment and
15 Performance of Counsel in Death Penalty Cases (1989); ABA Guidelines for the Appointment
16 and Performance of Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913 (2003); ABA
17 Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty
18 Cases, 36 Hofstra L. Rev. 677 (2008).

19 Counsels' failures to investigate adequately and present defenses and protect Petitioner's
20 statutory and constitutional rights prejudiced the defense. But for counsels' unprofessional
21 errors, there is a reasonable probability that the result of the proceeding would have been
22 different.

23 Counsel conducted virtually no investigation into guilt phase issues; failed to develop a
24 guilt phase strategy; did little to challenge the evidence introduced by the prosecution; presented
25 no defense; and failed to present readily available evidence disputing the prosecution's theory of
26 the case and Petitioner's culpability. Had counsel conducted a minimally competent

1 investigation and provided minimally competent representation, counsel could have presented
2 evidence and argument establishing a reasonable doubt in the minds of the jurors that Petitioner
3 was legally responsible for the crimes charged.

4 Counsels' representation at the initial and subsequent penalty phases were similarly
5 deficient. As had Petitioner's guilt trial attorney, Petitioner's retrial attorneys failed to
6 investigate any aspects of the State's guilt evidence that was later also introduced at the penalty
7 retrials. The prosecution, therefore, was able to present the erroneous and false picture of
8 Petitioner's culpability for the crimes and Petitioner was deprived of his right to have a defense
9 presented that rebutted the State's theory of the crime and Petitioner's role. Counsel also failed
10 to conduct a reasonable mitigation investigation; present readily available and compelling
11 mitigating information; prepare and present a comprehensive social history of Petitioner, or
12 explain the effects of Petitioner's social history on his development, behavior, and functioning;
13 present evidence regarding Petitioner's myriad mental illnesses and impairments, despite being
14 on notice of such impairments; or present readily available evidence regarding Petitioner's
15 adaptability to prison. Petitioner's penalty phase counsel has admitted to being unprepared to go
16 to trial and having no strategic reason for failing to present compelling mitigating evidence to the
17 jury, despite the fact that such evidence was readily available to counsel. Had counsel presented
18 such evidence to the jury, the jury would not have sentenced Petitioner to death.

19 In support of this claim, Petitioner alleges the following facts, among others to be
20 presented after full discovery, investigation, adequate funding, access to this Court's subpoena
21 power, and an evidentiary hearing:

22 1. Those facts and allegations set forth in each paragraph of this Petition and the
23 exhibits are incorporated by reference as if fully set forth herein to avoid unnecessary duplication
24 of relevant facts.

25 2. Petitioner was represented from the time of his arrest in December 1984 until
26 approximately August 1, 1985, by the Clark County Public Defender's Office. Various members

1 of that office appeared on his behalf at different times throughout the pretrial proceedings. There
2 is no evidence in the record or in the files of the Public Defender's Office that anyone undertook
3 any investigation or pretrial preparation on behalf of Petitioner during this time period.

4 3. In July 1985, the Public Defender's Office developed a "conflict of interest" which
5 is entirely unexplained in the record. The trial court granted the Public Defender's motion to
6 withdraw as counsel for Petitioner. 2 AA 252-53.

7 4. The court then appointed Randall Pike, who represented Petitioner throughout his
8 first trial. Mr. Pike's appointment was confirmed on August 7, 1985 (2 AA 260), just days
9 before the evidentiary hearing on pre-trial motions began in this case. As demonstrated below,
10 Mr. Pike was inexperienced, had no time to prepare for that hearing or for the trial, conducted no
11 meaningful investigation despite obvious unresolved issues, missed repeated opportunities to
12 exploit inconsistencies in testimony between the evidentiary hearing and trial of either
13 prosecution or defense witnesses, generally offered only the most minimal of defenses, and
14 offered virtually nothing in the way of mitigating evidence in the penalty phase.

15 5. At the time he was appointed, Mr. Pike had been practicing law for only three years,
16 two of which had been in the District Attorney's Office. Pike Aff. ¶1 (30 AA 7148). He had not
17 previously handled a death penalty case as a defense lawyer. *Id.* ¶3. Inexplicably, he made no
18 request for appointment of co-counsel to assist him with the substantial amount of work
19 necessary in a short period of time in order to present an adequate defense. *Id.* ¶¶7, 10.

20 6. Mr. Pike unreasonably and prejudicially failed to conduct a complete and thorough
21 investigation of possible defenses to the charged crimes. Mr. Pike's failure to conduct an
22 adequate investigation and prepare a potential defense is demonstrated by a multitude of
23 prejudicial errors. These errors were unreasonably and prejudicially repeated by subsequent
24 counsel appointed to represent Petitioner during the later penalty phase retrials.

25 a. Mr. Pike made no request of the court for the investigation funds necessary to
26 fully explore all possible defenses. Mr. Pike undertook no investigation other than to meet

1 briefly with Petitioner's father, who was not a witness to the crime and whom Pike believed
2 possessed little relevant information. Pike Aff. ¶¶6, 10 (30 AA 7148). Mr. Pike only
3 perfunctorily interviewed a few of the State's witnesses. Pike Aff. ¶¶7, 10.

4 b. As a result of counsel's deficient performance, he and subsequent counsel did
5 not learn of, interview and call at trial Robert Ramirez, who would have testified to Petitioner's
6 actual innocence. Ramirez Dec. ¶¶12, 13, 19 (30 AA 7186). Ramirez would have testified that,
7 rather than acting as ringleader and trigger man as he was portrayed at trial, Petitioner was
8 actively trying to prevent the murders and put himself at risk of death in doing so. Ramirez Dec.
9 ¶¶12, 13, 19. The failure to discover and present this evidence was extremely prejudicial.

10 c. Trial counsel failed to investigate Petitioner's case and to put forth evidence of
11 Petitioner's lack of specific intent that Mr. Gordon be killed. Had trial counsel conducted a
12 minimally competent investigation, counsel would have discovered such evidence. Petitioner
13 was materially prejudiced by trial counsel's failures. Petitioner was also materially prejudiced
14 by trial counsel's failure to object to the court's erroneous instructions on murder liability,
15 because if the jury had been properly instructed on aiding and abetting, Petitioner would not have
16 been convicted or sentenced to death.

17 d. Mr. Pike unreasonably and prejudicially failed to cross examine all key
18 witnesses on prior statements and previous court hearing testimony and statements given to
19 police to exploit the inconsistencies inherent throughout. Pike Aff. ¶16 (30 AA 7148). Indeed,
20 because Mr. Pike did not compare the testimony given at the preliminary hearing and the
21 evidentiary hearing with the witnesses' testimony at trial, he was unable to discredit the State's
22 witnesses or bolster the defense case. Pike Aff. ¶16.

23 e. Although the evidence indicated inconsistencies between testimony and
24 physical evidence, such as blood spatters, fingerprints, and bullet trajectories (Pike Aff. ¶10), Mr.
25 Pike and subsequent counsel unreasonably failed to investigate these facts as potential defenses
26 at trial. Pike did not seek funds for or hire any forensic experts, such as ballistic, blood spatter,

1 or fingerprint experts. For example, he failed to cross examine anyone or argue about the
2 inconsistencies of different witnesses regarding the method of breaking the window through
3 which entry was allegedly achieved. One witness said the window was broken by a piece of
4 wood wrapped with black electrical tape that was introduced into evidence, yet there were no
5 glass shards or evidence of it having been involved in breaking the window. Pike Aff. ¶¶7, 17
6 (30 AA 7148); 8 AA 1774; 7 AA 1624. Another witness testified that Petitioner himself broke
7 the window with his fist, yet there was no cross examination about wounds to Petitioner's hand.
8 3 AA 609; 6 AA 1440; 2 AA 323-324; 9 AA 2043; 9 AA 2076-2089; 11 AA 2520; Pike Aff.
9 ¶¶7, 17. The lack of fingerprints of any of the defendants at the crime scene was a significant
10 fact that Pike failed to investigate and exploit at trial. Pike Aff. ¶¶7, 8. This fact alone, if
11 properly presented, could have raised significant doubt about the prosecution's case. When
12 coupled with the numerous other weaknesses in the State's case, it is reasonably probable that
13 outcome of the trial would have been different.

14 f. Moreover, Mr. Pike and subsequent counsel unreasonably and prejudicially
15 failed to develop and present substantial evidence to dispute the State's theory concerning the
16 shootings of Mr. and Mrs. Gordon provided by Akers and Saldana. With respect to Mr. Gordon,
17 the State contended that Randy Moore shot him from the window on the first floor as Mr.
18 Gordon descended the stairs. The trajectory of the gunshot wounds that Mr. Gordon sustained,
19 however, disproves that theory. The lethal wound to Mr. Gordon's upper chest, which produced
20 the large amount of blood spatter on the stairway wall and which was fired immediately
21 following the first shot to Mr. Gordon has a downward trajectory and without any lateral
22 movement that likely would have been required had the shot been fired from the window. Clark
23 County Office of the Coroner Medical Examiner Material Regarding the Autopsy of Carl
24 Richard Gordon, Exhibits 78, 81-82. Indeed, only one wound—that to Mr. Gordon's lower left
25 chest has the trajectory that would have been present had the gunshot been fired from the
26 window. Exhibits 78, 81-82. Mr. Pike and subsequent counsel also unreasonably and

1 prejudicially failed to develop and present evidence that Mr. Gordon sustained a gunshot wound
2 to his right arm—identified as Wound Number 5 in the Autopsy Report—that was fired by the
3 same gun that was used to shoot Mrs. Gordon. Exhibits 82, 188-19. The existence of this wound
4 directly contradicts the State’s theory about the crime and the testimony of Akers and Saldana,
5 neither of whom testified that Petitioner fired any shots at Mr. Gordon. Indeed, had Petitioner
6 been the assailant who killed Mrs. Gordon in the bedroom according to the State’s theory, it was
7 not possible for him to have inflicted Mr. Gordon’s Wound Number 5.

8 g. Moreover, Mr. Pike and subsequent counsel unreasonably and prejudicially
9 failed to develop and present substantial evidence that the physical evidence disproved the
10 State’s theory that Petitioner held Mrs. Gordon down and shot her. Akers’ and Saldana’s
11 testimony was that Petitioner confessed to entering the bedroom, wrestling Mrs. Gordon to the
12 bed, and, holding her jaw, shot her in the head. The wound to the right parietal region of Mrs.
13 Gordon’s head had no significant front-to-back or back-to-front trajectory, meaning that the path
14 of the bullet perpendicular to her head. Clark County Office of the Coroner Medical Examiner
15 Material Regarding the Autopsy of Colleen Gordon, Exhibits 71-72. The wound to the right
16 temporal region had a slight front to back trajectory. Exhibits 71-72. There was no gunshot
17 residue or stippling on either the exterior of Mrs. Gordon’s head or within the wounds, and thus
18 as Dr. Green testified, the firearm that produced these wounds was fired at a distance of at least
19 two feet. Given the physical evidence and the fact that Petitioner is right handed, it is impossible
20 for him to have inflicted either fatal wound in the circumstances relied upon the State. Indeed,
21 even a left-handed assailant could not have held Mrs. Gordon down with one hand and fired the
22 shots to the right side of her head without the firearm leaving gunpowder residue, as was evident
23 from the shot to her left ear.

24 h. Similarly, Mr. Pike and subsequent counsel unreasonably and prejudicially
25 failed to investigate the testimony of Wayne Wittig. The testimony of Wayne Wittig was
26 incredibly prejudicial to Petitioner in the guilt phase. Wittig testified that Petitioner belonged to

1 a Satanic cult and was involved in “black” and “white” magic. Pike unreasonably failed to
2 adequately investigate the source of the information to which Wittig testified. Pike Aff. ¶13 (30
3 AA 7148). Had he done so, he would have discovered that Wittig’s testimony mirrored a story
4 that appeared in the July 14, 1984 Review-Journal. In that story, Petitioner was quoted as
5 saying, “A black magician wouldn’t be considered the highest level, but certainly one of the
6 highest. The highest would be a sorcerer or a wizard.” Had Pike been prepared, he would have
7 been able to cross examine Wittig to demonstrate his lack of personal knowledge concerning the
8 facts to which he testified. 9 AA 2045; Pike Aff. ¶18. Nor did Pike cross examine Wittig about
9 his telephone being out of service at the time of an alleged conversation with Petitioner, which
10 could easily have been bolstered by investigation of telephone records. 9 AA 2045; Pike Aff.
11 ¶18.

12 i. Pike never interviewed Wittig prior to trial. Wittig Dec. ¶44 (30 AA 7170).
13 Had he done so, he would have discovered that Wittig had spoken with Saldana and Moore about
14 how the two State witnesses would be “taken care of” after they testified against Mr. Flanagan.
15 Wittig Dec. ¶39 and how in exchange for Wittig’s testimony, the District Attorney offered to
16 “take care of” some of Wittig’s troubles with the law. Wittig Dec. ¶40.

17 j. Mr. Pike and subsequent counsel unreasonably and prejudicially failed to
18 investigate and impeach Saldana, the State’s star witness. Saldana was a prostitute. Samples-
19 Smith Dec. ¶2 (30 AA 7168). She had a sexual relationship with Officer Berni. Samples-Smith
20 Dec. ¶11. During the evidentiary hearing, Saldana testified in a prison outfit. Pike Aff. ¶19 (30
21 AA 7148). However, Pike and subsequent counsel failed to investigate Saldana’s criminal
22 record and her career as a prostitute. Pike Aff. ¶19. The importance of Saldana’s testimony
23 would have been diminished by full disclosure of her criminal background, and her need to
24 satisfy the prosecution (and law enforcement) by her testimony. Pike Aff. ¶19.

25 k. Mr. Pike and subsequent counsel similarly did not investigate or present
26 substantial evidence that demonstrated that Petitioner did not participate in any conspiracy to

1 commit the charged crimes or cross-examine the prosecution witnesses on conflicting versions of
2 events surrounding the alleged conspiracy.

3 1. Mr. Pike's and subsequent counsel's performance with respect to Petitioner's
4 mental state at the time of the crime and prior to and during trial similarly was deficient and
5 prejudicial. Mr. Pike did not investigate or present a diminished capacity defense for Petitioner
6 despite the three-day drug and alcohol binge the defendants had engaged in immediately
7 preceding the crimes. Pike Aff. ¶10. As a result, Mr. Pike failed to learn that Michelle Thayer
8 would have testified that Petitioner "smoked marijuana, took acid, cocaine, PCP (angel dust) and
9 crystal meth." Thayer Dec. ¶4 (30 AA 7191). Pike further failed to cross-examine Angela
10 Saldana regarding Petitioner's alleged statements that, on the night of the murders, he was on
11 acid. Saldana-Ficklin Dec. ¶11 (30 AA 7195). As a result of Pike's and subsequent counsel's
12 deficient performance, the juries did not learn that Petitioner was under the debilitating
13 influences of drugs and alcohol that exacerbated his pre-existing mental condition prior to,
14 during, and after the crimes.

15 m. Similarly, Mr. Pike unreasonably had no mental or physical tests performed on
16 Petitioner to determine whether he was competent to stand trial. Pike Aff. ¶10 (30 AA 7151). In
17 addition, although Pike occasionally met with Petitioner at the Clark County Detention Center,
18 he failed to obtain jail medical records which would have revealed to him that Petitioner was
19 receiving substantial psychotropic medications that rendered him incompetent to stand trial. Pike
20 Aff. ¶¶7, 10. Pike failed to raise a doubt about Petitioner's competence to stand trial, object to
21 the forced medication of his client, or otherwise ensure that Petitioner participated in his defense.

22 7. Reasonable competent counsel in a capital case have the duty to utilize pretrial and
23 in limine procedures to ensure a fundamentally fair trial process that accords the capital
24 defendant with his constitutional rights. The record is replete with instances in which Mr. Pike
25 prejudicially failed to fulfill his obligations.

26 a. Despite the substantial amount of the work that needed to be conducted prior to

1 trial, Pike failed to move for a continuance of the trial date in order to accomplish the necessary
2 preparation to defend Petitioner. Pike Aff. ¶12.

3 b. Mr. Pike failed to challenge the vague complaint against Petitioner or the
4 broader charges presented to the Court. Although Petitioner was first charged with murdering
5 Colleen Gordon and Carl Gordon (1 AA 4-6), the State amended the complaint to charge Mr.
6 Flanagan only with murdering Mrs. Gordon (1 AA 23; *see also* 1 AA 237 (complaint charging
7 only one murder). Thus, although the complaint charged Petitioner with one murder, he was
8 convicted of two. 12 AA 2761-62. Mr. Pike's implicit consent to this expansion renders his
9 counsel prejudicially ineffective.

10 c. Mr. Pike failed to object or move for a motion in limine to exclude witchcraft
11 evidence which co-defendant Lockett announced he would offer. Pike Aff. ¶13 (30 AA 7148).
12 Although Mr. Pike did move for severance of Petitioner's trial from that of his co defendants, he
13 failed to point out to the court that Lockett's taking the stand need not include the witchcraft
14 evidence that proved so prejudicial. Pike Aff. ¶13 When dealing with the severance motions,
15 Judge Mosley encouraged Pike to bring up any motions against testimony that may have
16 prejudiced Petitioner. 6 AA 1235. Judge Mosley practically invited Pike to make a motion in
17 limine to exclude Wittig's testimony. However, rather than make the motion, Pike unreasonably
18 and prejudicially allowed Wittig to testify without any effort to protect Petitioner's constitutional
19 rights.

20 d. Mr. Pike failed to ensure Petitioner's right to a fair and impartial jury. Mr.
21 Pike failed to object to the Court's requirement that all defense counsel must agree on the
22 exercise of peremptory challenges. 5 AA 1136. In addition, he acquiesced in the defense use of
23 a preemptory challenge when such a challenge was not in Petitioner's interest.

24 e. Mr. Pike failed to ensure that the jury was not unconstitutionally and
25 prejudicially influenced by the substantial publicity generated by the case. The record in this
26 case shows that Petitioner's trial and sentencing hearing in 1985 took place in an unduly

1 prejudicial atmosphere, saturated by media coverage that included commentary on the “satanic”
2 nature of the crimes, and with a jury biased by having been subjected to voir dire questioning
3 regarding such publicity. *See, e.g.*, 1 AA 3, 7 17, 233 236, 244, 247a, 248 2551, 263; 3 AA 736
4 737, 744 745; 4 AA 916-17, 919, 922, 924, 929, 931, 933, 934, 936, 937, 939, 940; 5 AA 1027,
5 1029, 1031, 1032, 1034, 1035, 1038, 1040, 1107, 1111, 1113, 1146, 1148; 13 AA 3001-02; 16
6 AA 3697 3698.

7 1) The murders of Carl and Colleen Gordon stand among the most
8 notorious in the history of Clark County. The crimes and, more especially, the arrests and trials
9 of defendants were the subjects of nearly continuous television, radio and newspaper coverage.
10 The intensity of the coverage was nearly unparalleled. One needs look no further than the trial
11 court’s file to see the voluminous requests by local television stations for cameras in the
12 courtroom. The media coverage focused heavily on the “satanic” nature of the killings and so-
13 called “witchcraft” of the defendants, evidence that was later held to be inadmissible. News
14 stories emphasized the “satanic” nature of the killings particularly when Petitioner was arrested
15 and charged.

16 2) The voir dire revealed that virtually all the jurors were aware of the
17 crimes and most had been exposed to news, television, or radio reports. 4 AA 917, 919, 922,
18 924, 925, 929, 931, 933, 934, 936, 937, 939, 940; 5 AA 1027, 1029, 1031, 1032, 1034, 1035,
19 1038, 1040, 1107, 1111, 1146, 1148. Despite the extraordinary number of prospective jurors
20 exposed to the saturated media coverage, most jurors were deemed impartial merely on their
21 word that they could be so. Several were not able to answer definitively when first asked about
22 their ability to remain impartial, and only when pressed, in front of others, stated that they could.
23 *See, e.g.*, 4 AA 917-18, 920, 921, 926, 930, 935; 5 AA 1108. These jurors were not questioned
24 further by defense counsel or the court. *See, e.g.*, 4 AA 918, 921, 930, 932, 935, 937, 940, 950,
25 951, 955, 958, 963, 971, 978; 5 AA 986, 997, 980, 1000, 1005, 1009, 1011, 1048, 1059, 1063,
26 1067, 1074, 1078, 1081, 1085, 1092, 1095, 1101, 1120, 1124, 1130, 1133, 1154, 1158.

1 3) Despite the substantial publicity this case generated, Pike failed to press
2 for a change of venue. Although Mr. Pike did file a venue motion (2 AA 388-90), the trial court
3 erroneously refused to rule on the motion and compounded the prejudice by failing to conduct
4 voir dire in a manner constitutionally sufficient to insure seating of an impartial jury. Even after
5 voir dire revealed that many potential jurors had been exposed to extensive media coverage and
6 two jurors made prejudicial statements in front of the venire, the court still failed to rule on the
7 motion.

8 4) Mr. Pike unreasonably failed to raise the court's failure to rule on the
9 motion or to supplement the motion with additional information learned during voir dire. Pike
10 Aff. ¶15 (30 AA 7148). Trial counsel's failure to secure a ruling on the change of venue motion
11 either before or after jury voir dire or take other steps to ensure a fair trial was unreasonable and
12 was constitutionally deficient. Moreover, trial counsel's failure to conduct a meaningful voir
13 dire regarding prospective jurors' views on the crime deprived Petitioner of the right to obtain
14 removal of the jurors for cause. Trial counsel compounded his deficient voir dire by failing to
15 exercise peremptory challenges on obviously biased jurors. Reasonably competent trial counsel
16 would understand the fundamental importance of obtaining a jury that is unswayed by bias
17 against his or her client. Reasonably competent and effective counsel would have vigorously
18 questioned prospective jurors to detect potential biases and requested the removal of jurors who
19 exhibited such biases. In addition, reasonably competent counsel would have exercised
20 peremptory challenges on those jurors that recalled the prejudicial pretrial publicity.

21 5) Defense counsel also failed to pursue individual sequestered voir dire,
22 which could have prevented prejudice to the remaining jurors from these statements. In light of
23 the negative publicity, questions to the jurors should have been asked individually and
24 sequestered, especially when it became apparent that certain jurors had heard such prejudicial
25 media coverage and counsel continued to ask questions, the court should have either suggested
26 such questioning be done at the bench, or at the very least issued a strong curative instruction to

1 the remaining jurors and re-questioned them to be sure that they remained impartial.

2 6) Thus, most of the jurors had heard of the case and a number of those had
3 already formed opinions about it before it went to trial. As a result, Petitioner was tried in Clark
4 County where there was keen awareness of the crimes and intense public pressure for
5 convictions and death sentences. When coupled with the highly prejudicial admission of
6 inflammatory, yet completely irrelevant evidence concerning Petitioner's (and others') teenage
7 flirtation with witchcraft, these factors eliminated any chance of a fair trial before an impartial
8 jury.

9 7) For example, two potential jurors expressed strong feelings about
10 Petitioner's guilt in the presence of other potential members of the jury panel. Prospective juror
11 David Singer stated that he had seen television and newspaper accounts of the crime at the time
12 it happened, and that he had also seen a newspaper article "within the last couple of days." Mr.
13 Singer stated that he remembered the specifics "quite well," and that he "had a strong opinion
14 that they were guilty" Mr. Singer further stated that he would be unable to disregard the
15 publicity that he had seen, and that he would be unable to be impartial. Mr. Singer was removed
16 from the jury panel for cause, to which the prosecuting attorney stipulated. 4 AA 924-27.

17 8) Prospective juror Billy Elder also stated that he had seen media coverage
18 of the crime in the newspaper and on the television news, and that he read the newspaper "quite
19 extensively." Mr. Elder had also seen a newspaper article about the crime on the previous day,
20 and stated "I don't know whether I should say what it was or not but I read yesterday morning's
21 paper." Mr. Elder stated that, based upon the publicity he had seen, he would be unable to be an
22 objective juror. When the trial court judge asked Mr. Elder if he would have the same
23 inclination throughout the proceedings if he were to serve as a juror, Mr. Elder responded: "Yes,
24 sir, I believe it would be. I believe if you read the same article I read yesterday morning or
25 maybe I take it too serious. I am a family man and I just --." 5 AA 1107-09.

26 9) These statements of Mr. Singer and Mr. Elder were made in the presence

1 of other potential jurors, who were likely to develop prejudice against the defendants as a result
2 of these characterizations of the recent publicity of the crime. Many of them were ultimately
3 seated on the jury.

4 10) Trial counsel's deficient representation and the trial court's failures to
5 protect against the substantial publicity prejudicially violated Petitioner's rights. Petitioner's
6 convictions and death sentences are invalid because they were rendered in violation of his right
7 against the infliction of cruel and unusual punishment and his rights to a fair and impartial jury; a
8 reliable, fair, non-arbitrary, and non-capricious determination of guilt, death eligibility, and
9 penalty; the effective assistance of counsel; to present a defense; to confrontation and
10 compulsory process; to the enforcement of mandatory state laws; to a trial free of materially false
11 and misleading evidence; and to due process of law as guaranteed by the Fourth, Fifth, Sixth,
12 Eighth, and Fourteenth Amendments to the United States Constitution as a result of the trial
13 court's denial of his motions for a change of venue, and trial counsel's inadequate presentation of
14 such motions.

15 11) Counsel's constitutionally deficient representation and the trial court's
16 failures had a prejudicial and substantial and injurious effect on the determination of the jury's
17 verdict and requires granting of the writ. There is a reasonable probability that, but for counsel's
18 unprofessional and the trial court's errors, the jury would not have convicted Petitioner of capital
19 murder or sentenced him to death.

20 f. Mr. Pike failed to object to the presence of armed guards in the courtroom
21 (Pike Aff. ¶19 (30 AA 7148)), or to Petitioner being seen in shackles by jurors (Declaration of
22 Genevieve Buchanan ("Buchanan Dec.") ¶2 (30 AA 7137)), which were prejudicial violations of
23 Petitioner's constitutional rights.

24 8. Reasonably competent counsel practicing at the time of Petitioner's three capital
25 trials recognized that a thorough investigation of the defendant's background and family history,
26 including his medical, mental health, academic, and social history, was essential to the adequate

1 preparation of a potential penalty phase defense. Mr. Pike unreasonably and prejudicially failed
2 to conduct any mitigation investigation and did not seek the appointment of appropriate
3 professionals to assist in the presentation of mitigation evidence. Mr. Pike failed to conduct any
4 mitigation investigation into Petitioner's character and background. Pike Aff. ¶10 (30 AA 7148).
5 He conducted virtually no investigation of Petitioner's life growing up, his drug addiction, or any
6 other aspect of his background. Moreover, he did not seek the appointment of appropriate
7 professionals to assist in the presentation of mitigation evidence. *Id.* For example, though other
8 defendants did seek appointment of psychiatrists (1 AA 247b g), Pike failed to do so (Pike Aff.
9 ¶10). Had he done so, he would have discovered that Petitioner suffered extreme abuse at the
10 hands of his parents and grandparents who caused him to suffer significant mental impairment,
11 as discussed more fully below. Pike consequently failed to demonstrate to the jury that the
12 victims were perpetrators of substantial, continuous abuse toward Petitioner, and by this silence
13 acquiesced in the prosecution's portrait of the victims as upstanding, kindly, avuncular citizens
14 who were terrorized and murdered by devil worshipping teenagers.

15 9. Mr. Pike failed to object to improper jury instructions. 12 AA 2726, 2734, 2755,
16 2744. Mr. Pike failed to object to the use of the "great risk" aggravator or request instructions
17 that would have required a nexus between the burglary and robbery that were used by the State
18 as aggravators to support the death sentences. Finally, he failed to object to the improper double
19 counting of the felony murder aggravator.

20 10. Mr. Pike's failures to conduct the investigation necessary to render constitutionally
21 appropriate representation cannot be deemed an informed or strategic decision.

22 11. Absent Mr. Pike's deficient performance, there is a reasonable probability that the
23 result of the proceeding would have been different.

24 12. In the second trial, Petitioner was represented by the Clark County Public
25 Defender's office. 14 AA 3191. However, as stated above, at the first trial, the Public
26 Defender's office had successfully moved to withdraw due to a conflict of interest. 2 AA 252,

1 254. Although no explanation appears on the record for this conflict, neither does any
2 explanation appear for its resolution. Without a resolution, the ethical conflict must be presumed
3 to continue to be in existence.

4 13. The trial court made no such inquiry in Petitioner's second trial (14 AA 3191-18
5 AA 4197, notwithstanding the admitted conflict of interest by the Clark County Public
6 Defender's office in the first trial. 2 AA 252-253. The existence of the conflict at the first trial
7 was more than sufficient to require the trial court to inquire further about it at the second trial.
8 The trial court's failure to do so requires the granting of the writ with respect to the death
9 sentences. Furthermore, as stated below, the District Court committed the same failure at the
10 third trial.

11 14. As in the first trial, Petitioner's counsel in the second trial, Mr. Dahl, devoted
12 inadequate resources to the task, failed to conduct an adequate investigation and did virtually
13 nothing to avoid the imposition of the death penalty. Further, counsel's performance with
14 respect to the guilt evidence presented by the prosecution at the second trial suffered from the
15 same deficiencies that occurred in the guilt trial.

16 15. Mr. Dahl unreasonably and prejudicially failed to move to sever Mr. Flanagan's trial
17 from his co-defendant, Randolph Moore, in order to focus on the evidence that was relevant only
18 to Petitioner. 14 AA 3196-16 AA 3700. Without such a motion, the jury was permitted to
19 misuse evidence of Moore's participation in the crimes against Petitioner.

20 16. Mr. Dahl unreasonably and prejudicially failed to secure a fair and impartial jury.
21 The only woman seated on the jury panel was Amy Knell. 15 AA 3454. During voir dire of the
22 jury, the prosecutor utilized his peremptory challenges in an intentionally gender-discriminatory
23 manner by excluding all other women from the jury panel. Three of the peremptory challenges
24 utilized by the prosecutor were used to exclude Laura J. Jacobs (15 AA 3612), Joleen J. Melton
25 (15 AA 3655) and Alverta N. Colonna (15 AA 3672). Mr. Dahl unreasonably and prejudicially
26 did not object to the prosecutor's peremptory challenges to the three excluded female jurors. Mr.

1 Dahl also failed to object to the court's dismissal of Juror Anne Catherine Cassidy when she
2 expressed reluctance to impose the death penalty. 14 AA 3295. Counsel's failures to protect
3 Petitioner's constitutional rights constitute constitutionally deficient and prejudicial
4 representation.

5 17. Mr. Dahl unreasonably and prejudicially did not conduct any substantial mitigation
6 investigation, failed to hire a mitigation expert, did no psychological or psychiatric investigation
7 and hired no such experts. 14 AA 3191-18 AA 4197. Moreover, Dahl did very little
8 investigation of Petitioner's adaptation to prison life and presented minimal evidence on that
9 point. These failures rendered him ineffective.

10 18. Counsels' failure to conduct the investigation necessary to render constitutionally
11 appropriate representation, prepare for the penalty retrial, rebut the state's case, and present
12 compelling mitigation cannot be deemed an informed or strategic decision.

13 19. Absent counsels' deficient performance, there is a reasonable probability that the
14 result of the second proceeding would have been different. Critically, counsel's deficient
15 representation negatively affected trial counsel's performance in the third penalty trial.

16 20. In the third trial, Petitioner was once again represented by the Clark County Public
17 Defender's Office. 19 AA 4534. For the reasons stated above, without a resolution of the ethical
18 conflict alleged to have existed in the first trial, the ethical conflict must be presumed to continue
19 to be in existence and counsel again must be deemed ineffective per se.

20 21. Once again, the Public Defender's Office devoted inadequate resources to
21 Petitioner's case. Affidavit of Rebecca A. Blaskey ("Blaskey Aff.") ¶3 (30 AA 7204). Although
22 two counsel were assigned to the case, Rebecca Blaskey and David Wall, the two kept separate
23 files and did not communicate with one another in preparation of the case. *Id.* The Public
24 Defender's Office was short-handed and overloaded with cases and was unable to devote
25 adequate resources to Petitioner's case. *Id.* ¶7. For example, Mr. Wall was appointed just 90
26 days before the trial and spent virtually no time with Petitioner before the trial began. *Id.* ¶¶6, 7.

1 Mr. Wall opted not to meet Petitioner at Ely State Prison on the day appointed for such a meeting
2 and chose instead to play golf. *Id.* ¶6. Wall waited until immediately before the trial to meet
3 with Petitioner and thus was inadequately prepared for the trial.

4 22. The inadequate preparation proved devastating to the defense. Retrial counsel's
5 performance with respect to the guilt evidence presented by the prosecution at the third trial
6 suffered from the same deficiencies that occurred in the guilt trial.

7 23. Although counsel recognized the need to employ a mental health expert, they failed
8 to provide that expert with an appropriate referral question, necessary background material and
9 information, and sufficient time to evaluate Petitioner and render an opinion about his mental
10 functioning and possible mitigation. Indeed, the expert was able to examine Petitioner very
11 briefly and only just days before trial began. *Id.* ¶4. They hired no mitigation expert and did
12 very little, if any, mitigation investigation. *Id.* ¶3.

13 24. Counsel unreasonably and prejudicially compounded their failure to prepare their
14 expert by voluntarily disclosing the expert's privileged raw data and materials to the prosecution
15 in advance of the hearing and prior to being able to make an informed decision about whether to
16 call the expert at the trial. This action enabled the prosecution to conduct a devastating cross
17 examination of the expert. *Id.* ¶4.

18 25. Counsel were constitutionally and prejudicially ineffective for not investigating the
19 systematic, arbitrary and discriminatory exclusion of African Americans from jury pools and at
20 all stages of jury selection, the improper hardship excusal of prospective jurors and moving to
21 challenge the jury selection procedures on these grounds.

22 1) Clark County has systematically excluded from and under-represented
23 African Americans on District Court juries, especially in criminal cases. According to the 1990
24 Census, African Americans—a distinctive group for purposes of constitutional analysis—make
25 up approximately 8.3 percent of the population in Clark County, Nevada. The 2000 Census
26 found that African Americans constituted 9.1 percent of the population in Clark County. Thus, a

1 representative jury would be expected to contain a similar proportion of African Americans.
2 Petitioner's jury was 100 percent Caucasian, and there were no African Americans present in the
3 jury pool. A prima facie case of systematic under-representation is established because, by any
4 standard, an all white jury and an all white venire in a community with 8.3-9.1 percent African
5 Americans cannot be said to be reasonably representative of the community as a whole.

6 2) Studies of the jury process in Clark County, Nevada have indicated that
7 African Americans are under-represented on jury venires by over 25 percent. The likelihood that
8 these findings were the result of chance alone rather than other factors is less than 3 in 1,000.

9 3) The jury selection process in Clark County, Nevada is susceptible to
10 abuse and is not racially neutral. In Clark County, the jury pool is selected by use of a computer
11 program, with the database drawn from lists compiled by the Nevada Department of Motor
12 Vehicles. Those lists contain the names of persons in Clark County who have driver's licenses,
13 as well as persons who have obtained identification cards from the Department of Motor
14 Vehicles. Petitioner is informed and believes, and therefore alleges, that this sample is less
15 inclusive and less representative than feasible. Petitioner is further informed and believes, and
16 therefore alleges, that the computer program used to select members from this sample is not
17 randomly generated, creates a list that does not contain a fair cross section of the community, and
18 systematically discriminates on the basis of race.

19 4) Once the names are selected by the computer program, the Jury
20 Commissioner of the 8th Judicial District Court mails summonses to those persons. On
21 information and belief, Petitioner alleges that one quarter of the summonses are returned as
22 undeliverable, and more than 20 percent of the remaining summonses mailed out fail to generate
23 any response from the individuals summoned. On information and belief, Petitioner alleges that
24 the Jury Commissioner's office does not attempt to ascertain correct addresses for summonses
25 that are undeliverable, and does not re-summon those who fail to respond. This failure to take
26 adequate steps to insure that a fair cross section of the community actually reports to the court

1 insures that jury venires do not contain a fair cross section of the community and results in
2 systematic discrimination on the basis of race.

3 5) After individuals report to the Jury Commissioner in response to the
4 summons, the Jury Commissioner retains the absolute discretion to excuse those persons over the
5 telephone. On information and belief, Petitioner alleges that approximately 67 percent of those
6 persons who respond to a summons are either disqualified or excused from serving, temporarily
7 or permanently. Consequently these persons do not reach the stage of appearing for assignment
8 to a venire.

9 6) Individuals who have received their summons, respond to it, and are not
10 excused by the Jury Commissioner, then report to the Eighth Judicial District Court on the date
11 stated in the summons. These individuals are assigned in groups to the various courtrooms
12 where needed. In many cases, these individuals constitute the venire, from which final jury
13 selection begins immediately. In capital cases and other high-profile cases, however, these
14 individuals are asked to fill out questionnaires which are then used to winnow the venire even
15 further. Petitioner is informed and believes, and therefore alleges, that the assignment system,
16 along with the jury questionnaires used in this and other capital cases, insures that jury venires
17 do not contain a fair cross section of the community by systematically discriminating on the
18 basis of race.

19 7) As a result, Petitioner was denied his Sixth Amendment right to a jury
20 drawn from a fair cross-section of the community, his right to an impartial jury as guaranteed by
21 the Sixth Amendment, and his right to equal protection guaranteed by the Fourteenth
22 Amendment. The arbitrary exclusion of groups of citizens from jury service, moreover, violates
23 equal protection guarantees under the federal Constitution. The reliability of the jurors' fact-
24 finding process was compromised. Finally, the process used to select Petitioner's jury violated
25 Nevada's mandatory statutory and decisional laws concerning jury selection and Petitioner's
26 right to a jury drawn from a fair cross-section of the community, and thereby deprived Petitioner

1 of a state-created liberty interest and due process of law under the Fourteenth Amendment.

2 8) Trial counsel's unreasonable failure to investigate and litigate the
3 unlawful composition of the jury and the court's failure to protect Petitioner's rights were
4 prejudicial. Trial by a jury selected in a racially discriminatory manner is prejudicial per se. The
5 use of an all-white jury also exacerbated the prejudicial affect of other trial errors. The totality of
6 these constitutional violations substantially and injuriously affected the fairness of the
7 proceedings and prejudiced Petitioner, thus entitling him to relief.

8 26. Counsel also unreasonably and prejudicially failed to move to sever Petitioner's
9 case from that of Randolph Moore, thus failing to present an individualized case in defense of
10 Petitioner. Without such a motion, the prosecution was improperly permitted to use evidence of
11 Mr. Moore's activities and character to prejudice Petitioner merely by his association with Mr.
12 Moore. Petitioner thus was deprived of a reliable and individualized sentencing determination.

13 27. Counsel unreasonably and prejudicially failed to move for a continuance to permit
14 the testimony of critical witnesses. As Ms. Blaskey explained, a key witness for Petitioner could
15 not be present for the trial. Blaskey Aff. ¶8 (30 AA 7204). Although Ms. Blaskey sought
16 permission from her superiors to move for a continuance, such permission was denied. *Id.* The
17 failure to seek a continuance in order to have necessary witnesses in attendance resulted in
18 deficient performance.

19 28. Counsel failed to object to the seating of obviously biased jurors Nietsch and
20 Rehman and made no motion to exclude them for cause.

21 a. During the third penalty hearing of Petitioner's trial, the following questions
22 and answers were exchanged between the attorney for Petitioner's codefendant and juror Bambi
23 Lynn Nietsch:

24 Q: You've heard some of the facts in this case. Do you think that the death
25 penalty is an appropriate punishment in this case?

26 A: I think it's an option.

1 Q: Is life with the possibility of parole an option?

2 A: Yes.

3 Q: Is it an option that you're going to consider?

4 A: No.

5 21 AA 5126.

6 b. Ms. Nietsch was seated on the jury without objection. She was obviously not
7 impartial. The seating of a juror so clearly biased in favor of imposition of the death penalty was
8 erroneous in light of the circumstances surrounding the trial and prejudiced Petitioner in the third
9 penalty hearing. Accordingly, the State cannot show beyond a reasonable doubt that these errors
10 did not cause prejudice to Petitioner.

11 c. During the third penalty hearing, Petitioner's counsel also failed to challenge
12 for cause prospective juror Jamil Ur Rehman. 19 AA 4614. Mr. Rehman was a person of the
13 Muslim faith who believed in the death penalty. 19 AA 4608, 4625. Mr. Rehman stated that he
14 may not follow the court's instructions on the law because he felt, for example, that "people who
15 kill children should be executed." 19 AA 4611, 4613. Mr. Rehman stated that if he were one of
16 the defendants, he would not want someone like himself on the jury, "[c]ause nobody wants to
17 die." 19 AA 4613. Mr. Rehman also stated he had participated in a school debate concerning
18 the death penalty, and that he had voluntarily chosen to advocate in favor of the death penalty.
19 19 AA 4624. Mr. Rehman also indicated that he thought a jury should have the option to vote in
20 favor of the death penalty even in the absence of any aggravating factors. 19 AA 4628. Defense
21 counsel unreasonably and prejudicially failed to challenge this juror for cause. Instead, defense
22 counsel was force to use one of their peremptory challenges to remove Mr. Rehman from the
23 jury panel. 21 AA 5027.

24 d. During the third penalty hearing, counsel failed to challenge for cause
25 prospective juror Mr. Pangburn. Mr. Pangburn testified that his wife was a former policewoman,
26 and that he would "lend a little more credence to their [police] testimony than to someone else."

1 20 AA 4765. Mr. Pangburn also stated that, based on his knowledge of the facts, he was already
2 leaning towards the death penalty, and that in his mind the defense had the burden to convince
3 him that the death penalty would be inappropriate. 20 AA 4780. Defense counsel unreasonably
4 and prejudicially failed to challenge this juror for cause. Instead, defense counsel was force to
5 use one of their peremptory challenges to remove Mr. Pangburn from the jury panel. 21 AA
6 5082.

7 e. During the third penalty hearing, Petitioner's counsel failed to challenge for
8 cause prospective juror Leroy Seckinger. One of the questions on the written questionnaire that
9 was completed by all prospective jurors asked the question, "Would your prior knowledge affect
10 your ability to sit as an impartial juror?" Mr. Seckinger's answer was, "they are guilty and
11 should get the maximum penalty of death." 21 AA 5088, 5089. Mr. Seckinger stated that those
12 answers were "candid." 21 AA 5089. Mr. Seckinger further explained, "what I basically meant
13 was that they should get the maximum penalty of whatever that penalty should be." 21 AA
14 5089. Defense counsel unreasonably and prejudicially failed to challenge this juror for cause.
15 Instead, defense counsel was force to use one of their peremptory challenges to remove Mr.
16 Seckinger from the jury panel. 21 AA 5083.

17 f. The use of peremptory challenges rather than challenges for cause put
18 Petitioner at a disadvantage in that he could have selected a jury more favorably disposed to a
19 penalty less than death. Accordingly, trial counsel's deficiencies prejudiced Petitioner.

20 29. Petitioner's Sixth Amendment rights were further violated by conflicts that
21 developed as a result of the breakdown in the working relationship between Blaskey and Wall
22 and as a result of institutional decisions made in the Clark County Public Defender's Office that
23 were adverse to Petitioner's interests. Blaskey Aff. ¶¶3, 8, 10 (30 AA 7204). The breakdown
24 between Blaskey and Wall created a hostile defense team environment that precluded any
25 cooperation between the attorneys and that had an adverse effect on Petitioner's defense.
26 Similarly, the institutional conflict of interest impaired Petitioner's attorneys' ability to make

1 independent decisions regarding strategy, the availability of resources, the ability of counsel to
2 seek continuances, and the preparation of a defense, all of which adversely affected Petitioner's
3 defense at trial.

4 30. Counsel unreasonably and prejudicially failed to conduct an investigation and
5 prepare for the penalty phase. Counsel did not do any substantial mitigation investigation, failed
6 to hire a mitigation expert, did no psychological or psychiatric investigation, did very little
7 investigation of Petitioner's adaptation to prison life and presented minimal evidence on that
8 point. *Id.* ¶¶3, 4, 10.

9 31. Counsels' failure to conduct the investigation necessary to render constitutionally
10 appropriate representation, prepare for the penalty retrial, rebut the state's case, and present
11 compelling mitigation cannot be deemed an informed or strategic decision.

12 32. Trial counsel unreasonably and prejudicially failed to request special instructions
13 regarding the elements of burglary, robbery, escape, and attempt; failed to develop and present
14 evidence that the robbery and burglary were incidental to the murder; and failed to object to the
15 erroneous instructions on parole and modification of sentences. *See Flanagan v. State*, 930 P.2d
16 at 699-700.

17 33. Absent counsels' deficient performance, there is a reasonable probability that the
18 result of the proceeding would have been different.

19 34. Had Mr. Pike or subsequent counsel conducted even a modicum of investigation
20 into the guilt phase issues, they would have learned that Robert Ramirez was a leader of the Aces
21 gang, to which some of the defendants belonged and that Petitioner was not a member. They
22 would further have learned that Ramirez could testify to credible evidence strongly indicating
23 that Petitioner not only did not participate in the murders, but actively tried to prevent them, to
24 the degree that he put his own life in jeopardy. Ramirez Dec. ¶¶12, 13 (30 AA 7186). Ramirez
25 would have testified that Roy McDowell said that Moore (not Petitioner) shot Mrs. Gordon (*id.*
26 ¶12) and that Petitioner was freaking out and could not believe what was happening and wanted

1 it to stop (*id.* ¶13). McDowell also stated that he and Moore threatened Petitioner's life if he did
2 not keep quiet about the crimes. *Id.* ¶13. That most certainly would have created reasonable
3 doubt that likely would have produced a not guilty verdict for Petitioner and would have resulted
4 in a sentence less than death in the penalty phase retrials. Buchanan Dec. ¶3 (30 AA 7137).

5 35. Any investigation by Mr. Pike or subsequent counsel would have demonstrated that
6 Petitioner was extremely unlikely to have participated in such a crime. Witnesses routinely
7 describe him as a follower, a quiet person, someone unlikely to participate in such a crime. ,
8 Lucas Dec. ¶¶25, 26 (30 AA 7138); Samples-Smith Dec. ¶4 (30 AA 7168); Wittig Dec. ¶¶3 7, 10
9 12 (30 AA 7170); Thayer Dec. ¶3 (30 AA 7191).

10 36. Trial counsel unreasonably failed to examine the crime scene evidence, interview
11 potential crime witnesses, and obtain expert assistance in assessing the prosecution's case.
12 Blaskey Aff. ¶¶3, 10 (30 AA 7204); Havens Dec. ¶10 (30 AA 7145); Wittig Dec. ¶44 (30 AA
13 7170); Lucas Dec. ¶24 (30 AA 7138); Ramirez Dec. ¶19 (30 AA 7186). Had trial counsel
14 undertaken even a rudimentary investigation and prepared for the guilt trial, they would have
15 been prepared to demonstrate that the State's version of the crime was inconsistent with the
16 physical evidence obtained at the crime scene and the accounts of those present. As noted in the
17 discussion of Mr. Pike's deficient performance, *supra*, trial counsel unreasonably and
18 prejudicially failed to investigate the critical issues surrounding the State's theory of the crime
19 and develop and present compelling evidence that diminished Petitioner's culpability. Absent
20 trial counsel's deficient performance, the jury would have heard compelling evidence that the
21 physical evidence disproved the State's theory that Petitioner killed Mrs. Gordon and would have
22 concluded that Akers and Saldana's testimony was false. In addition, counsel unreasonably and
23 prejudicially failed to object to the reading of Dr. Green's prior testimony in lieu of requiring his
24 attendance at trial and subjecting him to cross examination. Had trial counsel performed in
25 accordance with the constitutional standard of case, they would have elicited testimony from Dr.
26 Green that further disproved Akers' and Saldana's testimony. Such testimony would have

1 included the trajectory of the gunshot wounds to Mr. and Mrs. Gordon. In addition, trial counsel
2 would have disproved the State's theory that Petitioner participated in planning of the crime or
3 that he was motivated by any inheritance. Indeed, trial counsel would have been able to
4 demonstrate the opposite. Saldana-Ficklin Dec. ¶¶2 12 (30 AA 7194); Wittig Dec. ¶¶34 36 (30
5 AA 7170); McDowell Dec. ¶13 (30 AA 7158). But for counsel's unprofessional errors, the
6 result of the guilt and penalty proceedings would have been different.

7 37. Had Mr. Pike or subsequent counsel rendered constitutionally adequate
8 representation, they would have been able to prove that Petitioner was under the influence of
9 powerful psychotropic drugs on the night of the crime, which, combined with his pre-existing
10 mental condition, rendered him incapable of formulating any plan or intention to kill. Saldana-
11 Ficklin Dec. ¶¶11 12 (30 AA 7194). Had trial counsel properly developed and presented the
12 testimony of readily available experts, the jury would have heard compelling evidence
13 concerning, inter alia, Petitioner's multiple mental dysfunctions, the debilitating physical and
14 psychological effects of his traumatic and violent childhood and his deteriorating psycho-social
15 functioning at the time of the crime. Declaration of Jule A. Kriegler, Ph.D. ("Kriegler Dec.")
16 ¶¶37 42 (30 AA 7207).

17 38. Trial counsel unreasonably failed to ensure that only admissible evidence was used
18 against Petitioner. The trial court committed prejudicial constitutional error in admitting hearsay
19 statements under the guise of co-conspirator statements. During trial, John Lucas testified that
20 Moore made statements about disposing of two rifles, and the prosecution later linked one of the
21 rifles to cartridges found at the crime scene. The trial court improperly concluded that the
22 statements were admissible against Petitioner as a statement under the co-conspirator exception.
23 Petitioner was not present during the making of the statements and there was no evidence linking
24 him or the statements to any existing conspiracy. In addition to court's errors, trial counsel
25 unreasonably failed to object to the introduction of this evidence against Petitioner, request a
26 limiting instruction, or move for a mistrial. As a result, the trial court violated Petitioner's rights

1 to due process, confront witnesses, present a defense, and a reliable sentence as guaranteed by
2 the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

3 39. Throughout the trials, the trial court and trial counsel failed to ensure that to comply
4 with constitutional or statutory requirements that proceedings be conducted in public, the
5 proceedings be conducted on the record, and the record compiled on appeal, be accurate, reliable,
6 and complete.

7 a. In direct contravention of Petitioner's constitutional and statutory rights to the
8 creation of an accurate, complete and reliable record of all proceedings in his case, the trial court
9 frequently and habitually conducted significant and important proceedings off the record. Both
10 trial counsel and the prosecutor knew or reasonably should have known that the trial court's
11 practice was illegal and violative of Petitioner's rights, and unreasonably failed to affect
12 compliance with the constitutional or statutory requirements for creating an accurate and
13 reliable appellate record.

14 b. Numerous portions of this trial were closed to the public in the form of off-the-
15 record bench conferences. *See e.g.*, 6 AA 1462; 8 AA 1758, 1867; 12 AA 2812; 18 AA 4375; 19
16 AA 4523, 4637; 25 AA 6036. Similarly, the Court's instructions to the jury were not recorded.

17 c. During these unrecorded conferences, the trial court took material, substantial
18 actions, including ruling on objections, clarifying evidentiary rulings, and establishing courtroom
19 procedure and scheduling. Such proceedings are integral parts of a criminal trial and of
20 Petitioner's trial in particular. The trial court failed to articulate any reasons for these courtroom
21 closures, and no such reasons exist.

22 d. The off-the-record bench conferences and in-chambers meetings were
23 never transcribed. The trial court also failed to take any other measures to effectuate the public
24 interest in observation and comment on these proceedings. Likewise, it failed to take any
25 measures to assure that Petitioner was informed of the content of these conferences that were
26 held in his absence.

1 e. Similarly, although some proceedings were recorded, the reporter was not
2 obligated, under Nevada rules, to maintain notes of those proceedings for longer than eight years.
3 Nev. Rev. Stat. § 656.335. Apparently, trial counsel unreasonably and prejudicially did not order
4 those transcripts, and by the time they were ordered for the previous and these habeas
5 proceedings, the reporter's notes had been discarded. *See, e.g.*, Petitioner's Memorandum
6 Regarding Settlement of Record (31 AA 7571); Affidavit of Robert D. Newell ("Newell Aff.")
7 ¶4 (33 AA 7938); Stipulation re Substitution of Record (33 AA 7971).

8 f. These numerous off the record conferences violated Petitioner's constitutional
9 rights, including his right to participate in the proceedings as well as those of the public to free
10 and open proceedings. The failure to transcribe these proceedings violated Petitioner's
11 constitutional right to a record of sufficient completeness to allow for adequate appellate review
12 of his claims. These numerous courtroom closures also violated Petitioner's constitutional right
13 to a public trial, as well as those of the public to free and open proceedings.

14 g. Trial counsel's unreasonably failed to protect Petitioner's rights. Trial
15 counsel's failures to object to the off-the-record bench conferences and in-chambers meetings
16 deprived Petitioner of his Sixth Amendment right to effective representation.

17 h. These constitutional violations were prejudicial. The failure to conduct
18 proceedings in open court deprived the public the opportunity to observe the proceedings and the
19 Petitioner to have non-interested persons witness the pro-prosecution bias of the trial judge and
20 the myriad of constitutional violations that occurred. The failure to record the bench conferences
21 made it impossible for the Nevada Supreme Court and this Court to provide adequate review of
22 the constitutional errors inflecting Petitioner's trials; moreover, no showing of specific prejudice
23 is required in order to obtain relief for a violation of the public-trial guarantee. In the alternative,
24 the closures of the courtroom substantially and adversely affected Petitioner's constitutional
25 rights. Moreover, the lack of an adequate record precludes any application of a state procedural
26 default rule premised upon a failure to object at trial.

1 40. During each penalty phase, trial counsel presented some evidence about Petitioner's
2 background, childhood, and mental functioning. 12 AA 2769-71, 2774-76; 17 AA 3953-59; 24
3 AA 5669-92. Rather than a compelling and corroborated case in mitigation, however, the jury
4 heard a misleading and incomplete view of Petitioner's life and character. The jury thus did not
5 hear testimony from those people who witnessed the debilitating effects of the abuse and strife
6 on Petitioner as an infant, toddler, and child. Numerous witnesses could have testified that
7 Petitioner suffered severe, protracted, and sadistic physical and psychological abuse, often at the
8 hands of his grandparents. In addition, the jury never learned that Petitioner's family history was
9 fraught with alcoholism, mental illness, mental disturbance, and domestic violence. Kriegler
10 Dec. ¶¶ 9 12, 18 20, 34 (30 AA 7207). Had that evidence been presented, the sentences almost
11 certainly would have been less than death. Declaration of Mary Nosal ("Nosal Dec.") ¶ 3 (30 AA
12 7135); 30 AA 7137, Buchanan Dec. ¶ 3; Declaration of Janet Martinez ("Martinez Dec.") ¶¶ 3, 4
13 (30 AA 7184). Absent trial counsels' unreasonable performances, the jury would have heard
14 compelling mitigation (*see generally* Kriegler Dec (30 AA 7207)), including the following:

15 a. Dale Flanagan was born into a family whose relationships were forged in a
16 crucible of violence, sexual assault, and alcoholism. His biological father abandoned him before
17 birth, and the alcoholic man who reared him created an atmosphere of terror that affected every
18 aspect of Dale's life. Dale's mother offered no protection or safety to Dale or his sister and
19 abandoned their well-being to pursue her own interests. His maternal grandmother and her
20 husband, Dale's step-grandfather, continued the legacy of coercive control over him through
21 tactics of humiliation, degradation, and threats of harm to those whom he held dear. Dale's view
22 of himself, the world in which he lived, and his relationships with others originated in his early
23 experiences, which centered around surviving chronic, life-threatening assaults at the hands of
24 his care givers, the very people who were entrusted to nurture and protect him. The trauma Dale
25 survived caused acute and long term consequences that affected his day-to-day behavior and
26 shattered his ability to learn basic lessons that childhood and adolescence teach.

1 b. Dale's history is characterized by significant isolation, disconnection,
2 deprivation, coercion and consistent, unpredictable, brutal abuse, which combined to deprive him
3 of psychosocial factors that promote healthy development, including a sense of security and self
4 worth, social support for his endeavors and experiences, and a normal peer group to belong to
5 and bond with. His experiences of brutal abuse and his powerlessness and helplessness to
6 protect himself also had physiological implications. The traumatic events that Dale endured
7 developed secondary biological consequences, including a permanent alteration of
8 neurobiological processes that resulted in hyper arousal, fear responses to trauma-related stimuli,
9 and an altered cognitive understanding of his environment.

10 c. Dale's mother, Colleann Walton, and her husband, Ronald Flanagan, had a
11 tumultuous and chaotic relationship before and after their marriage. As teenaged sweethearts,
12 they ended their relationship and dated other people before either graduated from high school.
13 Dale's mother became pregnant by another teen who refused to marry her. Ronald learned of her
14 pregnancy and felt obligated to marry her. Dale Edward Flanagan was born August 13, 1965, in
15 Orange County, California, a few days before Ronald and Colleann married on August 23, 1965.
16 Ronald, a janitor, was 20 and Colleann, a file clerk, was 18. Shortly before Dale turned three, his
17 only sibling, Coreen Ann Flanagan, was born April 7, 1968, also in Orange County, California.

18 d. Neither Colleann nor Ronald was equipped to provide the kind of environment
19 their children needed for healthy and normal development, and their small family suffered the
20 consequences. Colleann's family of origin was fractious and estranged following the divorce
21 and remarriage of her mother, Colleen Walton. Colleen married Carl Gordon, an ex-Marine who
22 ran his home like a boot camp. Colleann, her sister Jacquelyn, and her half brother Robin left
23 home early to escape their stepfather. The family became so estranged over the coming years
24 that Dale's mother never mentioned to him the fact that she had a sister, and he grew up
25 believing that she had only one sibling, her half brother, a transient who was addicted to drugs
26 and alcohol. Friends who knew Colleann over time consistently described her as having a

1 volatile affect and being generally unstable.

2 e. Ronald had a similarly rocky background. His parents separated early in his
3 life, and his mother moved to California. His mother and father discussed reuniting, but his
4 father died unexpectedly and left his wife with three children to rear. Ronald had encounters
5 with juvenile authorities, but successfully completed the terms of his probation. Ronald and
6 Colleann never were able to complete their high school education and remained unskilled.
7 Despite Ronald's best efforts—he held six jobs in 1965 and nine jobs in 1966—he earned only
8 \$2600 during the first year of their marriage. He felt tremendous pressure to support his family
9 and the strain of multiple jobs served to increase the discord at home. He was exhausted from
10 working three jobs a day, had no energy to devote to needs of small children, and lashed out at
11 his children physically and psychologically as the demands of parenting became too great for
12 him to bear. Although he was absent physically from the home for long hours, he ruled by a
13 reign of terror that pervaded every aspect of family life.

14 f. Dale's early years were unstable as the family moved from one place to the
15 next because of financial difficulties. The small family lived in a series of apartments in Orange
16 County until 1971, when Dale was six years old, and moved to Las Vegas, where they
17 temporarily lived with Ronald's brother and his family. Relationships quickly became strained,
18 and Ronald moved his family to the first of ten locations in as many years. The frequent moves
19 disrupted Dale's progress in school and prevented the formation of stable peer groups,
20 friendships, or school groups, all of which are critical for development of healthy children. He
21 attended three different schools in the second grade, and transferred 14 times during his
22 academic career. Effects of the disruptions were aggravated by the family's isolation from the
23 community. The family did not participate in any community organizations or activities and did
24 not attend church or have any religious affiliation. As a result, any overarching support networks
25 that might have buffered the frequent moves were not available to Dale.

26 g. Dale's father intentionally isolated Dale and his sister from peer groups and

1 neighbors by strict prohibitions against visitors to the home and absences from the home other
2 than for school. The children were not allowed to invite other children to their home or to visit
3 other children. Dale and Coreen were not allowed to know their own home telephone number as
4 a safeguard against giving the number to any friends. They were not allowed to participate in
5 after-school events, join clubs or social groups, or leave the premises of their homes to engage in
6 social activities. Dale's father gave strict instructions that the children's routine did not have
7 room for friends. They were to come home from school and complete their chores without any
8 interference. They were not allowed outside the house unless it was for completion of a chore or
9 some kind of task given as punishment. If they conducted themselves as was developmentally
10 appropriate by playing outside, they were disciplined. They were not allowed to have birthday
11 parties or other celebrations where they could invite friends, normal interactions that allow
12 children to develop a sense of belonging or being part of, and having access to, a larger
13 community.

14 h. Discipline was harsh, life-threatening, and senseless. Ronald imposed
15 physically dangerous tasks as routine punishment for Dale. He forced Dale, under threat of
16 beating, to dig holes in the desert, to rake the dry yard, or to stack rocks for hours at a time under
17 the hot Nevada sun with no break to cool down and no water to quench his thirst. He made him
18 dig a ditch for a week in the summer heat as one punishment, and clear the desert of rocks across
19 five acres of land on another occasion. He choked, punched, kicked, and hit Dale without
20 provocation or for acting in an age-appropriate manner. He threatened to kill Dale and beat or
21 hit him daily. Verbal humiliation and degradation accompanied physical abuse. Ronald beat
22 Dale until he tired of it. The beatings were unpredictable, based on his father's mood rather than
23 any wrongdoing, and were handed down for small or developmentally appropriate or expected
24 behaviors. Thus, Dale spent his childhood powerless and terrified. At times Dale fled the home
25 in search of safety from the beatings and the constant threat of harm. On one occasion, he sought
26 shelter in a friend's home, but there was no room for him. Dale slept several days in their back

1 yard in their dog's house. Like other child survivors, Dale developed severe migraines and other
2 forms of physiological stress that debilitated him for days and continued to plague him in
3 adulthood.

4 i. Dale's father was omnipotent in his home and knew no boundaries to his
5 cruelty. He began to sexually assault Dale's younger sister, Coreen, when she was seven and
6 Dale was ten. The two shared a bedroom where Ronald came at night to assault her. When
7 Coreen told her mother's close friend what her father was doing to her, her mother became
8 enraged and beat her. No action was ever taken against the father. Coreen began to exhibit
9 symptoms of depression and required psychotropic medication as an adult.

10 j. Colleann, Dale's mother, was a narcissistic woman with erratic mood swings
11 who consistently placed the needs of her children secondary to her own needs. She did not
12 protect her children or attempt to decrease the abuse her husband meted out. At times, she
13 instigated the abuse, simply stood by or was absent when it occurred. She diverted hard-earned
14 and limited funds from the children to support her hobby of raising, breeding, and showing
15 horses. Although the family's financial situation should have improved in Las Vegas because of
16 Ronald's increased earnings as a furniture salesman and pizza parlor manager, Colleann
17 expropriated the money for her horses. Raising horses was an expensive hobby, and at one time
18 Colleann had 15 horses whose needs took precedence over her children's needs. Dale and
19 Coreen went without dental care, adequate clothing, and medical care as Colleann spent all
20 available resources on her horses. Dale was not only emotionally and socially deprived but
21 economically and tangibly as well, as he and his sister were denied basic necessities by their
22 mother's demand for resources for her hobby and by his father's indifference to their plight.

23 k. Dale's parents' marriage disintegrated completely following his sister's
24 disclosure that Ronald had been sexually assaulting her for years. Tension, physical assaults,
25 and chaos in the home increased, along with threats to kill and maim by Ronald. When Dale was
26 only 15 years old, he moved away from his home out of fear that his father would ultimately

1 make good on his threats and kill him. On his last day at home, his father attacked him one final
2 time by locking both hands around the boy's throat, lifting him from the ground, and strangling
3 him. Dale feared for his life.

4 l. Dale moved into the home of Randolph Moore, his only friend, and lived with
5 Moore and his mother for the next two years. Dale recognized that he lived in their home at their
6 convenience and used the survival lessons he learned at the hands of his father to make himself
7 as invisible as possible. He feared that he would become too noticed, too inconvenient, and too
8 much trouble for Moore and his mother, so he asked for nothing but shelter. His very survival
9 depended on Moore's tolerance, but Dale understood that he had no recourse other than to live
10 with Moore. Moore was everything that Dale was not. Moore was a leader at school and in the
11 community, was looked up to by other students, was popular with other teens, and was well liked
12 and respected by adults. Moore was a showman who enjoyed performing at local events and
13 who craved the spotlight. Moore had large circles of friends, most of whom did not even know
14 Dale or acknowledged him only as a friend of Moore's.

15 m. Once Dale left the family home, he never received any financial assistance,
16 moral support, or expression of concern from either parent. Dale's parents separated in 1980 and
17 divorced. His father returned to southern California where his earning increased dramatically,
18 but he never offered any assistance to Dale. Dale's mother went months without making any
19 effort to see her 15-year-old son or inquire about his well being. Dale did his best to stay in
20 school and work to earn enough money to support himself. When he had time in between jobs
21 and school and a means of transportation, he stopped by his mother's work to see her, but she
22 showed no interest in his well-being.

23 n. Dale tried to live up to the responsibility of being on his own, but he was far
24 too young and ill-equipped to have the maturity, competence and understanding of an adult. He
25 worked as many as three jobs at a time, worked double shifts on some jobs, and quickly
26 advanced through the ranks of fast food restaurants to low level management positions.

1 Although he wanted the extra responsibility and did not shirk his assignments, the demands were
2 too great for a teen—even one with Dale’s motivation. Dale was exhausted from the hours his
3 work required, depressed from living without a family, and constantly anxious that he would be
4 homeless if the Moores grew tired of him or angry with him.

5 o. Dale, who had first used drugs around the sixth grade to self medicate the side
6 effects of abuse, increased his use of illicit drugs to provide the extra energy he needed and to
7 combat the profound depression that threatened to paralyze him. Without parental supervision or
8 concern and with no one to check the devastating impact of street drugs, Dale quickly became
9 addicted to amphetamines. He routinely ingested a near fatal quantity of amphetamines to meet
10 each day’s obligations. He took Valium, Quaaludes, Black Beauties, Yellow Jackets, LSD, or
11 marijuana and drank beer and hard alcohol on a daily basis. He had multiple black outs and
12 mumbled incoherently from intoxication and its mind-numbing effects.

13 p. Dale’s dependence on Moore grew in direct proportion to the loss of his
14 family. Dale had no significant intimate or long-term relationships in his life other than with
15 Moore. His relationship with Moore is perhaps more aptly described as two survivors surviving
16 together than a functional, intimate relationship. Moore’s mother, like Dale’s, was a devoted
17 horsewoman, although the two did not know each other. Moore, like Dale, survived chronic
18 trauma at the hands of his father who threatened to kill him. In a particularly chilling incident
19 that Moore repeated years later with Dale, Moore’s father held a shotgun to Moore’s face when
20 Moore was only a child and threatened to murder him.

21 q. As Dale and Moore approached 18 years of age, Moore decided to leave his
22 mother’s house, marry, and withdraw from school. With his mother’s assistance, he rented an
23 apartment and he, his new wife, and Dale set up a home together. Dale worked hard to meet the
24 financial obligation of living independently, but counted on Moore and his wife to contribute as
25 well. For a few brief months, the trio was able to support themselves. Moore’s marriage
26 collapsed, however, when he discovered his wife was having an affair with one of his friends.

1 Within a few days, his wife moved out, he quit his job, and became extremely despondent. Dale
2 recognized that he, alone, was unable to maintain an apartment and support Moore. He
3 explained to Moore that they had no choice but for Moore to return home and for Dale to go to
4 his maternal grandmother and her husband's.

5 r. Although Dale was able to think rationally and recognize his own limitations,
6 Moore could not accept that their relationship would change so dramatically. He knew that
7 Dale's grandparents would prohibit him from visiting Dale and that the upcoming move would
8 effectively end the relationship between him and Dale. He interpreted Dale's planned move to
9 his grandparents' home as abandonment by the one person he could count on. In Moore's eyes,
10 Dale's decision to live at his grandparents was an intolerable betrayal. Moore could not survive
11 without Dale's daily presence. In a terrorizing act, Moore took his shotgun, placed it at Dale's
12 mouth, and announced that he would kill Dale and then himself rather than lose Dale and live
13 without him. Dale believed that Moore would kill him and then take his own life and tried to
14 convince Moore not to pull the trigger. Dale explained that the move was only out of economic
15 necessity and that he, Dale, would remain faithful to their friendship, regardless of the
16 circumstances. Moore could not be convinced and pulled the trigger while the gun was aimed at
17 Dale's face. The gun misfired, and Moore collapsed. Dale moved to his grandparents.

18 s. Dale was extremely apprehensive about living at his grandmother's and her
19 husband's home. His family's earlier experiences with the Gordons were marked by constant
20 arguments, accusations, threats of recrimination, and discord. The Gordons had bought land in
21 Las Vegas in the 1970's and allowed the Flanagans to live on it in a trailer while the Gordons'
22 home was being built. The Gordons promised they would deed some of the land to the
23 Flanagans for a nominal fee. In 1979, the Gordons moved into their new home and quickly
24 began to impose restrictions on the Flanagan family. The Gordons and the Flanagans argued
25 daily, the Gordons withdrew their offer of the land, and the Flanagans moved to another
26 residence deeply embittered. At the time Dale moved back to the Gordons' home, his mother

1 had not spoken to them for over four years, and they had made no overture to reconcile with her.

2 t. Although Dale thought he understood the terms of his living at the Gordons, he
3 was unprepared for the total control they expected to maintain over his life. The Gordons had a
4 small trailer parked behind their home and rented it to Dale for around \$100 a month. He was to
5 keep steady employment, attend school, help out with chores, and meet all his own expenses for
6 clothes, education, medical care, and food. Since he had been meeting those obligations for
7 almost three years, he anticipated being able to continue the same course.

8 u. Dale, however, did not understand the Gordons' expectations, and for good
9 reason. The Gordons, like the Flanagans, were not only disconnected from the outside world,
10 but were also disconnected from each other in serious and profound ways. Dale's parents had
11 never discussed anything with the children, and neither did the Gordons. Children and adults
12 lived separate and different lives. Any thoughts by the children of discussing an issue with their
13 parents were overruled by fear. The rules both families lived by were completely consistent with
14 those usually seen in families where abuse or chemical dependency is an issue. The families did
15 not interact or do things together. There were no personal or in-depth discussions and no
16 communal time. Everyone within the Gordons and the Flanagans went in different directions.

17 v. The Gordons and the Flanagans also shared another damaging family dynamic:
18 coercion. Coercion in the Flanagan and Gordon households meant that the adults used their
19 seniority, money, housing, and status to control the behavior and whereabouts of the children in
20 ways that satisfied the adults in control, but was not commensurate with the needs or wants of
21 the children themselves. In fact, the needs of the adults—Mr. and Mrs. Gordon and Mr. and
22 Mrs. Flanagan—often clashed with normal child and teen behavior. There was no understanding
23 or tolerance for children being children on the part of Dale's father or his step-grandfather. Both
24 men interpreted kids acting as kids as personal disrespect and noncompliance and punished Dale
25 for it. As a consequence, Dale could never figure out what in his own behavior would lead to
26 punishment.

1 w. Carl Gordon was an ex-Marine who controlled Dale by the threat that he would
2 put Dale out on the street if Dale did not comply with Carl's wishes and rules. Carl's greatest
3 domination of Dale occurred when Dale was a teenager when the natural developmental course
4 and need are for increasing separation and autonomy, combined with a stable, supportive home
5 environment. Carl, like Dale's father, punished Dale by forcing him to perform senseless tasks
6 such as digging ditches or raking rocks in the pasture. Dale's time at home was used in the way
7 the Gordons wished without regard for Dale's obligations at work and school. Carl and his wife
8 did not allow Dale to bring his friends to the trailer, searched the trailer when Dale was at school
9 or work, and dictated his daily schedule hour by hour. They denigrated Dale's friends, cursed
10 them, and ridiculed them. When his friends attempted to come onto the property, the Gordons
11 cursed, threatened, and forced them to leave. They verbally abused Dale and his family, cursed
12 and degraded his parents, and avowed that Dale would be as worthless as his father.

13 x. Carl was irrational, dangerous, and unpredictable. He forced Dale to follow
14 his orders, even when his orders placed neighborhood children in harm's way. Carl despised his
15 neighbors and their children and waged a war with them that began when he moved into his new
16 house on several acres of land surrounded by desert. Carl refused to acknowledge that the
17 children had a right to be on the road in front of his house or in the surrounding desert if their
18 noise or presence disturbed him. He designed lethal traps for the children, aimed at hurting them
19 if they came down his road or if they crossed his property en route to the desert, and ordered
20 Dale to construct the traps. He forced Dale to place piles of rocks in the middle of the road,
21 spread nails and tacks on the road, and string wire across the road in an attempt to cause the
22 children to wreck their desert bikes, lose control of their motor bikes, or break their necks. He
23 threatened to shoot one of the neighborhood girls when she befriended Dale and told Dale he
24 would burn his neighbor's horse barn down. Dale lived in sickening anticipation that the traps
25 Carl forced him to build might harm someone. At night, he would sneak from his trailer to the
26 traps and dismantle them, but his step-grandfather constantly came up with replacement designs

1 to injure Dale's potential friends.

2 y. The consequences of the trauma on Dale were devastating. Dale developed a
3 clearly recognizable and discrete set of behaviors and symptoms that meet the diagnostic criteria
4 for post traumatic stress disorder, major depressive disorder (recurrent), dysthymia, and chemical
5 dependency as enumerated in the Diagnostic and Statistical Manual, IV - Revised. He survived
6 chronic, life-threatening trauma at the hands of his caregivers that included threats to kill and
7 maim, repeated physical assaults, choking, and beatings on a daily basis. He experiences
8 significant psychological distress in response to internal or external cues that remind him of the
9 trauma. He persistently avoids stimuli associated with the trauma. As a child he learned to cope
10 with the constant threat of annihilation by depersonalizing and dissociating in response to his
11 overwhelming emotions of fear and pain. He developed a sense of foreshortened future and did
12 not expect to live into adulthood.

13 z. Dale, like other children who survive chronic brutality, has been depressed
14 since childhood. He was in a constant state of hopelessness and despair, and was actively
15 suicidal for over five years. His intent and desire was to be dead as the only escape from harm.
16 He cut himself, burned himself, held a gun to his chest and head with the intent to kill himself,
17 and overdosed on prescribed and illicit drugs. Following his arrest for the homicides of his
18 grandparents, he devoted his waking hours to developing a suicide plan.

19 aa. In an unsuccessful attempt to quell and manage the physiological and
20 emotional reactions to trauma, Dale engaged in multiple chemical abuse and developed alcohol
21 dependence, amphetamine dependence, and cannabis abuse. He used extremely high levels of
22 both alcohol and amphetamines on a consistent basis up until his arrest. Following his arrest he
23 displayed a number of physical symptoms of withdrawal, including shaking and sweating,
24 blurriness, and feeling sick and nauseous.

25 bb. Living in an atmosphere of fear and pain interrupted Dale's normal
26 development at many levels. He was preoccupied with concerns about injury, rescue and repair.

1 As his physical integrity and autonomy were compromised, his attention became directed more
2 toward fears of physical harm and loss of self. Periods of dissociation, or altered states of
3 consciousness, allowed him to feel a physical distancing from what was happening and to control
4 his arousal and anxiety. His preoccupation with safety interfered with his ability to perform up
5 to his potential in school, prevented him from engaging in normal social activities, and limited
6 his ability to develop peer relationships. His sense of worth mirrored his parents' and
7 grandparents' degradation of him, and he lived in a world of unrelenting sadness.

8 41. Trial counsel was ineffective for failing to secure for the court appointed expert
9 sufficient time to conduct a reliable and competent assessment of Petitioner's mental status. Trial
10 counsel scheduled the mental status examination of Petitioner for three days before trial, a time
11 frame too short to allow the expert to conduct the kind of clinical interviews that were the core of
12 determining the role of trauma in Petitioner's life. Blaskey Aff. ¶4 (30 AA 7204). Had the
13 expert been given sufficient time to conduct the clinical interviews with Petitioner, he would
14 have concluded that Petitioner endured multiple head trauma, experienced several episodes of
15 hypoxia, suffered from major mental disorders including post traumatic stress disorder and
16 depression and would have discovered and explained the mitigating nature of these impairments
17 and their effects on Petitioner's functioning throughout his life.

18 42. At the third penalty hearing, the court-appointed defense expert testified that
19 Petitioner was "not able to give the kind of in depth information about himself" that the expert
20 needed, that it was difficult to "get a strong idea" of Petitioner's childhood experiences and
21 family relationships, and that Petitioner was not able to answer questions commensurate with his
22 intelligence. 24 AA 5743. The expert further testified that it would have been helpful to know
23 the details of the offense but was not provided the autopsy and police reports. 24 AA 5780,
24 5783. Had the expert been provided the kind of information detailed above, the expert would
25 have testified that Petitioner was severely and chronically abused by his parents and
26 grandparents, that as a result of the abuse he suffered major mental disorders including post

1 traumatic stress disorder, depression, and chemical dependency, that he was intoxicated and
2 under the influence of drugs at the time of the offense, that he was extremely remorseful for his
3 actions and those of his friends, that he acted under the domination of others, that he lacked the
4 capacity to conform his conduct to the requirements of the law, and that his actions had to be
5 viewed against his background as a child and adolescent, all of which would have led to
6 sentences less than death. Kriegler Dec. (30 AA 7207).

7 43. The government prevented the defense mental health expert from conducting a
8 competent and reliable assessment of Petitioner's mental status. At the 1995 penalty phase the
9 court appointed defense expert testified that sheriff's deputies interfered with his evaluation of
10 Petitioner by limiting the amount of time he had for the clinical interview and tests to just a few
11 hours. 24 AA 5785; Blaskey Aff. ¶4 (30 AA 7204). Had the sheriff's deputies not interfered
12 and allowed additional time, the expert would have been able to conduct the kind of in depth
13 evaluation of trauma that was necessary to determine the nature, severity, and effect of the
14 trauma Petitioner survived as a child at the hands of his parents and grandparents as detailed
15 above. The State's interference with the expert interview with Petitioner deprived him of his
16 rights to develop and present a defense, due process, and a reliable death sentencing process.

17 44. Trial counsel unreasonably and prejudicially failed to retain and present experts to
18 review, synopsise, and explain Petitioner's social history and to provide a context within which
19 the jury could evaluate the mitigation presented. Employing an expert with qualifications in
20 family dynamics and child abuse would have resulted in a complete investigation into
21 Petitioner's family history, mental illness, and psychological disorders. Moreover, the
22 presentation of such an expert would have permitted the jury to understand the mitigating social
23 dynamics and influences that shaped Petitioner's life and behavior and would have provided a
24 context for understanding and assimilating the penalty phase witnesses' testimony, thereby
25 leading to sentences less than death.

26 45. Trial counsel's investigation of Petitioner's life and potential mitigation was

1 constitutionally inadequate. Trial counsel unreasonably did not identify, obtain, and use a
2 myriad of readily available records and documents relating to Petitioner's character and
3 background. Trial counsel unreasonably did not identify, obtain, and use a myriad of readily
4 available records and documents relating to Petitioner's immediate and extended family. Trial
5 counsel unreasonably failed to consider or pursue lines of investigation reasonably suggested by
6 the records or attempt to introduce them as independent and unbiased sources of compelling
7 mitigation. Trial counsel unreasonably failed to conduct adequate interviews with Petitioner's
8 family, neighbors, friends, and other persons whose identity was known or reasonably should
9 have been known. These potential witnesses include relatives, neighbors, friends, medical
10 personnel, teachers, and others with compelling information about Petitioner's life and family
11 history. The investigation that trial counsel did conduct was unreasonably and deficiently
12 limited in scope and focus. As a result of the constitutionally deficient investigation, trial
13 counsel was unable to assess potential guilt and penalty phase strategies, develop and present
14 coherent and compelling guilt and penalty phase defenses, and present compelling testimony
15 from unbiased and reliable witnesses.

16 46. Trial counsel also unreasonably and prejudicially failed to prepare and present the
17 testimony of a prison adjustment expert, familiar with the Nevada State prison system, who
18 could have described the conditions of confinement that Petitioner would endure if sentenced to
19 less than a death sentence and provide a context for the jury to credit and give mitigating weight
20 to the lay testimony about Petitioner's behavior in custody.

21 47. Trial counsel's deficiencies were not the product of any strategy or tactical decision
22 making. To the extent that any decisions were made affecting Petitioner's rights, trial counsel
23 made such decisions without sufficient information or investigation and without discussing the
24 ramifications of such decisions with Petitioner.

25 48. The state court previously improperly deprived Petitioner of the resources necessary
26 to fully develop the facts in support of this claim, including funding for investigation and

1 experts, discovery, and an evidentiary hearing.

2 49. To the extent that Respondents assert that trial and/or appellate and/or post-
3 conviction counsel should have raised these issues earlier or that Petitioner otherwise failed to
4 comply with any state procedures, trial and/or appellate counsel and/or post-conviction counsel's
5 failure to do so constitutes deficient and prejudicial representation that deprived Petitioner of his
6 statutory and constitutional rights to effective representation and timely and effective review of
7 these claims. Had such challenges been made, the prejudicial effects of the unlawful action
8 would have been ameliorated and Petitioner's rights would have been protected.

9 **E. CLAIM 5: THE CUMULATIVE EFFECT OF THE ERRORS RENDER**
10 **PETITIONER'S CONVICTIONS AND SENTENCES UNRELIABLE AND**
11 **UNCONSTITUTIONAL.**¹⁶

12 1. Petitioner's convictions and sentences were unlawfully obtained in violation of
13 Petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights in light of the multiple
14 constitutional errors committed by the prosecutor, Petitioner's counsel and the trial court and
15 which together rendered Petitioner's trial fundamentally unfair and rendered the resulting
16 verdicts and judgment unreliable.

17 2. Petitioner expressly requests that the Court examine the errors set forth in the
18 allegations contained in this Petition cumulatively and cumulatively assess their prejudicial
19 effect on Petitioner's right to a reliable review and evaluation of the harm caused to him thereby.
20 Such a cumulative review is mandated under the Eighth and Fourteenth Amendments in light of
21 the heightened scrutiny and need for reliability in capital cases.

22 3. Multiple deficiencies merit a collective or cumulative assessment of prejudice,
23 because errors that do not require that a judgment be set aside when viewed alone, or do not rise

24 ¹⁶ Petitioner previously raised this claim as part of each claim in the Supplemental Petition
25 for Writ of Habeas Corpus. Petitioner re-presents it here because it is further supported by the
26 previously unavailable allegations contained in, and evidence proffered in support of, Claim 1,
supra.

1 to the level of a constitutional violation when viewed singly, may violate the federal constitution
2 and require relief in the aggregate.
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1 **V. PRAYER FOR RELIEF**

2 WHEREFORE, Petitioner respectfully requests that this Court:

3 A. Order Respondent to show cause why the requested relief should not be granted;

4 B. Grant Petitioner leave to conduct discovery, including the right to take
5 depositions, request admissions, propound interrogatories, issue subpoenas for documents and
6 other evidence, and afford Petitioner the means to preserve the testimony of witnesses;

7 C. Grant Petitioner sufficient funds to secure investigative and expert assistance as
8 necessary to prove the facts alleged in this Petition;

9 D. Order an evidentiary hearing at which Petitioner will offer this and further proof
10 in support of the allegations herein;


11 E. Permit Petitioner a reasonable opportunity to supplement the Petition to include
12 claims which become known as a result of discovery and further investigation and as the result of
13 obtaining information previously unavailable to Petitioner;

14 F. After full consideration of the issues raised in this Petition, issue a writ of habeas
15 corpus relieving Petitioner from the judgment of conviction and sentences of death imposed in
16 the Eighth Judicial District Court Case Number C69269.

17 G. Grant such further relief as the Court may deem appropriate in the interests of
18 justice.

19 DATED this 28th day of September, 2012.

20 **POTTER LAW OFFICES**

21 
22 By _____
23 CAL J. POTTER, III, ESQ.
24 Nevada Bar No. 1988
25 1125 Shadow Lane
26 Las Vegas, NV 89102
Attorneys for Petitioner Dale Edward Flanagan

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DATED this 28th day of September, 2012.

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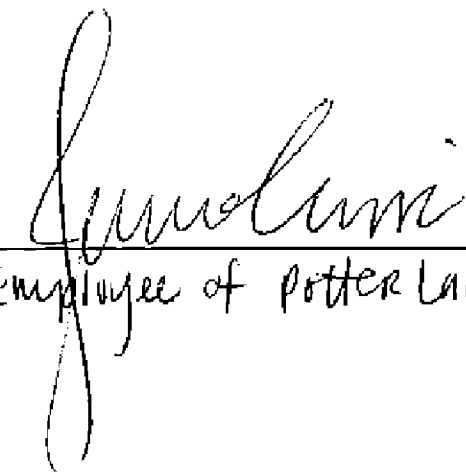
1 **CERTIFICATE OF SERVICE**

2 In accordance with EDCR 7.26(a)(1) of the Eighth Judicial District Court Rules, the
3 undersigned hereby certifies that on this 28th day of September 2012, I deposited for mailing in
4 the United States mail, first-class postage prepaid, a true and correct copy of the foregoing
5 PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) and EXHIBITS IN
6 SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)
7 addressed to the parties as follows:

8 Steven Wolfson
9 District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101

10 Dennis C. Wilson
11 Senior Deputy Attorney General
Office of the Attorney General
12 555 E. Washington Ave., Ste. 3900
Las Vega, Nevada 89101
13

14 DATED this 28th day of September, 2012.

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17 An Employee of Potter Law Offices
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