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DISTRICT ORAURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. DONTE JOHNSON, Defendant.	CASE NO. C153154 DEPT. VI

BEFORE THE HONORABLE ELISSA F. CADISH, DISTRICT COURT JUDGE

WEDNESDAY, JULY 20, 2011

TRANSCRIPT OF PROCEEDINGS
DECISION: PROCEDURAL BAR AND ARGUMENT: PETITION FOR WRIT OF HABEAS CORPUS

APPEARANCES:

For the State: STEVEN S. OWENS, ESQ.
Chief Deputy District Attorney

For the Defendant: CHRISTOPHER R. ORAM, ESQ.

RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

Wednesday, July 20, 2011 8:53 a.m.

THE MARSHAL: Top of page 1, State of Nevada v. Johnson, Donte.

MR. ORAM: Good morning, Your Honor.

THE COURT: All right, good morning.

MR. OWENS: Good morning.

THE COURT: So, when we were last here we had kind of lengthy discussion about the whole time bar issue and whether within the circumstances of this case where the convictions and all other sentences were affirmed but it was remanded for a new penalty phase hearing, whether that began the time to run for any habeas issues arising out of those parts other than the penalty phase that it was remanded for. And unfortunately we don't have any published Nevada decisions addressing that particular issue, which only applies in that circumstance where convictions are affirmed but a death penalty is reversed and remanded.

So, it was brought to my attention the Nevada Supreme Court unpublished decision in Chapel [sounds like], *Chappel*, I'm not sure how he pronounces it, but -- which of course we can't use as legal authority. I've got six Supreme Court Justices and an unpublished decision in that case saying that in fact they were the prior trial phase issues or guilt phase issues were barred, and citing *Phillips vs. Vasquez* from the Ninth Circuit, as well as two California decisions from 1974 and 1967regarding the finality of the underlying judgment, if you will, other than the penalty phase of the remand.

And Mr. Oram has cited for me the *Edelbacher* decision from the Ninth Circuit in 1998, subsequent to *Vasquez* that, you know, now of course

both *Vasquez* and *Edelbacher* are considering issues under the federal habeas standards in a federal court proceeding. But, in *Edelbacher* it was saying that the *Phillips v. Vasquez* was a narrow decision and absent unusual circumstances the general rule is that a petitioner must await the outcome of the state proceeding before commencing his federal habeas corpus action. And in that case saying wait until the new penalty phase is all done before you proceed at least for the federal court habeas.

All of which still leaves the issue still up in the air frankly. I was hope -- you know, on the one hand obviously seeing what six Supreme Court Justices did is kind of hard to say otherwise, although it's not binding and not authority. But once -- I guess make a long story short, having looked further at the Supreme Court's brief discussion in that decision, which they knew was not going to be a precedential decision, I'm not convinced that they gave that particular issue the full and detailed analysis that is should have for a precedential decision on that issue.

And it seems to me that the Nevada Statutes contemplated one habeas petition raising all issues in a case. And that these type of parallel tracks of proceedings where we'd be in habeas on a guilt phase and I guess and presumably sentence on all other charges at the same time as a new penalty phase on the murder charge -- charges would be contrary to that scheme. And it seems that it would lead to confusion on several levels, including as pointed out entitlement to counsel, which they're entitled to counsel on the habeas in a death penalty case, not on others. It would be unclear whether -- which one this would be in that circumstance.

And so I acknowledge what *Chappel* says, but knowing that the Supreme Court Justices knew that would not be regarded as precedent, couldn't be cited as legal authority, and given that even the *Vasquez* decision itself frankly appears in my view to be in question or only have narrow applicability even in the Ninth Circuit which issued that decision, I find that the claims are not time barred from that underlying trial.

So, Mr. Oram, I know you did not do your reply brief regarding those issues because this issue was pending.

MR. ORAM: Yes.

THE COURT: How long do you need to do your reply brief on the merits of those issues?

MR. ORAM: Could I have 30 days, Your Honor?

THE COURT: Sure. So, what's 30 days for a deadline for that?

THE CLERK: Yes, Your Honor. August 22nd.

THE COURT: Okay, so August 22nd to file the reply. So, after that we'll have oral argument regarding the merits of the issues that are raised and determine whether an evidentiary hearing is needed or not when we have that discussion.

MR. OWENS: And that'll be argument on all issues, guilty and the third penalty hearing?

THE COURT: Correct.

MR. OWENS: Okay, very good.

THE COURT: You know, let me -- I think we should probably look for a special setting on that, because I expect that'll take a while.

MR. OWENS: Yeah, that may take some time.

THE COURT: Let me take a look at my calendar here. I could -- so full disclosure I'm looking at like Thursday morning September 1st. I don't have any calendar that Thursday morning. The full disclosure is that that weekend is Labor Day Weekend. I'll be here, but just I would rather deal with any conflicts now than later. But, if you can do it that Thursday morning I've got it clear.

MR. ORAM: That's fine.

THE COURT: You could be the only matter on that morning.

MR. OWENS: That works for me.

THE COURT: Let's do September 1st at -- 8:30 work for you?

MR. ORAM: Yes, Your Honor.

MR. OWENS: Yes.

THE COURT: Okay.

THE CLERK: September 1st, 8:30.

MR. ORAM: And so that's argument on absolutely everything?

THE COURT: That's argument regarding all issues raised in the petition and the supplements.

MR. ORAM: Yes, Your Honor.

THE COURT: Okay.

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MR. ORAM: Thank you very much, Your Honor.

THE COURT: Thank you.

MR. OWENS: Thank you.

[Proceeding concluded at 9:01 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Jessica Kirkpatrick

Jessica Kirkpatrick
Court Recorder/Transcriber

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

DONTE JOHNSON,

Defendant.

CASE NO. C153154

DEPT. VI

BEFORE THE HONORABLE ELISSA CADISH, DISTRICT COURT JUDGE

WEDNESDAY, JUNE 29, 2011

TRANSCRIPT OF PROCEEDINGS
DEFENDANT'S MOTION TO PLACE ON CALENDAR TO EXTEND THE TIME TO FILE REPLY BRIEF IN SUPPORT OF DEFENDANT'S WRIT OF HABEAS CORPUS/HEARING AND ARGUMENT:
DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS

APPEARANCES:

For the State: STEVEN S. OWENS, ESQ., Chief Deputy District Attorney

For the Defendant: CHRISTOPHER R. ORAM, ESQ.

RECORDED BY: JESSICA RAMIREZ, COURT RECORDER

WEDNESDAY, JUNE 29, 2011, AT 10:21 A.M.

THE MARSHAL: Judge, if we could, page 2, State of Nevada v. Johnson, Dante.

THE COURT: Good morning.

MR. ORAM: Good morning.

MR. OWENS: Good morning, Judge. Steve Owens for the State.

MR. ORAM: Chris Oram for Mr. Johnson.

THE COURT: All right. So we are on today for argument regarding the petition for writ of habeas corpus. I have read the substantial briefing that's been submitted. Go ahead, Mr. Oram.

MR. ORAM: Your Honor, first of all just for clarification. I, in my reply, had argued against the time bar and I had argued against all the issues that they didn't claim were time bared.

THE COURT: Right.

MR. ORAM: I have reserved -- if you rule that it's time bared, obviously, I'm not replying to the other matters. If you rule it is not time bared, then I would ask permission to do so.

THE COURT: Okay.

MR. ORAM: I will address the time bar issue now. The time bar issue causes me numerous concerns. First of all, I guess I can go right to the heart of it. The Nevada Supreme Court has never ruled in the State's favor in that way. I cited to Mazzan. I cited Mazzan versus State at 110 Nevada 74 and Jimenez versus State, 106 Nevada 769. Those are cases where the Nevada Supreme Court had similar type issues where there was a reversal of a death sentence, affirmation of the first

degree murder conviction. And after re-sentencing, a re-penalty phase, the defendants then file in both of those cases, they file post-conviction relief, one post-conviction relief. And it goes up on appeal and both of those defendants had some success on appeal.

But the reason I bring that up is because the Nevada Supreme Court never said, hey, you can't do this. You've got to do post-conviction after we affirm your first degree murder conviction and then after you're sentenced, then you do a bifurcated post-conviction. And so there's -- I don't see any case law that the State has to support that.

Another grave problem is just -- well, there's something that's come to my attention. I believe the Nevada Supreme Court has considered this issue in another capital case being State of Nevada versus Flanagan and Moore. In that case -- it's a very old case. It's a very, very -- it has a tortured history, very tortured history and I believe it's come for a total of three penalty phases and we're back in litigation. I have now come on that case and it is very voluminous. But what I recognize is that a similar type issue, I believe, was raised in that case. And I believe that either the District Court or the Nevada Supreme Court rejected the argument. If that is the case, then I think the State has to tell you. And I can't tell you right now as I'm saying this, whether it was raised to the District Court or to the Nevada Supreme Court, but that is currently up on appeal from post-conviction of the third penalty phase and I am representing him on that. So I don't see any case law at all to support their position.

Furthermore, the Ninth Circuit in Edelbacher versus Calderon, 160 F.3d 582, considered a similar type issue where there had been a new penalty phase and it emphasized that the Supreme Court has held that death penalty is different from

all other punishments and the severity of the death sentence mandates heightened scrutiny. And in the Ninth Circuit they held that where there's a pending state penalty retrial and no unusual circumstances, we decline to depart from the general rule that a petitioner must wait to the outcome of the state proceedings before commencing his federal habeas corpus action. So it seems that the Ninth Circuit has done that. So I have in support of my position the Ninth Circuit, the Nevada Supreme Court. I believe this identical issue was raised previously in a court and was rejected.

Furthermore, if you look at the statute itself, it requires this. The statute says that in order to file a post-conviction, one thing you have to write on the little form is what's your sentence. So how could Mr. Johnson have answered that question? So we have an affirmation of his first degree murder conviction and we have a remand for a new penalty phase.

THE COURT: Right.

MR. ORAM: So how could he then say, yeah, I filed a post-conviction and when it comes to sentence, what does he say? I don't know? It's required by statute. And so if he then files that, let's just assume he does file it and say, I don't know but I want to file. Then isn't the State going to argue after he's sentenced to death again and he comes up for this type of proceedings, hey, this is a subsequent post-conviction? You can't do that. You bring it all at one time. So he's really in a catch-22.

Moreover, if you were to rule in the State's favor, my argument, as I raised in here, is going to be, okay, then guess what Special Public Defenders, then you're ineffective. Because you should have know what the State has known all along and that is, after the remand, where they said the Supreme Court issued an

order saying new penalty phase but the affirmation of the first degree murder conviction, you should have known you had to file post-conviction relief and you should have known.

And the problem I just saw happening right in front of you was how could the Special Public Defender who had represented Mr. Johnson all throughout, and then have to represent him in the penalty phase, a third penalty phase, then file a post-conviction motion essentially saying we're in ineffective. By the way, we're really ineffective, we're really ineffective. And since we're ineffective, he's going to have to -- and he's accusing us of ineffectiveness. We're going to have to get on the witness stand and he's going to have to waive the privilege. So if he's told us anything incriminating, we're going to have to reveal that. By the way, I may have to go -- hypothetically, this could happen. So the Special Public Defenders testifies against Mr. Johnson saying I wasn't ineffective and guess why? 'Cause he told me X, Y, Z and by the way, I've got to go do the closing argument 'cause I'm representing Mr. Johnson in his penalty phase trying to save his life.

It just doesn't make sense. It doesn't make any kind of common sense and I think it would result in a very, very confusing situation. Because if the State is right, what should Mr. Johnson have done? Are they really saying that they should have -- he should filed the post-conviction, even though he doesn't have a sentence, even though the statute requires it, and then file it against his attorneys, who are representing him the penalty -- upcoming penalty phase? And I just -- I can't see -- as I was drafting this, all the great difficulties.

Furthermore, if you were to rule in the State's favor, Holland versus Florida has been released by the U.S. Supreme Court. I have briefed that issue here and in a couple of other cases. And that talks about equitable tolling where

attorneys are missing deadlines. I don't find that very persuasive simply because I think the more logical analysis to do is do what the Nevada Supreme Court and the Ninth Circuit have done in the cases that I've cited and just say, hey, listen, when it's all done and you're decided and you have your sentence, then file a single post-conviction relief. You can fill in your form accurately. You can say what your sentence is and then you can accuse everybody under the sun who's represented you of being ineffective. And so one court, like yourself, can hear all the issues as opposed to just this bifurcated system where it would make absolutely no sense.

Furthermore, from Dante Johnson's position I think it would be very difficult, very difficult for him to actually say the allegations against a Special Public Defender. Here is the Special Public Defender; they're going to try to save his life in the third penalty phase and he says wait a second, before you do that, I'm going to write up this motion saying all the things that I've said about Special Public Defenders. You're ineffective for this; you're ineffective for that; you're ineffective this. That, I don't think is probably very conducive to a good attorney client working relationship. I think most attorneys would think, you know, you said that about me, to heck with you. And, obviously, then conflict of interest comes. There's conflict of interest then and clearly somebody else would have to be appointed.

And so I think the difficult is just so, so convoluted that the proper way to do this is look at Mazzan, look at Jimenez, look at the Ninth Circuit ruling, look at the statute and say -- and I would ask the State to state whether they've in fact raised this issue before and whether they've been successful. Because if they haven't, then I think that the better issue to do is just let this be decided at this time on the merits of the post-conviction.

THE COURT: All right. Let me here from you on this issue.

MR. OWENS: Certainly. I have looked at Mazzan. I have a copy of it here in front of me. I read it several times through. The only issues addressed in Mazzan, and this is after it had been affirmed as to guilt and reversed as to penalty, the only issues that they address in this appeal are ineffective assistance of counsel at the new penalty hearing and one brief mention of a claim of ineffective assistance of counsel on appeal from the new penalty hearing. Those claims were all properly raised in that post-conviction petition. There's nothing in Mazzan v. State, at 105 Nevada 745, to indicate that there was any guilt phase issues from trial, ineffective assistance of trial counsel that was raised in that petition.

What Mr. Oram is relying on is a subsequent appeal by Mazzan and that was some six years later, 112 Nevada 838, where, in the procedural history when they refer back to Mazzan's prior post-conviction petition, they say here in dicta that that petition had alleged ineffective assistance of counsel at trial, on appeal, and during the second penalty hearing. I think that is an error because when you go back and look, there was no ineffective assistance of counsel at trial raised in that petition that's mentioned anywhere here in the opinion that they are referencing.

I also took a look at Jimenez. Jimenez similarly was reversed and there was a -- just as to penalty. I looked at the post-conviction petition. It only addressed claims of ineffective assistance of counsel at the new penalty hearing. There was one issue that had to do with trial and that was a Brady claim. There's good cause to overcome procedural bars with a Brady claim. It was not ripe for adjudication like a claim of ineffective assistance of trial counsel where trial counsel's performance at trial is concluded. A Brady claim can be raised any time. You still need to raise it timely but interference by the State prevented him from raising that sooner and so

he would be able to raise a Brady claim in a petition many years after the trial. We see that all the time. We see them raised in successive petitions. But there is no claim of ineffective assistance of trial counsel that was raised by Jimenez in a petition after his guilt had already been affirmed and it was remanded for penalty hearing.

I also looked at Dawson, Dawson v. State, 108 Nevada 112. This does appear to address to go back and raise claims of ineffective assistance of trial counsel and after it had been remanded for a new penalty hearing, and guilt was supposedly long since final. However, I note that this is a 1992 case. The petition at issue here was filed, I believe, in 1988. That was under an entirely different procedural post-conviction chapter than what we have here today. The statutes were modified substantially and took effect in 1993. Back in '88, I believe, there was two alternative procedures; one was habeas proceedings of NRS 177 and the other was post-conviction proceedings of NRS 34. They were duplicative remedies. They don't have the time bars that we now have. To the extent that they did have time bars, it was incumbent on the State to invoke them. They were affirmative defenses that the State had to raise. So I don't know whether the State tried to invoke any affirmative defense, whether one existed under the procedural scheme in 1988 or not. But that's how I would distinguish that. It's so old it's simply just not applicable to our current statutory scheme for post-conviction petitions.

Mr. Oram cited from the Ninth Circuit case of Edelbacher v. Calderon. Incidentally, that has never been cited by the Nevada Supreme Court. I would note that it only has marginal applicability 'cause they're not dealing with state post-conviction procedures.

THE COURT: Sure.

MR. OWENS: They're dealing with federal rules of abstention and exhaustion requirements. There's no counterpart for that in the state system.

THE COURT: Right.

MR. OWENS: And it's never been cited. Unlike in my brief, where I cited another Ninth Circuit case, this was Phillips v. Vasquez. It's in our response in -- to the petition. Again, it still concerns federal abstention and exhaustion requirements but in there they clearly recognized, and this one has been cited, not in a published opinion but an unpublished. If they want to talk about unpublished orders, we can do that. In Chappell in 2009, that's a death penalty case, they refused to entertain guilt phase issues after it had been remanded for a new penalty hearing and they cited to Phillips v. Vasquez, which I cited the Court to. And Phillips v. Vasquez recognized that once a death penalty case -- death penalty's unique, once the convictions are affirmed and the penalty is reversed, the convictions remain final. Any other interpretation would result in absurd results. And so all these things that Mr. Oram's been talking about that my interpretation would be absurd, I suggest that his interpretation, where we're here eight years after the trial in Donte Johnson, that that leads to an absurd result. That's what the Supreme Court said just recently in that Chappell case. If the Court wants to look at --

THE COURT: And sorry. Chappell is unpublished; is that what you said?

MR. OWENS: That's an unpublished order and they cited the People v. Vazquez and they recognized that capital cases are different, that the statutory scheme is different. You've got a trial and a separate penalty hearing and they are bifurcated.

THE COURT: Sure.

MR. OWENS: I'm not asking Mr. Oram to bifurcate. Bifurcation is inherent in the post-conviction statutes of NRS 34. It talks about appealing -- or taking a post-conviction petition on a conviction or on a sentence.

THE COURT: All right. So let's talk about that. So, you know, Mr. Johnson gets sentenced to death eventually by the three-judge panel. It goes up on appeal. The Supreme Court reverses it; sends back for a new penalty phase. Okay? So at that point, there's no judgment because there's only a judgment when he's sentenced. So what is he addressing in his petition?

MR. OWENS: I disagree. Mr. Oram is quoting in NRS 176.105. That has one of many different definitions for judgment of conviction; there it requires the sentence. But there is nothing to indicate that this definition found in NRS 176 has application in the post-conviction context of 34.

For example in NRS --

THE COURT: Well, what judgment of conviction was there at that point?

MR. OWENS: Well, the way the NRS 34 refers to conviction, they say conviction or sentence. They clearly mean conviction to be the adjudication. The finding of guilt by the jury and the sentence is something different. So you can look at NRS 34 and see that they're not using it in the way that it is defined in NRS 176.

Likewise, by analogy, 200.033 talks about it's an aggravator for prior -- having been previously been convicted of a prior crime of violence. You don't have to be sentenced, you just have to have been found guilty. The legislature there in using the term conviction simply meant the adjudication, the finding of guilt by the jury. So we can use that as an aggravator even though he hasn't been sentenced.

Likewise, in NRS 34 they're talking about conviction or sentence. You can attack either. That would be redundant if they simply meant that you need to --

you've got to have the sentence as well. So just by looking at the plain language of it --

THE COURT: Well, doesn't a judgment mean the end of the case; here's a judgment? I mean, how -- in what --

MR. OWENS: The one-year time bar is tied to finality.

THE COURT: Right.

MR. OWENS: Finality means that you have a judgment of conviction and that you have either exhausted an appeal or you're not taking an appeal. And your opportunity to seeking cert is over and remittitur issues. So that's the terminology in which NRS 34.726 is framed. You have to file a petition from a judgment of conviction within one year of issuance of remittitur, within one year of finality.

This California case law in the Ninth Circuit case law, Phillips v. Vasquez says that the guilt portion of a capital murder case remains final even though it is reversed as to sentence and sent back for a new penalty hearing.

THE COURT: Sure. They can't relitigate it.

MR. OWENS: It's done. It's over.

THE COURT: Right.

MR. OWENS: If they wanted to take a writ of cert to the U.S. Supreme Court on those convictions, it's done and over. It's final. It doesn't become unfinal simply because they reverse the sentence and send it back. That's what Phillips v. Vasquez and the California case law that is cited in there, which the Supreme Court used and referred to in Chappell, an unpublished case, that's what that means. That the conviction does not become unfinal simply because they're sending it back for a new penalty hearing. This is part of the bifurcation of a capital system.

The Nevada Supreme Court, upon seeing that this death sentence

needed to be redone, they went ahead and entertained the guilt phase issues because they can -- they can and they do exist independently of each other. They didn't say, well, we're going to wait on guilt and send it back and not even look at guilt until you've got an actual sentence. No; they reversed his sentence and they went ahead and they resolved to a final conclusion all of the guilt phase issues.

Now they want to wait eight years and then start to take their post-conviction remedies from those guilt phase issues which were rendered final upon remittitur. There was a judgment and there always has been a judgment. Donte Johnson is not just up in prison for the fun of it. He's there pursuant to a judgment of conviction. The 2002 case reversed only as to penalty and not as to all the penalties.

THE COURT: Right.

MR. OWENS: We're only reversed as to the death sentences.

THE COURT: Right.

MR. OWENS: The judgment remains intact and in effect for his burglary, his conspiracy, his robbery with use, his kidnapping with use cases. He's doing like eight consecutive life without sentences on the kidnapping with use.

THE COURT: Right.

MR. OWENS: Those are final. If he wanted to take any sort of ineffective assistance of counsel claim from those, those are done and over with. Those are waived. Likewise, the guilt adjudication of the murder is done and over 'cause it was resolved by the Supreme Court to conclusion and it was affirmed as to guilt. That makes it final. Remittitur issued as to that. They can't go back and -- guilt is going to remain final here for ever after. If there's some new case that comes down after issuance of remittitur that changes the way in which we do guilty phase cases, he

doesn't get advantage of it 'cause his guilt phase is final. If they change the law on how we do penalty hearings, well, his penalty is unfinal and so he would get the benefit of any new law. So that's my argument on that.

I don't see that -- oh, he cites to Snipes from Florida. As near as I can tell, they're not talking about a post-conviction habeas petition there challenging ineffective assistance of counsel. There they talk about a two-year time bar for a motion; I think it's a motion for a new trial. We also have a two-year window in which motions for new trials can be raised. So we're comparing apples to oranges. Their statute actually says that it runs from the judgment of conviction, whereas our motion for new trial statute says it runs from the verdict. So Snipes really is not on point or consistent here in any way.

In Halverson in 2010, again, I think it's another unpublished case. And I do think the Nevada Supreme Court needs to come out more on point on a published case and gives us direction here.

THE COURT: Yes.

MR. OWENS: But just recently this year they refused to entertain -- no, I'm thinking of Chappell now.

Oh, in Halverson in 2010 they litigated a post-conviction petition contemporaneously with the direct appeal. And so that shows you have jurisdiction. I heard a lot, or at least in the brief, that the Court doesn't have jurisdiction to entertain a post-conviction petitionwhen there's an appeal pending. That's nonsense. It's done all the time. It was done in Halverson in 2010, it was done in Flanagan and Moore. David Schieck, one of the premiere capital defense litigators, in a published case in Flanagan and Moore, that's 112 Nevada 1409, that was remanded for a new penalty hearing and he filed a post-conviction petition

challenging the guilt phase 'cause it was final. If it wasn't final, he couldn't have filed that petition. It was final. He filed it. The Supreme -- the District Court judge ruled on that petition, went ahead with the new penalty hearing. They said, oh, you can't do that until we take our appeal. We've filed now our appeal from the denial of the motion for new trial -- sorry, we filed an appeal from the denial of the petition for post-conviction relief. You can't proceed with the new penalty hearing yet. District Court said nonsense. We're doing the new penalty hearing.

They go up on both appeals. He gets the death sentence again. They go up on both appeals. They're consolidated in a published case. The Supreme Court addresses both claims. So there's clearly jurisdiction on the same case as long as you're dealing with separate issues.

NRS Chapter 34 clearly says that it is collateral to what's going on in District Court. It doesn't effect other remedies. It can go on contemporaneously. Now, the practice has been that we usually wait till the Supreme Court's all the way done, but there certainly is precedent out there that it can be done and has been done at the same time.

As for the conflict of interest, I don't know of anyone who once sentenced to death who gets a shot at redoing the penalty hearing that he's going to go forward again with the same attorney. He's going to change things up, get a new attorney, get a new look at it.

Now in this case, the Special Public Defender did the appeal. There was nothing to prevent him from going after Figler and Sciscento on the guilt phase. They were long since done with the case. Their performance on that had concluded on the guilt phase and the guilt phase had been rendered final by the Nevada Supreme Court's ruling. And so they could have filed a petition for writ of habeas

corpus challenging ineffective assistance of trial counsel Figler and Sciscento.

Now, to the extent that he wanted to attack as well Special Public Defender's performance on the direct appeal as to the guilt phase issues, that is true. That would have presented a conflict of interest. And so we give them a new attorney if he wants to do that. NRS 34 contemplates it is not the attorney who's responsible for filing a petition. So there's no ineffective assistance of counsel of Special Public Defender for not filing it. They were appointed to do a new penalty hearing.

NRS 34 contemplates that a pro per petition is done, as was done in Donte Johnson, and then an attorney -- the decision's made whether or not you're going to get an attorney. Attorneys don't instigate post-conviction petitions. It's a discretionary form of collateral review should they elect to do it. So there's a pro per petition. In this case Oram was then appointed and he filed a supplemental petition. So it was incumbent on Dante Johnson, if he wanted to attack trial counsel Sciscento and Figler, to have filed a petition. It could have proceeded contemporaneously. If it's too much for one judge to be doing both things, then you could stay one, proceed with the other. Handle them any way you want, but that petition's got to get on file because it stops the time bars. You can't wait eight years and then say, now we want to go back and relitigate these things that have long since been final. That upsets the whole scheme of NRS 34 that these things are to be resolved quickly and expeditiously, especially the capital cases.

NRS -- we've been talking about the one-year time bar. That simply talks about it runs from a judgment of conviction and we've got two here. The judgment of conviction that is -- remains in effect as to all guilt phase issues and sentence as to all of the non-murder cases is that original judgment of conviction. It

was only amended for the penalty. And so if he wanted to challenge that original judgment of conviction for any of those guilt phase issues or sentences that were non-death, then that one year ran from that judgment of conviction or the remittitur from issuance of that conviction. That's NRS 34.726.

I've also alleged --

THE COURT: So, sorry. What -- there was -- what did you just say about the judgment of conviction?

MR. OWENS: There's two judgments of conviction. There's the one that was by the judges where they imposed death.

THE COURT: Right.

MR. OWENS: And that was reduced to a judgment of conviction and then it went up on appeal. It was reversed as to penalty; new penalty hearing. Then there's an amended judgment. The amended judgment only differs in that it now reinstitutes the death sentences that are now found by a jury based on certain aggravators and mitigators. The only difference between the two is the imposition now lawfully by a jury of those four death sentences. All the remainder of the judgment of conviction relates back to the original one and his time bars all run from that judgment of conviction. That's the one that he is attacking is that older, initial conviction, at least as it pertains to anything that is not death-related. And that's why we say anything having to do with the new penalty hearing, that's fine in a petition now because we're within -- he filed it within one year of the conclusion of that new penalty hearing. But going back to the guilt, that ties back to that original judgment of conviction where all those issues were rendered final.

THE COURT: Well, let me ask you this. Say it wasn't a death case and, you know, you're convicted of five charges at trial, sentenced, you go up on appeal and

one charge gets reversed for -- reversed and remanded for I guess new trial. Can -- is he supposed to start habeas on the other four charges while that's back on remand?

MR. OWENS: If it's reversed and remanded for a new trial, absolutely. Absolutely.

THE COURT: So the other charges --

MR. OWENS: 'Cause we may or may --

THE COURT: -- that aren't reversed --

MR. OWENS: They're affirmed and they're final and that case now is bifurcated and we will either proceed with the retrial or we'll elect not to proceed with the retrial or we'll retry him and maybe he'll be acquitted.

THE COURT: Right, right, right.

MR. OWENS: But they will be bifurcated, as well as his post-conviction and appellate remedies, forever after.

THE COURT: So whatever part of a case not reversed and remanded, if that's -- if some part of the case is reversed and remanded, if any -- any other part of it that's not reversed and remanded, that's final and should proceed to post-conviction if that's what they want to do.

MR. OWENS: Well, when we're talking about reversed as to guilt, I think that's true. When we're talking about reversing a sentence, I think it's limited to capital cases because a capital sentencing hearing is unlike any other sentencing hearing that can proceed pretty quickly.

Capital sentencing hearing is like a whole new trial and the statutory scheme treats them separately. And then I've got this California authority and the Ninth Circuit authority that says, yeah, we recognize they are separate and can and

should proceed separately through the system. And just because you reverse the capital death sentence, doesn't mean the adjudication is rendered unfinal. I think for non-capital sentences you can do it pretty quickly. You're not going to be running up against that one-year time bar. You're going to impose a new sentence within 30 days and be done with it. So it really is something unique to the capital sentencing structure.

I've also alleged NRS 34.800 that talks about delay in filing the petition. It's good cause to overcome procedural bars if a claim was not previously available to you. His claims of ineffective assistance of counsel against Sciscento and --

THE COURT: Figler.

MR. OWENS: -- and Figler, those were -- have been reasonably available to him for a long time. He's just elected to pursue other things rather than attack them. The more important thing has been the death sentence, not the adjudication on all these other counts or the murder convictions for that matter.

So the delay in filing the petition, they talk about a presumption of prejudice if more than five years passes. This is eight years since the trial. So clearly the intent was that you can't just sit back and allow there to be multiple resentencings, like there was in Flanagan and Moore, and then go back many years later and to adjudicate your guilt phase issues.

THE COURT: Can you spell Chappell for me? The Chappell --

MR. OWENS: C-H-A-P-P-E-L-L. It was 2009, the Westlaw cite is 3571279.

[Colloquy between State and Defense Counsel]

THE COURT: I mean, I realize it's unpublished but, you know.

MR. OWENS: It is. It is. But, yeah, that's why I say the Supreme Court needs to come out and publish something to give us a little bit more clarification on

this fairly unique issue.

Mr. Oram cited to several things in NRS 34 where he says it contemplates a single petition. Well, then why do we have a statute in there that talks about filing successive petitions, that you can do so upon good cause and prejudice? Most capital defendants that I have are on their third, if not fourth, state habeas petition. So single doesn't mean only one bite at the apple like the legislature perhaps intended.

THE COURT: Apparently not.

MR. OWENS: Or they at least intended there to be some attempts made at a successive petition.

And this language about filing a single petition is found in NRS 34.820, but there it talks about all claims which challenge the conviction or imposition of the sentence must be joined in a single petition. The way I read that is that if you're conviction's final, then all claims that relate to your conviction must be joined in a single petition because otherwise, if it was reasonable available to you and you did not bring it --

THE COURT: Then it's barred.

MR. OWENS: -- in that petition, it's barred.

THE COURT: Right.

MR. OWENS: Or all claims that would challenge the imposition of the sentence must be joined in a single petition. But I don't read it to say that you must bring all your conviction and sentencing claims together especially where in the unique situation of a reversal, your convictions are final and have been for some time and your sentence is pending and has been reversed and is up in the air. I don't see that as saying that those claims all must be brought. If they're both final,

then, yeah; you should bring the in a single petition, but not where they're not final.

And throughout here they talk about challenging the validity of a conviction or sentence. Clearly, they mean conviction to mean a finding of guilt not a judgment of conviction that includes a sentence. Otherwise, that would be redundant.

In this NRS 176.105 that talks about a judgment must include a sentence. That does not address a situation where a death sentence has been reversed and remanded for a new penalty hearing. Clearly, he was sentenced. We had a final judgment of conviction. It does not become unfinal. And that 176 -- that definition of judgment of conviction simply does not address -- case authority does, but not that statute, doesn't address what happens to that underlying conviction when the death sentence is reversed. Well, our case authority says it remains final.

And then 34.724 they said you must be convicted of a crime and be under sentence of death or imprisonment in order to file a petition. Well, he's been convicted of a crime and he's remained under a sentence of imprisonment this entire time. It's only the sentence of death that he is no longer under. So anything pertaining to the sentence of death he can't challenge, but his imprisonment he certainly can. He's being confined up there on all these other cases as well as on the murders.

Elsewhere in there they use, again, the or language. You can challenge a conviction or that the sentence was imposed in violation of the Constitution; conviction or sentence. They clearly intended bifurcated proceedings as near as I can tell.

Mr. Oram mentioned equitable tolling in Holland v. Florida. That has long been the policy of the federal courts and they're interpreting different habeas

statutes that are worded differently than our state habeas procedures. Nevada has never applied equitable tolling to the state post-conviction proceedings. I would like there to be a published opinion that says we don't do it, but the practice is that they don't and there are unpublished opinions out there saying flatly -- flat out rejecting equitable tolling. Sorry, the unpublished opinions come up in Westlaw now.

THE COURT: Yes.

MR. OWENS: So you can see them. You can read them. They're easily searchable.

THE COURT: I know. I know you can find them, you can like them, and you can't cite them. I know.

MR. OWENS: Right, right.

Nevada, instead, relies on the good cause. If there is to be some sort of excuse --

THE COURT: Right.

MR. OWENS: -- for which we waive the one-year, it has to fall within what the legislature said was good cause and they didn't define that very much. There's a few other lines in NRS 34, but primarily it's to the courts to decide what is good cause. So I think the bars apply. The question is whether or not Mr. Oram has stated good cause that he was litigating the third penalty hearing and that is, therefore, good cause as to why he did not file a petition to at least stop the time bars and say, you know, I want to get my foot in the door and meet the time bars. And then, you know, petitions can drag on for many years. It can be stayed, it can be supplemented many years down the road, but at least get the petition on file to stop the clock ticking. What's their good cause for not having been able to do that?

And, again, if it's -- if he's challenging the effective assistance of

counsel who's going to be representing him still in the new penalty hearing, then in that scenario, I don't think it'd be very often, but in that scenario where they happen to be the same attorney who tried them -- did the trial the first time, then, yeah, you would have to get them a new trial -- new attorney.

THE COURT: Sure.

MR. OWENS: We see that all the time. In the same post-conviction proceeding I've got capital defendants that have rotated through four or five attorneys just in one petition.

THE COURT: Yes; I've seen it, unfortunately.

MR. OWENS: So I don't think that would cause much of a problem. I don't see the absurd results that Mr. Oram believes would come from what I believe is the correct interpretation of the statutes and what we can piece out from what existing case authority is out there. Rather, what Mr. Oram would like to do I think would frustrate the purpose of NRS 34 which is to speedily resolve these things and not wait and delay until eight years. What if it took longer to do the retrial? What if it was ten years? What if it was 12 years? And then they go back? We can't go back. And memories fade. There's an interest in getting at least those issues that can be raised that are available, that are ripe for review, to get those adjudicated or at least framed in a petition so we know what evidence to preserve, we know what memories, people can make some notes so that we can resolve these things in a timely manner.

That's all I had on the time bars. I think I addressed --

THE COURT: I think that's probably all we're going to be addressing this morning.

MR. OWENS: Okay. Thanks.

THE COURT: Go ahead, Mr. Oram.

MR. ORAM: Your Honor, one thing I would ask the Court to do is -- Mr. Owens may not have addressed that, but I think he may know the answer and that would be did he address this identical issue in Moore, which he has contemplated, and Flanagan and did the Supreme Court -- was all this briefed and, in fact, the State was unsuccessful? I would just ask that question 'cause I've seen briefing that I think looks almost identical to this that we have before the Court and they were -- he was unsuccessful, the State was unsuccessful in making this argument. So I wondered was it done?

MR. OWENS: Well, I do a lot of capital cases and I don't remember them all. I know on Flanagan and Moore I found the published opinion where they challenged -- in a post-conviction petition they challenged -- David Schieck did, guilt phase issues long after they were -- or long before the penalty was certain. It had been reversed, remanded for a new penalty hearing. Before they could proceed with that, he filed his petition. That was heard, entertained in District Court and it was entertained on appeal by the Nevada Supreme Court. What happened thereafter I, frankly, do not recall.

THE COURT: Right, but --

MR. OWENS: I've made this argument in many other capital cases. I don't remember being unsuccessful. But it's a fairly narrow issue that we're talking about. There's not that many reversals where they have not yet -- or where they tried to challenge guilt phase issues so many years after the fact.

MR. ORAM: Well, see, my concern is that Mr. Owens is admitting, yes, I have challenged this. But, yet, he doesn't have, and he would have, if he had a case where he had challenged it like Moore and Flanagan and it is up there, this issue, up

before the Nevada Supreme Court and he'd won in a published decision, we'd see it.

THE COURT: Well, right. We don't have a published --

MR. OWENS: Unpublished.

THE COURT: I think we can all acknowledge --

MR. OWENS: Unpublished, Chappell.

MR. ORAM: Yeah; there's no published --

THE COURT: -- there's no published decisions on the point.

MR. ORAM: Right. Okay.

And unpublished Chappell, as I read it, he -- there's a highlight. If I may just quote to it. It says: An unpublished order shall not be regarded as precedent.

THE COURT: Right.

MR. ORAM: It shall not be cited as legal authority.

THE COURT: Oh, yeah. I understand that.

MR. ORAM: And so as I look at the case, I wonder, if you look at the State's position to its logical conclusion. First of all, Mr. Johnson was entitled to effective assistance of counsel on post-conviction. It's the only time that a person has a right to effective assistance of counsel on post-conviction is when you're sentenced to death.

THE COURT: Right.

MR. ORAM: So since he -- when the reversal came in, he wasn't -- he was no longer sentenced --

THE COURT: Wasn't sentenced to death

MR. ORAM: So does he have a right to effective assistance of counsel at post-conviction? Now let's say he doesn't.

THE COURT: Right.

MR. ORAM: Let's say -- take the State's logic. So Mr. Johnson, a relatively uneducated man, goes and he does some research. He does some -- 'cause we need him to. He needs to file his post-conviction.

THE COURT: Right.

MR. ORAM: And he reads NRS 34.820 subsection 4, which states in pertinent part, and I quote: All claims which challenge the conviction or imposition of the sentence must be joined in a single petition and -- and then I later quote within the statute: Any matter not included in the petition will not be considered in a subsequent proceeding.

So here's Mr. Johnson, an uneducated man, who reads that. And I would suggest that if he had an educated person next to him, they would look at that and say, no, you better just raise everything at one time. Because if you -- it looks right here that if you try to bifurcate this, 'cause he's saying -- Mr. Johnson would start arguing what Mr. Owens is. No, you see, if I don't do this, later on Judge Cadish in about eight years will find that I am -- I have delayed this matter. So I'm going to raise it all in a single petition.

How would he interpret that? I don't see how a reasonably intelligent human would look at that and not say, we're going to have real problems if we don't follow the statute and put it all in at once. Because the statute says it will not be considered and it must be joined in a single petition.

Furthermore, under subsection 5 of 34.735 it states: You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in the petition may preclude you from filing future petitions challenging your conviction and sentence.

Now, if you're Mr. Johnson, and a reasonable person is Mr. Johnson, I would suggest that Mr. Johnson realizes I -- if I do what the State is saying, I have to file everything. And then if somebody said, well, Mr. Johnson, what are you going to do if they sentence you to death? Well, then I'll raise it in a subsequent petition. Oh, no you won't because if you don't raise it all now, you're not allowed to raise it in subsequent petitions. And I think -- just can you imagine if we put that onus on Mr. Johnson sitting up in a prison cell somewhere, an uneducated man looking at that situation going, I don't know what to do.

And I would suggest that as lawyers, I don't think that when I hear Mr. Owens arguing against me, I don't think that -- Your Honor, am I going on too --

THE COURT: Go ahead, no, no. Sorry. I've got a jury waiting but I want to hear about this issue.

MR. ORAM: Okay. I --

THE COURT: This case has bigger implications.

MR. ORAM: It does have bigger implications and I would suggest that Mr. Johnson wouldn't have that ability. And when you, as the Court, are hearing us both argue, you have to be wrestling with the logic and the intellect that's required here. How would he be able to do that? And then come up and say, listen, Ms. Jackson, who's about as fine an attorney -- I've done quite a few capital trials with her.

THE COURT: Yes.

MR. ORAM: She's a fine attorney. How does he say to Alzora Jackson, hey listen, I've got to file this post-conviction. See? Because this is what this interpretation says, and imagine he's just arguing like he's Mr. Owens. So he's taking that position. I think Alzora has no choice, Ms. Jackson has no choice but to say then I'm conflicted 'cause you're calling --

THE COURT: Right.

MR. ORAM: -- Lee McMahon in my office ineffective and I got to get off this case.

THE COURT: Was he the appellate counsel?

MR. ORAM: Lee McMahon was the appellate counsel, Your Honor.

THE COURT: Okay. All right.

MR. ORAM: And so --

THE COURT: She. Sorry.

MR. ORAM: Yeah. And so she -- so the difficulty becomes almost -- it becomes impossible and I don't see how we put that on a capital defendant.

Furthermore, there's a policy here. A policy consideration I'd ask the Court to consider is that one thing that's interesting. I'm on Flanagan and Moore now. I've just gotten Chappell, which I'm just becoming familiar with.

And so my real worry is when I see this constantly in our state, Paul Lewis Browning is another one that I had worked on, where they're reversing penalty phases 15 years later. Mr. Moore, I think, was convicted -- or was accused of a crime from 1984 and we're now up on appeal. We're -- Mr. Owens and I are actually briefing it on appeal and we're in 2011. He hasn't even gone to federal court on his guilt phase issues because courts are making mistakes over and over and over. And they're really doing it in favor of the state and then realizing at some point another court said, boy, this was a mistake. Let's send it back. And I just look at that and think what a waste of resources.

And so, again, what I would argue is a bad policy here. Imagine that the Court rules in favor of the State here today and says you know what? I'm not even going to consider these other issues. And then it goes up to the Nevada

Supreme Court. They say, yeah, Judge Cadish was right. This is just ridiculous. It gets over to the Ninth Circuit. There's a good chance the Ninth Circuit's going to absolutely agree with this stuff and say, why are you doing? Send it back. Start over the post-conviction. And someday, you know, when I'm much grayer, somebody will put me on the witness stand and, you know, and say why was this done? And should we have a new penalty phase? And we'll be here on this case another ten years from now. I'm sure if we do this long enough, we'll get Mr. Owens completely out of here and he won't be able to make these type of creative arguments. And they are, they are creative. And I understand, you know, he's advocating but I think in someway, policy-wise, it's a dangerous policy. And it would be much better to just simply say, you know what, I read the statute as -- it would confuse a person like Mr. Johnson. It would confuse anybody and, therefore, I think it should be considered at one time and these are my ruling on all Mr. Johnson's issues on the merits.

Then irregardless of what the Court does, then the Supreme Court can overlook what has happened and say, we didn't look at everything on the merits, and then the Ninth Circuit can do it and the federal courts can do it. As opposed to ten years from now some judge hearing the issues that have already been raised by me. And I think that is a very, very dangerous, very dangerous policy.

I think that under the statutes as we've cited, under the cases that we've cited that are published, it seems to me that the Nevada Supreme Court has never, never precluded somebody from doing this in a published decision. And the statute does not make it clear. It should make it clear and there should be some case law that Mr. Johnson should be able to read and say, ah, I have to do this. So when it came back on the first decision reversing the penalty and affirming his first degree

murder conviction, that he and Ms. Jackson could have sat down or the Court could have sat and looked at and said, right; you have to file post-conviction now and then you can do it later if you're sentenced to death.

But then, one more logical thing, is because he wasn't sentenced to death on remand, if he filed post-conviction, would you have appointed him a lawyer? In other words, you have every right to say no. You're not sentenced to death.

THE COURT: Right.

MR. ORAM: If you're sentenced to death, you've got to give him a lawyer. So we're going to have a split with judges in here. There are some judges who don't want to appoint people lawyers. And in a case like this --

THE COURT: I think the Supreme Court has been telling us otherwise; but. regardless.

MR. ORAM: But, right. There really are.

THE COURT: Yes.

MR. ORAM: And so I really think that the -- and back then, when this was happening, the problem would be that he's told no, you can't raise it. Well, Mr. Johnson, who then raises a post-conviction doesn't really know what he's doing. He writes something up and then somewhere along the line; well, he was sentenced to death again. And then somewhere somebody says, well, he had a right to assistance of an attorney at the time.

One other thing I heard the Court say is if there was a case that was five convictions, one conviction was overturned, I see that as somewhat different. How about there were five convictions, like the Court said, and the man was sentenced to whatever, ten years, okay, on each sentence. And the Supreme Court

said, you know what, your sentences are all unconstitutional. You could only be given five years and the judge just inexplicably gave you ten.

THE COURT: Okay.

MR. ORAM: We're going to remand this.

THE COURT: Okay.

MR. ORAM: Your convictions are -- stand.

THE COURT: Right.

MR. ORAM: But your sentence is not.

THE COURT: Right.

MR. ORAM: Doesn't he then come back to be resentenced and then after the judgment of conviction is filed, then he files his post-conviction relief? And that's what I would suggest is the proper remedy. And I am just so concerned because, as I listed in my reply, all the issues that I would suggest have merit from the trial and I want them to be heard and for them not to be heard based upon this very highly technical argument that I can argue against Mr. Owens, Mr. Owens can argue and in the end if Mr. Johnson was standing right there, years ago, he wouldn't know what to do.

THE COURT: Can I consider, in your view, ineffective assistance claims? I mean, I don't know if there are issues like this, but for example, that would only go to the robbery conviction but not the murder conviction? Or I don't remember what all the --

MR. OWENS: There's at least two claims that deal with that kidnapping as being incidental and something else that dealt --

THE COURT: Right.

MR. OWENS: -- solely with kidnapping.

THE COURT: So kidnapping, the conviction wasn't reversed. The sentence wasn't reversed. Isn't that a final decision then?

MR. ORAM: I think that's an interesting argument; however, I would argue it's really not final because it's being -- those are being used in the subsequent penalty phase to get Mr. Johnson sentenced to death. And wouldn't he then -- the incidental, that's a good one because I raised that as the --

THE COURT: Right.

MR. ORAM: Okay. So if we come to that then, what he really has to say, Mr. Johnson would have had to say is Lee McMahon, you're ineffective. Why didn't you raise that on my direct appeal? As soon as he does that, if I -- let's say, I'm standing by his side whispering in his ear; I'm his family member. I'm like, raise that issue. So now, he raises it. Then Alzora Jackson and Brett Whipple, I don't think have a choice. They're like, we're off this case.

THE COURT: Right.

MR. ORAM: We have to withdraw off this case.

THE COURT: I think that's right.

MR. ORAM: And then look at the expense of what's now just happened. The office that handled this matter -- Dante Johnson's huge, Judge.

THE COURT: I know that.

MR. ORAM: Yeah; okay. I see.

THE COURT: Before I ever touched a criminal case, I knew about Dante Johnson.

MR. ORAM: It's just so large. So then somebody's going to get this case and then we're going to start. For judicial economy it doesn't make any sense. It makes sense that one person, like myself, gets to look it over and then I attack everybody.

I attack everybody.

THE COURT: Right.

MR. ORAM: And I figure out, okay, you did this wrong, you did this wrong, you did this wrong, and you did this wrong. It makes much more sense than bifurcating it because I'm not trying to say there's absurd -- that there would be absurd resultes but the potential is obvious that there would be --

THE COURT: And you think the entire case, all judgments, all -- the whole thing has to be together and only when the whole thing is all final and done on direct process can there be the petition.

MR. ORAM: Yes. And I think if the Nevada Supreme Court agrees with Mr. Owens, then it's incumbent upon them to tell these defendants that's what you're required to do. Because as I -- if I read the statute, conflicts with what Mr. Owens is arguing. The way I read it, the plain meaning conflicts with it. If he wants the Supreme Court to do that, and the Supreme Court disagrees with me and agrees with him, then publish an opinion so that we know, so Dante Johnson is not just stuck on this. But to absolutely put a man who's sentenced to death and just say, no, we're not considering all of your issues, to me is very dangerous and I just think the policy is so dangerous without the Supreme Court giving you the guidance.

I really can see that this is just a very -- it's a very -- I think I'm right. I think I'm absolutely right, but the --

THE COURT: So is your position that if -- and I'm going to have to look at these cases. I thought I knew what I wanted to do based on reading the briefs. But I need to look at the cases. So but, if I decide Mr. Owens is right --

MR. ORAM: Yes.

THE COURT: -- then is it your position that the procedural bar should not

apply? You know, are you -- you're saying, well, then good cause.

MR. ORAM: Yes.

THE COURT: Because --

MR. ORAM: Good cause.

THE COURT: -- he couldn't possibly know this.

MR. ORAM: Right. He couldn't know it. There was a conflict of interest. And furthermore, we're going to have large proceedings. Because if you rule in Mr. Owens' favor, then I've already raised the argument now, and that is, then he had ineffective assistance of counsel at the penalty phase because they were, essentially, covering up the fact that they should have known what Mr. Owens was thinking, and they should have known the way to read it, and they should have known what the Supreme Court was going to do, and they should have known what this Court was going to do, and they should have assisted him in filing his post-conviction because he's a person who's condemned. He has a right to post-conviction counsel that's effective. So they should have been acting then as his post-conviction counsel.

Because at some point, you see, the logic is so difficult there that they were ineffective. They should have told him then what Mr. Owens is now arguing to this Court. And they should have told him we have a conflict. Why? Why do you have a conflict? Well, because this kidnapping thing, our appellate counsel should have been raising this. That was really ineffective. I can't believe she did that. So here you go. Start filing and we better get you an attorney. But how does he get an attorney because he's not condemned to die? And so the difficulty is just so overwhelming. So, yes, I think if he does it, there was plenty of good cause for this.

And so I know the Court has a lot to wrestle with this but I just think the

policy -- I think, you know, Judge, the other thing --

THE COURT: I mean, I appreciate the policy but, ultimately, I've got to decide on the law.

MR. ORAM: But the law is so -- I think it's clear in our favor but I also think that to --

THE COURT: Right. And no, sorry, I didn't mean to imply it was for you or against you. I've got to figure out what it is.

MR. ORAM: Okay, okay.

THE COURT: But, I mean, I suppose, yes. You consider, you know, what are they saying in the statute when they write them so to that extent, I suppose it's policy or intent.

MR. ORAM: And the law -- I think the Supreme Court would have spoken if they wanted to preclude somebody. This is a condemned man.

THE COURT: Right.

MR. ORAM: And so they would have spoken and said in the past in these kind of cases, like Mazzan and Jimenez, the State even admitted in, I believe, one of them that, yes, there was some mention of guilt phase issues. Well, then they knew it and the State had the appellate -- the apparent argument there and they did not raise it and the Supreme Court did not look at it and say, you know what, you can't do this. So I think we win on that because that becomes a binding authority.

THE COURT: Right. So all I meant to say is it's not for me to say what I think the rule should be. It's for me to say what I think the rule is.

MR. ORAM: Yes, Your Honor.

THE COURT: And I'm going to do my best to try to figure that out.

So, I mean, I think it's best for me to make a decision one way or the

other on this before we go into the merits of the issues that are raised. If I rule in favor of Mr. Oram on this, then he's got additional briefing to do and I'd rather hear everything on the merits together, depending on what I do on that. But I'm going to need to read these cases and give you a decision. Now, obviously, there's still going to be some merits arguments regardless of what I do on this issue.

Let me -- what I'm going to do is put this on calendar in three weeks for a -- just for decision on this issue. I'm not going to expect you to argue the merits that day so you don't need to prepare for that.

MR. ORAM: Okay.

THE COURT: And then depending on what I do that day will decide where we go from there and schedule further hearings. What would three weeks from now be Keith?

THE COURT CLERK: It'd be July 20th.

THE COURT: So that will be for a decision regarding the procedural bar argument.

MR. ORAM: Would that be at 8:30?

THE COURT: Yes.

MR. ORAM: Okay.

THE COURT: And so I will need to dig into these decisions and --

MR. ORAM: Your Honor?

THE COURT: -- see where to go.

MR. ORAM: If -- I'm going to go back and look at Moore and Flanagan. It's also a massive case. If the State briefed this identically, would I be permitted to just send over the briefs to show that this issue was considered by the Nevada Supreme Court?

THE COURT: I'm sorry. Say that again.

MR. ORAM: I'm going to go back in Moore and Flanagan --

THE COURT: Oh, yes.

MR. ORAM: And if I find that the issue has been raised in Moore and Flanagan by the State of Nevada, can I submit their briefs to show you that, in fact, it was raised in Moore and Flanagan?

THE COURT: Okay. So if you have any additional authorities on anything like that, get it to me within a week from today.

MR. OWENS: Do you want unpublished?

MR. ORAM: No, it wouldn't be unpublished.

MR. OWENS: I could probably find a lot of unpublished orders.

MR. ORAM: No, it wouldn't be -- this would be unpublished. I'd be sending over an order. I would be -- well, I'd be sending over something showing that the Nevada Supreme Court heard briefing that they made this identical argument to.

THE COURT: That the issue was raised.

MR. ORAM: Yes, because I think that is -- I'm not trying to say their order is binding but I'm trying to say that, look, the State of Nevada made this identical argument to them and they didn't win. And so I think since they can't win in Moore, then why should they be able to win here?

MR. OWENS: Yeah; we won in Chappell and that was just two years ago.

THE COURT: All right.

MR. OWENS: On this issue in an unpublished order.

THE COURT: I guess what I would say is --

MR. OWENS: I think the reason that there's no published opinions is it didn't occur to Mr. Oram to even go back and try to raise any of these guilt phase issues.

His first supplemental dealt with the new penalty hearing. And then he says, oh, I got some more issues. In the second supplemental he goes back. Most attorneys would not do this. Mr. Oram, he's smart. He says, hey, let's go back and try to raise some of these eight-year-old claims from trial. That's what I don't think you have happen very often and that's why I don't think the Supreme Court very often gets confronted with this situation.

MR. ORAM: Judge, actually my rationale for doing that was that it was too huge sets of trials. So I did do one trial and then did a supplement and then I went and did the guilt phase issues in another one. It was just so massive so I asked for more time.

THE COURT: All right. So here's what I'm going to say. I'm going to clearly pull Chappell and read it. I know the rules say you're not supposed to cite it to me and it's not binding authority. But I'm at least curious to see what somebody thought; one of our Supreme Court Justices, at least one thought. I suppose three. But I guess I'm hesitant to tell you to submit to me a bunch of unpublished decisions, but -- given what the Supreme Court rule is. But at the same time, it may be all that's out there. So I guess I'm kind of torn on that issue. I mean -- all right. Well, all right, so go ahead and give me anything additional you think would be helpful to me to read and get it to me within a week.

MR. ORAM: Yes, Your Honor.

THE COURT: Okay?

MR. OWENS: Okay.

THE COURT: And I will -- and then we'll come back on July 20th and I'll tell you my decision on this and we'll set a schedule to go forward either way.

MR. ORAM: Yes, Your Honor.

Thank you very much, Your Honor.

THE COURT: Thank you.

THE COURT CLERK: Counsel, so is this death penalty or?

MR. ORAM: Yes. It's death penalty.

THE COURT: It is, yes.

All right. Thanks.

[Proceedings concluded at 11:19 a.m.]

* * * * * *

ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual proceedings in the above-entitled case to the best of m ability.

Cheryl Carpenter,
Court Transcriber

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DISTRICT ORAURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

DONTE JOHNSON,

Defendant.

CASE NO. C153154

DEPT. VI

BEFORE THE HONORABLE ELISSA F. CADISH, DISTRICT COURT JUDGE

MONDAY, JUNE 6, 2011

TRANSCRIPT OF PROCEEDINGS
DEFENDANT'S MOTION TO PLACE ON CALENDAR TO EXTEND THE TIME TO FILE A REPLY BRIEF IN SUPPORT OF DEFENDANT'S WRIT OF HABEAS CORPUS

APPEARANCES:

For the State: STEVEN S. OWENS, ESQ.
Chief Deputy District Attorney

For the Defendant: CHRISTOPHER R. ORAM, ESQ.

RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

Monday, June 6, 2011 10:03 a.m.

THE MARSHAL: Bottom of page 1, State of Nevada v. Johnson, Donte.

MR. OWENS: Judge, I think Mr. Oram is prepared to argue today, but I am not. When I saw the motion for extension of time to file the reply brief, --

THE COURT: Oh.

MR. OWENS: -- I assumed that would result in an extension of the argument.

THE COURT: Oh.

MR. OWENS: I have not even seen his reply brief. I was aware --

THE COURT: Oh.

MR. OWENS: -- this morning for the first time that it was filed.

THE COURT: It was filed in the interim, so we were just thinking -- so I lost several hours --

MR. OWENS: I apologize, I'm not --

THE COURT: -- of my Sunday reading for today.

MR. OWENS: Yeah, if you want to entertain it --

THE COURT: Well, --

MR. OWENS: -- we can call it at the end of the calendar. I just won't be -- I'm not -- I haven't read this. I haven't looked at this file in six months. I'm not prepared to argue anything, won't be of any assistance. But, --

THE COURT: Yeah.

MR. OWENS: -- whatever the Court's pleasure is.

MR. ORAM: I have no objection. I understand the situation.

THE COURT: I do.

MR. ORAM: I did ask for an extension. I filed the reply last week. And I understand Mr. Owens' situation. So, I'll do whatever the Court wants, but I have no objection to the State's request.

THE COURT: Okay. We'll put it over. I -- you know what we can either put it on next week if you have time to prepare by next week, otherwise I'm not here the following week.

MR. OWENS: Yeah, I'm gone next week.

THE COURT: Okay.

MR. OWENS: I'm gone part of the following week. I'm here the week of the 27th.

THE COURT: You're here the week of the 27th?

MR. OWENS: The last week of June I'm here.

THE COURT: Okay. I don't want it on the 27th. Let's put it on the 29th then.

MR. OWENS: Okay.

THE CLERK: June 29th at 8:30.

MR. ORAM: Your Honor, would it be heard at the end of the calendar? I imagine arguing --

THE COURT: Likely, because it will take some time to hear you, so --

MR. ORAM: So, do you think around 9:30-10?

THE COURT: Probably 10-10:30.

MR. ORAM: 10-10:30. Okay.

THE COURT: That's typical.

MR. OWENS: Thank you.

MR. ORAM: Your Honor, if I could just address one matter with the Court. From -- and so the State understands as well, what I've done is because there's a time bar issue which has to be addressed by the Court. I have addressed all of the issues that the State says does not say is time barred I have done replies to --

THE COURT: The last penalty phase issues?

MR. ORAM: Correct.

THE COURT: Uh-huh.

MR. ORAM: If the Court was to rule that the other matters were time barred, I did not want to do a reply at taxpayer's expense. If the Court does not rule that way and I prevail on that issue, then I would like an opportunity to reply.

THE COURT: Right. And I saw that in the reply and that's fine with me. So, we can talk about those issues as you've explained them on the 29th.

MR. ORAM: That's fine.

THE COURT: Okay.

MR. ORAM: Thank you very much.

THE COURT: Thanks.

MR. OWENS: Thank you, Judge.

[Proceeding concluded at 10:06 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Jessica Kirkpatrick

Jessica Kirkpatrick
Court Recorder/Transcriber

RPLY
CHRISTOPHER R. ORAM, ESQ.
Nevada State Bar #004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563

Attorney for Defendant
DONTE JOHNSON

DISTRICT COURT

CLARK COUNTY, NEVADA 6/29 ecd

* * * * *

THE STATE OF NEVADA, Plaintiff, vs. DONTE JOHNSON, Defendant.	CASE NO. C153154 DEPT. NO. VI

REPLY TO THE STATE'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION), DEFENDANT'S SUPPLEMENTAL BRIEF, AND SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S WRIT OF HABEAS CORPUS (POST-CONVICTION)

COMES NOW, Defendant, DONTE JOHNSON, by and through his attorney, CHRISTOPHER R. ORAM, ESQ., and hereby submits this Reply to the State's response to defendant's Supplemental Brief and Second Supplemental Brief in support of Defendant's Writ of Habeas Corpus.

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CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX 702.974-0623

This supplement is made and based pleadings and papers on file herein, the affidavit of counsel attached hereto, as well as any oral arguments of counsel adduced at the time of hearing.

DATED this 1st day of June, 2011.

Respectfully submitted by:

CHRISTOPHER R. ORAM, ESQ.
Nevada Bar No. 004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563

Attorney for Petitioner
DONTE JOHNSON

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

STATEMENT OF THE CASE

Mr. Johnson hereby adopts the statement of the case as enunciated in the first supplemental brief.

STATEMENT OF THE FACTS

Mr. Johnson hereby adopts the statement of the facts as enunciated in the first supplemental brief.

ARGUMENT

I. MR. JOHNSON'S ISSUES REGARDING INEFFECTIVE ASSISTANCE OF COUNSEL FROM TRIAL AND ON APPEAL FROM THE JUDGMENTS OF CONVICTIONS SHOULD BE HEARD ON THE MERITS.

In the instant case, Mr. Johnson can demonstrate good cause that an impediment external to the defense prevented him from complying with the State procedural default rules. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); citing, Pellegrini v. State, 117 Nev. 860, 886-887, 34 P.3d 519, 537 (2001); Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994). To find good cause there must be a "substantial reason: 1) that affords a legal excuse" Hathaway, 71 P.3d at 506; quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989).

Mr. Johnson can demonstrate good cause for the failure to file the writ pursuant to NRS 34.726(1). First, the State cites no authority for the proposition that Mr. Johnson should not have concluded his third penalty phase and appeal before filing a post-conviction writ. The filing of the post-conviction writ after the remittitur was issued from direct appeal would have resulted in the withdrawal of his attorney's based upon the conflict of interest. Lastly, the State provides no case law for the proposition that Mr. Johnson is required to file his writ of habeas corpus prior to the third penalty phase.

The State claims that the defendant cannot contend that a sentencing rehearing prevented him from filing a timely petition. In support, the State cites to Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989).The State argues that Mr. Johnson's post-conviction petition for a writ of habeas corpus should be limited to issues concerning the penalty phase of his trial because issues concerning the guilt phase should have been brought within one year of the date that the Nevada Supreme Court affirmed his convictions and reversed his sentence of death. There is no support

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for the State's argument. Nevada does not provide for a bifurcated post-conviction proceeding. Mr. Johnson's judgment of conviction was not final until his final sentence was rendered by the district court. His post-conviction petition for a writ of habeas corpus was not due until one year after the Nevada Supreme Court's decision on direct appeal from his final penalty phase. Accordingly, Mr. Johnson's post-conviction petition was timely filed in this case and all issues, those concerning the guilt phase as well as those concerning the penalty phase, are properly before this Court.

A. NRS CHAPTER 34 CONTEMPLATES THE FILING OF A SINGLE PETITION

The main premises underlying the provisions of NRS 34.720 et. seq., setting forth the procedures to be followed in post-conviction proceedings, is to insure that all of petitioner's claims are consolidated so as to avoid the inefficiency which would result from filing separate post-conviction petitions for each claim the petitioner may have (NRS 34.820(4)). An interpretation of NRS 34.726(1) which would permit bifurcated post-conviction proceedings such as that suggested by the State would place a greater burden on the system, the defendant, and the State.

A post-conviction petition filed before the final judgment of conviction is entered is a nullity as prematurely filed. NRS 34.724 permits a post-conviction petition for a writ of habeas corpus to be filed by "[a]ny person convicted of a crime and under sentence of death or imprisonment[.]" Here, there was no valid judgment of conviction until the third penalty hearing was complete. The two prior judgments of conviction were invalid for the purpose of filing post-conviction proceedings because they lacked the essential requirement of a sentence once the sentence was vacated on appeal. See NRS 176.105 ("If a defendant is found guilty and is sentenced as provided by law, the judgment of conviction must set forth: (a) The plea; (b) The verdict or finding; (c) The adjudication and sentence, including the date of the sentence, any term of imprisonment, the amount and terms of any fine, restitution or administrative assessment, a reference to the statute under which the defendant is sentenced and, if necessary to determine eligibility for parole, the applicable provision of the statute; and (d) The exact amount of credit grated for time spent in confinement before conviction, if any." See also Ex Parte Dela, 25 Nev.

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346, 250, 60 P. 217, 218 (1900) (there are two essentials to a judgment of conviction – "the statement defining the punishment, and the statement of the offense for which the punishment is inflicted"); Ex Parte Roberts, 9 Nev. 44 (1873) (judgment was void because it did not state a valid sentence); Ex Parte Salge, 1 Nev. 449, 453 (1865) (a valid judgment of conviction must list the reciting court and cause, the sentence defining the punishment, and a statement of the offense for which the punishment is inflicted). A judgment of conviction is not final until a written judgment setting forth the plea; the verdict or finding; and the adjudication and sentence, including the date of sentence and a reference to the statute under which the defendant is sentenced. Bradley v. State, 109 Nev. 1090, 1094, 864 P.2d 1272, 1275 (1993) (citing NRS 176.035(1)). See also Johnson v. State, 118 Nev. 787, 59 P.3d 450, 460 n. 31 (2002) (a conviction becomes final when judgment has been entered, the availability of appeal has been exhausted, and a petition for certiorari to the Supreme Court has been denied or the time for sch a petition has expired) (citing Griffith v. Kentucky, 479 U.S. 314, 321 n.6, 93 L.Ed.2d 649, 107 S.Ct. 708 (1987); Doyle v. State, 116 Nev. 148, 157, 995 P.2d 465, 471 (2000) (same); Berman v. United States, 302 U.S. 211, 212, 58 S.Ct. 164, 166, 82 L.Ed.2d 204, 204 (1937) ("Final judgment in a criminal case means sentence. The sentence is the judgment); Midland Asphalt Corp. v. United States, 489 U.S. 794, 798, 109 S.Ct. 1494, 1498, 103 L.Ed.2d 879, 887 (1989) (same).

The judgment of conviction is filed not merely after completion of the guilt phase of a capital trial, but only after the penalty has been determined. The judgment of conviction in this case, as required by NRS 176.105, sets forth both the fact of the conviction and the imposition of the death sentence. Where the Supreme Court affirms the conviction but reverses the death sentence and remands for a new penalty hearing, the original judgment of conviction is void. Following retrial of the penalty phase, a new judgment of conviction is filed.

There is no statute providing for the filing of a post-conviction petition prior to entry of the final judgment of conviction, thus the petition was a nullity. See. Kinsey v. Sheriff, Clark County, 94 Nev. 596, 596, 584 P.2d 158, 159 (1978) (vacating order denying a pretrial petition for a writ of habeas corpus because there was no statute permitting a pretrial challenge to an order denying a motion for discovery and no statute providing for interlocutory appellate review of such orders);

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Sheriff v. Toston, 93 Nev. 394, 395, 566 P.2d 411, 411 (1977) (remanding case with instructions to dismiss a petition that did not meet the requirements imposed by the legislature). See also Allgood v. State, 78 Nev. 326, 372 P.2d 466 (1962) (finding it impermissible to file a notice of appeal prior to entry of judgment).

Further, NRS 34.724(1) provides in pertinent part that "[a]ny person convicted of a crime and under sentence of death or imprisonment . . . may, without paying a filing fee, file a post-conviction petition for a writ of habeas corpus to obtain relief from the conviction or sentence . . . ." Emphasis added. This statute requires that the petitioner be convicted of a crime and be under a sentence of death or imprisonment. Here, the petitioner's sentence was reversed, and the petitioner is under neither sentence of death nor sentence of imprisonment and, under this statute, is not permitted to file for post-conviction relief.

Chapter 34 clearly contemplates that a single post-conviction petition will be filed which challenges both the underlying conviction and sentence. NRS 34.820(4) states in pertinent part that "all claims which challenge the conviction or imposition of the sentence must be joined in a single petition and . . . any matter not included in the petition will not be considered in a subsequent proceeding." If this Court were to interpret Chapter 34 in the manner suggested by the Court, Mr. Johnson would be unable to properly complete the petition. NRS 34.735 sets forth the form of the Petition for Post-Conviction Relief. In pertinent part, the instructions state that "(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence." Emphasis added. The instructions further state that "(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted." The statute also sets forth the form of the Petition, in pertinent part question 5: (a) Length of sentence; and (b) If sentence is death, state any date upon which execution is scheduled. This question can clearly not be answered by a petitioner whose sentence has been reversed and who has yet to be resentenced.

Finally, NRS 34.750 provides that, in the case of an indigent defendant filing a petition for post-conviction relief, "the court may appoint counsel to represent the petitioner." However, NF

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34.820 provides, where "a petitioner has been sentenced to death and the petition is the first one challenging the validity of the petitioner's conviction or sentence, the court shall (a) Appoint counsel to represent the petitioner . . ." If NRS 34.726(1) were to be interpreted to require a petitioner to file a petition for post-conviction relief on his conviction only, while resentencing was pending, the following results are possible: 1) the petitioner could be denied appointed counsel for this petition, as he is not currently facing the death sentence, and 2) if he is unsuccessful in his petition and he is again sentenced to death, he may be denied appointed counsel in a petition for post-conviction relief challenging his subsequent death sentence. Further, he would be required to file his direct appeal of his subsequent death sentence within thirty days of entry of judgment of conviction, at a time when he may have a petition for post-conviction relief pending. Similarly, he could receive an unfavorable decision ion his petition for post-conviction relief, but be unable to appeal within the required thirty days because he may not yet have had his subsequent sentencing hearing.

"A fundamental rule of statutory interpretation is that the unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another that would produce a reasonable result." Sheriff, Washoe County v. Smith, 91 Nev. 729, 733, 542 P.2d 440 (1975). An interpretation of Chapter 34 such as that suggested by the State would produce a clearly unreasonable result.

A "judgment" or "decision" is final for the purposes of appeal only when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined. Parr v. United States, 351 U.S. 513, 518, 76 S.Ct. 912, 915, 100 L.Ed. 1377, 1383 (1956). "'Final judgment in a criminal case means sentence. The sentence is the judgment.'" Id. (quoting Berman v. United States, 302 U.S. 211, 212-13, 58 S.Ct. 164, 84 L.Ed.2d 204 (1937)). "Adherence to the rule of finality has been particularly stringent in criminal prosecutions because 'the delays and disruptions attendant upon intermediate appeal,' which the rule is designed to avoid, 'are especially inimical to the effective and fair administration of the criminal law.'" Abney v. United States, 431 U.S. 651, 657, 97 S.Ct. 2034, 2039, 52 L.Ed.2d 651, 658 (1977) (quoting DiBella v. United States, 369 U.S. 121, 126

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(1962)). See also Bateman v. Arizona, 429 U.S. 1302, 97 S.Ct. 1, 50 L.Ed.2d 32 (1976) (opinion of Rehnquist, J.) ("This Court is precluded from taking cases unless the petition is from a 'final judgment' within the meaning of 28 U.S.C. § 1257. In a criminal case, the 'final judgment' is, of course, the imposition of a sentence." (Citing Parr v. United States, 351 U.S. 513, 518, 76 S.Ct. 912, 915, 100 L.Ed. 1377, 1383 (1956); Berman v. United States, 302 U.S. 211, 212, 58 S.Ct. 164, 84 L.Ed.2d 204 (1937)).

B. CASE AUTHORITY SUPPORTS MR. JOHNSON'S POSITION

This issue was considered at length by the United States Court of Appeals for the Ninth Circuit in Edelbacher v. Calderon, 160 F.3d 582 (9th Cir. 1998). In that case, a defendant sought habeas corpus review of his conviction at a time when his conviction had been affirmed but his sentence of death had been vacated and he was awaiting a new penalty hearing. The court held that "[w]hen there is a pending state penalty retrial and no unusual circumstances, we decline to depart from the general rule that a petitioner must wait the outcome of the state proceedings before commencing his federal habeas corpus action." Id. at 583. The Court explained that it was generally not feasible to conduct habeas review of the guilt phase of a case prior to a determination of the sentence in part because it was necessary to know whether the case was capital or not. Id. at 585-86. It emphasized that the Supreme Court "has repeatedly held that the death penalty is qualitatively different from all other punishments and that the severity of the death sentence mandates heightened scrutiny in the review of any colorable claim of error." Id. at 585 & n.4 (citing Ford v. Wainwright, 477 U.S. 399, 411, 106 S.Ct. 2595, 2602, 91 L.Ed.2d 336 (1986); Zant v. Stephens, 462 U.S. 862, 885, 103 S.Ct. 2733, 2747, 77 L.Ed.2d 235 (1983); Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). It also noted that "prisoners in state custody subject to a capital sentence are afforded numerous other procedural guarantees such as the appointment of counsel and greater compensation for counsel, investigators, and experts." Id. (citing 28 U.S.C. 2261). The Court further noted that the procedural ambiguity of such a situation created duplicative proceedings, confusion and judicial inefficiency. Id. See also Burris v. Parke, 95 F.3d 465, 467 (7th Cir. 1996) (noting that "guilt and sentencing are successive phases of the same case, rather than different cases"; holding that a

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judgment refers to the sentence rather than the conviction; and holding that the Antiterrorism and Effective Death Penalty Act of 1996 would not permit bifurcated habeas proceedings.

The Florida Court of Appeals reached the same conclusion in Snipes v. State, 843 So. 2d 1043 (Fl. App. 2003). Snipes was tried and convicted of first degree capital murder, and subsequently sentenced to death. On direct appeal, the Supreme Court of Florida affirmed the conviction, but reversed the death sentence and remanded to the trial court with instructions to impose a sentence of life imprisonment. After the trial court imposed sentence in accordance with the instructions of the Supreme Court, Snipes appealed this sentence to the court of appeals, which affirmed the sentence. Id. at 1043-44. Florida post-conviction statutes provide that post-conviction relief proceedings must be filed within two years of the date the judgment and sentence become final. Fla. R. Crim. P. 3.850, 3.851 The supreme court's mandate on direct appeal was issued on May 24, 1999. The court of appeals issued its mandate affirming Snipes' life sentence on January 16, 2001. Snipes filed a motion for post-conviction relief on January 4, 2002. The trial court dismissed his petition as untimely, alleging that the two-year time period began to run when the supreme court issued its mandate on May 24, 1999 . Snipes argued that the time period did not begin to run until January 16, 2001, when the appeals court issued its mandate affirming his life sentence. Id. at 1044. The court agreed with Snipes. Further the court illustrated the unreasonable results which might have occurred if the time period had begun to run at the date of the issuance of the supreme court's mandate. Snipes could not have filed his motion for post-conviction relief while the appeal of his sentence was still pending in the appeals court, because the court would have been without jurisdiction to entertain it. Under the trial court's analysis, Snipes' two-year period of time would have been reduced from two years to two months. Further, the court stated that, given the trial court's determination that the time period began to run on May 24, 1999, if the court of appeals had delayed its decision on Snipes' appeal of his life sentence for four additional months, Snipes would have forfeited his post-conviction rights altogether. Id.

C. THE STATE'S PROPOSED PROCEDURE HAS NOT BEEN FOLLOWED IN OTHER NEVADA CASES

Similarly situated defendants have not been required to utilize the procedure the State

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argues is required by Nevada law. The following cases are illustrative:

John Mazzan was convicted of one count of first degree murder and sentenced to death. On direct appeal from his judgment of conviction, the Nevada Supreme Court affirmed the finding of guilt on the charge of murder but vacated his sentence and remanded the matter for a new penalty hearing. Mazzan v. State, 100 Nev. 74, 675 P.2d 409 (1984). In the second penalty hearing he was again sentenced to death. Mazzan v. State, 103 Nev. 69, 733 P.2d 850 (1987). Following the decision on direct appeal from the second sentence of death, Mazzan filed in the district court a petition for post-conviction relief and a motion for a stay of execution. The district court granted the stay and held a hearing on appellant's petition. On December 2, 1987, the district court entered an order denying the petition for post-conviction relief. Mazzan v. State, 105 Nev. 745, 747, 783 P.2d 430 (1989). The Nevada Supreme Court subsequently noted that Mazzan's 1987 petitioner alleged. "ineffeetive assistance of counsel at trial, on appeal, and during the second penalty phase." Mazzan v. Warden, Nevada State Prison, 112 Nev. 838, 840, 921 P.2d 920 (1996). At no point did the Nevada Supreme Court conclude that any of the claims raised in the 1987 petition were untimely because they were not filed withing one year of the decision on the first direct appeal in 1984.

After a May 1987 mistrial resulting from a hung jury, Victor Jimenez's second trial in January 1988 produced convictions of first-degree murder and robbery with use of a deadly weapon, and a sentence of death. The Nevada Supreme Court affirmed his convictions on appeal, but reversed his capital sentence. Jimenez v. State, 105 Nev. 337, 775 P.2d 694 (1989). Following a second penalty hearing, Jimenez again received a death sentence, which the Nevada Supreme Court affirmed. Jimenez v. State, 106 Nev. 769, 801 P.2d 1366 (1990). In 1991, Jimenez filed a post-conviction petition in the district court. Counsel was appointed and counsel filed a supplemental petition in 1992. The post-conviction petition included claims relevant to the guilt phase and the penalty phase, and included claims that the State withheld exculpatory evidence relevant to the guilt phase. The Nevada Supreme Court found merit to the claims and ordered a new trial on both guilt and penalty. Jimenez v. State, 112 Nev. 610, 612, 918 P.2d 687 (1996). At no point in its opinion did the Court find that claims concerning the guilt phase were

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not timely raised because a post-conviction petition was not filed within one year of the first appeal.

Henry Dawson was convicted of first degree murder and sentenced to death. The Nevada Supreme Court affirmed the conviction and remanded for a new penalty determination. Dawson v. State, 103 Nev. 76, 734 P.2d 221 (1987). After his second penalty hearing, Dawson was sentenced to death, and the Nevada Supreme Court affirmed the sentence. Dawson v. State, Docket, No. 18558, Order Dismissing Appeal, October 21, 1988. Dawson filed a proper person petition for post-conviction relief, alleging that he had received ineffective assistance of counsel in the guilt phase and penalty phase. The district court denied the request for counsel and dismissed the petition. The Nevada Supreme Court directed the district court to hold an evidentiary hearing to resolve the factual issues raised in Dawson's petition and to appoint counsel to represent him during those proceedings. Dawson v. State, Docket No. 20440, Order of Remand, November 17, 1989. After an evidentiary hearing, the district court denied Dawson's petition for post-conviction relief. The Nevada Supreme Court addressed the merits of the issues and affirmed. Dawson v. State, 108 Nev. 112, 825 P.2d 593, 594-595 (1992). At no point in its opinion did the Nevada Supreme Court concluded that the claims concerning the guilt phase of the case were procedurally barred as untimely based on the fact that the claims were not presented until completion of the second penalty hearing and the appeal therefrom.

There appear to be no case in which the State's proposed procedure of bifurcating guilt and penalty phase habeas corpus proceedings has been followed. Certainly it would be inequitable to mandate such a procedure without prior notice to the defendant.

D. COMMON SENSE SUPPORTS MR. JOHNSON'S POSITION

There are practical considerations which also support Mr. Johnson's position that the time for filing a post-conviction petition for a writ of habeas corpus does not commence until the judgment is final. The bifurcated procedure suggested by the State would lead to absurd results and outrageous costs. For example, the following issues would be presented:

1. Jurisdiction:

Under the State's proposed procedure, it is possible that the Nevada Supreme Court would

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entertain an appeal from the denial or grant of a post-conviction petition for a writ of habeas corpus at the same time the new penalty hearing was proceeding in the district court. In such a situation, both the district court and the Supreme Court would be claiming jurisdiction over the same case. The Nevada Supreme Court, however, has repeatedly held that jurisdiction over a case may not co-exist simultaneously in the Nevada Supreme Court and the district court. See Buffington v. State, 110 Nev. 124, 868 P.2d 643 (1994); Dickerson v. State, 114 Nev. 1084, 967 P.2d 1132 (1998).

2. Conflicts with Counsel:

Under the State's proposed procedure it is possible that a defendant would be represented by an attorney for the second penalty hearing at the same time that the defendant was challenging the effectiveness of that same attorney. In most cases, trial counsel represents the defendant upon remand for a new penalty hearing. If the State's procedure were followed, the defendant would be arguing that that same attorney's performance was ineffective and prejudicial through post-conviction proceedings at the same time as the second penalty hearing. Such a procedure would be highly debilitating to the attorney-client relationship and would create additional conflicts that would be the source of future claims.

3. Appointment of Counsel:

A defendant who is sentenced to death is entitled to the appointment of post-conviction counsel. NRS 34.820(1) (providing for mandatory appointment of counsel for the first post-conviction petition challenging the validity of conviction or sentence where the petitioner has been sentenced to death). Cf. NRS 34.750(1) (providing for discretionary appointment of counsel in other cases). See Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001). Under the State's proposed procedure, the district court would not be able to determine whether or not counsel was mandated because the district court would not know the defendant's sentence. Likewise, the district court would not be able to determine whether Supreme Court Rule 250, which governs procedures in capital cases, was applicable to the case. Further, the district court would not know whether to pay appointed counsel $100, the rate for non-capital cases, or $125, the rate for capital cases. Still further complications would ensue as the district court considered appointment of

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experts and investigators and considered the degree of scrutiny to give the claims presented in the petition.

4. Possession of the File:

Under the State's proposed procedure, duplicate copies of the entire file would be necessary as both trial counsel and post-conviction counsel would need a complete copy in order to adequately represent the defendant. As the files in capital cases are often enormous, considerable expense would be incurred. Still further expenses could be incurred unnecessarily if different Deputy District Attorneys were assigned for the penalty phase and habeas proceedings or if different District Court Judges were assigned to the two phases of the case. Duplicate copies would also be required if the original file was sent to the Nevada Supreme Court for an appeal from the penalty verdict if post-conviction proceedings were still pending in the district court.

5. Attorney-Client Privileged Matters:

A defendant has a right to have confidential and privileged conversations with his attorney. This privilege may be waived during post-conviction proceedings if certain issues are raised. A defendant may be hesitant to raise certain issues in a post-conviction petition if the privilege would be waived as a result and the penalty phase were still pending.

6. Federal Review

The federal courts are strict in their requirements both that a single habeas petition be filed and that it be filed within one year of the final decision of the state appellate court's decision on direct appeal. See Carey v. Saffold, 536 U.S. 214 (2002); 28 U.S.C.S. § 2244(d)(1)(A) (federal Antiterrorism and Effective Death Penalty Act of 1996). Under the State's proposed procedure, chaos and confusion would result as to when a defendant was obligated to file his federal court petition.

Conclusion

For each of the above stated reasons, the State's argument should be rejected. There is no support for the State's assertion that a capital defendant must file two post-conviction petitions - one challenging the guilt phase of his case and one challenging the penalty phase of his case. To the contrary, Nevada statutory and case authority clearly provides for a single post-conviction

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proceeding following a decision on direct appeal from a final judgment of conviction, which includes both the finding of guilt and entry of a valid sentence. Accordingly, Mr. Johnson's claims concerning both the guilt phase and the penalty phase of this case are properly before this Court.[1]

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[1] For purposes of fiscal responsibility, Mr. Johnson will reply to the issues the State argues as time barred if this Court makes a decision that Mr. Johnson's issues are not time barred. The following issues will be replied to if this Court is to make a decision that Mr. Johnson is not time barred:

II. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR FAILURE TO RAISE ON DIRECT APPEAL THE UNCONSTITUTIONALITY OF JOHNSON'S JURY SELECTION PROCESS.

III. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR COUNSEL'S FAILURE TO OBJECT AND FILE A MOTION TO DISMISS THE KIDNAPPING AS IT IS INCIDENTAL TO THE ROBBERY. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR FAILURE TO RAISE THIS ISSUE ON DIRECT APPEAL.

IV. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR FAILURE TO RAISE THE ISSUE OF CHANGE OF VENUE ON DIRECT APPEAL.

V. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR FAILURE OF COUNSEL TO RAISE ON DIRECT APPEAL THE DISTRICT COURT'S RULING TO NOT ALLOW TRIAL COUNSEL TO INTRODUCE THE BIAS AND PREJUDICE OF THE STATE'S WITNESS.

VI. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE PROSECUTORIAL MISCONDUCT REGARDING INTESTINAL FORTITUDE ON DIRECT APPEAL.

VII. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR FAILURE TO RAISE ON APPEAL THE ADMISSION OF HEARSAY IN VIOLATION OF THE UNITED STATES CONSTITUTION.

VIII. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR THE FAILURE TO RAISE ON DIRECT APPEAL THE STATE'S FAILURE TO REVEAL ALL OF THE BENEFITS THE STAR WITNESSES RECEIVED FROM THE STATE OF NEVADA IN VIOLATION OF THE UNITED STATES CONSTITUTION AMENDMENTS FIVE, SIX AND FOURTEEN.

IX. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILURE TO OBJECT TO THE PROSECUTORS REPEATED REFERENCE TO THE TRIAL PHASE AS THE GUILT PHASE. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

X. MR. JOHNSON IS ENTITLED TO A NEW TRIAL BASED UPON INADMISSABLE EVIDENCE BEING PRESENTED PURSUANT TO NRS 48.045.

XI. MR. JOHNSON IS ENTITLED TO A NEW TRIAL BASED UPON IMPROPER CLOSING ARGUMENT IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

XII MR. JOHNSON IS ENTITLED TO REVERSAL OF HIS CONVICTIONS BASED UPON THE STATE'S INTRODUCTION OF OVERLY GRUESOME AUTOPSY PHOTOS.

XIII. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR TRIAL COUNSELS TO FAILURE TO OBJECT AND STATE ON THE RECORD WHAT TOOK PLACE DURING THE UNRECORDED BENCH CONFERENCES.

XIV. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING HIS THIRD AND FINAL PENALTY PHASE WHEN COUNSEL FAILED TO INTRODUCE EVIDENCE THAT MR. JOHNSON HAD PREVIOUSLY HAD A FINDING OF NUMEROUS MITIGATING CIRCUMSTANCES WHICH WERE NOT ARGUED TO AND FOUND BY THE JURY WHICH SENTENCED HIM TO DEATH IN VIOLATION OF THE SIXTH, EIGHT, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON APPEAL.

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II. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AS HIS ATTORNEYS HAD AN ACTUAL CONFLICT OF INTEREST IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In the State's response, the State contends Mr. Johnson's issues relating to his actual convictions are time barred (State's Response pp. 16-22).

On December 18, 2002, the Nevada Supreme Court affirmed Mr. Johnson's convictions. However, the Nevada Supreme Court reversed Mr. Johnson's sentences of death. Johnson v. State, 118 Nev. 787, 59 P.3d 450 (2002). At trial, Mr. Johnson was represented by Mr. Joe Sciscento and Mr. Dayvid Figler. On direct appeal, Mr. Johnson was represented by Lee McMahon of the Special Public Defenders office (See, Johnson v. State,118 Nev. 787, 59 P.3d 450 (2002)). The Nevada Supreme Court issued a remittitur on January 14, 2003. The State claims Mr. Johnson's one year time limit to file a post-conviction writ began January 14, 2003. See NRS 34.726(1). Hence, the State argues that Mr. Johnson was required to file his post-conviction writ no later than January 13, 2004 (State's Response pp. 21).

During this time period, the special public defender continued to represent Mr. Johnson. The Special Public Defender conducted investigation and began preparation for Mr. Johnson's third penalty phase. In fact, the special public defender represented Mr. Johnson during the third penalty phase. The Special Public Defender continued to represent Mr. Johnson on appeal from the sentences of death he received during his third penalty phase.

Accordingly, *assuming arguendo* this Court agrees with the State's position, Mr. Johnson

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XV. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR FAILING TO RAISE ON DIRECT APPEAL THE DISTRICT COURT GIVING INSTRUCTION NUMBERS 5, 36, 37 IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FOR TRIAL COUNSELS FAILURE TO OFFER PROPER JURY INSTRUCTIONS ON MALICE.

XVI. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR COUNSEL'S FAILURE TO RAISE ON DIRECT APPEAL THE COURTS OFFERING OF JURY INSTRUCTION 12.

XVII. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILURE OF TRIAL COUNSEL TO OFFER A JURY INSTRUCTION REGARDING MALICE.

XVIII. MR. JOHNSON IS ENTITLED TO A REVERSAL OF HIS CONVICTIONS AND SENTENCE OF DEATH BASED UPON CUMULATIVE ERROR.

XIX. THE UNDERSIGNED ENDORSES ALL ARGUMENTS RAISED ON BOTH DIRECT APPEALS TO THE NEVADA SUPREME COURT(TRIAL AND FINAL PENALTY PHASE).

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received ineffective assistance of counsel based upon an actual conflict of interest. The court appointed the Special Public Defender to represent Mr. Johnson. Yet, counsel for Mr. Johnson should have filed a post-conviction proceedings. Mr. Johnson has been condemned to death and was represented by counsel. In the instant case, the undersigned has found numerous instances of ineffective assistance of trial and appellate counsel. All of the issues allege that the Special Public Defenders committed ineffective assistance of counsel. Rather than file these issues in a timely fashion, the Special Public Defender failed to ever file a post-conviction petition for Mr. Johnson. The Special Public Defender would have been required to argue that they had provided ineffective assistance of counsel both at trial and on appeal. Obviously, the Special Public Defender has an actual conflict in claiming that they had provided ineffective assistance of counsel to Mr. Johnson.

The sixth amendment provides that "in all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense". This right to counsel includes a "correlative right to representation that is free from conflicts of interest" Wood v. Georgia, 450 U.S. 261, 271, 67 L.Ed. 2d 220, 101 Sup. Ct. 1097 (1981); See also, Cuyler v. Sullivan, 446 U.S. 335, 345, 64 L.Ed. 2d 333, 100 Sup. Ct. 1708 (1980). Whether a defendant's representation "violates the sixth amendment right to effective assistance of counsel is a mixed question of law and fact that is reviewed de novo" Triana v. United States, 205 F.3d 36, 40 (2nd Cir. 2000)(quoting United States v. Brau, 159 F.3d 68, 74 (2nd Cir. 1998), cert denied 531 U.S. 956 (2000).

Conflicts of interest can be placed into three categories. The first category describes those conflicts that are so severe that they are deemed per say violations of the sixth amendment. Such violations are unwaivable and do not require of showing that the defendant was prejudiced by his representation. See, United States v. Fulton, 5 F.3d 605, 611 (2nd Cir. 1993); United States v. John Doe # 1, 272 F.3d. 116, 125 (2nd Cir. 2000); Finlay v. United States, 537 U.S. 851, 154 L.Ed. 2d 82, 123 Sup. Ct. 204 (2002); Armienti v. United States, 234 F.3d 820, 823 (2nd Cir. 2000). By contrast when an actual conflict of interest occurs when the interest of the defendant and his attorney "diverge with respect to a material factual or legal issue or to a course of action" United States v. Schwarz, 283 F.3d 76, 91 (2nd Cir. 2002). To violate the sixth amendment, such conflicts must adversely affect the attorney's performance. See, United States v. Levy, 25 F.3d 146, 152

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(2nd Cir. 1994). Lastly, a clients representation suffers from a potential conflict of interest if "the interest of the defendant may place the attorney under inconsistent duties at some time in the future" United States v. Kliti, 156 F.3d 150, 153 (2nd Cir. 1998). To violate the sixth amendment such conflicts must result in prejudice to the defendant. Levy, 25 F.3d at 152.

While a defendant is generally required to demonstrate prejudice to prevail on a claim of ineffective assistance of counsel. See, Strickland v. Washington, 466 U.S. 668, 687, 80 L.Ed. 2d 674, 104 Sup. Ct. 2052 (1984), this is not so when counsel is burdened by an actual conflict of interest. Id. 466 U.S. at 692. Prejudice is presumed under such circumstances. See also, United States v. Malpiedi, 62 F.3d 465, 469 (2nd Cir. 1995); United States v. Iorizzo, 786 F.2d 52, 58 (2nd Cir. 1986). Therefore, a defendant claiming he was denied a right to conflict free counsel based on an actual conflict need not establish a reasonable probability that, but for the conflict or a deficiency in counsel's performance caused by the conflict, the outcome of the trial would have been different. Rather, he need only establish 1) an actual conflict of interest that 2) adversely affected his counsel's performance. See, Cuyler v. Sullivan, 446 U.S. 335, 348, 64 L.Ed 2d 333, 100 Sup. Ct. 1708 (1908); See also, Levy, 25 F.3d at 152.

"An attorney has an actual, as opposed to potential, conflict of interest when, during the course of the representation, the attorney's and the defendant's interest diverge with respect to the material factual or legal issue or to a course of action." Winkler v. Keane, 7 F.3d 304, 307 (2nd Cir. 1993).

The State claims that Mr. Johnson missed his statutory time period for alleging ineffective assistance of counsel for his convictions. Mr. Johnson was represented by the Special Public Defender who did not file the petition (*assuming arguendo* this court rules that the State was correct). Based on this actual conflict of interest, the case law establishes Mr. Johnson received ineffective assistance of counsel. Mr. Johnson is entitled to a new penalty phase based on the failure of his counsel to recognize that an actual conflict of interest existed during the third penalty phase.

Mr. Johnson is entitled to a new penalty phase based upon ineffective assistance of counsel based upon a conflict of interest in violation of the sixth and fourteenth amendments to

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the United States Constitution.

III. MR. JOHNSON'S ISSUES REGARDING INEFFECTIVE ASSISTANCE OF COUNSEL FROM TRIAL AND ON APPEAL FROM THE JUDGMENTS OF CONVICTIONS ARE NOT TIME BARRED PURSUANT TO HOLLAND V. FLORIDA, 130 S.Ct. 2549 (JUNE 14, 2010).

In the instant case, Mr. Johnson's counsel failed to timely file a post-conviction Petition for Writ of Habeas Corpus. Additionally, Mr. Johnson's counsel failed to advise him of his need to file a timely petition.

In Holland v. Florida,130 S.Ct. 2549 (June 14, 2010), the United States Supreme Court determined that limitation periods are customarily subject to equitable tolling. The United States Supreme Court reasoned that basic habeas corpus principles have always considered equitable principles.

The United States Supreme Court granted Holland's petition for Certiorari. The Eleventh Circuit Court of Appeals application of equitable tolling doctrine to instances of professional misconduct, conflicted with the approach taken by other circuits Id. at 2560. The United States Supreme Court had not decided whether the statutory limits for the one year filing of the petition would be tolled for equitable reasons. Id. at 2560. See also, Pace v. DiGuglielmo, 544 U.S. 408, 418, n. 8 (2005). The United States Supreme Court determined that the AEDPA "statute of limitations defense... is not jurisdictional" Id. at 2560. See also Day v. McKonough, 547 U.S. 198, 205 (2006). "It does not set forth an inflexible rule requiring dismissal whenever it's clock has run Id. at 208.

"It is hornbook law that limitation periods are customarily subject to equitable tolling" Id. at 2560. See Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95)(internal quotations omitted). "...the presumption strength is reinforced by the fact that equitable principles have traditionally governed the substance of law of habeas corpus, Munaf v. Geren, 553 U.S. 674, 693 (2008), for we will not construe the statute to displace court's traditional equitable authority absent the clearest command, Miller v. French, 530 U.S. 327, 340 (2000). Id. at 2560.

The United State Supreme Court in Holland, reasoned that the application of equitable tolling would not affect the substance of a petitioner's claim. Id. at 2560. The United States Supreme Court reasoned that basic habeas corpus principles have always considered equitable

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principles, Holland (pp. 16). See also, Slack v. McDaniel, 529 U.S. 473, 483 (2000).

The United States Supreme Court provided,

> The importance of the Great Writ, the only writ explicitly protected by the constitution, Art. I. Sec. 9, cl. 2, along with congressional efforts to harmonize the new statute with prior law, counsels hesitancy before interpreting AEDPA's statutory silence as indicating a congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open Id. at 2562.

The United States Supreme Court has held that a petitioner is entitled to equitable tolling if she can show that 1) she was pursing her right diligently, and 2) that some extraordinary circumstance stood in her way and prevented timely filing. Id. at 2562. See also, Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005).

The United States Supreme Court reminds courts for the need of "flexibility", for avoiding "mechanical rules " Holland, 130 Sup. Ct. 2562. See also Holmberg v. Armbrecht,327 U.S. 392, 396 (1946). The United States Supreme Court reasons,

> ...We have found a tradition in which court of equity have sought to relieve hardships which, from time to time, arise from hard and fast adherence to more absolute legal rules, which, if strictly applied, threaten the evils of archaic rigidity (Holland v. Florida, pp. 17)(Internal quotations omitted), See also Hazel-Atlas Glass Co. v. Hartford Empire Co, 322 U.S. 238, 248 (1944).

Moreover, the United States Supreme Court explained,

> Taken together, these cases recognize that courts of equity can and do draw upon decisions made in other similar cases for guidance. Such courts exercise judgment in light of prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case Holland, 130 Sup. Ct. 2563.

The United States Supreme Court enunciated that the Eleventh Circuit rule is difficult to reconcile with more general equitable principles and that it failed to recognize, at least sometimes, professional misconduct amounts to egregious behavior, which would create an extraordinary circumstance and demands equitable tolling. Holland, 130 Sup. Ct. 2563.

In this case, the failure of Mr. Johnson's counsel to file a timely petition or advise Mr. Johnson of the need to file a timely petition demands the extraordinary circumstance which warrants equitable tolling.

In Holland v. Florida, the United States Supreme Court provided the following ratio

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decidendi,

> Several lower courts have specifically held that unprofessional attorney conduct may, in certain circumstances, prove egregious and can be extraordinary even though the conduct in question any not satisfy the Eleventh Circuit's rule. See, e.g. Nara v. Frank, 264 F.3d 310, 320 (CA3 2001)(ordering hearing as to whether client who was effectively abandoned by lawyer merited tolling); Calderon, 128 F.3d, at 1289 (allowing tolling where client was prejudiced by a last minute change in representation that was beyond his control); Baldayaque, 338 F.3d at 152-153 (finding that where an attorney failed to perform an essential service, to communicate with the client, and to do basic legal research, toling could, under the circumstances, be warranted); Spitsyn, 345 F.3d, at 800-802 (finding that extraordinary circumstances may warrant tolling where lawyer denied client access to files, failed to prepare a petition, and did not respond to this client's communications); United States v. Martin, 408 F.3d 1089, 1096 (CA8 2005) (client entitled to equitable tolling where his attorney retained files, made misleading statements, and engaged in similar conduct). We have previously held that a garden variety claim of excusable neglect, Irwin, 498 U.S., at 96, such as a simple miscalculation that leads a lawyer to miss a filing deadline, Lawrence, supra, at 336, does not warrant equitable tolling. But the case before us does not involve, and we are not considering, a garden variety claim of attorney negligence. Rather, the facts of this case present far more serious instances of attorney misconduct. And, as we have said, although the circumstances of a case must be extraordinary before equitable tolling can be applied, we hold that such circumstances are not limited to those that satisfy the test that the Court of Appeals used in this case. Holland, 130 Sup. Ct. 2564. (Internal quotations omitted).

Pursuant to Holland v. Florida,130 S.Ct. 2549 (June 14, 2010), the United States Supreme Court determined that limitation periods are customarily subject to equitable tolling. Therefore, Mr. Johnson's issues regarding ineffective assistance of counsel from trial and on appeal from the judgments of convictions should be heard on the merits for the failure of Mr. Johnson's counsel to file a timely writ.

IV. MR. JOHNSON IS ENTITLED TO A NEW TRIAL BASED UPON INEFFECTIVE ASSISTANCE OF COUNSEL WHEREIN TRIAL COUNSEL FAILED TO PROPERLY INVESTIGATE IN THE THIRD PENALTY PHASE.

Mr. Johnson's conviction is invalid under the federal and state constitutional guarantees of due process, equal protection, and effective assistance of counsel, due to the failure of defense counsel to conduct an adequate investigation. U.S. Const. Amends. V, VI, VIII & XIV; Nevada Constitution Art. I and IV.

> Counsel's complete failure to properly investigate renders his performance ineffective. [F]ailure to conduct a reasonable investigation constitutes deficient performance. The Third Circuit has held that "[i]neffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice when s/he [sic] has not yet obtained the facts on which such a decision could be made." See U.S. v. Gray, 878 F.2d 702, 711 (3d Cir.1989). A lawyer has a duty to "investigate what information ... potential eye-witnesses

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possess[ ], even if he later decide[s] not to put them on the stand." Id. at 712. See also Hoots v. Allsbrook, 785 F.2d 1214, 1220 (4th Cir.1986) ("Neglect even to interview available witnesses to a crime simply cannot be ascribed to trial strategy and tactics."); Birt v. Montgomery, 709 F.2d 690, 701 (7th Cir.1983) . . . ("Essential to effective representation . . . is the independent duty to investigate and prepare.").

In the instant case, Mr. Johnson's trial counsel failed to properly investigate the facts of the case prior to trial.

In State of Nevada v. Love, 865 P.2d 322, 109 Nev. 1136, (1993), the Supreme Court considered the issue of ineffective assistance of counsel for failure of trial counsel to properly investigate and interview prospective witnesses. In Love, the District Court reversed a murder conviction of Rickey Love based upon trial counsel's failure to call potential witnesses coupled with the failure to personally interview witnesses so as to make an intelligent tactical decision and making an alleged tactical decision on misrepresentations of other witnesses testimony. Love, 109 Nev. 1136, 1137.

Under Strickland, defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Id. at* 691, 104 S.Ct. at 2066. (Quotations omitted). Deficient assistance requires a showing that trial counsel's representation of the defendant fell below an objective standard of reasonableness. *Id. at* 688, 104 S.Ct. at 2064. If the defendant establishes that counsel's performance was deficient, the defendant must next show that, but for counsel's errors, the result of the trial probably would have been different. *Id. at* 694, 104 S.Ct. at 2068.

In the instant case, Mr. Johnson argues that the following facts show a lack of reasonable investigation by his trial counsel. Defense counsel failed to properly investigate several issues that should have been presented at the third penalty phase.

A. FAILURE TO PRESENT ANY MITIGATION ON FETAL ALCOHOL DISORDERS

A review of the file reveals that counsel failed to obtain or conduct testing on Mr. Johnson to determine whether he suffered from Fetal Alcohol Disorder. The State claims that Dr. Thomas Kinsora concluded there was no evidence that Mr. Johnson suffered from Fetal Alcohol Syndrome. Dr. Kinsora also labeled Mr. Johnson as "a really bright individual" (State's Response

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pp. 23-24). The State concludes that the defendant's mitigation expert saw no reason to conduct any further inquiry, and therefore, there is no proof that Mr. Johnson suffered from Fetal Alcohol Syndrome. However, the State cites to the Fetal Alcohol Syndrom: Guidelines for referral and diagnosis (July 2004) wherein the guidelines state "it is easy for a clinician to misdiagnose Fetal Alcohol Syndrom" (State's Response pp. 25). The State recognizes that Mr. Johnson fits several of the factors of Fetal Alcohol Syndrome. The State admits that the defendant's mother, Eunice Cain testified that she drank alcohol while pregnant with the defendant (State's Response pp. 24). The State admits that Mr. Johnson is of extremely small stature (State's Response pp. 24). Additionally, the State admits that Mr. Johnson suffers from "poor reasoning and judgment skills".

Based on the factors, Mr. Johnson's counsel should have investigated the possibility that Mr. Johnson suffered from Fetal Alcohol Syndrome. Mr. Johnson received ineffective assistance of counsel based on the failure of counsel to properly investigate. If an expert had testified to Mr. Johnson's Fetal Alcohol Syndrome the result of the penalty phase would have been different. Hence, Mr. Johnson can meet both prongs of the Strickland standard.

B. FAILURE OF COUNSEL TO OBTAIN A PET SCAN

The State claims "even assuming that this Court somehow finds defendant's counsel deficient for failing to conduct a PET scan defendant's claim must still fail because he cannot meet the second prong of Strickland. Defendant has not even attempted to demonstrate that a PET scan could have possibly led to a more favorable outcome during his penalty phase" (State's Response pp. 27). In fact, a PET scan may establish that Mr. Johnson suffered from brain injury. If a jury was aware that the defendant suffered from a brain injury, they most certainly would have found this a mitigating circumstance. Had the jury been aware of additional mitigating circumstances, the result of the sentence would have been different. Mr. Johnson was entitled to funding by the state to determine whether there was brain injury.

C. FAILURE TO PRESENT EVIDENCE THAT THE CO-DEFENDANT SIKIA SMITH AND TERELL YOUNG RECEIVED SENTENCES OF LIFE.

The State acknowledges the defense failed to present any evidence establishing that the co-defendant's received life sentences (State's Response pp. 29). The State claims that counsels

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mentioning of the life sentences during closing argument was sufficient. Yet, the State acknowledges that closing argument is just argument. The defense failed to present any evidence of the life sentences.

Moreover, the State objected to defense counsels argument and the objection was sustained. The State provides no case law for the proposition that proportionality cannot be considered. Defense counsel was ineffective for failing to present actual evidence, either by way of testimony or exhibit establishing that both defendants received life sentences. Appellate counsel was also ineffective for failing to raise this issue on appeal.

D. FAILING TO OFFER MITIGATORS WHICH HAD BEEN FOUND BY THE FIRST JURY.

In the instant case, during the third penalty phase, trial counsel failed to offer mitigating circumstances which the first jury had determined existed. According to the State, counsel during the third penalty phase had reason to avoid some of the twenty-three mitigating circumstances found by the jury in 2000 (State's Response pp. 36). A comparison between the seven mitigating circumstance found by the third penalty phase jury compared to the twenty-three found by the initial jury demonstrates ineffective assistance of counsel. For instance, the jury in 2000 found mitigator three "witness to father's emotional abuse of mother". Whereas, the third penalty jury was not asked to specify the mitigator of the father's emotional abuse of the mother. The initial jury found that Mr. Johnson witnessed drug abuse by parents and close relatives. Whereas, the third penalty jury did not make such a finding. The 2000 penalty jury found that Mr. Johnson had poor living conditions while living with his great grandmother. The third penalty jury did not make such a finding. The 2000 penalty jury found the mitigator that the great grandmother turned Mr. Johnson into the police. The third penalty jury did not. The 2000 penalty jury found crowded living conditions while at the grandmothers house. The third penalty jury did not find this mitigator. The 2000 penalty jury found that Mr. Johnson lived a guarded life, whereas the third penalty jury made no such finding.

In fact, several of the twenty-three mitigators listed by the 2000 jury was not found by the third penalty jury. More importantly, trial counsel in the third penalty phase failed to offer these mitigators. Interestingly enough, Mr. Johnson's first trial jury was unable to reach a verdict as to

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his sentence. Having found twenty-three mitigators, the jury did not impose a sentence of death. Whereas, during the third penalty phase only seven mitigators were found and Mr. Johnson received sentences of death. According to the state,

> Defendant's 2000 special verdict form only had five mitigating circumstances specifically enumerated, three of which were found by the jury. The remaining twenty mitigating circumstances were added to the special verdict form by a member of the jury (State's Response pp. 33).

The State's claim that twenty mitigators were added by a member of the jury is speculative. The State has no way of determining whether all the jurors found these mitigators or if just one found each mitigator. However, trial counsel during the third penalty phase failed to recognize that jurors found twenty-three mitigators and failed to offer these mitigators to the third penalty phase jury.

Additionally, during the third penalty phase, the State claimed that Mr. Johnson unequivocally fired the fatal shots according to the evidence. Yet, the 2000 penalty jury found that there was "no eyewitness to identify the shooter". The State argues that the first jury did not provide an expression of doubt as to who was the actual shooter. The State speculates that "...it is simply a statement that one of the jurors may have felt more comfortable with returning a death verdict had he heard eyewitnesses testimony from a third party" (State's Response pp. 32). This is pure speculation. Maybe all of the jurors believed there was a doubt as to who actually pulled the trigger. For the State to conclude that a single juror may have felt comfortable returning a death verdict had there been an eyewitness is pure supposition.

The State provides no case law or reasonable rational for the failure of counsel to offer the twenty-three mitigators listed by the 2000 jury in the third penalty phase. There would be no rational or tactical reason for failing to offer mitigators that had already been found by a previous jury.

The failure to properly review and investigate the case rendered Mr. Johnson's sentence of death unreliable. When twenty-three mitigators were found, the jury did not sentence Mr. Johnson to death. Whereas, when seven mitigators were found, he received multiple sentences of death.

E. FAILURE TO PRESENT EVIDENCE FROM THE DEFENDANT'S FATHER.

In the instant case, the defense presented evidence that Mr. Johnson had been abused by

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TEL. 702.384-5563 | FAX. 702.974-0623

his father and that his father was abusive to his mother. The defense failed to call Mr. Johnson's father in the penalty phase. The State claims that defense counsel could not be deemed ineffective for failing to call a witness that would likely have been hostile (State's Response pp. 37). On the contrary, one of the most effective tactical decision a capital litigator can make is to present the following scenario: evidence that a parent has been neglectful and/or abusive. Thereafter, call the parent who claims to be a model parent. This type of evidence has been repeatedly effective in establishing the neglect and abuse of a parent.

In the instant case, Mr. Johnson presented overwhelming evidence of his father's abusive behavior. Having reviewed the transcripts, no rational trier would believe the father's denial of abuse. A jury would have rejected the father's denials of abuse and recognized the lack of parenting by Mr. Johnson's father. It was a significant tactical error in failing to call the abusive parent.

Mr. Johnson is entitled to an evidentiary hearing to establish the allegations of ineffective assistance of trial and appellate counsel for failure to investigate and present mitigation evidence in violation of the United States Constitutions amendments five, six, eight, and fourteen.

V. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL FOR FAILURE TO PRECLUDE THE STATE FROM INTRODUCING AN INADMISSIBLE BAD ACT.

This argument stands as submitted in Mr. Johnson's Supplemental Brief.

VI. TRIAL COUNSEL WAS INEFFECTIVE FOR PROVIDING THE STATE A MITIGATION REPORT FROM TINA FRANCIS WHICH WAS USED TO IMPEACH A DEFENSE EXPERT.

Mr. Johnson's conviction is invalid under the Federal Constitution based on his counsel providing a copy of Tina Fracis' mitigation report to the State in violation of the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution. At the direction of the district court, defense counsel provided the State with a copy of Tina Francis' mitigation report. The State was permitted to impeach Dr. Kinsora with information contained within Tina Francis' report. Specifically, the State used the report to question Dr. Kinsora regarding the following: 1) Donte's mother had not used drugs or alcohol her pregnancy, 2) Donte Johnson allegedly took a small caliber gun and gave it to a co-defendant in another case because the c-defendant was angry

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TEL. 702.384-5563 | FAX. 702.974-0623

with the cheerleader, 3) Donte's grandmother stated he should have been treated as an adult by California authorities, and 4) Donte Johnson moved to Las Vegas because he could make more money selling marijuana and crack in Las Vegas then in LA.

Prior to Dr. Kinsora's testimony, he admitted that he relied upon numerous documents for his opinions. One of the documents Dr. Kinsora admitted to reviewing was a report by the mitigation specialist, Tina Francis.

The State has no right to request the district court to order the production of reports generated by mitigation specialists. This issue is reoccurring in capital trials in this jurisdiction. First, capital litigators are required to obtain mitigation specialists. Prior to this requirement, capital litigators conducted their own mitigation investigation with the aid of private investigators. The information obtained by the capital litigators was not discoverable as it is work product. Now, in the infinite wisdom of higher courts, mitigation specialists are required. Admittedly, some capital litigators have proven so lazy that the mitigation investigation had not been conducted at the time of penalty phase. Thus, causing several courts concern regarding this issue. However, the result is proving to be equally devastating.

Mitigation specialists are required to interview many individuals associated with the defendant. Thereafter, the conversation with potential mitigation witnesses are recorded or placed in reports, then provided to the defense. Almost systematically, prosecutors now request that the mitigation information contained in these reports be produced to the State. It is difficult to imagine the information contained in these reports will not have evidence of the defendant's poor character. For instance, many defendants who are charged with capital murder have significant criminal histories. It is rare, that a capital defendant has an exemplary past. Hence, an extensive investigation into the defendant's background will possibly lead to multiple witnesses who have very damaging information against the defendant. This information is then placed into reports.

Additionally, capital defense teams often work hand in hand. Therefore, it is common for the psychologist and/or psychiatrist and mitigation specialist to provide information to one another. It is also has been common for capital litigators to provide all mitigation information to each of the potential penalty phase experts. Often, a mitigation expert will list in his or her report

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LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

everything they have reviewed. Therefore, the expert is now in a position to have rendered conclusions based upon the entire review of what is listed on the report. The State then claims that all of that information is now discoverable. However, the reports almost invariably contain extremely damaging information against the defendant. **This is exactly what occurred here. This is exactly is occurring throughout the state of Nevada.** The Nevada Supreme Court has not had an opportunity to have this issue extensively litigated and to consider the ramifications of their previous holdings.

In Floyd v. Nevada, 118 Nev. 156, 42 P.3d 249 (2002), the Nevada Supreme Court held that the State's use of evidence obtained from Mr. Floyd's own expert did not violate Floyd's constitutional rights. In Floyd, the defense filed notice of their intention to potentially call Neuropsychologist David Schmidt. The district court ordered the defense to provide the State with Dr. Schmidt's report which included standardized psychological testing. Dr. Schmidt did not testify. During the penalty phase Mr. Floyd called Dr. Edward Dougherty. In rebuttal, the State called Dr. Lewis Mortillaro, Dr. Mortillaro relied in part on the results from the standardized testing administered by Dr. Schmidt. Id.

Floyd argued that Dr. Motillaro's testimony violated his constitutional rights and attorney client privilege. The Nevada Supreme Court determined that Dr. Schmidt's report and test results were not internal documents representing the mental processes of defense counsel. 118 Nev. 156, 168. NRS 174.234(2) and NRS 174.245(1)(b) require discovery from the defendant only when he intends to call an expert witness or to introduce certain evidence during his case in chief. The State often relies upon Floyd for the argument that the mitigation specialist's report should be produced for the State. The State continuously claims that the psychologist and psychologist have relied upon documents, including information from the mitigation specialist and therefore the report is discoverable.

In the instant case, the defense did not call Tina Francis as a witness. Yet, Tina Francis' report was used to impeach Dr. Kinsora and to establish extremely poor character evidence against Mr. Johnson. The concern is as follows. The defense is required to obtain a mitigation specialist who then proceeds to interview numerous witnesses. In order to establish a thorough

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LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX 702.974-0623

job, the mitigation specialist places in a report the information he or she has received. Everyone on the defense team obtains those reports. Therefore, the potential defense witnesses have reviewed the report and potentially relied upon information within the report. Now, the report is discoverable. In essence, the State has forced the defense to have an informant within the defense camp. This is logical given the State's continuous requests for the information from the mitigation specialist. The discovery statute that previously required defense counsel to turn over reports of non-testifying experts was declared unconstitutional by the Nevada Supreme Court. See, Binegar v. Eighth Judicial District Court, 112 Nev. 544, 551-52, 915 P.2d 889, 894 (1996).

In the instant case, the defense should not have placed their expert in such a position that he would be impeached with the mitigation specialists report. Additionally, appellate counsel should have raised this issue on appeal. Mr. Johnson was devastated by the mitigation specialists report that was mandated by the courts. The State's argument that this policy and procedure is constitutional is meritless. Mr. Johnson is entitled to a new penalty phase based upon ineffective assistance of appellate counsel. Mr. Johnson is also entitled to a new penalty phase based upon the unconstitutional ruling of the district court mandating the production of the mitigation specialist's report in violation of the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

VII. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FOR TRIAL COUNSEL TO DISAGREE AMONG THEMSELVES IN FRONT OF THE JURY.

In the instant case, during closing argument, defense counsel contradicted each other. One attorney indicated that there are no drugs in prison. However, co-counsel argued that drugs are present in the prison. In the State's response, the State takes great pains in attempting to surmise the tactical decision of both Mr. Johnson's attorneys for providing inconsistent arguments. There is no valid reason for inconsistent arguments to the jury. Defense counsel should have met and conferred regarding their potential arguments. For one attorney to argue there are no drugs in prison only to have the fact disputed by the other attorney amounts to a divided defense team. The State claims there were two motivations for the inconsistent arguments. Yet, there maybe two different motivations but the end result is inconsistency. Inconsistency in front of a jury does not

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equate to effective assistance of counsel. One defense counsel arguing to the jury that the other defense attorney is wrong because there are drugs in prison disparages counsel.

This issue is evidence of cumulative error and ineffective assistance of counsel. "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though those errors are harmless individually" Butler v. State, 120 Nev. 879, 900, 102 P.3d 71, 85 (2004); U.S. v. Necoechea, 986 F.2d 1273, 1282 (9th Cir.1993), (although individual errors may not separately warrant reversal, "their cumulative effect may nevertheless be so prejudicial as to require reversal").

Mr. Johnson is entitled to a new penalty phase based upon ineffective assistance of trial counsel when counsel inconsistent arguments to the jury.

VIII. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL REFERRED TO THE VICTIMS AS KID/KIDS.

During closing argument, the defense attorney explained that it didn't matter whether Mr. Johnson laughed about the murders or not after one of the "kids" are killed. Defense counsel further stated, "does it make any worse? The poor kid is dead". Defense counsel was ineffective for referring the victims as "kids" because the Nevada Supreme Court had already considered whether it amounted to prosecutorial misconduct for the district attorney to refer to the victims as "kids". The Nevada Supreme Court noted,

> Second, Johnson contends that the prosecutor violated a pre-trial order by the District Court when he referred to the victims as "boys" or "kids" during rebuttal argument. He is correct that the prosecutor violate the order but we conclude he was not prejudiced. The meaning of the term "boys" or "kids" is relative in our society depending on the context of its use and the terms do not inappropriately describe the victims in this case. One of the four victims was seventeen year old; one was nineteen years old; and two others were twenty years old. Referring to them as "young men" may have been the most appropriate collective description. But we conclude that the State's handful of references to them as "boys" or "kids" did not prejudice Johnson. Johnson v. State, 122 Nev. 1344, 1356, (2006).

In the State's response, they admit that the Nevada Supreme Court found that the State violated the pre-trial order by referring to the victim as "kids" (State's Response pp. 54).

Next, the State spends great effort in attempting to surmise the tactical decision why defense counsel would move to preclude the State from referring to the victims as "kids" and thereafter, refer to the victims as "kids". There is no valid reason defense counsel forgot the

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court's own prior rulings. Mr. Johnson will not entertain reasons why defense counsel would move to preclude the use of the words "kids" to describe the victims and thereafter have his own attorney describe the victims as "kids".

This amounts to ineffective assistance of counsel. "The Supreme Court has clearly established that the combined effect of multiple trial errors violated due process when it renders the resulting criminal trial fundamentally unfair" Tarle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007)(citing, Chambers v. Mississippi, 410 U.S. 284 (1973); Montana v. Egelhoff, 518 U.S. 37, 53 (1996). The cumulative effect of multiple errors can violate due process even when no single error arises to the level of a constitutional violation or would independently warrant reversal. Id. Citing, Chambers 410 U.S. at 290.

Mr. Johnson is entitled to a new penalty phase based upon numerous errors which have established a violation of both prongs of Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 205, (1984). First, the errors fell below a standard of reasonableness. Second, the errors prejudiced the defendant, which resulted in a sentence of death.

IX. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEYS SUCCESSFULLY MOTIONED THE COURT FOR A BIFURCATED PENALTY HEARING.

This argument stands as submitted as enunciated in Mr. Johnson's Supplemental Brief.

X. MR. JOHNSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FOR THE FAILURE TO OFFER A MITIGATION INSTRUCTION.

This argument stands as submitted as enunciated in Mr. Johnson's Supplemental Brief.

XI. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON APPEAL THE PROSECUTION IMPROPERLY IMPEACHING A DEFENSE WITNESS.

During the penalty phase, the prosecutor improperly impeached one of Mr. Johnson's mitigation witnesses with evidence of a misdemeanor conviction.

The following questions and answers during Dr. Zamora's cross-examination by the prosecutor, illustrates the impermissible impeachment:

Prosecutor: Your not a convicted felon
Mr. Zamora: No
Prosecutor: You don't have any felony convictions or misdemeanor convictions?
Mr. Zamora: I have misdemeanor convictions.

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Ms. Jackson: Your honor that's not a proper question for impeachment.
The Court: That is correct (A.A. Vol. 9, April 29, 2005).

NRS 50.095 states as follows:

"Impeachment by evidence of conviction of a crime.

1. For the purpose of attacking credibility of a witness, evidence that he has convicted of a crime is admissible but only if the crime was punishable by death or imprisonment for more than one year under the law under which he was convicted.
2. Evidence of a conviction is inadmissible under this section if a period of more than 10 years has elapsed since:
(a) The date of the release of the witness from confinement; or
(b) The expiration of the period of his parole, probation, or sentence, whichever is the later date.
3. Evidence of a conviction is inadmissible under this section if the conviction has been the subject of a pardon.
4. Evidence of juvenile adjudication is inadmissible under this section.
5. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is inadmissible.
6. A certified copy of a conviction is prima facie evidence of the conviction."

The Nevada Supreme Court has held that, "[o]n appeal from denial of a writ of habeas corpus, where during preliminary hearing counsel for defendant asked witness for State if he had ever been arrested, and objection to question was sustained and counsel refused to cross-examine witness unless counsel could attack witness's credibility, defendant was not denied right to confront witness because pursuant to the statute, credibility may be attacked only by showing conviction of felony, not by mere arrest." Johnson v. State, 82 Nev. 338, 418 P.2d 495 (1966), *cited*, Plunkett v. State, 84 Nev. 145, at 148, 437 P.2d 92 (1968), Azbill v. State, 88 Nev. 240 at 247, 495, P.2d 1064 (1972), Bushnell v. State, 95 Nev. 570 at 572, 599 P.2d 1038 (1979).

In the State's answering brief, the State admits this was improper impeachment evidence (State's Response pp. 59-60). However, the State argues that Mr. Johnson suffered no prejudice as a result of the improper question (State's Response pp. 60). The State claims they had another motivation for questioning Dr. Zamora as opposed to impeachment. The State's argument makes no sense and violates the statute. It does not matter whether you have a separate motivation for desiring to question a witness regarding misdemeanor convictions. The law dictates you cannot impeach a witness with this type of cross-examination. Any skilled litigator could inform a trial court that they are not impeaching the witness with a misdemeanor conviction but simply want to establish that the witness has lied, deceived, is violent, or makes things up and that is why they

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want to question the witness about a misdemeanor conviction. Clearly, the State used improper impeachment on Mr. Johnson's mitigation witness. The errors during the third penalty phase were numerous and cumulative and should result in a new penalty phase. Mr. Johnson's penalty phase was unconstitutional in violation of the fifth, sixth, eighth and fourteenth amendments to the United States Constitution.

XII. THE DEATH PENALTY IS UNCONSTITUTIONAL

This argument stands as submitted as enunciated in Mr. Johnson's Supplemental Brief.

XIII. MR. JOHNSON'S DEATH SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, AND A RELIABLE SENTENCE, BECAUSE THE NEVADA CAPITAL PUNISHMENT SYSTEM OPERATES IN AN ARBITRARY AND CAPRICIOUS MANNER. U.S. CONST. AMENDS. V, VI, VIII AND XIV; NEV. CONST. ART. I SECS. 3, 6 AND 8; ART IV, SEC. 21.

This argument stands as submitted as enunciated in Mr. Johnson's Supplemental Brief.

XIV. MR. JOHNSON'S CONVICTION AND DEATH SENTENCE ARE INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, TRIAL BEFORE AN IMPARTIAL JURY AND A RELIABLE SENTENCE BECAUSE THE PROCEEDINGS AGAINST HIM VIOLATED INTERNATIONAL LAW. U.S. CONST. AMENDS. V, VI VIII AND XIV; NEV. CONST. ART. I SECS. 3, 6 AND 8; ART IV, SEC. 21.

This argument stands as submitted as enunciated in Mr. Johnson's Supplemental Brief.

XV. MR. JOHNSON IS ENTITLED TO A REVERSAL OF HIS CONVICTIONS AND SENTENCE OF DEATH BASED UPON CUMULATIVE ERROR.

Johnson's state and federal constitutional right to due process, equal protection, a fair trial, a fair penalty hearing, and right to be free from cruel and unusual punishment due to cumulative error. U.S. Const. Amend. V, VI, VIII, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

"The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." Butler v. State, 120 Nev. 879, 900, 102 P.3d 71, 85 (2004); U.S. v. Necoechea, 986 F.2d 1273, 1282 (9th Cir. 1993) (although individual errors may not separately warrant reversal, "their cumulative effect may nevertheless be so prejudicial as to require reversal"). "The Supreme Court has clearly established that the combined effect of multiple trial errors violates due process where it renders the resulting criminal trial fundamentally unfair." Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007) (citing Chambers v. Mississippi, 410

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TEL. 702.384-5563 | FAX. 702.974-0623

U.S. 284 (1973); Montana v. Egelhoff, 518 U.S. 37, 53 (1996)). "The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." Id. (Citing Chambers, 410 U.S. at 290 n.3).

Each of the claims specified in this supplement requires vacation of the sentence and reversal of the judgement. Johnson incorporates each and every factual allegation contained in this supplement as if fully set forth herein. Whether or not any individual error requires the vacation of the judgment or sentence, the totality of these multiple errors and omissions resulted in substantial prejudice.

In Dechant v. State, 116 Nev. 918, 10 P.3d 108,(2000), the Court reversed the murder conviction of Amy Dechant based upon the cumulative effect of the errors at trial. In Dechant, the Court provided, "[W]e have stated that if the cumulative effect of errors committed at trial denies the appellant his right to a fair trial, this Court will reverse the conviction. Id. at 113 citing Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). The Court explained that there are certain factors in deciding whether error is harmless or prejudicial including whether 1) the issue of guilt or innocence is close, 2) the quantity and character of the area and 3) the gravity of the crime charged. Id.

The errors in the instant case should result in a new penalty phase. The cumulative errors were numerous. The errors included counsel's failure to properly investigate and present information regarding Fetal Alcohol Syndrome, failing to obtain a PET scan, failure to offer mitigators which had been found by a previous jury, failure to present evidence from the defendant's father, failure to preclude the State from introducing inadmissible bad acts, failure for handing over mitigation reports, and failure for the attorney's disputing facts with one another, failure to refer to the victims as "kids", and failure for not raising on appeal the prosecution improperly impeaching a defense witness. Therefore, Mr. Johnson is entitled to a new penalty phase.

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520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

CONCLUSION

Based on the foregoing, Mr. Johnson's writ in the instant matter must be granted based upon violations of the United States Constitution Amendments Five, Six, Eight, and Fourteen.

DATED this 1st day of June, 2011.

Respectfully submitted by:

CHRISTOPHER R. ORAM, ESQ.
Nevada Bar No. 004349
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

Attorneys for the Petitioner
DONTE JOHNSON

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX 702.974-0623

ROC
CHRISTOPHER R. ORAM, ESQ.
Nevada State Bar #004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563

Attorney for Petitioner
DONTE JOHNSON

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

THE STATE OF NEVADA, Plaintiff, vs. DONTE JOHNSON, Defendant.	CASE NO. C153154 DEPT. NO. VI

RECEIPT OF COPY

RECEIPT OF A COPY of the attached **REPLY TO THE STATE'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION), DEFENDANT'S SUPPLEMENTAL BRIEF, AND SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT'S WRIT OF HABEAS CORPUS (POST-CONVICTION)** is hereby acknowledged this 1 day of June, 2011.

DAVID ROGER, DISTRICT ATTORNEY

By _____
DEPUTY DISTRICT ATTORNEY
200 Lewis Avenue

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

TRAN

ORIGINAL

DISTRICT ORAURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. DONTE JOHNSON, Defendant.	CASE NO. C153154 DEPT. VI

BEFORE THE HONORABLE ELISSA F. CADISH, DISTRICT COURT JUDGE

MONDAY, APRIL 11, 2011

TRANSCRIPT OF PROCEEDINGS
DEFENDANT'S MOTION TO PLACE ON CALENDAR TO EXTEND THE TIME TO FILE A REPLY BRIEF IN SUPPORT OF DEFENDANT'S WRIT OF HABEAS CORPUS

APPEARANCES:

For the State: STEVEN S. OWENS, ESQ.
Chief Deputy District Attorney

For the Defendant: CHRISTOPHER R. ORAM, ESQ.

RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

MR. ORAM: Your Honor, do you think Mr. Johnson, as this is a capital case, should be here for argument? I think probably out of the abundance of caution.

THE COURT: All right, that's fine.

MR. OWENS: No, I'm opposed to that. We don't usually transport people off of death row unless it's for an evidentiary hearing. They're required to be here for an evidentiary hearing. But, I mean, we do arguments all the time and if we had to transport them all for that it'd be an unwarranted expense I feel.

MR. ORAM: I'd submit it, Your Honor. I think there will be an evidentiary hearing, so I'll submit it. I don't want extra costs.

THE COURT: And just remind me, is this an ineffective assistance --

MR. ORAM: It is.

THE COURT: -- petition?

MR. ORAM: Yes.

THE COURT: All right. So, I won't transport him for the argument and if an evidentiary hearing is scheduled we'll certainly transport him for that.

MR. ORAM: Thank you very much, Your Honor.

MR. OWENS: Thanks, Judge.

THE COURT: Okay. See you in June.

[Proceeding concluded at 8:58 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Jessica Kirkpatrick

Jessica Kirkpatrick
Court Recorder/Transcriber

TRAN

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Oct 20 2 35 PM '10
CLERK OF COURT

DISTRICT ORAURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. DONTE JOHNSON, Defendant.	CASE NO. C153154 DEPT. VI

BEFORE THE HONORABLE ELISSA F. CADISH, DISTRICT COURT JUDGE

WEDNESDAY, OCTOBER 20, 2010

TRANSCRIPT OF PROCEEDINGS
HEARING

APPEARANCES:

For the State: STEVEN S. OWENS, ESQ.
Chief Deputy District Attorney

For the Defendant: CHRISTOPHER R. ORAM, ESQ.

RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

Wednesday, October 20, 2010 8:47 a.m.

THE MARSHALL: Judge, if you could page 1, State of Nevada v. Johnson, Donte. We lost Mr. Oram.

MS. JEANNEY: He was just here.

THE COURT: He was the one who was here.

THE MARSHAL: That is correct.

MR. OWENS: Yeah.

THE COURT: Well --

THE MARSHAL: All right, Judge, if you could -- here he is. Hold on.

MS. NYIKOS: He's right there. He's right there.

THE MARSHAL: He was hiding, Judge.

THE COURT: Yeah.

MR. ORAM: I was hiding.

THE COURT: Good morning, Mr. Oram.

MR. OWENS: Judge, this is my request to reset the briefing schedule. We did not get -- I think our response was due a month or so ago.

THE COURT: Yep.

MR. OWENS: We did not get it done. And I'm requesting a new date of January 28th for our response, February 28th for their reply and argue at the Court's discretion after that.

MR. ORAM: Your Honor, Donte Johnson was sentenced to death, has been sentenced to death twice. You may remember -- recall him. You probably don't. A year ago at this time I had Donte Johnson and it's a very, very large file. And I had a large capital trial that was pending, looming --

THE COURT: Right.

MR. ORAM: -- on the horizon. And I remembered Mr. Owens came into court and he gave me a very difficult time about an extension of time, very difficult. And I remember that quite well.

The State now did not file a motion for a continuance. Usually and every time in this case when I've needed more time I've filed a motion for a continuance with explanations as to why I needed more time. This was due a month ago. And so, I think we need briefing, Your Honor, on this particular matter as to why the State did not respond. When they figure out that they had not responded, why they didn't put a motion on?

If it had been just a few days I try to be courteous at all times. I really do. I have had situations with Mr. Leon Simon, he's an excellent attorney, Ms. Nancy Becker, and I almost always just agree, because they're courteous to me.

But I do distinctly remember a year ago. And so, I would like to have this briefed and I'd like to have an explanation as to why the State, on a case that they want to execute Mr. Johnson, did not bother to file a motion for an extension at a minimum. And so, I would ask for briefing on the matter.

THE COURT: Now, your supplement, was that filed by July 14th?

MR. ORAM: It was. I filed two. I filed two very, very lengthy supplements in this particular case. I remembered that I filed both of them timely by the time that I was given to respond. And I have not had a response back on either one of them, although in fairness to the State that was their deadline.

And again, I would not have complained if they had filed a motion to continue. I just -- I would have had no grounds to. But, like I said, I just remember what happened last year. And so, I think in fairness to Mr. Johnson his attorney was put under tremendous pressure as a solo practitioner to read through -- I think I was given somewhere in the range of 22 bankers boxes and had a six-week trial pending and was given no consideration. And so, I think it's in fairness the State should have to at least tell me why they didn't do it and let me respond to it.

MR. OWENS: Judge, Mr. Oram was given consideration. Okay. He was appointed in this case in April 30th of 2008. Yeah, I probably gave him a hard time, because it took him a year and a half to get that first supplemental petition filed. He then -- I wanted to respond at that time. But, he said: Oh, no, no, no, there's more issues. I need to file a second supplemental. Fine, I'll sit back and wait. We wait another 9 months. So, it's been over two years that it's taken him to get his briefs in. And he wants to give me grief over the very first extension of time that I need when this brief just got in, in July. I'm going to need until January to respond. I don't think he ought to say a word about my delay until about 2012.

THE COURT: Your response was due by my order September 15th. It's now October 20th. Why didn't you request additional time before now?

MR. OWENS: We called the -- Your Honor's chambers. We called Mr. Oram. We said we're gonna need an extension of time as is always done in all of these capital cases. We usually do it informally. I've never put on a motion for extension of time. We always do it informally. We call chambers, we call counsel.

Counsel wanted to come in and give me a hard time about it. So, fine, give me a hard time. But, I'm going to need more time. This is a huge capital case, and until I take until 2012 I don't think equity would allow Mr. Oram to sit here and complain about my delays in this case.

MR. ORAM: Well, Your Honor, I think that would be an excellent argument if at the time I was given notice. I had actually talked to Mr. Owens and he briefly mentioned Mr. Johnson. When he says he asked me for more time, I would have given him more time had it been a timely requested. This wasn't timely requested. I got a call I think either Monday, so what two days ago? Or maybe it was last Friday -- Thursday or Friday. So, they were over a month late at the time they called me and requested this.

And I think in fairness I have no difficulty giving many attorneys -- in fact I can't imagine giving an attorney a bad time. However, they have to remember what they have done and what equity brings when you act -- when you make requests like happened a year ago. Well, then I don't think that they can complain when they made me stand here and fight for an extension.

But, I always filed timely requests for an extension. And that's the difficulty here. Is that if he'd filed a timely request I wouldn't have said a word. I wouldn't have. I couldn't have said a word, because I think he'd be right. If I came in and said: Oh, they shouldn't be allowed more I think that would seem silly. To ask to January 29th, I think he would have been entitled to much longer than that. And I wouldn't have had a problem. The problem here is just the absolute failure to bring this up.

Now, if he has reasons why he hasn't raised the issues then he needs to put it in there. If they were busy I understand things like that. But, we want an opportunity to brief it. And I think that's fair.

MR. OWENS: Judge, the time is not his to give. It's the Courts. If Your Honor would like a motion in the future I will be happy to do a motion. It's been my experience that these things usually take six months to a year to get a petition in. And it's always been done informally. If Your Honor prefers a motion, if Mr. Oram prefers a motion I will know in Mr. Oram's cases from now on to do it by motion. But, I did not see a problem on a first extension, just calling up the parties and requesting a new briefing schedule. And so, I apologize. I will try and I can do a motion in the future.

THE COURT: Okay. All right, so I guess from my perspective I don't know if you necessarily need a motion, but I would at least want you to contact the opposing side by whatever the deadline -- the existing deadline is to seek additional time. If you both agree, it's fine with me. If you don't agree, then you would need to bring a motion. But obviously if you agree, you don't.

In any event, I do understand the extent of the file in this case, the extent of what needs to be responded to. And I'm not in a position to rule without the State's response. So, I will grant the State additional time through and including January 28th to file the response to the supplemental briefs submitted on behalf of Mr. Johnson.

Mr. Oram, now realistically is a month after that going to be enough time for you to reply?

MR. ORAM: I don't think so, Your Honor. I just think --

THE COURT: So, how much time do you need after that?

MR. ORAM: We'll probably need 60 days.

THE COURT: 60 days. So, let's go to -- what's 60 days after January 28th? It should be around March 28th, but I don't know what the days of the week look like. I don't have that calendar.

THE CLERK: March 28th would be a Wednesday.

THE COURT: It is. Okay, so March 28th for defense reply and then let's put it on for hearing two weeks after that.

THE CLERK: Yes, Your Honor. April 13th 8:30.

MR. ORAM: Your Honor, --

THE COURT: Yes.

MR. ORAM: I'd also like to point out that recently the State, on another capital case in this courtroom, needed more time. And the attorney had -- apparently there were some issues and the time was missed. I had no difficulty whatsoever stipulating to it. And I think that's just because I felt that attorney was always very courteous with me. Again the only reason is just I remember what happened a year ago.

THE COURT: I understand.

MR. OWENS: Which was because he waited a year and a half. There was multiple extensions. So, yeah, eventually I get --

...

...

THE COURT: Okay. I granted it. Bye.

MR. OWENS: Thanks, Judge.

[Proceeding concluded at 8:55 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Jessica Kirkpatrick

Jessica Kirkpatrick
Court Recorder/Transcriber

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

DONTE JOHNSON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

S.C. CASE NO. 65168

APPEAL FROM DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)
EIGHTH JUDICIAL DISTRICT COURT
THE HONORABLE JUDGE ELISSA CADISH, PRESIDING

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APPELLANT'S APPENDIX TO THE OPENING BRIEF
VOLUME XXXV

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ATTORNEY FOR APPELLANT
CHRISTOPHER R. ORAM, ESQ.
Attorney at Law
Nevada Bar No. 004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

ATTORNEY FOR RESPONDENT
CLARK COUNTY DISTRICT ATTORNEY
200 Lewis Avenue
3rd Floor
Las Vegas, Nevada 89101
(702) 671-2500

CATHERINE CORTEZ MASTO
Nevada Attorney General
Nevada Bar No. 0003926
100 North Carson Street
Carson City, Nevada 89701-4717

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

IN THE SUPREME COURT OF NEVADA

DONTE JOHNSON, Appellant, vs. THE STATE OF NEVADA Respondent.	CASE NO. 65168

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520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on the 9th day of January, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ-MASTO
Nevada Attorney General

STEVE OWENS
Chief Deputy District Attorney

CHRISTOPHER R. ORAM, ESQ.

BY:

/s/ Jessie Vargas
An Employee of Christopher R. Oram, Esq.

CHRISTOPHER R. ORAM, LTD.
520 SOUTH 4TH STREET | SECOND FLOOR
LAS VEGAS, NEVADA 89101
TEL. 702.384-5563 | FAX. 702.974-0623