IN THE SUPREME COURT OF THE STATE OF NEVADA

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RANDOLPH LYLE MOORE, Petitioner, vs. RENEE BAKER et al., Respondents.	No. 66652

APPELLANT'S OPENING BRIEF

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

Eighth Judicial District Court, Clark County

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NRAP 26.1 Disclosure

The undersigned counsel of record certifies that the following persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Murray Posin was appointed to represent Mr. Moore during pretrial, trial, and sentencing proceedings.

2. Thomas L. Leeds, of Lang & Leeds, was appointed to represent Mr. Moore during his first direct appeal.

3. David Schieck was appointed to represent Mr. Moore during the second penalty hearing, the appeal from the second penalty hearing, the third penalty hearing, the appeal from the third penalty hearing, and for a brief period during Mr. Moore's first post-conviction petition.

4. Jonell Thomas was appointed to represent Mr. Moore during the first post-conviction petition and during the first appeal from the first post-conviction petition.

5. Chris Oram was appointed to represent Mr. Moore during the second appeal from the first post-conviction petition.

6. Gary A. Taylor and Randolph M. Fiedler, for the Federal Public Defender for the District of Nevada, appeared below for the instant petition.

7. Michael Pescetta, Tiffani D. Hurst, and Randolph M. Fiedler, for the Federal Public Defender for the District of Nevada, are expected to appear before this Court in the instant proceedings.

Dated June 4, 2015

/s/ Randolph M. Fiedler
Attorney of record for
Appellant Randolph Moore

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I. Jurisdictional Statement

This is an appeal from a district court decision denying Mr. Moore's petition for writ of habeas corpus in a capital case, No. C069269. The district court entered its decision on August 27, 2014. 41AA10136. The court entered and mailed The Notice of Entry of Findings of Fact, Conclusions of Law, and Order on September 2, 2014. Id. Mr. Moore timely filed a Notice of Appeal on October 6, 2014. 41AA10162. This Court has appellate jurisdiction over this appeal pursuant to NRS 34.575(1), 34.830, 177.015(1)(b) & 177.015(3).

II. Issues Presented for Review

A. Whether the Clark County District Attorney's Office may, in its proposed order, substantially expand the scope of the district court's order both legally and factually.

B. Whether penalty phase counsel was ineffective where their presentation was more sparse than during their previous presentation and where they did not conduct any investigation, missing substantial mitigating evidence.

C. Whether the state's failure to disclose substantial witness benefit and intimidation testimony was prejudicial.

D. Whether the district court erred in applying procedural defaults to Mr. Moore's petition.

E. Whether the district court erred in failing to grant an evidentiary hearing.

F. Whether the cumulative effect of the errors in Mr. Moore's case require reversal.

III. Statement of the Case

The history of this case is a history of errors. Starting with the guilt phase and continuing through the post-conviction proceedings, this Court, the lower court, and the United States Supreme Court have all acknowledged errors in Mr. Moore's proceedings. Despite the distressing proliferation of errors, Mr. Moore's conviction remains intact. This is so because, for each unremedied error, this Court has found harmlessness. This Court has never weighed the sum of the errors in Mr. Moore's case. It must now.

On December 20, 1984, the state filed a criminal complaint charging Mr. Moore, and others, with conspiracy to commit burglary, conspiracy to commit murder, burglary, two counts of murder with use of a deadly weapon. 15AA3601.[1] The state filed a notice of aggravating

[1] On February 11, 1985, the state filed an amended criminal complaint adding two more counts: conspiracy to commit robbery and robbery with use of a deadly weapon.

circumstances, alleging that the murders were: (1) committed in a way that created a great risk of death to more than one person; (2) committed during the commission of a robbery; (3) committed during the commission of a burglary; and (4) committed for the purpose of receiving money or any thing of monetary value. 15AA3620-21.

The jury found Mr. Moore guilty of all counts, 15AA3623-29; after the penalty phase, the jury imposed a death sentence. 15AA3631. In what would be the first of numerous findings of error in this case, this Court reversed. Moore v. State, 104 Nev. 113, 114, 754 P.2d 841, 841 (1988) (adopting reasoning of Flanagan v. State, 104 Nev. 105, 107, 754 P.2d 836, 837 (1988)). Specifically, this Court noted the "troubling and recurring issue of prosecutorial misconduct;" but despite the "aggravated prosecutorial remarks" during the guilt phase, this Court held that "the prosecutor's actions were not so prejudicial as to mandate reversal." Flanagan, 104 Nev. at 107, 754 P.2d at 837; see also Flanagan v. State, 112 Nev. 1409, 1416, 930 P.2d 691, 695 (1996) ("This court acknowledged that prosecutorial misconduct had occurred during the guilt phase of the trial . . . ."). Nonetheless, as to the penalty

phase, this Court held the prosecutorial misconduct warranted reversal. Id.

Mr. Moore's second penalty phase, again, suffered from error: the United States Supreme Court vacated and remanded Mr. Moore's case because the state presented evidence of Mr. Moore's religion in violation of Dawson v. Delaware, 503 U.S. 159 (1992). Moore v. Nevada, 503 U.S. 930 (1992) (per curiam). On remand, this Court found that the error was not subject to harmless error analysis and remanded for a new penalty hearing. Flanagan v. State, 109 Nev. 50, 57, 846 P.2d 1053, 1059 (1993) ("The prosecution may not raise the issue of appellants' religious beliefs for the bare purpose of demonstrating appellants' bad character. By violating this prohibition, the prosecution invited the jury to try appellants for heresy.").

During the third penalty phase, the jury imposed the death penalty, finding all four aggravating circumstances. Again, Mr. Moore's third penalty phase suffered from error—found by the district court during the initial post-conviction proceedings. 36AA8848. After this Court issued McConnell v. State, 121 Nev. 25, 107 P.3d 1287 (2005),

the district court concluded that the burglary and robbery aggravating circumstances must be stricken and that Mr. Moore was entitled to a new penalty hearing. 36AA8848 ("The State has not shown, beyond a reasonable doubt, that the consideration of the burglary and robbery aggravating factors did not affect the jury's verdict and imposition of the two sentences of death.").

This Court reversed, instructing the district court to "enter detailed findings as to whether the jury's consideration of the erroneous aggravating circumstances was harmless beyond a reasonable doubt." 19AA4719. Although nothing had changed since its previous decision, the district court reversed itself, concluding that "it is clear beyond a reasonable doubt that absent the invalid burglary and robbery aggravators the jury still would have imposed a sentence of death as to Moore . . . ." 21AA5049. Thus, another error was deemed harmless.

This Court had acknowledged that it was error, but harmless, for the prosecution to use Mr. Moore's religion during the guilt phase. Flanagan, 112 Nev. at 1418, 930 P.2d at 696. The district court also found that "trial counsel's performance was in some ways deficient."

36AA8847.[2] Another error not prejudicial enough. Id. This Court took issue with the trial court's requirement that defense counsel object off the record:

> we express our disapproval of the district court's procedure in this regard. Parties are required to assert contemporaneous objections to preserve alleged errors for appellate review. Judge Mosley's unusual procedure frustrated the defense's ability to comply with this fundamental rule of appellate procedure. Additionally, it precluded the defense from securing any cautionary instructions to the jury should such instructions become necessary during the course of the trial. Therefore, we caution the district court to refrain from employing such practices that may impede a party's ability to comply with elemental rules of trial and appellate practice.

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[2]The state all but conceded that trial counsel's performance during the guilt phase was ineffective. 4SA932-33 ("I will say in all candor to the Court, I think [post-conviction counsel,] Ms. Thomas has made a prima facie showing that [guilt-phase counsel,] Mr. Posin was ineffective."); 4SA963 ("I don't want to go on record as saying that I concede that Mr. Posin was ineffective. What I'm conceding is that she has made a prima facie showing that he was ineffective."); 4SA965 ("What I'm stipulating to now is that to the best of my recollection, it sounds to me like Mr. Posin didn't do a very good job."); see also 4SA977 (Court: "So the State is sort of conceding [that trial counsel was ineffective] . . . ." State: "It is marginal. I think whether or not counsel was actually ineffective would be for the Court to decide, but I found the performance troubling . . . the counsel did things that didn't make much sense that were to his client's detriment."); but see 4SA991 ("I didn't stipulate that he was ineffective. I stipulated that his performance was troubling.").

20AA4727. Again, however, a harmless error. Id.

This Court also noted errors in jury instructions. For example, the jury in this case received instructions on aiding and abetting liability that did not include a specific intent requirement, a violation of Sharma v. State, 118 Nev. 648, 655, 56 P.3d 868, 872 (2002).[3] See 20AA4730-31. Similarly, Mr. Moore's jury received the wrong instruction as to first-degree murder. 20AA4734. Both of these errors, however, harmless. 20AA4730-31, 20AA4734-35.

On September 19, 2013, Mr. Moore filed a petition below alleging new errors and providing additional supporting evidence of previously alleged errors. The state responded, arguing that Mr. Moore's petition was barred by NRS 34.726, 34.800, and 34.810. On June 23, 2014, the district court heard arguments from counsel. 41AA10045. The court held, "At this time the Court's going to deny the petition, make a finding that it's a successive petition and the petitioner has failed to

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[3]In Mitchell v. State, 122 Nev. 1269, 1276-77, 149 P.3d 33, 38 (2006), this Court noted that Sharma was a clarification of the law, and thus applied retroactively. See also 20AA4730 n.26.

show good cause and prejudice." 41AA10063. The court asked the state to prepare the order. Id.

On July 16, 2014, the state filed proposed Findings of Fact, Conclusions of Law and Order. 41AA10066. Despite the district court's order, which denied relief solely on the basis of a successive petition, the proposed findings additionally applied NRS 34.726 and 34.800. And, despite the dearth of factual findings in the district court's short oral order, the proposed findings added numerous factual findings without an evidentiary hearing. Mr. Moore promptly filed objections. 41AA10065.

The district court held a hearing where it indicated:

> Mr. Owens, I just wanted to make sure, because I don't think I've ever received an objection that's filed in the form of a pleading and it was extensive as I received . . . . I just wanted to know if you wanted to be heard on that or if you wanted—I mean, in all fairness, I think since they filed this pleading you should have an opportunity to respond.

41AA10112. After the state indicated it did not have any response to the objections, the district court again reiterated: "Really I just wantedto make sure the State had an opportunity to be heard."

41AA10113.[4] The district court then adopted the state's proposed findings, word for word. 41AA10141.

This appeal followed.

IV. Statement of Facts

In the 1980s, Clark County suffered from two blights: inadequate representation from defense counsel in capital cases and egregious prosecutorial misconduct.[5] This case represents the worst of both. On one side of the case was Murray Posin representing Mr. Moore, who suffered apparent hearing loss and whose performance in this case was so egregious that, after eliciting—for no discernible reason—testimony

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[4]The district court's minutes erroneously indicate that "it just wanted to see if defense needed to make a further record of their objections." 41AA10114. This was not the case: the district court never asked defense counsel if they wished to make a record and did not address defense counsel until they asked for permission to be dismissed. See 41AA10112-13.

[5]See, e.g., Riley v. McDaniel, No. 11-99004, slip op. at 4 n.1 (9th Cir. May 15, 2015) available at 2015 WL 2262549 (noting "seriously inadequate public defense infrastructure in Clark County some quarter of a century ago"); Santillanes v. State, 104 Nev. 699, 703, 765 P.2d 1147, 1149 (1988) ("we hereby direct the District Attorney of Clark County to take whatever administrative action may be necessary to assure that Mr. Seaton's prosecutorial misconduct, so frequently repeated heretofore, does not again recur." (emphasis added)).

damaging to his client and the other codefendants, counsel for the codefendants moved for a mistrial. See below § VI.F.1.iii. On the other side were two prosecutors, whose lasting contribution to this state's jurisprudence has been their notorious and brazen prosecutorial misconduct. See Flanagan v. State, 104 Nev. 105, 107, 754 P.2d 836, 837 (1988) (noting that this case "once again, focuses our attention on the troubling and recurring issue of prosecutorial misconduct.").

On November 6, 1984, the bodies of Carl and Colleen Gordon were found in their home. Flanagan, 107 Nev. at 245, 810 P.2d at 760. The state charged six people for these crimes: Randolph Moore, Dale Flanagan, Thomas Akers, Johnny Ray Luckett, Michael Walsh, and Roy McDowell. 15AA3605. The state's case primarily rested on the testimony of co-conspirators. See 2AA497 (Rusty Havens, agreeing to participate in the conspiracy); 4AA753 (testimony of Mr. Akers); 4AA856 (testimony of Mr. Lucas); 22AA5383 (statement of Mr. Lucas that he helped dispose of weapons after crime); but see 4AA943.

With one exception: Angela Saldana testified that Dale Flanagan confessed to the crime. 5AA1013. Ms. Saldana testified that Mr. Moore

was present when the murder was planned, 5AA1014; that, according to the plan, Mr. Moore would carry one of the firearms, 5AA1015; that the motive for the crime was an inheritance to Mr. Flanagan, id.; that Mr. Moore left with the others to commit the crime, 5AA1031; and that Mr. Moore shot Carl Gordon, 5AA1034. Angela Saldana was the only non-conspirator to testify against Mr. Moore.

The state emphasized the importance of Ms. Saldana's testimony during the closing argument. See 8AA1768-69; 8AA1774 ("That was Angela Saldana. And she told you what happened in the last conspiratorial meeting . . . ."); 8AA1784; 8AA1786 ("Angela Saldana said that Dale Flanagan told her that Randy Moore had said that he had shot the grandfather with the long rifle.").

However, Ms. Saldana's testimony was coached and coerced. See below § VI.C.1. Ms. Saldana's testimony was coached by Robert Peoples at the behest of Clark County District Attorney Investigator Beecher Avants. Id. The state, through Mr. Avants and Mr. Peoples, engaged in a long-term and secret plan to mold Ms. Saldana's testimony into Mr. Avants's theory of the crime. Id. They threatened her with the death

penalty; they provided her benefits; they provided her with police reports. Id.

None of this information was provided to defense counsel. Id. None of this information was provided to the jury, either. Thus, the most important challenge to the state's key witness—that the state had coerced and coached her testimony—was never presented.

Nor was substantial, compelling mitigation evidence, which was available. During the third penalty phase, counsel presented evidence that can be summarized in one sentence: "Randy Moore grew up in less than a perfect home environment without a true father figure, entered into a foolish marriage causing him to drop out of high school." 13AA3083. This encapsulates the fundamental error of penalty-phase counsel—the mitigation presentation was essentially that Mr. Moore had a mildly abnormal childhood. Penalty phase counsel made this presentation without investigating Mr. Moore's life. See 25AA5980 (indicating that, other than very basic investigation, counsel did not investigate Mr. Moore's case). Had counsel investigated, he would have

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learned that Mr. Moore's childhood was far more than "less than perfect."

V. Summary of Argument

The district court dismissed Mr. Moore's petition after adopting the state's findings, despite the fact that the state's proposed order expanded the scope of the court's oral findings and reached numerous factual determinations without a hearing. This was error, and this Court should reverse.

Penalty phase counsel was ineffective for failing to investigate Mr. Moore's case; as a result, penalty phase counsel failed to present compelling mitigation evidence to the jury. This Court should, thus, vacate Mr. Moore's penalty phase and order a new trial.

The state committed an egregious violation of Brady v. Maryland, 373 U.S. 83 (1963), by coaching and coercing its key witness, Angela Saldana, and then failing to disclose that information to defense counsel. As a result of this violation, this Court should vacate Mr. Moore's conviction and order a new trial.

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The district court erroneously found that Mr. Moore's petition is barred by NRS 34.726, 34.800, and 34.810. However, 34.800 does not apply to this case: laches does not apply because the delay in the filing of the petition is not his fault.

Regardless, Mr. Moore has established good cause and prejudice to overcome any procedural default in this case. Mr. Moore has a statutory right to effective assistance of post-conviction counsel; here, his post-conviction counsel were ineffective. As a result of post-conviction counsel's ineffectiveness, the district court did not hear meritorious claims during initial post-conviction proceedings, namely that penalty phase counsel was ineffective; that guilt phase counsel was ineffective; that the state engaged in egregious prosecutorial misconduct; that one of the jurors did not speak English; and that Mr. Moore was entitled to a change of venue based on the pretrial publicity in this case.

Mr. Moore has also established good cause and prejudice because the state has violated Brady v. Maryland, 373 U.S. 83 (1963), because the district court has consistently refused to provide an adequate forum

or resources, and because Mr. Moore is actually innocent of the death penalty.

The district court also erred by refusing to grant Mr. Moore an evidentiary hearing; this error is particularly damaging because of the state's proposed order, which included factual findings contrary to Mr. Moore's uncontradicted evidence.

Finally, because Mr. Moore has established good cause and prejudice to overcome the procedural defaults, this Court must consider the errors in this case cumulatively.

VI. Argument

A. The district court improperly allowed the state to expand the scope of its legal and factual findings.

The district court denied Mr. Moore's petition in one simple sentence: "At this time the Court's going to deny the petition, make a finding that it's a successive petition and that the petitioner has failed to show good cause and prejudice." 41AA10063 (emphasis added). The district court provided no explanation or elaboration. Thus, the district court's holding was as to one and only one procedural bar, NRS 34.810, which allows judges to dismiss a "second or successive petition."

This Court has noted that, when allowing a prevailing party to draft an order, "the district court should . . . have issued a new ruling, and either drafted its own findings of fact and conclusions of law or announced them to the parties with sufficient specificity to provide guidance to the prevailing party in drafting a proposed order." Byford v. State, 123 Nev. 67, 70, 156 P.3d 691, 693 (2007). And where "the district court did not make any express findings in support of its determination and provided no guidance to the prevailing party," the district court commits error. State v. Greene, 129 Nev. ___, 307 P.3d 322, 325-26 (2013).

This error has occurred here. In making such a laconic ruling, the district court provided no guidance to the state for drafting a proposed order. Mr. Moore raised numerous allegations of good cause and prejudice, including that post-conviction counsel were ineffective and that the state violated Brady v. Maryland, 373 U.S. 83 (1963). The district court addressed none of these arguments in its oral finding.

Exacerbating this error, the state expanded the scope of the district court's finding, both legally and factually. The district court's

holding denied Mr. Moore's petition on the basis of NRS 34.810; the state's proposed order expanded this to include denials under NRS 34.726 and 34.800. Compare 41AA10063 with 41AA10117 (applying NRS 34.726 and 34.800). Nor did the district court's oral order make any specific factual findings. See 41AA10063. The proposed order, in contrast, reaches factual findings such as: post-conviction counsel were effective, 41AA10119-20; Juror Guerra could speak and understand English, 41AA10124; and there was no Brady violation, 41AA10126. Mr. Moore provided the only evidence for these issues; thus, his factual contentions were uncontradicted. Nonetheless, the proposed findings reach these factual determinations.

The error in reaching these factual determinations is particularly grave because the district court has refused to hold an evidentiary hearing in this case, ever. See below § VI.E. Thus, the state's proposed findings, adopted by the district court, were not supported by a hearing where parties presented witnesses subject to cross examination.[6]

[6]That Mr. Moore is entitled to an evidentiary hearing is a sufficient basis to reverse this case and remand. See below § VI.E.

Accordingly, in accepting the state's proposed order, the district court erred in three ways: (1) in making its oral ruling, the court failed to provide the state with sufficient particularity for the state to draft the order; (2) the court adopted the state's order even though it expanded the legal scope of the oral ruling; and (3) the court adopted the order even though it adopted factual findings without an evidentiary hearing. These errors, independently, warrant reversal.

B. Mr. Moore received ineffective assistance of counsel during the penalty phase of his trial.

Overwhelming authority requires counsel to investigate a defendant's case. See Strickland v. Washington, 466 U.S. 668, 691 ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."); see also Rompilla v. Beard, 545 U.S. 374, 387 (2005) (noting that counsel must "obtain information that the State has and will use against the defendant."); Wiggins v. Smith, 539 U.S. 510, 524-25 (2003) (noting that counsel was ineffective for failing to investigate mitigation evidence); accord Colwell v. State, 118 Nev. 807, 813, 59 P.2d 463, 467-68 (2002).

This duty to investigate is also enshrined in professional performance standards. See In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases, ADKT 411 [hereinafter ADKT 411], Standard 9(a) ("Counsel at every stage has an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case . . . ."); 31 Hofstra L. Rev. 913, 1079-80 (ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) [hereinafter 2003 ABA Guidelines], 10.7(A) (noting that obligation to investigate applies to guilt and penalty phase); id., Commentary (referring to the penalty phase: "Counsel's duty to investigate and present mitigating evidence is now well established. The duty to investigate exists regardless of the expressed desires of the client. Nor may counsel 'sit idly by, thinking that investigation would be futile.'"); ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) [hereinafter 1989 ABA Guidelines], 11.4.1(C) ("investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to

rebut any aggravating evidence that may be introduced by the prosecutor.").

Thus, failing to conduct a sufficient investigation is ineffective assistance of counsel. See Hart v. Gomez, 174 F.3d 1067, 1071 (9th Cir. 1999) ("A lawyer who fails to adequately investigate, and to introduce into evidence, records that demonstrate his client's factual innocence, or that raise sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance.").

David Schieck, Mr. Moore's attorney for the penalty phase, failed to uphold this duty. His investigation was incomplete. Numerous indications in the record indicated investigative leads. See, e.g., 36AA8883 (noting that Mr. Moore abused drugs and alcohol and noting that Mr. Moore dropped out of high school); 12AA2871 (Mr. Moore's father was abusive); 12AA2872 (Mr. Moore lacked a father figure). Despite this, Mr. Schieck did not hire an investigator or mental health expert in this case. See 25AA5979-80 ("Every case I am assigned to involves a litigation team which will include at least one investigator. In most cases, I retain a mental health investigator to assist the team

in identification of issues or the presentation of evidence. These are steps, other than I have indicated, I do not recall taking in Mr. Moore's case."). Nor did Mr. Schieck himself investigate these leads. 25AA5978-79 ("I do not recall that I investigated Mr. Moore's drug or alcohol use, any drug or alcohol addiction, other than numerous discussions with Mr. Moore."). As a result, Mr. Schieck missed substantial mitigation evidence that undermines confidence in the jury's penalty verdict.

Wiggins is instructive. There, trial counsel relied solely on a presentence investigation and a detailed social services report to conclude that they needed no further mitigation investigation. Wiggins, 539 U.S. at 518. The Court noted that the failure to expand the mitigation investigation fell below the standard of practice because funds were available to hire a forensic social worker, but counsel did not seek one. Id. at 524. Further, the Court noted that counsel's failure to investigate was exacerbated because counsel ignored investigative leads: that Wiggins's mother was an alcoholic, that Wiggins was shuttled from foster home to foster home, that Wiggins demonstrated emotional difficulties, that Wiggins had frequent and lengthy absences

from school, and that his mother would leave him and his siblings alone for days without food. Id. at 525. Failing to follow up on these leads was ineffective. Id. ("any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses.")

Mr. Moore's case is no different. Other than some notes indicating that Mr. Schieck attempted to contact a couple of witnesses, there is no evidence that Mr. Schieck conducted any investigation for Mr. Moore's penalty phase. See 25AA5979, 25AA5981-88. Despite the ostensible availability of experts, Mr. Schieck failed to hire any experts to investigate Mr. Moore or the facts of his case. 25AA5978-79 ("I believe that I personally conducted any investigation which was accomplished.").

Trial counsel's failure to investigate these leads constitutes ineffective assistance of counsel. See Wiggins, 539 U.S. at 526 ("In assessing the reasonableness of an attorney's investigation . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable

attorney to investigate further."). The information available to Mr. Schieck would lead a reasonable attorney to investigate further because drug and alcohol abuse, abusive parental figures, and disrupted home life are all examples of classic mitigation. See Stankewitz v. Young, 698 F.3d 1163, 1171-72 (9th Cir. 2012) ("Counsel's possession and awareness of the evidence, but failure to investigate or present it, is evidence of—not an excuse for—his deficiency.").

Here, trial counsel failed to conduct any kind of mitigation investigation, failed to hire experts who could have analyzed evidence found during a mitigation investigation, and failed to investigate the state's witnesses. These failures individually and cumulatively constitute ineffective assistance of counsel.

1. Penalty phase counsel failed to conduct a mitigation investigation and, in doing so, failed to present relevant mitigating evidence.

The evidence that trial counsel failed to develop falls into three categories: (a) Mr. Moore's home life, which included abusive and absent parental figures; (b) Mr. Moore's attempt to attach to other

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figures instead of his parental figures; and (c) Mr. Moore's use of drugs and alcohol to numb his inability to escape his circumstances.

i. The abusive father, the absent mother.

Mr. Moore's mother, Lindy Moore, was born in 1944, in East Prussia at the height of World War II. 27AA6521. East Prussia, which would eventually become Germany, suffered a tumultuous history during the first half of the Twentieth Century. See 24AA5958.-59 During World War I, East Prussia was occupied by Russia; between World War I and World War II, East Prussia underwent the same regime change that the rest of Germany underwent: the rise of the Nazi party. 24AA5959. Thus:

> Growing up in East Prussia was difficult. The Russians invaded our country and traumatized our people. Meanwhile the Nazis spread propaganda and tried to control us in their own way. We were literally trapped in the middle of a war zone. On one occassion, a Russian soldier stepped in front of me, and hid me, or I would have been killed. We have family photographs and heirlooms that are damaged by bullet holes.

27AA6521. Times were difficult: Lindy Moore's sister died from a routine vaccination because of a dirty needle; her brother "was thrown up in the air and sliced in half by Russian soldiers during the second

world war." Id. Lindy Moore's father disowned her family in order to join the Nazi Army; he tried to have them placed in a concentration camp to improve his status. Id. To escape Germany, Lindy's mother married Rick Shelley, who had dual citizenship. Id. Rick was abusive. 27AA6521-22 ("I saw him hit my mother on several occasions . . . . Many years later . . . Rick threatened to kill my mother for her life insurance benefits.").

Lindy Moore, to escape Rick Shelley, married James Hungerford when she was 15 ½ years old. Id. This would be the first time Lindy used marriage to solve one of her problems. However, this solution was not perfect: "Hungerford was in the United States Navy and was an alcoholic. My mother and step-father interfered in the marriage in such a way that it caused irreparable issues between my husband and me." Id. They divorced. Id.

When she was 19, Lindy married again. Id. She married Kenneth Lyle Smith, Mr. Moore's biological father. Id. Mr. Smith joined the Navy in 1958, shortly before meeting Lindy. 24AA5794-95. Mr. Smith describes Lindy: "Lyn was attractive and, at first, spontaneous and

funny. She was the kind of woman who spur-of-the-moment liked to get in the car and take off somewhere. It was exciting to me to be with a woman like that." 24AA5795. They got married, in a spontaneous decision. Id. "In the beginning we were young and carefree, we liked to socialize and go out partying." Id.

Things gradually changed. "Lyn's attitude shifted even before our first child was born. She became distant and apathetic as time went on." Nonetheless, in 1963, Lindy gave birth to Mr. Moore. 24AA5842.

Then, when Mr. Moore was six months old, his father left for his first tour of duty in Vietnam. 24AA5796. He returned a broken man, interested only in forgetting the horrors of the war. Id. Where, previously, Mr. Smith was a "happy-go-lucky-man," the Mr. Smith who came back suffered from temper tantrums and was an alcoholic. 27AA6523. (Lindy: "While Kenneth always had a temper, it was far worse when he returned from Vietnam . . . . Kenneth abused alcohol and he frequently drank until he passed out."). And Mr. Smith was abusive:

> When Randy was around six or seven years old, I came home and discovered Kenneth threatening Randy's life.

> Kenneth picked up Randy by his shirt and threw him off the couch, against the wall . . . Another time, Kenneth Smith threatened Randy with a gun . . . After we left our home, Randy told me that Kenneth was violent toward him on several occasions—kicking him, pointing a gun at him and scaring him. Whenever I asked [Mr. Moore's sister, Leah] about Kenneth, she began to cry and ran outside, or to another room. Leah always refused to talk about whatever Kenneth did to her. In hindsight, Leah spent a lot of time alone in her room whenever Kenneth was home.

27AA6523-24; see also 24AA5924 ("Randy confided in me several times that his real father beat him and that was part of the reasons [sic] for his parents' break-up. He specifically described how his father picked him up and shook him . . . I suspect that, to tell me those things, Randy must've been really traumatized by his father."). When Mr. Moore was three of four years old, Mr. Smith broke his arm by throwing him across the trailer. 24AA5912. Mr. Moore's ex-girlfriend described Mr. Moore's recollections of his father, "He talked about how his stepfather verbally and physically abused him. It bothered him. I always wondered if he was sexually abused as well. I also got the impression that he was disappointed that his mother put him in the position to be

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abused." 24AA5966-67.[7] Leah also stated that "she had been molested, possibly by one of her stepfathers." 25AA5975.[8]

Lindy did not help this situation. She was an exceptionally unemotional, cold parent. 24AA5796 ("Lyn was totally ambivalent as a mother . . . I got the feeling Lyn would have left Randy at the hospital if she didn't have her mother to answer to."); id. ("She didn't have emotional attachments to anything, as far as I could tell. She certainly didn't show emotions like normal people."); 24AA5861 ("Lyn wasn't a hugger. I never saw her show any affection towards Randy or his sister."); 24AA5869 ("Lindy never hugged or kissed Leah or Randy. She never told them she loved them, or even to be careful when they left

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[7]Mr. Moore referred to Kenneth Smith as his step-father. Lindy explains: "[a]fter Kenneth Smith left, the children became convinced that he was not their biological father. I believe that they couldn't understand how their biological father could have done the things to them that Kenneth did. My mother and I did not help the situation. Mother told the children that their biological father was a man named Hunter, who died in a Naval training accident. I went along with the Hunter story. I really didn't see any harm in it; I did not believe that Kenneth Smith acted like a father." 27AA6524.

[8]Mr. Smith's abusive behavior did not end with his marriage to Lindy Moore: after re-marrying, Mr. Smith was abusive towards his step-children. See 28AA6759.

home. Lindy seemed very sterile as a mother."). She especially showed little emotion towards Mr. Moore:

> Lyn was not attentive as a mother, even when Randy was a newborn/infant and totally dependent on adults. When he cried, Lyn's mom or I always tended to him, not Lyn. She did not nurse Randy. She didn't seem to have any emotional or physical bond to Randy as a baby and even less so as he got older. She only did the bare minimum as a mom. She didn't treat Randy as her own.

24AA5796. This dearth of emotion was coupled with Lindy's favoritism toward Leah. 24AA5797 ("If Lyn ever had a care for Randy, it was completely pushed aside when Leah was born. I guess she felt like she finally had her little girl, a little version of herself to shape and mold. Lyn's attitude was that Randy came second or third to Leah."); 24AA5879; 24AA5888 ("Randy's mother treated Leah better than she treated him . . . . Leah had a large bedroom filled with all the creature comforts you could want, such as a large, plush bed. I remember that Randy had a bedroom no bigger than a walk-in-closet. His tiny twin bed barely fit. I heard that, in one of the family's other houses, Randy actually slept in a closet.").

Insofar as Lindy showed emotion, it was to manipulate or express

anger towards Mr. Moore. Many people who knew Lindy noted how manipulative and deceitful she was. See 24AA5796 ("To me it felt like she was only nice to me when she wanted something. If Lyn wanted something, she found a way to get it no matter what."); 24AA5969 ("Lindy was always engaged in questionable things. She was a con-artist."); 24AA5907 ("It seemed to me that Lindy was always involved in sort of a scheme."); 27AA6586 ("Lindy used Leah's good looks and charm to advance her own business ventures."). Lindy had many paramours. 24AA5862; 24AA5903; 27AA6586 ("Lindy also had many boyfriends—sugar daddies, really, many of whom were married—to further her own agendas."); 25AA6135 ("Lynn prostituted herself at times . . . . I heard Lynn discuss her different clients and she sometimes said that she did whatever she had to do to get money.").

Many people also noted Lindy's explosive anger. 24AA5906 ("Lindy was so angry, so out of control, that she antagonized me to the point that I could not say anything."); 24AA5918 ("Leah was afraid of Lindy and I became aware of what she was capable of, too."); 25AA5975 ("Lindy grabbed, pushed, and slapped the children—Randy more than

Leah."). As a buffer, Mr. Moore's maternal grandmother stood between Mr. Moore and his mother's uncontrollable temper. 27AA6526 ("Mother often cared for my children."); see also 24AA5918 ("Leah said that her grandmother used to stand up to Lindy and that she was the only one ever brave enough to challenge Lindy."). However, Mr. Moore's grandmother was not enough to curb the chaotic home life exacerbated by Lindy's emotional instability.

Thus Mr. Moore lived in a home with no structure or boundaries. 24AA5867 ("We did whatever we wanted. In our younger days, we had water fights with garden hoses inside the house. When we were teens, we had wild parties with booze, drugs, and sex."); 24AA5861 ("I believe that, if Lyn had been more conscientious as a parent and not allowed me to sleep at their house, I wouldn't have gotten pregnant twice. I have four children now, and I use Lyn's style of parenting as my guide of what not to do and what not to allow." (emphasis in original)); 24AA5878 ("I thought she was pretty cool until I became a mother myself and realized how self-centered and irresponsible she really was."); 27AA6634-35.

Lindy Moore neglected her children; Mr. Moore and his sister were allowed to drink alcohol and smoke cigarettes at home. 27AA6526-27. She also gave Leah fake identification so that she could go dancing and drinking in bars. Id. Lindy was away from home most of the time. 24AA5867 ("She spent about 95% of her time away from the kids, and, beginning when they were about fifteen or sixteen, she didn't even live under the same roof as Randy and Leah."); see also 24AA5893 ("Randy and his sister, Leah, were left alone most of the time."); 24AA5868 ("Lindy found Randy, Leah, and me places to live, but she never actually lived with us. We lived in about six or eight different places from the time I was sixteen until I was 18."). It is unsurprising, then, that Mr. Moore "lost his virginity" when he was eleven years old and Leah was engaged in prostitution.[9] See 15AA3634; 25AA6134-35 ("Leah's prostitution was no secret to her family . . . Randy accepted that she was doing what she had to do to take care of herself.").

[9]See NRS 201.230(1) ("A person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child, is guilty of lewdness with a child.").

ii. Seeking other attachments.

Starting from Mr. Moore's early childhood and continuing until the time of the murders, Mr. Moore sought to replace the abusive, absent parental figures he had in his life. Mr. Moore's childhood friend, Alfonso Cota describes Mr. Moore's desperate need for Mr. Cota's friendship:

> Once we became friends, Randy followed me everywhere. No matter what I did or said to him, he was always there. Even when I told him to get lost, he was ready to make up and play with me again when I was willing—as if nothing had happened . . . I remember that I stole Randy's Hot Wheels cars one time. When he saw me with the cars, he asked why I had his Hot Wheels. I responded, "These aren't yours . . . they're mine!" Randy just shrugged his shoulders and pretended like nothing happened, even though he knew darn well those were his Hot Wheels cars. I will never forget that day and now I am ashamed. I believe Randy would have turned a blind eye to a lot of things because he desperately wanted to be accepted and to be my friend. Randy went along with whatever I said and did whatever I told him to do. He never put his foot down or stood up to me. We played what I wanted to play, when I wanted to play it. We rode bikes where I wanted to ride and when I wanted to ride. If we were riding somewhere we weren't supposed to go, Randy would say from behind, "Maybe we shouldn't do this," but I just kept riding and Randy always followed me. He went along with anything, just to be my friend.

24AA5923-24. This need to fill a void continued after Mr. Moore's

family moved to Las Vegas, in the figure of Jon Wall, a horse trainer:

> I felt embarrassed for Randy. He often spent time hanging out and talking with me. I sensed that it bothered him that he didn't have proper riding clothes or show clothes. I would try to make a joke of it and say, "boy you are growing so quick." Randy would awkwardly say, "these were my mothers." On show days, I would provide Randy with clothes and chaps that fit him. I wanted him to look appropriate, but more importantly to feel like he fit in . . . Randy was a sweet kid. Randy always had a positive outlook. He would assist with grooming, ribbons, announcing, and working the show gate. Randy was more interested in caring for the horses than riding. He was always eager to help everyone.

24AA5791. However, as with Mr. Cota, this relationship fell apart when Mr. Moore's family moved. Id.

Starting in late middle school, Mr. Moore also formed an attachment to one of his family's horses: "Sam followed Randy around in the corral. He nuzzled Randy and ate of his hand [sic]. He adored Randy and vice versa. I think Sam provided Randy with the affection and acceptance he desperately sought from his mother." 24AA5879; see also 15AA3633 ("Randy was 'closer than close' to his horse Sam. His life was that horse. Sam used to drink beer and smoke cigars. Randy was an actual horse whisperer."); 24AA5888 ("Randy raised Sam since he

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was a colt."). Sam would continue to play an important role in Mr. Moore's life while he was in high school. 24AA5906.

Mr. Moore also sought relief from his home life by creating his own. During high school, Mr. Moore started dating Sheri Shea; she got pregnant and they decided to get married:

> Randy and I decided we wanted to get married and raise the baby together. We had dreams of building a family, buying a house, and experiencing life together. Randy desperately wanted to be a father. We got married on April 4, 1983. I was 17 and Randy was 18 . . . . First, we lived in a weekly apartment near Flamingo and Maryland Parkway in Las Vegas, then we moved into a second apartment near Jones & Cheyenne. We were really kids trying to play adults. When we married, Randy worked full-time for the Honda dealership off of Sahara Avenue. He started as a lot boy, washing cars, and worked his way up into the service shop. That boy loved to turn a wrench. It was his passion, and he was mechanically inclined. Everyone at the dealership loved him. All of Randy's training was on the job but he hoped to get formal training one day.

24AA5857-58. Mr. Moore attempted to make the family he never had.

Then, the losses began. Sam died. 24AA5857; see also 27AA6528 ("He lost his horse, Sam, to colic. Randy spent several nights in the barn, holding Sam's head in his lap."). For the first time in their relationship, Ms. Shea saw Mr. Moore cry. 24AA5857. Mr. Moore was

devastated. 24AA5906; 27AA6528 ("Randy was an emotional mess and devastated. He detached from everyone and everything around him. He lost weight. He never really bounced back."); 24AA5870; 24AA5888 ("Randy was visibly upset, but he didn't express his feelings to me or others; that wasn't his way.").

Next, Ms. Shea miscarried:

> When I was about three months into pregnancy, I suddenly collapsed onto the floor of our apartment with excruciating abdominal pain. I knew that something was terribly wrong. I called Randy at work. It seemed like he was home in no time. He scooped me up, carried me to the car, and drove me to Sunrise Hospital.
>
> The doctors at Sunrise knew something was seriously wrong, however it took several procedures to figure out the cause of my pain. They finally determined I had a life-threatening ectopic pregnancy. I was in danger of rupturing and bleeding to death. The doctor said I had to have immediate surgery, and because it was an ectopic pregnancy, there was no way the baby could be saved. I remember my parents spoke about changing hospitals due to insurance coverage and costs. It was the only time I saw Randy challenge my parents. He didn't care about cost or insurance; I was in tremendous pain and we were both scared for my life. Randy comforted me, saying not to worry about my dad. Randy made sure I that I had the procedure I needed to save my life, right then and there, regardless of cost.

> Randy stayed with me in the hospital the entire time. He was such a comfort. He made sure I had whatever I needed and that I didn't suffer any more than I already had, either physically or emotionally.

24AA5858. Mr. Moore bottled up his feelings. Id. ("As I look back on those times now, I realize that Randy was so attentive to me that he never really had the time and space to grieve the loss [of] our baby . . . . Randy didn't mourn openly in front of me or express his own feelings about the whole thing, though I could tell he was heartbroken.").

Only once did Mr. Moore express his feelings: "we were lying next to each other talking and he sadly whispered, 'I wish it would have been a boy.'" Id.

Mr. Moore lost his job; their relationship started to crumble. 24AA5859-60. Mr. Moore was unfaithful; they divorced. 24AA5860; 26AA6365. This would not be the home he never had.

Then, the day after Christmas, Mr. Moore's grandmother died:

> Randy discovered mother when he went to wake her for breakfast. I remember that Randy returned with a strange look on his face and said he thought his grandmother was dead. When I entered the room, the television was on, her glasses were down on her nose, and her hands were open; she was dead. Randy called the police and helped to handle funeral arrangements because I was so overwhelmed.

> Although Randy wanted to be strong, I knew this was a big loss for him. Randy was always very close to his grandmother.

27AA6529. This was another loss in a chain of failed emotional attachments. See 24AA5878 ("When she died, Randy had no adult figure to positively influence him."). Troy Darling described why the loss was so tragic: "When his grandmother died, it was really hard on Randy. In some ways, I think he lost the only person who supported him. After his grandmother died, Randy was literally on his own." 24AA5893.

This, however, was not true: Randy had Dale Flanagan.

iii. Alcohol, Drugs, and Dale Flanagan.

Mr. Moore's life with Mr. Flanagan became a party. 24AA5897 ("Randy's apartment was a place where everyone went to party, get high and have sex with girls."). But Mr. Moore found no solace in this new life: "He drank more and I saw him passed out more often. He was depressed. We talked a lot about his depression and he would say, 'I just feel like I should kill myself.' . . . He was melancholy and acting like a brooding musician." 24AA5967-68; see also 25AA5971 ("It seemed

to me that he was very sad toward the end and that he really wasn't enjoying partying any longer.").

Mr. Moore became increasingly dependent on his relationship with Mr. Flanagan. 24AA5806 ("They were inseparable and referred to each other as brothers."); 24AA5898 ("Randy and Dale were a strange pair. They were closer to one another than anyone else"). Mr. Moore's friends described Mr. Flanagan as controlling. 24AA5894; 25AA6139 ("Dale usually directed the activities that he and Randy did together."); 27AA6528 ("I believe that Dale had a significant, and negative, influence on Randy."). Even though Mr. Moore was a leader among his friends, around Mr. Flanagan, Mr. Moore was "almost passive." 24AA5894. Mr. Moore became a different person around Mr. Flanagan. 24AA5898 ("When they were together they tried to act tougher than they really were and were very protective of one another.").

As this dependency grew, so did Mr. Moore's use of drugs and alcohol.[10] His abuse of alcohol and drugs stood out even among drug abusers. 24AA5787-88 ("After meeting Randy we all began using a

[10]Mr. Moore began drinking alcohol as a young boy. 24AA5903.

variety of drugs, including cocaine, methamphetamine, pills and other substances."); 24AA5788 ("Abusing drugs and alcohol was a daily occurrence in our group—there was almost never a sober moment."); 24AA5909 ("Randy's drug use and drinking was out of control."); 27AA6616 ("We used way more drugs than the average kids.").

Mr. Moore was drinking every day. 25AA6139; 27AA6615 ("Substance abuse was our main pastime and we indulged it on a daily basis. We abused any and every drug that we could get our hands on."); 27AA6619 ("Mr. Havens, Mr. Moore and others in their circle drank alcohol and abused drugs everyday. Mr. Havens stated that they tried to stayed [sic] intoxicated as much as they could."). Constance Russell remembered that, over time, "Randy's drinking became more severe and problematic." 25AA5971. Mr. Moore drank himself into a stupor every night she was with him. Id. ("I remember that on occasion, he would vomit, quietly and on his own in the bathroom, and keep drinking."). He often began to drink when he woke up and drank until he passed out. 25AA5971-72. According to Michelle Gray-Thayer, "Randy was a blackout drug and alcohol abuser and he often forgot

what took place before he passed out. Randy frequently passed out from alcohol and/or drug use." 25AA6136.

Mr. Moore used heroin and pills called white crosses. 24AA5966; 25AA5972. Two witnesses related a story wherein Mr. Moore addressed his heroin habit on his own by spending two weeks at Red Rock Canyon "alone, sick and withdrawing, from drugs and alcohol." 24AA5968; 15AA3635. Ms. Shea remembered that Mr. Moore "smoked pot, drank, took little red pills called 'Red Hots,' and 'ludes.' Randy told me he dropped acid in the past." 24AA5860. Lori Hauxwell remembered that Mr. Moore drank alcohol and used pot, crank and acid. 24AA5869-70. Mr. Flanagan told Angela Saldana that he and his co-defendants were "all high on acid during the night his grandparents were killed." 24AA5874. Roy McDowell "personally saw Randy abuse acid, speed, crystal meth, and various pills." 24AA5897-98; 25AA6135 ("Randy's hard drugs of choice were crystal meth and cocaine . . . . Randy abused other hard drugs as well . . . ."); 27AA6631.

Debbie Samples-Smith described an occasion, shortly before the offense in this case, where Mr. Flanagan and Mr. Moore took acid:

> On one occasion . . . Blake gave Randy, Dale and I one hit of Pyramid Acid each. Then we all started smoking pot together and waiting for the acid to take affect [sic]. Randy and Dale began petting a balloon and they told me they believe the balloons were alive. They thought the balloons were furry little creatures. They then began laughing uncontrollably and then Dale said they had to go leave and go somewhere.

25AA6139; see 25AA6140 ("Randy and Dale often bragged about the hallucinations they experienced while using and tripping out on acid and mushrooms.").

Before his arrest, Mr. Moore, his girlfriend, Leah, and Mike Walsh stayed at a ranch in Tecate, Mexico. 24AA5925. Mr. Moore drank beer and whiskey every night, becoming intoxicated. 24AA5925. He bragged about his use of cocaine, marijuana and other drugs. Id. Lindy stated that there was a period of time, after Mr. Moore's arrest, where "his whole body seemed to 'vibrate' or 'shake.'" 27AA6530. He was also paranoid, believing he would be killed in the jail because he knew too much about drugs in Las Vegas. Id.

And "[w]hen Randy was intoxicated, he had a hair trigger temper and was the first to fight if he perceived any threat to himself or his friends." 24AA5898; 24AA5909 ("Randy became an asshole drunk. He

was short tempered, animated and acted like he was 'God.'"); 25AA6135 (when intoxicated, "Randy cursed a lot, seemed angry at everyone and spoke incoherently at times."). He was "suggestible" and could be talked into taking foolish actions. 24AA5898. Finally, Constance Russell remembered that Mr. Moore became "really paranoid." 25AA5972; see 27AA6530.

This narrative is substantially different from what trial counsel presented during the third penalty phase. Trial counsel's mitigation case did not show the jury Mr. Moore's troublesome childhood, the extent of Mr. Smith's abuse, the absent parental figures in Mr. Moore's life, and Mr. Moore's gradually worsening addiction to drugs and alcohol, this despite indications during the second penalty phase that such an investigation would be fruitful. See 10AA2312 (indicating physical abuse); 10AA2317 (indicating possible drug use). Rather than following up on the obvious investigative leads, trial counsel simply repeated what he did during the second penalty phase; thus, the third penalty phase presentation mirrored the unsuccessful second penalty phase presentation. Compare 10AA2276-2341 with 12AA2754-2884.

2. Penalty phase counsel failed to hire experts to evaluate Mr. Moore.

Had Mr. Schieck hired experts, he would have learned additional mitigation evidence. For example, Dr. Lipman, after evaluating evidence in Mr. Moore's case, concluded that:

> As a result of his drug abuse it is more likely than not that his judgment was impaired prior to and at the time of the offenses and that he suffered from then-measurable deficits in cognitive function and neurobehavioral performance, including impulsivity, memory dysfunction and emotional regulation, now likely resolved.

24AA5811. Dr. Lipman's conclusion would have served to mitigate Mr. Moore's involvement because it shows that, insofar as he was involved, he was not acting with full cognition. Dr. Lipman also noted the long-term, adverse effects of Mr. Moore's heavy drug use. See 24AA5820-26.

Dr. Mack also evaluated Mr. Moore. See 28AA6921. He diagnosed Mr. Moore with alcohol dependence, polysubstance dependence/abuse, attention deficit hyperactivity disorder, insomnia, major depression, posttraumatic stress disorder, and psychotic disorder. 28AA6955. Based on these findings, Dr. Mack concluded that:

1. Mr. Moore was a victim of childhood neglect and abuse with a skein of broken attachments;

2. Mr. Moore was in an extremely distraught state at the time of the homicides due to his childhood in general and due to a series of losses that were calamitous to him that proximally preceded the homicides including the loss of his horse and his grandmother;

3. Dale Flanagan filled an emotional void left by chronic abuse and neglect that caused Mr. Moore to abandon his old social networks and to descend into a psychotic state due to substance abuse and a bizarre and delusional belief system;

4. Mr. Moore resorted to drug abuse as a coping mechanism for PTSD and depression which severely exacerbated his underlying problems;

5. Mr. Moore's tendency to gravitate towards stimulants is related to his underlying ADHD;

6. Mr. Moore required treatment for his mental illnesses extant at the time of the homicides.

28AA6956. Notably, Dr. Mack's conclusions are consistent with the mitigation narrative that trial counsel failed to present: to escape an abusive and neglectful home, Mr. Moore attempted to form attachments with others; when those attachments failed, he turned to the only supports available: Dale Flanagan and drugs. Thus, trial counsel was ineffective.

3. Penalty phase counsel failed to investigate and impeach the state's witnesses.

Trial counsel's failure to investigate includes his failure to investigate the state's witnesses. For example, he failed to uncover the fact that John Lucas received even more benefits than disclosed during the guilt phase, i.e. that John Lucas was able to avoid prison for child molestation in exchange for his testimony. 24AA5900. Mr. Lucas told Roy McDowell, while trying to persuade him to become a state's witness, that the state offered to move him to Florida, all expenses paid. 24AA5900. This evidence is impeaching two ways: first because it shows that Mr. Lucas had additional bias; second because it showed the lengths to which the state would go to secure a death sentence.

Trial counsel briefly cross-examined Mr. Akers about the deal he received in exchange for his testimony. See 11AA2634; 11AA2649. Counsel did not know that Mr. Akers received additional benefits. 24AA5808. Beecher Avants, an investigator for the Clark County District Attorney's Office, found an attorney to represent Mr. Akers for a discounted rate. 24AA5808. Later, Robert Peoples, an informant beholden to Avants, helped secure a job for Mr. Akers. 24AA5809.

Penalty phase counsel failed to learn of these benefits and thus to cross examine Mr. Akers about them. Nor did penalty phase counsel learn of the extensive benefits and coercion applied to Angela Saldana. See § VI.C above.

Counsel also failed to learn, and cross-examine, that many of Mr. Wittig's statements were false. Mr. Wittig, now deceased, was a well known liar. 27AA6628; 27AA6622. Ms. Shea, Mr. Moore's ex-wife, indicated that Mr. Wittig perjured himself in his testimony. 24AA5863-64.

4. Trial counsel suffered from a conflict of interest in representing Mr. Moore.

In addition to representing Mr. Moore, Mr. Schieck represented his mother, Lindy Moore in a number of matters. See 26AA6404; 26AA6450; 26AA6445. This created an actual conflict of interest because trial counsel served two masters: Mr. Moore, for whom Mr. Schieck had an obligation to conduct a social history investigation, and Lindy Moore, whom Mr. Schieck had a financial incentive not to investigate. See Cuyler v. Sullivan, 446 U.S. 335 (1980). Trial counsel's dual representation was both affected by the conflict and ineffective.

C. The state violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to disclose substantial witness benefits and coercion.

"Brady and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment." Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000) (citing Jimenez v. State, 112 Nev. 610, 618-19, 918 P.2d 687, 692 (1996)). To prove his Brady claim, Mr. Moore has shown that the evidence is favorable, that the state withheld evidence, and that prejudice ensued. See State v. Huebler, 128 Nev. _____, 275 P.3d 91, 95 (2012); see also 14AA3338-62. Claim Six of Mr. Moore's petition provides compelling evidence that Angela Saldana, who provided substantial inculpatory testimony, was coached and coerced. See 14AA3338-62. Specifically, the claim shows that Robert Peoples, under instruction from Beecher Avants, an investigator with the Clark County District Attorney's office, provided evidence to Angela Saldana and coached her testimony; Peoples then coerced her testimony in subsequent proceedings.

1. The state coerced and coached Ms. Saldana's testimony.

Angela Saldana was the state's main witness: she testified that Mr. Flanagan confessed to the crime, 5AA1013; she also provided testimony that Mr. Moore shot Mr. Flanagan's grandfather. 5AA1034; see also 5AA1030-38 (providing details of the Gordons' murders). The only other people who testified as to details of the offense—or implicated Mr. Moore at all—were co-conspirators. See 2AA497 (Havens agreed to participate in the killing); 4AA794-830 (Akers describing his participation in the crimes); 4AA856 (Lucas describing his presence while murders were discussed); 22AA5383 (Lucas helped dispose of the weapons); but see 4AA943 (Lucas denying he helped dispose of the weapons). Thus, the importance of Ms. Saldana's testimony cannot be overstated.

i. The investigator and the investigator behind the investigator: Beecher Avants and Robert Peoples.

Ms. Saldana reports that her uncle, Robert Peoples "was close friends with Avants and the prosecutor, Dan Seaton." 24AA5875. When Avants campaigned for Clark County Sheriff, Peoples worked on his

campaign. Id. Mr. Peoples encouraged Angela "to work with Avants and give him whatever information he sought to secure in his case." Id. In fact, Mr. Peoples was beholden to Mr. Avants.

Before Mr. Avants entered Mr. Peoples's life, Mr. People was no more than a two-bit criminal, committing crimes in Arkansas, Washington, Michigan, California, Arizona, and Nevada. See 21AA5188-89. His criminal career culminated with a murder conviction in Nevada. See Peoples v. Hocker, 423 F.2d 960, 962 (9th Cir. 1970). Mr. Peoples was sentenced to life without the possibility of parole. Id. at 962. This sentence was later commuted to a sentence of life with the possibility of parole. 22AA5253.[11]

Beecher Avants dated Mr. Peoples's sister. 27AA6609. He was also investigating the murder of Al Bramlet. Id. Mr. Peoples was housed with one of the suspects, Grambley Hanley. Id. Grambley Hanley and Tom Hanley were accused of murdering Al Bramlet because Mr. Balmlet wanted to unionize the dealers of Las Vegas. 22AA5257. Mr. Avants arranged to get Mr. Peoples released on parole

[11]This was after much judicial and media interest in Mr. Peoples's case. See 22AA5240; 22AA5243; 22AA5247; 22AA5235; 22AA5249.

in exchange for Mr. Peoples's assistance in the Bramlet investigation. Id. Then, Mr. Avants arranged for Mr. Peoples to get involved with Hanleys' defense counsel. Id.; see also 22AA5255. Mr. Peoples proceeded to play a double agent: the Hanleys and their attorneys believed that Mr. Peoples was working for the defense; in fact, Mr. Peoples was working with the Las Vegas Metropolitan Police Department and Mr. Avants. 22AA5255.

As part of his double role, Mr. Peoples seduced Tom Hanley's wife, Wendy Hanley. 22AA5257 ("I was playing the Huphrey [sic] Bogart role."); 22AA5396 (Wendy: "I later realized that Robert started a relationship with me in an attempt to get additional information from me that would further implicate Tom."). After the Hanleys were convicted, Mr. Peoples convinced Wendy that, without his protection, she would also face criminal liability. 22AA5398 ("I could somehow get in trouble for things Tom Hanley had done unless I married [Mr. Peoples]. I felt under his control, and he told me that he was the only one who could save me."); 27AA6609 ("My mother's 'cross to bear' in exchange for being implicated in Tom Hanley's murders, was that she

had to marry Robert Peoples."). And so someone convicted of murder was both out of prison and married—all because of Mr. Avants.

Mr. Peoples helped Mr. Avants—unofficially—in a number of cases; in exchange, Mr. Avants protected Mr. Peoples. 27AA6609; see also 16AA3842-43. For example, Wendy describes Mr. Avants's protection:

> Robert Peoples' sister Marlena, was living with a man named Larry Wilch. Wilch was abusive. Robert Peoples stabbed Wilch for beating Marlena in 1987. Wilch almost died. I retained a well known attorney to represent Robert. Beecher got in touch with the attorney and then told Wilch how it was going to be. Beecher put a gun to Wilch's head and told him what story he would tell so that he did not implicate Robert. Robert ended up serving less than six months for almost killing Wilch.

16AA3842. Thus "Robert Peoples was so dependent upon law enforcement to cover up his criminal activities, that he did whatever Beecher Avants, or any other policeman, requested." Id.

Angela Saldana was related to Wendy, and in fact had lived with the Peopleses. Wendy explains:

> I have a half-sister named Caren, who had several children, including a daughter, Angela Saldana . . . . Angie was a very troubled, mixed up girl. She had at least once run away from home, and she spent time in juvenile facilities. I felt sorry

> for Angie and so I let her come live with us when she was about 20 years old.

22AA5398-99. So the homicide of the Gordons—a homicide to which Mr. Peoples was connected because Ms. Saldana was dating Dale Flanagan—presented a perfect opportunity for Mr. Peoples to prove his worth. 22AA5400. And he did.

ii. "You're going to do this Angie," and then he would tell her exactly what to say.

After Flanagan's grandparents were killed, the Las Vegas Metropolitan Police Department asked Peoples to assist in their investigation. 27AA6607. By this time, Mr. Avants had left Metro and joined the district attorney's office. 16AA3843 ("Avants [and others] all lost their jobs at [Metro]. Sheriff Moran was tired of their corruption and their lack of cooperation with the FBI. I know that several of these people went to work at the District Attorney's office."). Shortly after the Gordons were killed, Mr. Peoples told Mr. Avants that Ms. Saldana was Mr. Flanagan's girlfriend. 27AA6607. Within a day, Mr. Avants came over to the Peoples's house. 22AA5400. Mr. Avants had already made up his mind that Mr. Flanagan was involved in the killings. 16AA3842.

So, Mr. Peoples and Mr. Avants created a plan to have Ms. Saldana "solve" the case. 22AA5400. Mr. Peoples then set about manipulating and controlling Ms. Saldana.[12] 24AA5401. He told Ms. Saldana that if she did not cooperate with him and Mr. Avants, she would be charged with conspiracy and executed. Id.

After the crime, Ms. Saldana continued to spend time with Mr. Flanagan at his trailer. Id. She never lived there. Id. Meanwhile, Mr. Avants went to the Peoples' house several times to talk about the investigation with Mr. Peoples. Id. "Sometimes the two of them would sit in the house at the red counter top island bar to talk, sometimes they would go outside to talk and other times they would meet elsewhere or talk by telephone." Id. "Beecher told Robert that we

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[12]Undoubtedly, Ms. Saldana was an easy target. As noted above, Ms. Saldana was a "troubled, mixed up girl." 22AA5399. Ms. Saldana "was a very manipulative person and would do almost anything to get her way. Because she was very attractive she would use her looks to get boys and men to do what she wanted. She was not a very good person. She also worked as a prostitute. When she got into trouble she would get help from Las Vegas Metro police officers. She had sex with several of them." Id.; see also 24AA5780. Angie was part of a prostitution ring. See 22AA5399; see also 24AA6134. Mr. Avants seduced Ms. Saldana with the prospect of being part of a 21 Jump Street type program. 24AA5874.

needed to find the gun and to get a confession." Id. And so, Mr. Peoples was provided with all of the police reports in the case, and he reviewed them carefully. Id.

Mr. Peoples discussed the case with Ms. Saldana; he would say, "'You're going to do this Angie,' and then tell her exactly what to say." Id. Later, when Mr. Peoples believed that Mr. Flanagan would not be in his trailer, he took Ms. Saldana and his step-daughter, Amy, to the trailer. 27AA6608. "I remember seeing the crime scene tape—I was scared. Angie went into the trailer with Robert. Robert threatened her and told her, "you need to testify as I tell you. If you don't say this your [sic] going down girl for the rest of your life." He pointed to a picture and told Ms. Saldana "that it was a picture of the devil" and that "she had to testify against Dale Flanagan and say that Dale Flanagan was a devil worshiper." 22AA5393. During the drive home, Ms. Saldana cried; Mr. Peoples continued to threaten her with prison if she failed to do exactly as he instructed.

This did not end with the first trial. Before Mr. Moore's second trial in 1989, Mr. Peoples's step-daughter, Amy, lived with her aunt

while Mr. Peoples lived in an apartment near Maryland Parkway and Swenson. 22AA5393. Mr. Peoples's "rent was just being 'taken care of.'" Id. Mr. Peoples often picked Amy up at her aunt's house and took her to the apartment. Id. Inside, "[t]here were boxes of paperwork in his room with the name 'Flanagan' on papers in the boxes. Robert Peoples caught me looking through these files, became very angry, and yelled 'get the f*** out of the room.'" 22AA5393-94. During her visits, Amy would hear:

> Robert Peoples talking to Angie on the telephone for hours at a time. Robert Peoples constantly talked to Angie about what was contained in the reports from the Flanagan boxes. He also told Angie over and over how she had testified at the first trial and that she had to do so again. Robert Peoples threatened her over and over. He said "You have to do this. You got paid, if you don't do it you're going to fry. They will put you in the electric chair." Robert Peoples said "that dirty little wh*** is not doing what she is supposed to be doing."

22AA5394.[13] Amy explains that, during this time, Mr. Peoples was

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[13]Two Ninth Circuit judges have noted the extreme coercive effect of threatening a person with the death penalty: "Threatening a potential witness for the defense with execution constitutes prosecutorial misconduct far more coercive than that present in any reported case of which we are aware . . . . Here, the prosecution's unprecedented threat to seek the death penalty against Edmonds if he testified that Smith was not the killer was unquestionably coercive and constituted substantial interference with Edmond's decision whether to

keeping Ms. Saldana hidden and watched by an investigator. Id. Once, at a dinner with Mr. Peoples, Mr. Avants, and officer Bob Hilliard, Amy heard Mr. Avants say to Mr. Peoples, "You better get that little b**** under control" referring to Angie." Id. His step-daughter remembers a delivery that occurred:

> Robert Peoples ran ABC Ready Mix Construction at the time of the murders. I was about eight years old and I answered the phones for the company. I remember an occasion in which Beecher Avants, Bob Hilliard, and John Smallovitch came to our offices and demanded to speak with Robert. They all had a meeting about a truck delivery. A truck was set up to deliver a shipment of boxes from the police to our offices. They told Robert he needed to find Angie Saldana immediately.
>
> A truck came to the company and delivered a lot of boxes that were labeled "Flanagan Murders". The boxes were moved to a weekly apartment on Swenson. In addition to the Flanagan Murder boxes, there were other boxes which were marked "Angie's Testimony." I remember that crime scene photos covered the walls of that apartment.

27AA6607-08.

Before the third trial, Ms. Saldana showed up in Reno, where Wendy was living. Ms. Saldana told Wendy that "she was expecting

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testify." Smith v. Baldwin, 510 F.3d 1127, 1152 n.5 (9th Cir. 2007) (Reinhardt, J., with Thomas, J., dissenting from en banc opinion) (quoting overruled panel decision).

$10,000 for testifying" but that "she did not get the $10,000, and [Wendy] had to pay to send Angie back to Las Vegas." 22AA5402.

2. The state failed to disclose the relationship between Ms. Saldana, Mr. Peoples, and Mr. Avants.

"Evidence impeaching the testimony of a government witness falls within the Brady rule when the reliability of a witness may be determinative of a criminal defendant's guilt or innocence." United States v. Service Deli Inc., 151 F.3d 938, 943 (9th Cir. 1998); see also Gigio v. United States, 405 U.S. 150, 154 (1972) ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within [Brady]."") (internal citation omitted). Here, the evidence at issue was favorable to Mr. Moore because it provided compelling impeachment material—the reliability of Angela Saldana's testimony is undermined by the fact that Mr. Peoples fed her evidence, told her how to testify, threatened her, and offered her rewards.[14]

[14]This evidence, although similar, is categorically different from the evidence that came out during trial. During the guilt phase, Ms. Saldana testified that she received $2,000 for her testimony and that she actively sought a sexual relationship with Mr. Flanagan to gain

The district court, adopting word for word the state's argument in its opposition, concluded:

> [w]hether Angela's uncle had other motives in getting Angela to assist law enforcement was simply not relevant nor exculpatory. The declarations from Wendy and Amy simply indicate that Robert Peoples pressured Angela Saldana to testify and told her what to say based on apparent police reports he had. Even if true, this does not mean that Angela felt coerced or that she testified falsely.

41AA10128; see also 36AA8762 (state's Response to Petition for Writ of Habeas Corpus). This is belied by the affidavits.[15] Ms. Saldana was not simply "pressured;" she as threatened with prison and the death penalty. 16AA3843; 27AA6608 ("you greedy little bitch, if you don't do what your [sic] told you will end up in prison. You were there and we are all protecting you. If you don't cooperate you will go to the chair for their murders."). And the word "pressure" does not convey how the

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more information. 5AA1046; 5AA1079. Although eye-brow raising, this is not the extensive prosecutorial intimidation and coercion described above. See 14AA3338-62.

[15]That the district court resolved this factual dispute without an evidentiary hearing is sufficient for this court to remand for an evidentiary hearing. See § VI.E above.

state coached Ms. Saldana's testimony: Mr. Peoples told Ms. Saldana exactly what to say. 27AA6608; 22AA5394.

Nonetheless, even if Robert Peoples merely "ressured Angela Saldana to testify and told her what to say based on apparent police reports he had," such would be impeaching Brady information regardless of whether Ms. Saldana felt coerced or perjured herself. That is, the state's interference with Ms. Saldana's testimony is Brady material; the state's showing Ms. Saldana police reports is Brady material. Both provide impeachment because both show that Ms. Saldana may not have been testifying truthfully.

"The law requires the prosecution to produce Brady and Giglio material whether or not the defendant requests such evidence." Milke v. Ryan, 711 F.3d 998, 1003 (9th Cir. 2013) (citing e.g., Strickler v. Greene, 527 U.S. 263, 280 (1999)). The state was thus required to disclose the relationship between Ms. Saldana, Mr. Peoples, and Mr. Avants.

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3. The Angela Saldana evidence was material.

"[T]he materiality standard for Brady claims is met when 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Banks v. Dretke, 540 U.S. 668, 698 (2004) (quoting Kyles v. Whitley, 514 U.S. 419, 435 (1995)). Put differently, the materiality standard requires showing of a "reasonable probability of a different result." Banks, 540 U.S. at 699 (quoting Kyles, 514 U.S. at 434).

Here, there is a reasonable probability of a different result because Ms. Saldana's testimony was crucial to the state's case. The state needed a non-accomplice witness to fulfill the corroborating evidence requirement. See NRS 175.291; see also Heglemeier v. State, 111 Nev. 1244, 1250, 903 P.2d 799, 803-04 (1995) ("In order for a defendant to be convicted on the testimony of an accomplice, the state must present other, independent evidence that tends to connect the defendant with the crime."). Thus, Ms. Saldana's testimony was crucial. The district court, again adopting word for word portions of the state's argument in the draft order, held that Ms. Saldana's testimony was

corroborated by other witnesses. 41AA10128 (listing Rusty Havens, Lisa Licata, Michelle Gray, Tom Akers, and John Lucas); see also 36AA8763. However, Mr. Havens, Mr. Akers, and Mr. Lucas were all co-conspirators or accomplices; thus, the validity of their testimony rested on Ms. Saldana's corroboration. See NRS 175.291. As to Ms. Licata and Ms. Gray's testimony; they indicated only that Mr. Flanagan had a knife and was concerned that it was found at the crime scene. See 3AA542 (Ms. Licata); 3AA640 (Gray). This evidence in no way corroborated Mr. Moore's involvement in the crime.

Additionally, the evidence corroborates a major defense theme: that the state pressured all of the witness testimony against the defendants. 3AA693-94 (testimony regarding Mr. Akers's plea agreement under which he was sentenced to probation); 4AA936 (Mr. Lucas noting that police applied pressure to him and, because he was scared, he changed his story); 4AA938 (Mr. Lucas testifying that he received $1,000 for testifying and expected additional money after he was done testifying). The Saldana evidence shows that the state's manufacture of testimony was much more substantial than presented

to the jury; nonetheless, the jury was not given an opportunity to hear this evidence. And problems posed by Ms. Saldana's testimony extend to the penalty phase: the state relied extensively upon the level of the Defendants' involvement in arguing for a death verdict. 13AA3073 ("but in this kind of a case it's the degree of involvement in the crime. And that is equally important."); see also 13AA3074 ("That leaves us with the leader of the pack, the leaders of the pack . . . . If these other defendants were sentenced in a stairstep fashion according to their involvement in the crime . . . . Just in terms of fairness these two deserve the death penalty. They did far more than what any of these other four did."). Further, in showing the state's tactics in securing Ms. Saldana's testimony, the penalty phase jury may have believed there was a reasonable doubt as to the alleged motive for the murders.[16]

D. The district court erroneously concluded that Mr. Moore's petition is barred by procedural defaults.

The district court found that Mr. Moore's petition was untimely under NRS 34.726, barred by laches under NRS 34.800, and successive

[16]Insofar as guilt phase counsel or penalty phase counsel could or should have learned about the Saldana evidence, they were ineffective. See § VI.F.1.

under NRS 34.810. 41AA10117-18. Mr. Moore's petition cannot be barred by NRS 34.800, and he has shown good cause and prejudice to overcome any applicable default.

1. Mr. Moore's petition cannot be barred by NRS 34.800 because the laches doctrine does not apply when the delay in filing is not attributable to the petitioner.

The laches doctrine in NRS 34.800 does not bar Mr. Moore's petition. As noted in State v. Powell, 122 Nev. 751, 758-59, 138 P.3d 453, 457 (2006), NRS 34.800 does not apply if delay in filing a petition cannot be attributable to petitioner. Here, as in Powell, delay cannot be attributed to Mr. Moore because it was caused by multiple remands arising from district court error and prosecutorial misconduct.

In Powell, the petitioner's judgment of conviction was entered in 1991; however, his direct appeal was not resolved until 1997, because this Court "erroneously decided that a new rule of criminal procedure announced by the Supreme Court soon after Powell's trial did not apply to his case." Id. at 758, 138 P.3d at 458. Thereafter, Mr. Powell filed a timely habeas petition in 1998 and was granted partial relief. However, in 2002, this Court reversed and remanded the case for an evidentiary

hearing. Id. at 759, 138 P.3d at 458. Under these circumstances, this Court found that the state was "not entitled to relief under NRS 34.800," because "[t]he record indicates that Powell has not inappropriately delayed this case." Id.

Mr. Moore's case is indistinguishable. Although Mr. Moore's judgment of conviction was entered on November 27, 1985, this Court has remanded this case twice for new penalty hearings—once after the United States Supreme Court vacated Mr. Moore's death sentence. See 15AA3637; Moore, 104 Nev. 113, 754 P.2d 841; Flanagan, 109 Nev. 50, 846 P.2d 1053. Remittitur from Mr. Moore's direct appeal of his last penalty phase did not issue until May 22, 1998. 17AA4128. Mr. Moore timely filed a petition for writ of habeas corpus less than two weeks later. 17AA4160. The district court appointed counsel, 36AA8854; in early 2006, the district court ordered a new penalty hearing, which this Court reversed in 2008. 36AA8843; 19AA4715. On remand, the district court appointed new post-conviction counsel. 36AA8856. Finally on October 22, 2012, this Court issued its remittitur upon the conclusion of Mr. Moore's first state post conviction proceedings. 36AA8858.

Less than a year later, Mr. Moore filed the instant petition. As with Powell, the delay in this case is not attributable to Mr. Moore—this Court cannot fault Mr. Moore for the delays caused by prosecutorial error, the district court, this Court, or the United States Supreme Court. Compare above with Powell, 122 Nev. at 758, 138 P.3d at 458 ("The record indicates that Powell has not inappropriately delayed.").

Thus, the district court erred by dismissing Mr. Moore's petition on the basis of NRS 34.800. See 41AA10117-18. The district court reasoned, again adopting the state's proposed order word for word, that "approximately 25 years and 17 years respectively [had passed since] the decisions on appeal affirming guilt and penalty." 41AA10117; see also 36AA8743. Based on this logic, however, Mr. Moore could never file a petition challenging the effectiveness of initial post-conviction counsel because such a petition would be barred—by the time first post-conviction proceedings were complete in 2012, roughly fourteen years had passed since the decision on direct appeal from his penalty phase through no fault of Mr. Moore. This Court cannot read NRS 34.800 as

making it impossible for Mr. Moore to seek relief on the basis that first post-conviction counsel were ineffective, because this Court has found that a second state post-conviction petition is the appropriate vehicle for vindicating this right. See Crump v. Warden, 113 Nev. 293, 304-05, 934 P.2d 247, 254 (1997); see also State v. Eighth Judicial Dist. Ct. (Riker), 121 Nev. 225, 240 nn.51-52, 112 P.3d 1070, 1080 nn.51-52 (2005) (acknowledging that proper way to raise claim that first post-conviction counsel was ineffective is to raise it in a second petition).

In any event, a party who seeks to invoke an equitable defense must do so with clean hands. See, e.g., Truck Ins. Exchange v. Palmer J. Swanson, Inc., 124 Nev. 629, 637-38, 189 P.3d 656, 662 (2008) ("he who comes into equity must come with clean hands."). The state lacks clean hands in this case—both of the times this Court overturned Mr. Moore's penalty phases, the state's misconduct was to blame. See 104 Nev. at 107, 754 P.2d at 837; 109 Nev. at 57, 846 P.2d at 1058-59.

Finally, even if laches did apply to Mr. Moore's petition, Mr. Moore can overcome the presumption of prejudice. Mr. Moore's original trial was in 1985; the state has retried Mr. Moore's penalty phase two

times since then, in 1989 and 1995. In each of the retrials, the state and the defense has been able to present the testimony of unavailable witnesses. See, e.g., 9AA2208; 10AA2264; 11AA2504; 12AA2730; 12AA2770; 12AA2791; 12AA2862; see also NRS 51.325. Thus the district court erred in applying laches to this case.

2. Mr. Moore has established good cause and prejudice to overcome any purported procedural default.

Mr. Moore is entitled to have any applicable defaults excused because he can prove good cause and prejudice. See Rogers v. State, 127 Nev. _____, 267 P.3d 802, 804 (2011) (noting that to overcome procedural default, petitioner must demonstrate good cause and prejudice). Here, Mr. Moore establishes good cause and prejudice for six reasons: (1) his initial post-conviction counsel was ineffective; (2) the state violated Brady v. Maryland; (3) Mr. Moore is actually innocent of the death penalty and failing to hear his claims will result in a miscarriage of justice; (4) the district court has never held an evidentiary hearing during post-conviction proceedings; and (5) Mr.

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Moore is entitled to have this Court review the errors in his case cumulatively.

i. Mr. Moore has established good cause and prejudice because initial post-conviction counsel was ineffective.

Recognizing the importance of death penalty cases, and to vindicate the right to counsel enshrined by NRS 34.820, this Court has held that the ineffectiveness of counsel appointed under NRS 34.820 constitutes good cause and prejudice to overcome procedural defaults. Crump, 113 Nev. at 303-04, 934 P.2d at 253-54. To establish such ineffective assistance, this Court adopted the Strickland standard. Id. at 304 n.6 (citing Strickland v. Washington, 466 U.S. 668, 690 (1984)). Thus, to excuse procedural default, Mr. Moore must show that "counsel's performance fell below an objective standard of reasonableness" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Crump, 113 Nev. 304 n.6, 934 P.2d 254 n.6. Here, post-conviction counsel was ineffective because they failed to conduct an adequate investigation and thereby failed to raise a number of

meritorious claims. These errors were prejudicial because the evidence not presented and claims not raised are meritorious.

a. Post-conviction counsel was ineffective because their investigation of Mr. Moore's case was inadequate, constituting good cause to excuse procedural default.

As noted above, overwhelming authority requires effective counsel to investigate a defendant's case. See § VI.B; see also Strickland, 466 U.S. at 691. This duty applies to post-conviction counsel.[17] See ADKT 411, Standard 9(a) ("Counsel at every stage has an obligation to conduct a thorough and independent investigation relating to the issues of both guilt and penalty."); see also ADKT 411, Standard 9(b) ("Post-conviction counsel has an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case . . . ."); 2003 ABA Guidelines, 10.15.1(E) ("Post-conviction counsel should fully

[17]After this Court remanded Mr. Moore's case in 2008, Chris Oram took over representation of Mr. Moore. Mr. Oram did not raise any new claims and instead relied only on the claims already raised by Ms. Thomas. See 4SAA994. When Mr. Oram was appointed, however, he had an independent obligation to investigate Mr. Moore's case and an obligation to raise these claims both before the district court and this Court.

discharge the ongoing obligations imposed by these Guidelines, including the obligation[] to . . . continue an aggressive investigation of all aspects of the case; 31 Hofstra L. Rev. at 1085-86 (Commentary to Guideline 10.15.1) ("collateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation . . . .")); 1989 ABA Guidelines, 11.9.3(B).

Post-conviction counsel failed to uphold this duty; their investigation was inadequate. Ms. Thomas "did not conduct a complete factual or mitigation investigation related to Randolph Moore's case" and was "focused on the court record and the guilt phase of the trial." 25AA5990 (Decl. of JoNell Thomas). Nor did she "seek any records relating to [Mr. Moore's] childhood, medical or educational background, or records relating to his family." 25AA5991-92. She spoke only to Mr. Moore's mother, his then-wife, and "possibly one or two of his friends." id. She also did not "investigate any possible child abuse or neglect in Mr. Moore's childhood." 25AA5992.

Additionally, Ms. Thomas notes "[a]lthough there was evidence of Mr. Moore's use of drugs and alcohol in the trial record, I did not

independently investigate this issue and I do not believe I asked his mother if she was aware of when he began to use drugs and alcohol or the extent to which he may have been addicted." Id. Nor did counsel seek appointment of any experts. 25AA5992-93. Counsel did not interview witnesses or codefendants. 25AA5993.

Counsel acknowledged the importance of conducting a comprehensive investigation, listing the ways in which she would have conducted an investigation. 25AA5990 ("I know that, presented with the same circumstances today, I would conduct a more thorough factual and mitigation investigation."); 25AA5992 ("The investigation and records collection regarding Randolph Moore's childhood and social history is another area which I would handle differently today. I believe it is essential to obtain records relating to a client's previous education, medical history, mental/emotional treatment, drug and alcohol abuse, criminal history and work history."); id. ("It is also essential to interview witnesses who may have knowledge regarding any of these circumstances. In fact, this is often the only manner in which to discover possible evidence or defenses which were available to trial

counsel."); 25AA5992-93 ("Had I conducted an investigation into Randolph Moore's childhood and social history, and identified any issues, I am sure that I would have sought expert assistance. Today we routinely rely on experts to assist in the identification and development of issues in our current practice.").

Notably, counsel argued that penalty-phase counsel was ineffective because they failed to hire a mitigation expert, failed to develop and present evidence or Mr. Moore's "mental state at the time of the crime," and "failed to investigate, develop, and present compelling mitigation evidence at the penalty phase." 18AA4377; 18AA4379-80; 18AA4381. Despite this, post-conviction counsel did not themselves perform the very acts they faulted penalty-phase counsel for failing to perform. Compare 18AA4376-83 with 25AA5990-94. Thus, counsel performed ineffectively, establishing good cause to overcome any procedural default.

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b. Post-conviction counsel's ineffective assistance was prejudicial because they failed to present meritorious claims.

Mr. Moore was also prejudiced by post-conviction counsel's ineffective assistance. To establish prejudice to excuse procedural default, Mr. Moore must show only that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; accord Crump, 113 Nev. at 304 n.6, 934 P.2d at 254 n.6 (adopting Strickland standard).

(1) Post-conviction counsel failed to present evidence supporting Mr. Moore's claim that penalty phase counsel was ineffective.

In Mr. Moore's May 2, 2003, petition for writ of habeas corpus, post-conviction counsel raised the claim that Mr. Moore's penalty phase counsel was inadequate. 18AA4376 (Claim 40: Ineffective Assistance of Counsel at the Third Penalty Hearing); see also 36AA8909. Post-conviction counsel raised only record based claims. 18AA4376-83 (e.g.,

failure to sever, failure to challenge constitutionality of Nevada's death penalty scheme, failure to file a motion to prohibit prosecutorial misconduct). Counsel did raise a claim that penalty phase counsel "hired no mitigation expert and did very little, if any, mitigation investigation." 18AA4377. Unfortunately, because post-conviction counsel repeated these errors, they were not able to present available and compelling mitigation evidence in support of these claims. This evidence was extensive and undermines confidence in the outcome of both Mr. Moore's initial post-conviction proceedings and his penalty phase. See § VI.B above; see also 13AA3211-14AA3279. Because Mr. Moore's claim of ineffective assistance of penalty phase counsel is meritorious, post-conviction counsel's ineffective assistance was prejudicial: so this Court must not apply any procedural defaults.

(2) Post-conviction counsel failed to raise Mr. Moore's meritorious claim of ineffective assistance of guilt-phase counsel.

Post-conviction counsel's failure to investigate also applies to Mr. Moore's guilt phase claims. In particular, counsel failed to hire and investigate guilt-phase witnesses. Jerry Chisum, a qualified

criminalist, determined that a number of errors occurred during the investigation of Mr. Moore's case, including questions over the authenticity of the testimony regarding the guns, and whether the guns could be connected to the bullets or casing founds at the crime scene; and that portions of testimony were inconsistent with the forensic evidence. See 27AA6640-67. If counsel had sought a forensic expert, she could have presented these errors to support a claim that trial counsel was ineffective for failing to hire an expert to undermine the state's guilt case. Counsel also failed to hire an expert to analyze Mr. Moore's substance abuse. Such an expert would have supported an ineffective assistance of guilt-phase counsel claim because, in failing to retain an expert, guilt-phase counsel failed to learn extensive evidence that could have undermined evidence of the mens rea requirement for first-degree murder. See 24AA5826-27.[18]

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[18]Such evidence is particularly important because the court used the improper Kazalyn instruction to define the mens rea element of first-degree murder, allowing the jury to equivocate between premeditation and the other mens rea elements. See § VI.F.6.i below.

(3) Post-conviction counsel failed to learn of and present the Angela Saldana evidence.

Post-conviction counsel failed to investigate and learn of the extensive evidence that the state coached and coerced Angela Saldana's testimony. See § VI.C above. Thus, counsel failed to present Mr. Moore's meritorious claim that prosecutors engaged in misconduct, both by suppressing evidence and by presenting false testimony. See 14AA3338-62; Giglio v. United States, 405 U.S. 150 (1972); Brady v. Maryland, 373 U.S. 83 (1963); Napue v. Illinois, 360 U.S. 264 (1959). This was ineffective.

(4) Prosecutors engaged in extensive and pervasive misconduct in handling witnesses and evidence.

Prosecutorial misconduct violates the Constitution if it "so infected the trial with unfairness as make the resulting conviction a denial of due process." Parker v. Matthews, 132 S. Ct. 2148, 2153 (2012) (citing Darden v. Wainwright, 477 U.S. 168, 181 (1974)). In the context of witnesses, "coercive or threatening behavior towards a potential witness may justify reversal of a defendant's conviction." Earp

v. Ornoski, 431 F.3d 1158, 1171 (9th Cir. 2005) (citing Webb v. Texas, 409 U.S. 95, 98 (1972)). Furthermore, substantial governmental interference with a witness's choice to testify amounts to a violation of due process. Earp, 431 F.3d at 1170 (citing United States v. Vavages, 151 F.3d 1185, 1188 (9th Cir. 1998)).

Here, the state's mishandling of evidence and witnesses, coupled with the state's pattern and practice in other cases, leads to only one conclusion: the prosecutorial misconduct in this case was not only excessive, it was intentional.

(i) Prosecutors engaged in misconduct by coercing witnesses and inducing false testimony. The most prominent example of prosecutorial misconduct in this case is how the state manipulated witness testimony. This was particularly so with Ms. Saldana's testimony, described above. See VI.C above. However this was not the only example: Prosecutors offered probation to Mr. Akers, who knew Detectives Avants, Hilliard, and Geary through his stepfather. See 24AA5876; 24AA5807-08. Additionally, Mr. Akers received help

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securing a prominent criminal defense attorney at a discount. 24AA5808.

In addition to receiving payments for testifying, Mr. Lucas later received other benefits. See 4AA938 (Q: "How much have you received?" A: "A thousand dollars." Q: "Do you expect that you will get any more?" A: "Yes, sir."); Mr. Lucas also received only a term of probation for two felony sexual offense charges. 24AA5788; see also 24AA5900. And the state attempted to use Mr. Lucas to convince Mr. McDowell, a codefendant, to testify against Mr. Moore and Mr. Flanagan. See 24AA5899 ("Lucas was speaking to police and acting as their agent, before anyone was arrested. Lucas approached me before I was arrested . . . . The prosecutors told Lucas that they were prepared to grant me immunity if I agreed to cooperate against the others. I refused and was arrested shortly afterwards."); see also id. at 24AA5899-900 ("The prosecutors used Lucas a second time in order to convince me to cooperate.").

The state also attempted to coerce and manipulate Wayne Wittig. See 24AA5752 ("They threatened to arrest and hold me on charges of

contempt and withholding information if I decided not to participate and help them in their investigation . . . . I was alone, I was terribly frightened of the threats and accusations being made by the detectives. I was very afraid by the detectives' threats."). In exchange for his help during the first trial, prosecutors told Mr. Wittig they would "take care of" driving citations. 24AA5754. Mr. Wittig was also coached, for each of the trials. See 24AA5754-56 ("I feel as though I was coerced and manipulated by the detectives of the Las Vegas Metropolitan Police Department and by the Clark County District Attorney's office.").

One of the prosecutors in this case, Dan Seaton, has a pattern and practice of providing witness benefits without disclosing those benefits. See 14AA3390-92 (listing examples of Mr. Seaton providing witness benefits without disclosure); see also 28AA6784; 28AA6787; 28AA6812; 28AA6817; 27AA6578; 28AA6818.

(ii) The prosecutors in this case have a pattern and practice of engaging in prosecutorial misconduct during opening and closing argument. This Court has rebuked Dan Seaton in the past for his prosecutorial misconduct. See 28AA6821, 28AA6823; see also Howard

v. State, 106 Nev. 713, 722-23, 800 P.2d 175, 180-81 (1990) ("The prosecutor, Dan Seaton, made three improper arguments to the jury. In all three instances the case law was unambiguous that such remarks were not permitted. Mr. Seaton is a veteran prosecutor and knows very well that these remarks were improper."); id. at 722 n.1 (collecting "a non-exhaustive sampling of cases" involving Mr. Seaton's misconduct); Santillanes v. State, 104 Nev. 699, 702, 765 P.2d 1147, 1149 (1988); Browning v. State, 104 Nev. 269, 272, 757 P.2d 351, 353 (1988); Downey v. State, 103 Nev. 4, 8, 731 P.2d 350, 353 (1987). Mr. Seaton is known, by this Court, to inject his personal opinion into cases. See 28AA6821; 28AA6823; 28AA6825.

Mr. Harmon, too, is notorious for misconduct during argument. For example, in Collier v. State, 101 Nev. 473, 480, 705 P.2d 1126, 1130 (1985), Mr. Harmon "melodramatically faced the defendant, and exhorted him: 'Gregory Alan Collier, you deserve to die.'" This statement was so prejudicial that the Review Journal reported the statement as "I execute you, you murderer." Id. at n.3. Examples of Mr. Harmon's argumentative misconduct are legion. See Dawson v. State,

103 Nev. 76, 734 P.2d 221 (1987); 31AA7500; 28AA6787; Rippo v. State, 113 Nev. 1239, 1253-54, 946 P.2d 1017, 1026 (1997); 28AA6904; 28AA6915; Evans v. State, 117 Nev. 609, 633-34, 28 P.3d 498, 515 (2001); see also § VI.F.3.iii below.

(iii) The prosecutors in this case have a pattern and practice of failing to disclose Brady materials. During an evidentiary hearing in this case, Mr. Seaton represented to the district court that defense counsel "have all the notes, all of the statements made by [witnesses]" because "We give them an open file discovery." 1SA6. Counsel requested notes of statements made to the prosecution, to which Mr. Seaton replied, "I am not about to do that. I have never done it in 15 years, and the discovery statute does not require me to." Id. at 8. And so Mr. Seaton never disclosed statements made by witnesses. Additionally, prosecutors never disclosed the extensive coercion campaign against Ms. Saldana. See § VI.C above; see also 27AA6575-76. This behavior is part of Mr. Seaton's and Mr. Harmon's pattern and practice of failing to disclose Brady material.

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For example in Jimenez v. State, 112 Nev. 610, 620-21, 918 P.2d 687 (1996), this Court reversed a capital conviction because Mr. Harmon failed to disclose material evidence. During an evidentiary hearing in that case, Mr. Harmon indicated complete ignorance of Giglio v. United States, 405 U.S. 150 (1972). See 25AA6096; 30AA7283. Or, to take an example of Mr. Seaton's failure to comply with Brady, in State v. Lopez, Case No. C068946 (8th J. Dist.), Mr. Seaton presented evidence from a key witness. During federal discovery proceedings, it was discovered that the state knew this witness was in jail during the period he allegedly witnessed crimes. See 30AA7331. The witness signed a recantation. 30AA7335. Mr. Seaton then submitted his own affidavit, indicating he possessed no exculpatory evidence, had the witness sign a recantation of his recantation, and then testify that his trial testimony was true. 30AA7341; 30AA7339.

These are only two examples of Mr. Harmon and Mr. Seaton's egregious disregard of Brady and its obligations. See also 30AA7308; 30AA7328; 30AA7351; 30AA7359; 30AA7411; 30AA7416; 30AA7419; 30AA7422; D'Agostino v. State, 112 Nev. 417, 423-24, 915 P.2d 264

(1996); 28AA6812; 28AA6787; 28AA6773; 30AA7430; 30AA7447; 31AA7480; 14AA3396-407 (detailing examples).[19]

(iv) The Clark County District Attorney's office has a pattern and practice of both failing to comply with disclosure obligations and having an "open" file policy that is not open or complete. The failure of the Clark County District Attorney's Office to comply with its disclosure obligations is corroborated by the lack of any institutional mechanism to ensure compliance. Records custodians from various law enforcement entities have testified in depositions that there is no consistent and systematized procedure for retaining or disclosing records. See 32AA7832; 32AA7883; 32AA7929. Time and time again, prosecutors in Clark County have indicated ignorance of files that, it later turns out, were retained by another Clark County law

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[19]Other prosecutors in the Clark County District Attorney's office followed the example set by Mr. Seaton and Mr. Harmon. See 14AA3407-16; see also 31AA7482; 31AA7489; 30AA7308; 30AA7318; Lay v. State, 116 Nev. 1185, 14 P.3d 1256 (2000); 31AA7507; 33AA8122-208; 31AA7510; 34AA8250; 31AA7517; 31AA7520; 31AA7556; 31AA7559; 31AA7562; 31AA7572; 31AA7574; 31AA7577; 31AA7581; 31AA7595; 31AA7597; 31AA7602; 31AA7609; 31AA7621; 31AA7626; 33AA8209; 31AA7645; 31AA7697; 31AA7699; 32AA7736; 34AA8222; 34AA8224; 31AA7694; 32AA7725; 32AA7736-64; 32AA7774-77; 32AA7778; 32AA7800; 32AA7801-07; 32AA7820.

enforcement body. See 33AA7971; 33AA7981; 33AA7988; 33AA7997; 33AA8016; 33AA8029.

Similarly, where the Clark County District Attorney's Office has indicated that it has an open file, it has not actually had an open file. See 33AA8056; 33AA8102; 33AA8107; 33AA8109; 33AA8112.

The conduct of Mr. Seaton and Mr. Harmon, and the Clark County District Attorney's Office indicates that Mr. Seaton and Mr. Harmon suffer from "prosecutorial recidivism"—the tendency of the same prosecutor or office to engage in prosecutorial misconduct repeatedly—despite admonishments from this Court. This pattern of prosecutorial recidivism supports an inference that the misconduct in this case was intentional or, at the very least, knowing.

(5) One of Mr. Moore's penalty phase jurors was not proficient in understanding English.

Carlos Guerra served as Juror #4 during Mr. Moore's penalty phase. He could not speak English well enough to understand the proceedings. 27AA6594 ("Carlos complained to me that he was not able to follow the testimony and arguments made by the lawyers."). His wife

describes how he felt about his jury service:

> Carlos was not happy at being selected as a juror in 1995. Because of his difficulty with English, he did not think he should be a juror. Carlos believed it was unfair to the people who were on trial, and to the justice system, to have a juror who was not proficient in English.

Id. Counsel was on notice that Mr. Guerra could not understand English sufficiently: his juror questionnaire showed his difficulties with spelling; he listed his wife's occupation as "retair," 28AA6897; his opinions about the criminal justice system was "Ay don not," 28AA6899; his hobby was "fiching," id.; he watches "muvis," id.; that the types of books, magazines, and newspapers he reads were "non," id.; and that his view of attorneys in the criminal justice system was "God," 28AA6900. In response to whether his views on the death penalty would interfere with his performance as a juror or whether he believed in "an eye for an eye," he responded, "no andersten." 28AA6902.

His performance during voir dire provided even more evidence of difficulties with English. When asked basic questions, such as whether he knew the attorneys or defendants, he stated, "I don't understand that question." 2SA320. Other representative examples:

> Mr. Schieck: Mr. Guerra, what do you think about the death penalty?
>
> Mr. Guerra: I never think it about.
>
> . . . .
>
> Mr. Schieck: Have you seen any news coverage where someone had been perhaps executed and you thought to yourself, "Well, that was an appropriate punishment," or, "It wasn't an appropriate punishment"?
>
> Mr. Guerra: No. I don't be involved in that case.

2SA322-24.[20] Mr. Guerra's difficulties were not wasted on other jurors. Jurors Funk and Rogers indicated that "he had difficulty interpreting the words and phrases used in the jury instructions." 27AA6625. The jury foreman stated that "Mr. Guerra did not understand what was going on at times, especially when it came to technical issues like 'jury instructions.'" Id.

Under Nevada law, a juror who is not proficient in English is barred from serving on a jury. NRS 6.010 (requiring jurors to have "sufficient knowledge of the English language). This is an independent reason to reverse Mr. Moore's death verdict and to remand.

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[20]Penalty phase counsel was ineffective for failing to challenge Mr. Guerra for cause.

However, under federal law, Mr. Guerra's inability to competently understand English also requires this Court to reverse Mr. Moore's death verdict. Defendants are entitled to jury composed of "jurors who will conscientiously apply the law and find the facts." Bell v. Uribe, 748 F.3d 857, 869 (9th Cir. 2014) (quoting Lockhart v. McCree, 476 U.S. 162, 178 (1986)). Further, a jury must be "capable and willing to decide the case solely on the evidence before it." Bell, 748 F.3d at 869 (quoting McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 554 (1984)). A juror who cannot understand the proceedings in front of him cannot fulfill these basic requirements, and the seating of an unqualified juror is structural error. Estrada v. Scribner, 512 F.3d 1227, 1236 (9th Cir. 2008); see also Vasquez v. Hillery, 474 U.S. 254, 263 (1986).

(6) During both the guilt phase and the penalty phase, the district court failed to change the venue despite extensive and prejudicial pretrial publicity.

The murders of Carl and Colleen Gordan were among the most notorious in the history of Clark County. The crimes, the arrests of

several young men, and their trial, were the subject of nearly continuous television, radio, and newspaper coverage. 23AA5624-63. News coverage focused on the allegations of witchcraft and Satanic rituals. Articles appeared in newspapers shortly after the killings, at the time of the arrests of the six young men, and shortly before the first trial. 23AA5534; see also 1AA95 ("There is a great problem here especially with the media coverage, any articles in the paper and on T.V. about covens and black magic and white magic and things like that."). The media coverage tainted Mr. Moore before the trial occurred.

The press tainted the jury pool by providing excessive coverage of Mr. Moore's alleged connection with Satanism. See 27AA6695 (Devil worship may be linked to slayings) (noting that all the defendants were part of a coven); 27AA6704 (Stories differ on extent of slaying suspects' cult involvement). The media coverage not only presented Mr. Moore as a Satanist, but implied that he engaged in Satanic rituals involving animal or human sacrifice. 27AA6702 (Officials tackle 'devil worship') (quoting Mr. Flanagan: "I know of human sacrifices that have been done—some out at Red Rock, some out at Long Mountain, and some up

at the lake."). Much of this press focused on the supposed problems posed to society by Satanism. 27AA6703 (describing other Satanic crimes in the area); 27AA6704 (noting "If you divulge the secrets of the coven, you will be dealt with. And they won't deal with you in the traditional way, they'll go after your family."); 27AA6705 (Good vs. evil, 1985 style); id. (Teenage Satanism: A passing fad or ultimate rebellion); id. (Three teens tell of rituals in LV Satanist cult).

The press further contaminated the jury pool by reporting on the facts of the offense. For example, much of the press coverage discussed Mr. Flanagan's knife. 27AA6692; 27AA6696. The coverage also indicated that the motive for the crime was Mr. Flanagan's inheritance and that the codefendants planned on making the scene look like a burglary. 27AA6694-97. The press disclosed that Mr. Flanagan had confessed to the crime. 27AA6694; 27AA6696. Some of the descriptions were highly inflammatory: "Flanagan was the first one in the house, and he went straight to his grandmother's room, where he covered her mouth and shot her in the head with a .22 caliber pistol . . . ." 27AA6696.

The press also offered facts that were irrelevant but prejudicial, such as the fact that Mr. Moore had left town before officers arrested his codefendants. 27AA6695; 27AA6698; 27AA6699; 27AA6700. This information contaminated the potential jury pool by allowing potential jurors to predetermine Mr. Moore's guilt without hearing any evidence.

To create a better story, the press provided victim impact information, describing the Gordons as high school sweethearts who had moved to Las Vegas into a home designed and built by Mr. Gordon. 27AA6693. The coverage noted that Mr. Gordon was a World War II veteran of the Marine Corps. Id. Exposure to this information predisposed potential jurors to imposing the death penalty.

The intensity of the coverage was nearly unparalleled at the time. There were voluminous requests by local television stations for cameras in the courtroom and media coverage. See 23AA5664-97; see also 1AA155.

Codefendant's counsel filed a motion for change of venue; Mr. Moore's attorney joined this motion but failed to articulate a specific

basis as to Mr. Moore. 23AA5588; 1AA97.[21] The court denied the motion. 2AA395. See VI.F.1 below; see also VI.B above.

Numerous potential jurors heard about the case prior to trial. See 1AA174; 1AA186; 1AA190; 1AA193; 2AA283; 2AA285; 2AA287; 2AA288; 2AA294; 2AA295; 2AA369; 2AA368; 2AA385. A few potential jurors were particularly influenced by the publicity. See 1AA182 ("They would have to prove their innocence."); 2AA364 (Q: "Do you feel that would be the inclination [the inclination to put the burden of proof on the defense] that you would have throughout the proceedings in evaluating this case and be candid about it?" A: "Yes, sir, I believe it would be. I believe if you read the same article I read yesterday morning or maybe I take it too serious. I am a family man and I just–"). A number of seated jurors were exposed to media accounts. See 1AA172; 1AA178; 1AA192; 1AA247; 2AA290; 2AA291.

Under the Sixth and Fourteenth Amendments, a criminally

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[21]Trial counsel should have collected press accounts of Mr. Moore's case and presented them to the court in support of his motion. His failure both to articulate a reason specific to Mr. Moore for the change of venue and to provide supporting evidence rendered him ineffective. See § VI.F.1.iv below. Post-conviction counsel was also ineffective for failing to provide this additional evidence. See § VI.D.2.i above.

accused is entitled to a fair trial by a panel of impartial, indifferent jurors. Irvin v. Down, 366 U.S. 717, 722 (1961). "Interference with a defendant's fair-trial right 'is presumed when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime.'" Hayes v. Ayers, 632 F.3d 500, 508 (9th Cir. 2001) (quoting Harris v. Pulley, 885 F.2d 1354, 1361 (9th Cir. 1988)). Under the Supreme Court's jurisprudence, a conviction is invalid if it was "obtained in a trial atmosphere that [was] utterly corrupted by press coverage." Skilling v. United States, 561 U.S. 358, 380 (2010) (quoting Murphy v. Florida, 421 U.S. 794, 798-99 (1975)). Two factors are relevant: (1) the size and characteristics of the community and (2) the level of prejudice in the pretrial publicity. Skilling, 561 U.S. 383.

Thus, in the seminal pretrial publicity case, Rideau v. Louisiana, 373 U.S. 723 (1963), the Court overturned a conviction where a confession was broadcast to 20,000 people in a community of 150,000. 373 U.S. at 724, 726. The confession was broadcast three times, enough for the Court to conclude that it was prejudicial. Id. at 726. Although

the population of Clark County was greater than that in Rideau, Las Vegas was still a small city.[22] And the coverage was highly prejudicial. Evidence of satanism, covens, and sacrifice held special significance in the 1980s, which obsessed with the possibility that there was a secret Satanic conspiracy. See Debbie Nathan & Michael Snedeker, Satan's Silence, 1 (1995). In this context, the prejudice was substantial. Thus, the district court should have granted a change of venue.

This error was repeated during Mr. Moore's penalty phase. By the time of the third penalty phase, Mr. Moore's case had been a media focus for roughly ten years. See 27AA6690. This coverage included both details of Mr. Moore's first and second trials. See 23AA5624; 27AA6690. Every article reminded potential jurors that Mr. Moore had been sentenced to death more than once. For his third penalty trial, coverage again focused on Satanism. See 23AA5647 (quoting Mr. Flanagan: "This was not a penalty hearing. It was an inquisition . . . . It was a

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[22]According to the 1980 U.S. Census, Clark County had a population of 463,087 people. See U.S. Department of Commerce, Bureau of Census, Characteristics of the Population: Number of Inhabitants Nevada, PC80-1-A30 (Oct. 1981) available at www2.census.gov/prod2/decennial/documents/1980a_nvABCD-01.pdf.

religious trial and nothing else. Every other word out of the district attorney's mouth was 'coven' this and 'devil worship' that."). One article noted that "Devil worship is a constitutionally protected religion, according to the Nevada Supreme Court." 28AA6750. The article also quoted the dissent, "He said these people have 'embraced evil, including amorality and lawlessness, as desirable objectives.'" 28AA6751.

The repeated characterizations of Mr. Moore as a Satanist were particularly prejudicial because the media regarded Mr. Moore's conversion to Christianity with skepticism. 23AA5645 (Killers who 'found God' get second death terms); 23AA5646 (Killers claim they are fighting devil worship); id. (Lawyers say killers now born again Christians); 28AA6746 (A skeptical look at jail-house converts) ("At the time of the murders, Flanagan and Moore were leaders of a 'coven' of teen-age devil worshipers. But now, we discover, they have found Jesus . . . These facile doubtful jail-house conversions should never be viewed by juries as reason to mitigate a killer's sentence."). So, media coverage conveyed that Mr. Moore was a Satanist and his conversion to Christianity was inauthentic.

Several potential jurors were aware of this media coverage. 1SA240-41; 1SA246; 2SA357-58. The district court failed to change the venue. And, despite the substantial publicity, trial counsel failed to move for a change of venue; this was ineffective.

c. Mr. Moore has timely raised his allegations that post-conviction counsel was ineffective.

As explained above, the only way to vindicate Mr. Moore's right to the effective assistance of first post-conviction counsel under Crump was through the filing of a successive petition. See Riker, 121 Nev. at 240 nn.51-52, 112 P.3d 1070, 2080 nn.51-52. No rule of law specifically addresses how much time a petitioner has to file a successive petition under Crump, but the weight of authority indicates that petitions filed within a year of the finality of the first post-conviction proceeding are timely. See, e.g., Floyd v. State, No. 51409, 2010 WL 4675234 at *1 (Nev. Nov. 17, 2010) ("Floyd's second post-conviction petition for a writ of habeas corpus was filed more than one year after the remittitur issued from the appeal of the denial of his first petition, and therefore his claims of ineffective assistance of post-conviction counsel were also

untimely."); see also 38AA9413 (implying that NRS 34.726(1) allows for a second petition to be filed within one year from the issuance of denial of motion for rehearing).[23] [24]

As explained in the section addressing NRS 34.800 above, Mr. Moore timely filed his current petition eleven months after the remittitur issued from this Court's denial of first post-conviction proceedings. Remittitur from Mr. Moore's direct appeal of his last penalty phase did not issue until May 22, 1998. 17AA4128. Mr. Moore timely filed his first petition for writ of habeas corpus less than two weeks later. 17AA4160. The district court appointed post-conviction

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[23]This disposition, and other citations to unpublished decisions by this Court contained herein, are not cited as legal authority, see Sup. Ct. R. 123, but as evidence of this Court's practices.

[24]Nevada prosecutors have represented in multiple death penalty habeas proceedings that petitioners are allowed one year following the completion of the initial state habeas proceeding within which to file a claim of ineffective assistance of post-conviction counsel. See, e.g., Lopez v. McDaniel, No. C068946, 38AA9434 ("anything outside the one-year statutory period contemplated under NRS 34.726 would be unreasonable."); 39AA9534 ("any claims relating to ineffective assistance of post-conviction counsel would be required to be filed within one year of the remittitur reflecting denial of the first petition for post-conviction relief"); 39AA9575; 39AA9613; 39AA9622; 39AA9633; 39AA9645; 39AA9672-73.

counsel JoNell Thomas to represent Mr. Moore. 36AA8854. In early 2006, the district court ordered a new penalty hearing, which this Court reversed in 2008. 36AA8843; 19AA4715. On remand, because Ms. Thomas's new employment rendered her no longer available, Christopher Oram took over representation of Mr. Moore on February 26, 2009. 36AA8856. The district court denied Mr. Moore's petition on January 15, 2010, after which Mr. Oram litigated the appeal of this denial. 21AA5064. Finally on October 22, 2012, this Court issued its remittitur upon the conclusion of Mr. Moore's first state post conviction proceeding. 36AA8858. Less than a year later, Mr. Moore filed the instant petition. Compare 36AA8858 (Remittitur, Oct. 15, 2012) with 13AA3185 (instant petition, Sept. 19, 2013).

In declaring Mr. Moore's current petition untimely filed, the district court-- in fact, the district attorney's draft order -- erroneously relied upon February 26, 2009, or in the alternative January 15, 2010, as the triggering date for when Mr. Moore's second petition, filed pursuant to Crump, would be considered timely. 41AA10119. February 26, 2009, is when Ms. Thomas ceased her representation of Mr. Moore

because she had changed jobs; January 15, 2010, is when the district court issued its ruling denying Mr. Moore's petition. See 21AA5046. Neither of the dates relied upon by the district court is relevant because Mr. Moore appealed the denial of the district court's January 15, 2010, order.

Clearly, Mr. Moore could not have raised his allegations of ineffective assistance of first post-conviction counsel either before or during the time period that prior counsel was appointed to represent him. First post-conviction counsel's mere presence would have prevented Mr. Moore from filing another petition, see, e.g., Manning v. Foster, 224 F.3d 1129, 1135 (9th Cir. 2000), and he would not have had a factual basis for raising allegations of ineffective assistance of post-conviction counsel before the conclusion of counsel's representation, cf., e.g., Nika v. State, 97 P.3d 1140, 1144-45 (2004) (counsel not in a position to raise ineffective assistance of trial counsel before conclusion of direct appeal). Indeed, by relying upon the date that lower court proceedings concluded (or the date that Ms. Thomas's representation ended), the district court ignored this Court's decision in Middleton v.

Warden, 120 Nev. 664, 669, 98 P.3d 694, 697-98 (2004), in which this Court acknowledged a right to the effective assistance of initial post-conviction counsel on appeal.

ii. Mr. Moore has established good cause and prejudice because the state violated Brady v. Maryland.

The good cause and prejudice requirements to overcome procedural default parallel the second and third requirements of a Brady violation. State v. Huebler, 128 Nev. _____, 275 P.3d 91, 95 (2012) ("establishing that the State withheld evidence demonstrates that the delay was caused by an impediment external to the defense, and establishing that the evidence was material generally demonstrates that the petitioner would be unduly prejudiced if the petition is dismissed as untimely.").

As noted above, in failing to disclose the substantial coercion and coaching of the state's main witness, Angela Saldana, the state committed a Brady violation. See § VI.C above; see also 14AA3338-62. This Brady violation establishes good cause and prejudice to overcome any procedural default.

The district court faulted Mr. Moore for failing "to account for the entire length of the delay occurring after any new facts in support of a Brady violation became reasonably available to him, in particular the time during Flanagan's litigation of these same claims . . . ." 41AA10127. In Huebler, this Court noted that "a Brady claim still must be raised within a reasonable time after the withheld evidence was disclosed to or discovered by the defense." 275 P.3d at 95 n.3. Here, the state has never disclosed the Saldana evidence. Mr. Moore had no possible way of learning this information through discovery in the state proceedings (because the State District Court never conducted an evidentiary hearing) until Mr. Flanagan filed his federal habeas petition, on February 11, 2011. 37AA8982; see also 22AA5392; 22AA5396. By then, briefing was already in progress before this Court. See 21AA5064. Upon learning of the evidence, post-conviction counsel sought a limited remand for the purpose of permitting the district court to consider this issue. 21AA5183.

The state, through Mr. Owens, opposed, noting that "Moore's remedy is to file a successive petition per NRS 34.810 wherein he can

allege his new claims and attempt to show good cause and prejudice for not raising them in the first post-conviction proceedings . . . ." 38AA9293. This is exactly what Mr. Moore has done.[25]

As noted above, Mr. Moore has filed the instant petition less than one year after issuance of remittitur from the appeal of his first post-conviction proceeding. See 36AA8856. The state's position, under which Mr. Moore must justify delay in filing every single claim, would require piecemeal filing of claims, partial claims, or every tittle of evidence as a petition is compiled and an investigation completed.

iii. Mr. Moore has established good cause and prejudice because the failure to consider his claims would amount to a miscarriage of justice.

Procedural default will be excused upon a showing of actual innocence. Pelligrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001) ("This court may excuse the failure to show cause where the prejudice from a failure to consider the claim amounts to a

[25]Mr. Moore would note that this is another example of the Clark County District Attorney's Office's policy of taking inconsistent positions, which, if adopted by this Court, would effectively make it impossible for petitioners to file anything correctly.

'fundamental miscarriage of justice.' We have recognized that this standard can be met where the petitioner makes a colorable showing he is actually innocent of the crime or is ineligible for the death penalty.") (emphasis added). Here, Mr. Moore has made a colorable showing that he is ineligible for the death penalty because one of the two remaining aggravating circumstances is invalid and because this Court engaged in an improper reweighing analysis. See 14AA3456-66.

The jury found that the murders of the Gordons "by Defendants who knowingly created a great risk of death to more than one person by means of a weapon, device, or course of action which would normally be hazardous to the lives of more than one person." 17AA4002; see also NRS 200.033(3). This aggravating circumstance is unconstitutional because it violates both the Eighth Amendment and the Fourteenth Amendment.

Relevant to this analysis is the rule of lenity, which states, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Liparota v. United States, 471 U.S. 419, 427 (1985) (quoting Rewis v. United States, 401 U.S. 808, 812 (1971)). The

rule dictates that, "if two rational readings are possible, the one with the less harsh treatment of the defendant prevails." Antonin Scalia & Bryan Gardner, Reading Law 296 (2012) (citing McNally v. United States, 483 U.S. 350, 359-60 (1987)). Applying the rule of lenity to NRS 200.033(3), the aggravating circumstance cannot apply in this case. The circumstance requires both the creation of great risk and that the risk is created by a weapon or device that would normally be hazardous to the lives of more than one person. NRS 200.033(3). Two independent shootings, done by two shooters, using two guns does not create a great risk; guns fired in different directions at two different targets creates a hazard only for each of the targets. See Jimenez v. State, 105 Nev. 337, 342, 775 P.2d 694, 697 (1989); Flanagan, 112 Nev. at 1425, 930 P.2d at 701 (Springer, J., dissenting) ("There is absolutely nothing done by any of these killers that would normally be dangerous to the lives of more than one person. One or more persons killed two other persons. If there is something that Flanagan or Moore or the other four did that was 'normally [ ] hazardous' to the lives of other people, I cannot identify what hazardous activity was being engaged in.").

a. The great risk of death aggravating circumstance violates the Eighth Amendment because it is vague and because it fails to narrow the class of death eligible defendants.

The Eighth Amendment imposes two requirements on aggravating circumstances: "First, the circumstance may not apply to every defendant convicted of murder . . . . Second, the aggravating circumstance may not be unconstitutionally vague." Tuilaepa v. California, 512 U.S. 967, 972 (1994). The great risk of death aggravating circumstance violates both proscriptions.

"[A] vague propositional factor used in the sentencing decision creates an unacceptable risk of randomness, the mark of the arbitrary and capricious sentencing process prohibited by Furman v. Georgia." Tuilaepa, 512 U.S. at 974-75 (citation omitted). A vagueness claim asserts that the aggravating circumstance fails to inform the sentencing body what they must find to impose the death penalty. Maynard v. Cartwright, 486 U.S. 356, 361-62 (1988). However, if an aggravating circumstance has some "common-sense core of meaning" that juries are capable of understanding, the circumstance is not

vague." Tuilaepa, 512 U.S. at 967. Additionally, a facially vague aggravating circumstance will be upheld if the state courts have applied a constitutional construction of the circumstance. See Bell v. Cone, 543 U.S. 447, 454 (2005) (citing Godfrey, 446 U.S. at 432).

Here, the great risk of death to more than one person aggravating circumstance, as construed by this Court, is too vague to provide any guidance to the sentencer. The aggravating circumstance reads: "The murder was committed by a person who knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person." NRS 200.033(3) (emphasis added). This Court has construed this aggravating circumstance to not require "risk of death" to more than one person: in Hogan v. State, 103 Nev. 21, 24-25, 732 P.2d 422, 424 (1987), this Court found that the aggravating circumstance: "includes a 'course of action' consisting of two intentional shootings closely related in time and place, particularly where the second attack may have been motivated by a desire to escape detection in the original shooting." (emphasis added). This re-writes the

aggravating circumstance to encompass any situation with multiple murders as well as injecting a consideration of motive which, under the Hogan formulation, can be satisfied by speculation rather than proof beyond a reasonable doubt. Because the aggravating circumstance as passed by the legislature requires that a defendant create "great risk" to more than one person, this Court's reading of the circumstance renders it constitutionally vague under the Eighth Amendment.[26]

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[26]The vagueness of this aggravating circumstance and this Court's application of it is further evidenced by comparing it to the legislative history of NRS 200.033(12). NRS 200.033(12) aggravates murder if the "defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree . . . ." When considering this aggravating circumstance, NRS 200.033(3) already existed; nonetheless, the legislature noted that "[u]nder current law, more than one murder is an aggravating circumstance only if the person was convicted in a previous proceeding or if the multiple murders were random and without apparent motive." See An Act Relating to Murder; Expanding the Aggravating Circumstances Under Which the Death Penalty May be Imposed, Hr'g on A.B. 58 Before the Comm. on the Judiciary, 67th Session (1993) (hereinafter AB58 Leg. Hist.). A number of people, representing prosecutors and defense attorneys, noted that no aggravating circumstance encompassed the situation where multiple murders occurred in a single transaction. Compare AB58 Leg. Hist. with Hogan, 109 Nev. at 958-59, 860 P.2d at 715. Notably, one of the prosecutors in this case, Mr. Harmon, testified that "Nevada did not have an aggravating circumstance in place which dealt with multiple murders." AB58 Leg. Hist. at 3.

In addition to being vague, the great risk of death to more than one person aggravating circumstance violates the Eighth Amendment because it is overbroad. To avoid arbitrary application of the death penalty, "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." McCleskey v. Zant, 499 U.S. 862, 866 (1983). Here, NRS 200.033(3) fails to narrow the class of persons eligible for the death penalty.

b. This Court must strike the great risk of death to more than one person aggravating circumstance because it is void for vagueness.

"As generally stated, the void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983). "What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has

been proved; but rather the indeterminacy of what that fact is." United States v. Williams, 553 U.S. 285, 306 (2008). So, this aggravating circumstance is unconstitutionally vague if it "fail[s] to put a defendant on notice that his conduct is criminal." United States v. Harris, 705 F.3d 929, 932 (9th Cir. 2013) (quoting United States v. Kilbride, 584 F.3d 1240, 1257 (9th Cir. 2009)).

Because this Court has read this aggravating circumstance broadly, the circumstance fails to put defendants on notice of what conduct renders first-degree murder aggravated. The text of the circumstance does not indicate that it would apply to any multiple murder; by including this conduct within the ambit of the circumstance, defendants have not been put on notice that such behavior is aggravating. See NRS 200.033(3).

c. Application of the great risk of death to more than one person aggravating circumstance violates the ex post facto clause.

"The ex post facto prohibition forbids the Congress and the States to enact any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes an additional

punishment to that then prescribed." Weaver v. Graham, 450 U.S. 24, 28 (1981) (quoting Cummings v. Missouri, 4 Wall. 277, 325-26 (U.S. 1867)); see also U.S. Const. art. I, § 10, cl. 1. The ex post facto clause applies to judicial decisions. Gentry v. Sinclair, 705 F.3d 884, 908 (9th Cir. 2012) (citing Bouie v. City of Columbia, 378 U.S. 347, 353-54 (1964)); but see Rogers v. Tennessee, 532 U.S. 451 (2001). A law is ex post facto if it is both "retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." Weaver, 450 U.S. at 28. This Court's interpretation of NRS 200.033(3) is both.

In Moran v. State, 103 Nev. 138, 734 P.2d 712 (1987) and Jimenez v. State, 105 Nev. 337, 775 P.2d 694 (1989), this Court faithfully adhered to the statutory language of NRS 200.033(3). Namely, this Court required, for the aggravating circumstance to apply, an "immediate risk" and that the course of action be "normally dangerous to a multiplicity of persons." See Moran, 103 Nev. at 142, 734 P.2d at 714; Jiminez, 105 Nev. at 342, 775 P.2d at 697. Thus, this Court's cases reflected "the view that the employment of a weapon, device or course

of action that is intrinsically hazardous to more than one life is a necessary predicate to a finding under NRS 200.033(3)." Jimenez, 105 Nev. at 342, 775 P.2d at 697. This understanding tracks the plain meaning of the statute and thus is unproblematic—of course, under this understanding, NRS 200.033(3) would not apply in Mr. Moore's case.

However, this Court in Hogan applied a new understanding of the aggravating circumstance, and applied that understanding retroactively. Hogan, 103 Nev. at 24-25, 732 P.2d at 424. It is only under this reading of NRS 200.033(3) that the aggravating circumstance applies to Mr. Moore's case. See Flanagan, 112 Nev. at 1421, 930 P.2d at 698-99. This retroactive application of a novel interpretation of NRS 200.033(3) violates the ex post facto clause. Thus, this Court must strike the aggravating circumstance.

d. This Court improperly re-weighed the aggravating circumstances after striking two of them under McConnell v. State.

When courts invalidate aggravating circumstances, the "state sentencer must actually perform a new sentencing calculus" to provide

close appellate scrutiny. Richmond v. Lewis, 506 U.S. 40, 49 (1992); cf. Styers v. Schriro, 547 F.3d 1026, 1034 (9th Cir. 2008) (state supreme court "did not satisfy its constitutional duty to reweigh the aggravating and mitigating factors because the court improperly refused to consider relevant mitigation evidence"). In order to provide a new sentencing calculus, Clemons v. Mississippi, 494 U.S. 738 (1990), requires this Court to consider the mitigation before it. See Williams v. Taylor, 529 U.S. 362, 397-98 (2000) ("the State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation." (citing Clemons, 494 U.S. at 751-52)). This Court, too, has acknowledged the responsibility to consider all mitigation evidence. See State v. Haberstroh, 119 Nev. 173, 184, 69 P.3d 676, 683-84 (2003); Leslie v. Warden, 118 Nev. 773, 783, 59 P.3d 440, 447 (2002).[27]

[27]Thus, failing to consider all of the mitigation evidence in this case would also violate the equal protection clause. See Myers v. Ylst, 897 F.2d 417, 418 (9th Cir. 1990); see also Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam); Johnson v. Arizona, 462

Mr. Moore reiterates that in his case, the jury has never heard substantial mitigation evidence. It is especially important that a jury hear this evidence because under Nevada law, there is no set of circumstances that requires a juror to vote for death, no matter how greatly the aggravation outweighs the mitigation; and every juror's right to refuse to impose the death penalty is unlimited. Haberstroh, 119 Nev. at 184, 69 P.3d at 683-84; Bennett, 111 Nev. at 1109-10, 902 P.2d at 683-84.

Examining other cases that have resulted in verdicts or negotiations of less than death demonstrates that a death sentence in Mr. Moore's case is not a foregone conclusion. See 40AA9797 (examples of cases with egregious facts that resulted in sentences of less than death both by jury verdict or negotiations with the state).

Sentencing by a reviewing court cannot replace the range of options. No court, reviewing a cold record, can consider a defendant's demeanor. See Riggins v. Nevada, 504 U.S. 127, 137-38 (1992); Allen v. Woodward, 395 F.3d 979, 1014 (9th Cir. 2005). While the Supreme

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F.2d 1352, 1354 (9th Cir. 1972) ("justice must be even-handed").

Court allows re-weighing, Clemons, 494 U.S. at 741, the intensively subjective structure of Nevada sentencing is antithetical to judicial re-weighing or to aggressive harmless error analysis. That judges are elected only exacerbates these problems. See § VI.F.9 below.

Considering all of these factors, it is clear that any death sentence imposed in Mr. Moore's case cannot be constitutionally reliable under the Eighth and Fourteenth Amendments unless it is imposed by a fully informed and properly instructed jury. See Valerio v. Crawford, 306 F.3d 742, 758 (9th Cir. 2002) (en banc) (state appellate court cannot cure constitutional error in vague jury instruction on aggravating circumstance by engaging in fact-finding on appeal, when original sentencer was jury).

iv. The district court's failure to provide an adequate forum establishes good cause and prejudice.

The district court has never held an evidentiary hearing to determine if Mr. Moore has received ineffective assistance of counsel. See 4SA933 (state arguing that evidentiary hearing was unnecessary because Mr. Moore had not established prejudice under Strickland);

22AA5409 (denying ineffective assistance of guilt phase counsel claim without an evidentiary hearing); 18AA4432 (denying claim that counsel on appeal from the third penalty phase was ineffective without an evidentiary hearing). Notably, counsel indicated a need for an evidentiary hearing to prove that counsel during the third penalty phase was ineffective. 4SA995 ("I would think all of that would require an evidentiary hearing where I would need to question Mr. Schieck as to why he didn't bring these people forward and to question Mr. Wolfbrandt as to why a mitigation expert wasn't hired"). Counsel also indicated the need for an investigator. 4SA999. The district court concluded that neither was necessary; perhaps unsurprisingly, the court then denied Mr. Moore's claims for failure to provide enough evidence. See, e.g., 5SA1005 ("This issue fails because their counsel has failed to identify what mitigation investigation or evidence counsel failed to conduct or present" without an evidentiary hearing).

The district court's failure to hold an evidentiary hearing or appoint an investigator constitutes good cause and prejudice to overcome any procedural defaults in this case. Without an evidentiary

hearing or an investigator, post-conviction counsel did not have an opportunity to develop evidence to support the claims in Mr. Moore's petition. Thus, counsel could not provide evidence to support Mr. Moore's claims. See Crump, 113 Nev. at 305, 934 P.2d at 254.

E. The district court erred by dismissing Mr. Moore's petition without an evidentiary hearing to determine if he has shown good cause and prejudice.

This Court has "long recognized a petitioner's right to a post-conviction evidentiary hearing when the petitioner asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief." Mann v. State, 118 Nev. 351, 354 (2002) (citing Hargrove v. State, 100 Nev. 498 (1984)). This right applies to establishing good cause and prejudice to overcome procedural default. See Crump, 113 Nev. at 304, 934 P.2d at 254 (remanding for evidentiary hearing to determine whether petitioner could establish cause and prejudice).

As detailed above, Mr. Moore has provided extensive extra record evidence to support two bases for good cause and prejudice: the ineffective assistance of post-conviction counsel and the state's Brady

violation. See § VI.B & VI.C above. These allegations are not belied by the record; and, if true, they would entitle Mr. Moore to relief.

Despite Mr. Moore's demonstrated right to an evidentiary hearing, the district court denied his petition without one. See 41AA10115. Worse, the district court adopted a number of the state's proposed factual findings despite the uncontradicted evidence presented by Mr. Moore.[28]

For example, the district court found that post-conviction counsel was effective. 41AA10120. However, post-conviction counsel signed a declaration indicating she did not investigate Mr. Moore's case. 25AA5990. Insofar as the order suggests that post-conviction counsel did investigate the case, such a finding is belied by the record—namely the uncontradicted declaration signed by post-conviction counsel. Compare 41AA10120 with 25AA5990. Insofar as the district court's order found that post-conviction counsel made a strategic decision not to investigate, such a finding would be wholly impermissible without an

[28]Mr. Moore made the district court aware of these factual findings and the problem posed by reaching them without an evidentiary hearing. See 41AA10068-71.

evidentiary hearing, given that no testimony was presented as to post-conviction counsel's reason for failing to investigate.[29]

The district court also "found" that "Moore's representation that Carlos Guerra could not understand English is belied by the voir dire transcript which indicates that the judge and three attorneys had no trouble communicating in English." 41AA10124. Without an evidentiary hearing, the district court could not resolve that factual issue. Mr. Moore presented evidence that Juror Guerra could not speak English; the state presented no rebuttal evidence.

The district court's order also states that "Moore's claim that the state withheld evidence of Angela Saldana's inducements under Brady fails as good cause has not been established [sic] to overcome the procedural bars in this case." 41AA10129. The court's order purports to make a number of factual findings: that "Wendy Mazaros and Amy Hanley-Peoples had strong motive against Robert Peoples and Beecher

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[29]Counsel would also reiterate that, here, post-conviction counsel could not have made a strategic choice not to investigate Mr. Moore's case. See Williams v. Taylor, 529 U.S. 362, 396 (2000) (rejecting theory that counsel's failure to present evidence was "justified by a tactical decision" where "counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background.").

Avants" and that the involvement of Ms. Saldana's aunt and uncle in the Bramlet murder in 1977 had little to no connection with the current case." 41AA10127-28. The order concludes:

> This Court agrees with the State's position that it was Angela Saldana, not Robert Peoples, who was a witness and testified in Moore's murder trial. Accordingly, it was her motivation and relationship with law enforcement that was at issue, not that of Robert Peoples. Whether Angela's uncle had other motives in getting Angela to assist law enforcement was simply not relevant nor exculpatory. The declarations of Wendy and Amy simply indicate that Robert Peoples pressured Angela Saldana to testify and told her what to say based on apparent police reports he had. Even if true, this does not establish that Angela felt coerced or that she testified falsely. Angela Saldana's testimony could not have been compelled by issuance of a material witness warrant. Pressuring someone to testify is not the same thing as pressuring them to testify falsely, and Moore failed to provide evidence of the latter.

41AA10128. This passage purports to resolve a number of factual disputes, without the benefit of an evidentiary hearing. The passage concludes that Robert Peoples's motivation and relationship with members of law enforcement was not relevant, that Mr. Peoples's motives are not relevant or exculpatory, and that pressuring Ms.

Saldana to testify does not establish that she testified falsely.[30] Purporting to resolve these factual issues is especially unreasonable because Ms. Saldana signed a declaration and is available to testify. See 24AA5873. Her declaration shows that Metro officers and Investigator Beecher Avants were hiding her full participation from each other and from other members of law enforcement. 24AA5874. Her declaration also discloses benefits she received during criminal proceedings against her. 24AA5875.

Given the large number of factual issues the district court (through the state's proposed findings of fact) saw fit to resolve despite Mr. Moore's presentation of uncontradicted evidence, there can be no question that there were factual disputes below. Under this Court's precedents, however, the district court lacked the authority to resolve these factual disputes without an evidentiary hearing. See Mann, 118

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[30]Mr. Moore would also note that, under Brady, evidence does not have to prove that a witness is lying for it be exculpatory. See Huebler, 274 P.3d at 95 (to be favorable, evidence must be exculpatory or impeaching). Thus, any impeachment evidence falls under the Brady rule. Id. Certainly, here, evidence that Ms. Saldana was coached and coerced impeaches the veracity of her testimony.

Nev. at 354, 46 P.3d at 1230. Thus, this Court should remand for an evidentiary hearing.

F. This Court must consider Mr. Moore's claims cumulatively.

Mr. Moore requests this Court to cumulatively consider claims not previously raised, see § VI.B above, claims raised ineffectively, see VI.D.i.b above, and the claims below, which were fully raised in previous proceedings, but erroneously rejected by this Court as procedurally barred or meritless. See 15AA3527-32. Constitutional errors that may be harmless in isolation can have the cumulative effect of rendering the petitioner's trial fundamentally unfair. Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985); Parle v. Runnels, 505 F.3d 922, 927-28 (9th Cir. 2007). This Court must consider the cumulative effect of multiple errors in assessing whether any particular error may have been prejudicial in combination with other constitutional errors that infected the trial. Id. at 927; see Chambers v. Mississippi, 410 U.S. 284, 298, 302-03 (1973). This Court has long engaged in cumulative error analysis in habeas cases. See, e.g. Evans v. State, 117 Nev. 609, 647-48, 28 P.3d 498, 524 (2001). Therefore, even

though this Court has previously rejected the arguments listed below, it should reconsider both the merits of the arguments, and the effect of the error on Mr. Moore. This is especially true given that Mr. Moore cites additional caselaw supporting many of these arguments.

1. Guilt-phase counsel was ineffective.

There can be no question that guilt phase counsel was ineffective in this case. See 36AA8847.[31] ("trial counsel's performance was in some ways deficient."). As noted above, to prove ineffectiveness of counsel, Mr. Moore must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and that "the deficient performance prejudiced the

[31]See also 4SA932("I will say in all candor to the Court, I think [post-conviction counsel,] Ms. Thomas has made a prima facie showing that [guilt-phase counsel,] Mr. Posin was ineffective."); 4SA963("I don't want to go on record as saying that I concede that Mr. Posin was ineffective. What I'm conceding is that she has made a prima facie showing that he was ineffective."); 4SA965("What I'm stipulating to now is that to the best of my recollection, it sounds to me like Mr. Posin didn't do a very good job."); 4SA977(Court: "So the State is sort of conceding [that trial counsel was ineffective] . . . ." State: "It is marginal. I think whether or not counsel was actually ineffective would be for the Court to decide, but I found the performance troubling . . . the counsel did things that didn't make much sense that were to his client's detriment."); but see 4SA991.

defense." Strickland, 466 U.S. at 687. Prejudice is shown if there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. Here, trial counsel's errors fall into four broad categories: (1) failure to learn all the facts of Mr. Moore's case; (2) failure to adequately object to the effect of the adversarial relationship with Mr. Moore's codefendants which made them essentially additional prosecutors; (3) eliciting damaging evidence; and (4) failure to object to various issues that competent counsel would have objected to.

i. Trial counsel failed to learn all of the facts of Mr. Moore's case.

Trial counsel failed to investigate or seek full discovery in Mr. Moore's case. See 14AA3300-02; 14AA3316-17; see also Strickland, 466 U.S. at 691 (requiring investigation); see also Rompilla, 545 U.S. at 387 (same); Wiggins, 539 U.S. at 524-25 (same); Colwell, 118 Nev. at 813, 59 P.2d at 467-68 (same). For example, trial counsel failed to interview Mr. Havens or Mr. Lucas. 23AA5595-06. Counsel could not have a strategic reason for failing to interview these witnesses. This error is coupled with trial counsel's failure to conduct full discovery: trial

counsel never sought records regarding the full extent of law enforcement's relationship with Ms. Saldana. Most importantly, counsel's failure to investigate and learn all the facts of Mr. Moore's case means that trial counsel never learned of, and so never presented, the extensive evidence of coaching and coercion of Ms. Saldana. See § VI.C above. This was ineffective.

Unsurprisingly, counsel also failed to develop a theory of the case. Thus, rather than a focused presentation during the trial, counsel simply went along with the other attorneys in this case. See 14AA3298; see also 27AA6575 ("Murray Posin's strategy at trial appeared to be nothing more than to 'ride the tide.'"). This was ineffective.

ii. Trial counsel failed to act on or prevent the adversarial conflict between Mr. Moore, on the one hand, and prosecutors and codefendants, on the other.

Trial counsel failed to object to antagonistic evidence presented by codefendants in this case. See 14AA3281-91; see § VI.F.2 below. Counsel knew that codefendants were going to present a defense by shifting the blame to Mr. Moore. See 1AA95 (Mr. Luckett's attorney to the district court: "It is going to be absolutely essential for us in

presenting a defense to portray the other defendants as, quite frankly, very savage, amoral individuals."). This was so both with regard to evidence that Mr. Moore coerced other codefendants and with regard to Satanism evidence. That counsel failed to seek to exclude this evidence or to have a limiting instruction issued was ineffective. See § VI.F.4 below. Thus the co-defendants with whom Mr. Moore was tried acted essentially as additional prosecutors, but trial counsel did not effectively seek to sever the trials.

Despite the antagonistic relationship between codefendants, trial counsel primarily relied on the work product of codefendants' counsel, engaged in joint defense strategy discussions, and shared prejudicial information with codefendants' counsel. See 14AA3299; 14AA3307; 14AA3315-16. For example, counsel failed to litigate the admissibility of co-conspirator statements, instead relying on codefendants' counsel's pleadings. See 23AA5473; see also 14AA3291-93. All of these errors inured to the detriment of Mr. Moore: by relying on other attorneys' work product, no issues or motions were individually tailored for Mr. Moore; by sharing information or strategy with codefendants' counsel,

Mr. Moore's attorney gave valuable information that codefendants' counsel could then use against him.

iii. Trial counsel elicited damaging testimony.

Trial counsel elicited damaging testimony from witnesses. See 14AA3295-98. For example, it was trial counsel, and not the state or codefendants' counsel, who first injected Satanism into the trial. 5AA1096. Apparently thinking that Ms. Saldana had already testified about Satanism, trial counsel elicited testimony from her about it. Id. The problem is that, in fact, the jury had not yet heard any evidence of Satanism; thus the first time the jury heard about the highly prejudicial Satanism evidence was when trial counsel asked about it.[32] Id. This was ineffective.

iv. Trial counsel failed to object to numerous errors during the trial.

Trial counsel also failed to make a number of meritorious objections. In failing to make them, he was ineffective. Trial counsel failed to object to the prosecution's disclosure that the district court had

[32]Codefendants' counsel immediately asked for a mistrial on the basis of this error. See 5AA1155-56.

already found a conspiracy. See 5AA1017; see also 14AA3293-95. The jury should not have been informed that the district court had reached a ruling as to the conspiracy, as the jury had to make its own factual determination about the existence of the conspiracy. See 22AA5430.

Counsel also failed to object to prosecutorial misconduct. See 14AA3307-12. Prosecutors engaged in misconduct by using improper arguments, withholding information about benefits, coercing witnesses, refused to turn over discovery, and used law enforcement resources to do background checks on members of the venire. Id.; see also §§ VI.D.2.i.b; VI.C; VI.F.3 above. Trial counsel should have objected to this misconduct.

Counsel also failed to object to improper jury instructions. Counsel should have objected to the reasonable doubt instruction, the premeditation and deliberation instruction, the implied malice instruction, the equal and exact justice instruction, the guilt or innocence of another person instruction, a prior consistent statement instruction, and the aiding and abetting instruction. See 14AA3312; see

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also § VI.F.6.vi below; § VI.F.6.i below; § VI.F.6.viii below; § VI.F.6.viii below; § VI.F.6.ix below; § VI.F.6.x below; § VI.F.6.xi below.

Additionally, trial counsel failed to move for a change of venue based on the pretrial publicity. See 14AA3313-14; see also § VI.D.2.i.b. Counsel's failure to object to the venue was exacerbated by counsel's other errors related to the jury. Namely, counsel failed object to biased jurors and to rehabilitate unbiased jurors. See § VI.F.5 below. This error, in turn, was exacerbated by counsel's failure to object to the trial judge's restriction of voir dire, which was limited to the judge's questioning of potential jurors. See, e.g., 1AA205.

Counsel also failed to object to the prosecutorial and judicial interference with his defense of Mr. Moore. The prosecution and the court were involved with choosing psychiatric experts for Mr. Moore; the prosecution sought to prevent Mr. Moore from having access to transcripts of pretrial hearings. See 23AA5699; 23AA5703.

Counsel failed to object to the district court's requirement that counsel voice objections during recesses, while the jury was absent. See

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2AA486-87. This Court has already held that the district court's practice was error. See 20AA4727.

Finally, counsel failed to object to the exclusion of Mr. Moore from critical proceedings. See 14AA3320-21; see also § VI.F.12.

v. The trial court failed to inquire into counsel's competence, despite indications in the record that counsel was not capable of adequately representing Mr. Moore.

The district court appointed Mr. Posin without any inquiry into whether he was sufficiently qualified to represent a defendant during a capital trial. Then, during the trial, the court failed to inquire about trial counsel's hearing, which was patiently impaired. See 6AA1353 (Mr. Posin: "The witness is rambling at so fast a pace I am having difficulty digesting that. I just realized he probably said he was something about getting stoned with a killer bee." Court: "Weed, marijuana.").

Nor did the court take seriously Mr. Moore's motion to remove counsel. See 23AA5712. Mr. Moore's allegations that trial counsel had too high a caseload and did not have time to prepare were proven true when trial counsel moved to withdraw as counsel after the guilt-phase

verdict. See 23AA5715. The court erred in failing to have a hearing on Mr. Moore's motion.

vi. Trial counsel's ineffectiveness was prejudicial.

Individually and cumulatively, the impact of trial counsel's ineffective assistance creates a reasonable probability that, but for counsel's errors, the result of Mr. Moore's proceedings would have been different. And Mr. Moore notes that this Court's prior treatment of prejudice in this case has emphasized its perception that the guilt evidence was "overwhelming." See, e.g., Flanagan, 104 Nev. at 107, 754 P.2d at 837; Flanagan, 107 Nev. at 245, 810 P.2d at 760; Flanagan, 112 Nev. at 1412, 930 P.2d at 699. However, the prejudice of counsel's ineffectiveness goes directly to the heart of whether the evidence was overwhelming because it affects what evidence was presented, or not, and what evidence was challenged, or not. Here, trial counsel failed to investigate Mr. Moore's case, allowed codefendants' counsel and the prosecution to gang up on him, and presented to the jury evidence that Mr. Moore was part of a coven. Such evidence undoubtedly affected the jury's consideration of Mr. Moore's role in the offense and what degree

of murder applied. Based on the overwhelming evidence that trial counsel was ineffective during the guilt phase, this Court should vacate Mr. Moore's conviction.

2. Co-defendant-Related Errrors.

There is a reasonable probability that, but for the prejudicial errors argued below, Mr. Moore would not have been convicted and sentenced to death.

i. Failure to Sever.

Mr. Moore's constitutional rights were violated by the trial court's failure to severe his trial from the trial of codefendants Mr. Luckett and Mr. McDowell, and by trial counsel's failure to seek severance on grounds specific to Mr. Moore instead of relying on motions filed by codefendants. Further, Mr. Moore's attorney was ineffective by failing to join the motion for mistrial due to the prejudice caused by the failure to sever. 14AA3327-32. The failure to sever rendered Mr. Moore's trial fundamentally unfair, and deprived Mr. Moore of the constitutional guarantee of the right to confrontation. See Herd v. Kincheloe, 800 F.2d 1526 (1986); see also Bruton v. United States, 391 U.S. 123 (1968). For

example, codefendant Luckett called witnesses to show that he was coerced to commit the crimes by Mr. Moore. 5AA1239; 6AA1088. Mr. Lucket also testified about specific acts of violence committed by Mr. Moore. 6AA1348-49. Indeed, Mr. Moore's antagonistic codefendants acted as supplemental prosecutors against him. Mr. Moore is entitled to relief because he was significantly prejudiced by the testimony of his codefendants, and the evidence of his guilt was not overwhelming. Bruton, 391 U.S. 123; Byrd v. Wainwright, 428 F.2d 1017 (5th Cir. 1970).

ii. Confrontation Clause Violation

The trial court erred by permitting the state to introduce several out of court statements allegedly made by Mr. Moore's co-defendants, on the basis that they were made in furtherance of a conspiracy to commit the murders. See 14AA333-35, 336-37. However, several statements were erroneously admitted that were made before the conspiracy originated or after it terminated. See Wong Sun v. United States, 371 U.S. 471, 491 (1963); United States v. Perez, 989 F.2d 1574, 1579 (10th Cir. 1993) (the High Court mandates a strict construction of

the "in the course of" the conspiracy requirement for the admission of con-conspirator statements). The record reflects that the statements at issue here were not made in furtherance of the conspiracy. See 14AA3327-32, 333-35.

Further, the court in United States v. Adams, 446 F.2d 681, 683 (9th Cir. 1971), ruled that although the Confrontation Clause and the evidentiary hearsay rules stem from the same source, the Supreme Court has never equated the two. The application of a hearsay exception does not necessarily render evidence admissible under the Confrontation Clause. Here, the hearsay violated the Confrontation Clause. Ohio v. Roberts, 448 U.S. 56, 64-65 (1980); Pointer v. Texas, 380 U.S. 400, 403-05 (1965).[33] No reasonable trial strategy would allow the admission of such evidence without an attempt to rebut it. See Burdge v. Belleque, No. 07-35685, 290 Fed. Appx. 73, 78-79 (9th Cir. Aug. 15, 2008).

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[33]Although the Roberts test was abrogated in Crawford v. Washington, 541 U.S. 36, 63-69 (2004), the Supreme Court ruled that Crawford is not to be applied retroactively. See Whorton v. Bockting, 549 U.S. 406, 421 (2007); see also Ennis v. State, 122 Nev. 694,704, 137 P.3d 1095, 1102-03 (2006). Consequently, Roberts controls the resolution of this claim.

3. Prosecutorial Misconduct.

But for severe and pervasive prosecutorial misconduct, Mr. Moore would not have been convicted and sentenced to death.

i. Witness Payments.

The state committed misconduct by paying witnesses Saldana and Lucas $2,000 in exchange for their testimony, a significant sum for teenagers in the 1980s. See 23AA5602; 24AA5875; see also 4AA938; 5AA1056; 14AA3363-64. The payment for Mr. Lucas depended upon the content of his testimony. 14AA3363-64. Further, Mr. Lucas and Mr. Havens, who testified that he agreed to kill Mr. Flanagan's grandmother, testified in exchange for agreements that they would not be prosecuted. Id. The prosecutors committed misconduct by failing to disclose these inducements to Mr. Moore. Kyles v. Whitley, 514 U.S. 419, 434 (1995); Brady, 373 U.S. 83; Giglio v. U.S., 405 U.S. 150 (1972); Harris, 532 F.2d 1247.

ii. Witness Intimidation.

During the third penalty hearing, over defense counsel objection, the state elicited testimony regarding alleged intimidation and threats

to the safety of state witness Lucas, despite that no such testimony had been presented during the prior three trials. 14AA3365-66; 11AA2572-73. The state failed to present credible information that Mr. Moore was the source of the alleged intimidation or threats. At the time of the third penalty phase, Mr. Moore had been segregated on death row since 1985, and could not have been a threat to Mr. Lucas who was in the general prison population. 14AA3365-66. However, Mr. Moore could not rebut Mr. Lucas's testimony with information regarding his death row status without informing his jury that his prior jury had imposed the death penalty. Id. This created a due process error. See Simmons v. South Carolina, 512 U.S. 154, 161 (1994) (the Due Process Clause does not allow the execution of a person "on the basis of information which he had no opportunity to deny or explain"); Skipper v. South Carolina, 476 U.S. 1, 5 n.1 (1986), Gardner v. Florida, 430 U.S. 349, 362 (1977).

iii. Improper Argument.

The prosecutors committed misconduct during statements and arguments. 14AA3367-79. Prosecutor Harmon committed misconduct during guilt phase opening statements by presenting argument rather

than facts; invoking the prestige of his position; and presenting descriptions of events unsupported by the evidence. See, e.g., 2AA427-44. During guilt phase closing arguments, prosecutor Seaton violated Mr. Moore's constitutional rights by emphasizing evidence obtained in violation of the confrontation clause; disparaging trial counsel; arguing facts not in evidence; presenting their personal opinions and misstating the law; inflaming the passions and prejudices of the jury by providing lurid descriptions of the crimes; and arguing that the jury had promised to convict Mr. Moore. 8AA1754-68. During his penalty phase closing, prosecutor Seaton made numerous arguments condemned by this Court as improper: he inflamed the passions and emotions of the jurors; he expressed his personal opinion about whether Mr. Moore should be sentenced to death and about Mr. Moore's character; he asked the jury to compare the codefendants' sentences; he misstated the law; he argued that Mr. Moore should be executed to cure societal wrongs; and he invoked religious authority and mocked Mr. Moore's spiritual beliefs. 13AA3056-108.

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These arguments were improper. See Darden v. Wainwright, 477 U.S. 168, 180 (1986) (improper to disparage defendant); Donnelly v. DeChristoforo, 416 U.S. 637 (1974) (improper to argue facts not in evidence and to misstate the facts); In re Winship, 397 U.S. 358, 364 (1970) (prosecutor's arguments regarding reasonable doubt improper); United States v. Richardson, 161 F.3d 728, 735 (D.C. Cir. 1998) (improper to disparage defense counsel); United States v. Procopio, 88 F.3d 21, 32 (1st Cir. 1996) (improper to refer to defense arguments as a smoke screen); United States v. Copple, 24 F.3d 535, 545 (3d Cir. 1994) (improper to argue victim impact evidence in the guilt phase of trial); United States v. Molina, 934 F.2d 1440, 1446 (9th Cir. 1991) (alluding to facts not in evidence is prejudicial); Brooks v. Kemp, 762 F.2d 1383, 1400 (11th Cir. 1985) (improper for prosecutors to rely on personal experiences and expertise) (vacated on other grounds by Kemp v. Brooks, 478 U.S. 1016 (1986)). The prosecutorial misconduct had a substantial and injurious effect and influence on the jury's determination of the verdict. See Donnelly, 416 U.S. 637.

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iv. Fifth Amendment Violation.

During guilt phase closing arguments, Mr. Moore's Fifth Amendment right to be free from self-incrimination was violated. 14AA3380; Griffin v. California, 380 U.S. 609 (1965). Mr. Seaton commented on the failure of Mr. Moore to take the stand by saying, "No one has taken the stand in this case that I remember, no one has taken the stand and said, 'Wait a minute. Those people are lying.'" 8AA1776. Further, counsel for codefenant Luckett tacitly commented on Mr. Moore's failure to take the stand: Counsel argued that unlike Mr. Moore and his codefendants, Luckett would take the stand so that the jury could "look him in the eye, and the State will have the chance to cross examine him." 2AA465-67.

v. Improper Admission of Codefendant Sentences.

The trial court erred by allowing the prosecutors to commit misconduct by introducing evidence that Mr. Moore's codefendants, Mr. Luckett and Mr. McDowell, were sentenced to life. 14AA3381-82. The sentences were not relevant to Mr. Moore's character, record, or the circumstances of the offense. The sentences were imposed in a separate

proceeding involving different aggravating and mitigating evidence than was before Mr. Moore's penalty jury. Mr. Moore was entitled to a sentence based upon an individualized assessment of his personal culpability for his offense; this does not involve consideration of codefendant sentences. Zant v. Stephens, 462 U.S. 862, 879 ("What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime.") (citing Eddings v. Oklahoma, 455 U.S. 104, 110-12 (1982); Lockett v. Ohio, 438 U.S. 586, 601-605 (1978)); see also Flanagan v. State, 107 Nev. 243, 250-54, 810 P.2d 759, 763-66 (1996) (Rose, J., concurring) ("The sentences imposed on the other participants in these murders should not have been received in evidence . . .").

4. Religion and Purported Gang Membership Evidence.

Under the First Amendment, the state may not present irrelevant evidence of a defendant's membership in a gang or of his religion. Dawson v. Delaware, 503 U.S. 159, 160 (1992). Thus, if the state presents evidence of a defendant's "abstract beliefs," and such evidence is presented merely because "the jury would find such beliefs morally

reprehensible," the state has violated the First Amendment and Fourteenth Amendments. Id. at 160, 167; see also Bains v. Cambra, 204 F.3d 964, 974 (citing McClesky v. Kemp, 481 U.S. 279, 309 n.30 (1987)). Such has occurred here.

During Mr. Moore's guilt phase, the jury learned that Mr. Moore was part of a coven, that members of the coven engaged in an initiation ritual with a burnt knife, and that Mr. Moore's coven nickname was "Wizard." See 6AA1267-68; 6AA1295; 6AA1419. This evidence was highly prejudicial. When the jury first heard this evidence, codefendants' counsel immediately moved for a mistrial and noted the prejudicial effect the evidence had on the jury.[34] 5AA1155 ("I am renewing my motion for a severance as well as the motion for a mistrial based upon raising the occult involvement of the individuals in this case."); 5AA1156 ("The jury's reaction is very clear in that they seemed shocked about the occult and this has tainted, given very prejudicial effect to Mr. McDowell's defense."). And the evidence was irrelevant, as

[34]To repeat: it was Mr. Moore's counsel, acting ineffectively, who elicited this evidence, ostensibly because he was mistaken about whether it had already been presented to the jury. See 5AA1096; see also § VI.F.1.iii above.

conceded by the state. See 8AA1966 ("And then Mr. Luckett through his attorney decided to project this notion of white and black magic into the case. I don't know that it has any relevance . . . ."); see also Moore, 112 Nev. at 1418, 930 P.2d at 697 ("The evidence was irrelevant to the crimes charged, and the prosecutor improperly used it in the guilt phase simply to demonstrate the appellants' bad character.").

The state used the Satanism evidence extensively during closing argument. See 8AA1754 ("They were devil worshippers."); 8AA1763; 8AA1781; 8AA1795; 8AA1816-18.[35] Codefendant's counsel also used the Satanism evidence against Mr. Moore. See 8AA1855; 8AA1899.

The pejorative use of religious affiliation is prejudicial per se; no showing of prejudice is required and this Court, on the basis of the Satanism evidence alone, should vacate Mr. Moore's conviction. In the alternative, the state cannot show that the violation of Mr. Moore' rights was not prejudicial. At the time of Mr. Moore's trial, the United States was in the midst of a Satanic panic. See Jeffrey S. Victor, Satanic Panic (1993); Sandra Salmans, P.&G.'s Battles With Rumors,

[35]Use of this evidence during argument was also prosecutorial misconduct. See Darden v. Wainwright, 477 U.S. 168, 180 (1986).

N.Y. Times, July 22, 1982, at D1; Debbie Nathan & Michael Snedeker, Satan's Silence (1995).[36] Las Vegas was not immune to this hysteria. See 27AA6701; 27AA6702; 27AA6704; 27AA6705; 27AA6711. The media was quick to tie the murders to the Satanic panic. See 23AA5628; 23AA5631; 27AA6697; 27AA6704. In this atmosphere of hysteria, presentation of the evidence of Satanism was highly prejudicial to Mr. Moore.

Additionally, the jury heard evidence of Mr. Moore's membership in a gang. This, too, was irrelevant and prejudicial. See 3AA681-19; 6AA1343. This evidence had no relationship to the crimes charged, and thus was presented merely to prejudice the jury because of Mr. Moore's

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[36]By the 1990s, it was clear that the panic was without real factual support. See The Satanism Scare, (James T. Richardson, Joel Best, & David Bromley, eds., 1991); David Shaw, Where was skepticism in media?, L.A. Times, Jan. 19, 1990, at A1 ("Stories exposing the weakness of the evidence might have stopped the case a lot sooner,' says Walter Urban . . . . If Urban and the others are right, not only might the defendants have avoided years of anguish, ostracism, and staggering legal bills but the McMartin case itself would have been just another child-molestation case—heinous charges without a doubt, but no different from many others. Instead, McMartin became the mind-boggling 'case of the century' with accusations that hundreds of children had been molested over more than a decade amid Satanic rituals, the slaughter of animals and scores of other charges that were soon echoed in similar cases across the country.").

association with others. Thus, presentation of this evidence violated Mr. Moore's First and Fourteenth Amendment rights. See Dawson, 503 U.S. at 160. The state took advantage of this evidence during argument. See, e.g., 8AA1754. This was error.

5. Jury Errors

Certain jury errors were prejudicial per se. For those that were not, there is a reasonable probability that Mr. Moore would not have been convicted and sentenced to death but for their prejudicial effect.

i. Improper Voir Dire on Considering the Potential Penalties Equally.

During voir dire, the district court repeatedly entreated jurors to equally consider the penalty options. 14AA3442-45. This misstated the law and shifted the state's burden. See Leonard v. State, 117 Nev. 53, 65, 17 P.3d 397, 405 (2001) ("We agree that 'equal' consideration of the three possible forms of punishment, including death, is not required. Rather, the proper question is whether a prospective juror's views 'would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."'") (quoting

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Wainwright v. Witt, 469 U.S. 412, 424 (1985)). Trial counsel was ineffective by failing to object and thus making the same error. 2SA326

ii. Improper Voir Dire on Religion

Throughout penalty phase jury selection, the district court erroneously asked potential jurors about their religion and whether they regularly attended religious services. 14AA3440-41. Questioning jurors regarding their religious preferences and practices is structural error. See, e.g., Dawson v. Delaware, 503 U.S. 159 (1992)

iii. Improper Removal of Unbiased Juror

During guilt phase jury selection, the district court committed structural error by unconstitutionally removing jurors for cause. 14AA3453-55. The trial court removed Mr. Pike for cause despite that he could impose death in the "worst case." 2AA334-55. Trial counsel was ineffective by failing to rehabilitate this juror. Id. The trial court also improperly dismissed for cause Mr. Marten because he could not equally consider all three sentences despite that Nevada law does not require the equal consideration of all three sentences. 45SA797-98. In

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Adams v. Texas, the Supreme Court summarized Witherspoon as follows:

> [A] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

Adams v. Texas, 448 U.S. 38 at 45 (1980); see Witherspoon v. Illinois, 391 U.S. 510 (1968).

In Wainwright v. Witt, 469 U.S. 412, 412 (1985), the United States Supreme Court clarified the law relating to juror exclusions. It held the proper standard is stated in Adams: "whether the juror's views would 'prevent or substantially impair the performance of his duties in accordance with his instructions and his oath.'" Witt, 469 U.S. at 424. The record here does not establish that Mr. Pike's views would have interfered with his ability to perform his duty. See Lockhart v. McCree, 476 U.S. 162, 176 (1986); see also Szuchon v. Lehman, 273 F.3d 299, 329-30 (3d Cir. 2001) (dismissal of prospective juror improper where prosecutor failed "to meet his burden under Witt of asking even a

limited number of follow-up questions to show that [the juror's] views would render him biased").

iv. Failure to Remove Biased Juror

During the third penalty hearing, biased juror Nietsch—who stated she would not consider the possibility of parole— was seated. 14AA3449-52. The seating of one biased juror is structural error. United States v. Mitchell, 568 F.3d 1147 (9th Cir. 2009). Further, the trial court should have granted trial counsel's challenge of Mr. Rehman, who would have given more credibility to police officers, and who was already leaning towards death. 2SA409-10, 416. Trial counsel was ineffective by failing to challenge for cause Mr. Seckinger who stated that Mr. Moore was guilty and should receive the maximum penalty. 2SA494-95. The voir dire procedure prejudiced Mr. Moore, including the trial court's failure to ask meaningful questions and limiting of trial counsel's ability to ask probing questions. See Witt, 469 U.S. at 424.

In Morgan, the High Court concluded that a trial court may not refuse inquiry into whether a potential juror would automatically impose the death penalty. Morgan, 504 U.S. at 749; see also

Witherspoon, 391 U.S. 510; Adams, 448 U.S. 38; Witt, 469 U.S. 412 ; Ross v. Oklahoma, 487 U.S. 81, 85 (1988); Turner v. Murray, 476 U.S. 28 (1986) (plurality). In doing so, the High Court ruled that "part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." Morgan 504 U.S. at 729.

v. Juror Misconduct

A potential juror notified the court that another juror, Mr. Pearlstein, had violated its admonition not to discuss Mr. Moore's case. 14AA3446-48 (citing 2SA356). Mr. Pearlstein, who worked for the detention center, knew that Mr. Moore's case had been reversed twice due to inadmissible devil worship evidence, and he informed ther potential jurors that the proceeding would be a retrial. Id. Although Mr. Pearlstein did not specifically recall mentioning devil worship during these discussions, he stated that: "A lot of things have been said out there, and I don't really remember saying anything." 2SA360. Given the equivocal nature of his statements, the trial court erred by failing to make a full and complete inquiry into whether Mr. Pearlstein told the remaining jurors about the reason for the retrial, especially

given that Mr. Pearlstein dishonestly failed to bring his violation of the trial court's admonition to the court's attention. Smith v. Phillips, 455 U.S. 209, 215 (1982); Remer v. United States, 347 U.S. 227, 230 (1954). Estrada, 512 F.3d at, 1240.

6. Improper Jury Instructions

Certain jury instruction errors were prejudicial per se. For those that were not, there is a reasonable probability that Mr. Moore would not have been convicted and sentenced to death but for their prejudicial effect.

i. Kazalyn instruction

The jury in Mr. Moore's case received an instruction on "premeditation and deliberation,"that relieved the state of its burden to prove that he premeditated and deliberated. See14AA3467-15AA3473 (citing Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992)). This error deprived Mr. Moore of due process, in violation of the then-existing authority in Hern v. State, 97 Nev. 529, 531-32, 632 P.2d 278, 280 (1981). See Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007); Riley v. McDaniel, __ F.3d __, 2015 WL 2262549 (9th Cir.). Further, this Court's

conflation of premeditation and deliberation with intent to kill renders the first-degree murder statute void for vagueness in violation of the Due Process Clause and the Eighth Amendment. The federal constitution requires that penal statutes give "fair notice" of what is forbidden, Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939), and "the more important aspect of the vagueness doctrine 'is . . . [the] requirement that a legislature establish minimal guidelines to govern law enforcement,'" Kolender v. Lawson, 461 U.S. 352, 358 (1983), quoting Smith v. Goguen, 415 U.S. 566, 574-575 (1974). Without such guidelines, "a criminal statute may permit a standardless sweep, [that] allows policemen, prosecutors, and juries to 'pursue their personal predilections.'" Kolender, 461 U.S. at 358 (quoting Smith, 415 U.S. at 575 (emphasis added)). The "complete erasure" of the distinction between first and second-degree murder created by the Kazalyn instruction left juries with no "adequate guidelines" for determining when a homicide is first- rather than second-degree murder. The absence of such adequate standards does not merely "encourage arbitrary and discriminatory enforcement," Kolender, 461 U.S. at 357

(citations omitted); Morales v. City of Chicago, 527 U.S. 41, 56 (1999)(plurality opn.); id. at 64-65 (O'Conner, J., concurring), but virtually ensures it.

This constitutional violation leads, in turn, to two other constitutional violations. First, the "standardless sweep" of the definition will result in arbitrarily disparate treatment in violation of the Due Process Clause: similarly situated defendants, whose offenses will be rationally indistinguishable, will be convicted of first- or second-degree murder, based arbitrarily upon the "personal predilections" of juries; while defendants whose offenses differ radically in seriousness will arbitrarily be convicted of first- degree murder, again based simply upon the "personal predilections" of juries. This gives rise in turn to a violation of the equal protection guarantee that "all persons similarly situated should be treated alike," Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985), unless there is a "rational basis for the difference in treatment." Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000)) (per curiam) (citations omitted).[37]

[37]The conflation of premeditation and deliberation with simple intent to kill also has the effect of eliminating any necessity of showing

Second, Nevada law restricts imposition of the death penalty to cases involving convictions of first-degree murder. NRS 200.030(4)(a). A state system that limits the application of the death penalty to first-degree murders, but then erases any rational distinction between first- and second-degree murders, necessarily results in arbitrary imposition of the death penalty in violation of the Eighth Amendment. Basing death-eligibility on a vague aggravating factor invites "arbitrary and capricious application of the death penalty." Stringer v. Black, 503 U.S. 222, 228, 233-236 (1992); Lowenfield v. Phelps, 484 U.S. 231, 244-45 (1992); Godfrey v. Georgia, 446 U.S. 420, 433 (1980). Basing it on

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any evidence from which the jury could infer that the defendant actually premeditated and deliberated. The kind of evidence cited by Blackstone as tending to show malice aforethought, 4 William Blackstone, Commentaries on the Laws of England * 199 (1769), is essentially the same as the evidence cited in American decisions as tending to show premeditation and deliberation. See 2 LaFave, Substantive Criminal Law § 14.7(a) at 480-482; 2 Charles E. Torcia, Wharton's Criminal Law § 142 (15th ed. 2003). If a court can simply recite that premeditation can be instantaneous, and essentially identical to, and arising at the same time as, a simple intent to kill, it can completely ignore the absence of any evidence that would support an inference that premeditation and deliberation actually occurred. The Kazalyn instruction thus effectively reversed the burden of proof, and placed it upon the accused to disprove the elements of premeditation and deliberation, while at the same time depriving the defendant of meaningful legal standards to guide the jury's decision in that respect.

conviction of a capital offense—when the conviction is predicated upon a vague definition of the elements that are supposed to distinguish it from second-degree murder—is even more arbitrary and capricious. Beck v. Alabama, 447 U.S. 625, 638 (1980) (requirement that death penalty be "imposed on the basis of 'reason rather than caprice or emotion'" to ensure constitutional reliability also requires invalidating "rules that diminish the reliability of the guilt determination [by] enhanc[ing] the risk of an unwarranted conviction," (quoting Gardner v. Florida, 430 U.S. 349, 358 (1977) (Stevens, J., with Stewart & Powell, JJ., plurality opinion)); cf. Jones v. State, 707 P.2d 1128, 1134 (Nev. 1985) (high degree of premeditation is prerequisite to death eligibility).

ii. Commutation instruction

The commutation instruction given in Mr. Moore's case was unconstitutional. 14AA3474-76. In Geary v. State, this Court held that the "jury instruction suggesting that Geary's sentence could be modified, combined with the arguments of counsel, may have misled the jury into believing that it had to choose death in order to prevent Geary from being paroled and released back into society." Id., 112 Nev.

1434, 1443, 930 P.2d 719, 725 (1996). Here, Mr. Moore's jury received essentially the same clemency instruction as that given in Geary. See id. at 1440, 930 P.2d at 723, 724.

While the High Court has allowed states to give an accurate jury instruction on the possibility of executive clemency, see California v. Ramos, 463 U.S. 992, 1004 (1983), an accurate instruction can still violate the constitution if it inaccurately describes the possibility of clemency. See Gallego v. McDaniel, 124 F.3d 1065, 1074-77 (9th Cir. 1997) (finding Nevada's instruction on possibility of executive clemency misleading where defendant under sentence of death in other jurisdiction, and instruction implied early parole available); see also Sechrest v. Ignacio, 549 F.3d 789, 807 (9th Cir. 2008); Coleman v. Calderon, 210 F.3d 1047, 1050-51 (9th Cir. 2000) (noting that prosecutor's argument on the necessity of imposing a death sentence to prevent release on parole exacerbated prejudice of misleading instruction); McLain v. Calderon, 134 F.3d 1383, 1386 (9th Cir. 1998) (abrogation on other grounds recognized by Coleman v. Calderon, 210 F.3d 1047, 1049 n.1 (9th Cir. 2000)).

iii. Anti-Sympathy Instruction

Mr. Moore's jury was improperly instructed that "a verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law." 24AA5738; 15AA3477-78. By forbidding the sentencer from taking sympathy into account, this language on its face precluded the jury from considering evidence concerning Mr. Moore's character and background, thus effectively negating the constitutional mandate that all mitigating evidence be considered. See Tennard v. Dretke, 542 U.S. 274, 284-87 (2004). A reasonable likelihood exists that this instruction, compounded by the state's improper argument, denied Mr. Moore the individualized sentencing determination that state and federal constitutions require. Mr. Moore is aware that this Court has rejected this claim. See Nevius v. State, 101 Nev. 238, 250, 699 P.2d 1053, 1060-61 (1985).

iv. Lack of Unanimity Instruction

Mr. Moore's jury was never instructed that it must unanimously find the existence of one aggravating circumstance beyond a reasonable

doubt. See, e.g., DePasquale v. State, 106 Nev. 843, 852 n.10, 803 P2d 218, 223 n.10 (1990); 15AA3479-83. The omission of the unanimity requirement in the jury instructions establishes a federal due process violation under Hicks v. Oklahoma, 447 U.S. 343, 346 (1980), by depriving Mr. Moore of a liberty interest created by state law, and also violates Ring v. Arizona, 536 U.S. 584, 609 (2002).

The failure of the jury instructions to require unanimity as to the finding of an aggravating circumstance must be considered prejudicial because, if the correct instruction would have been given, Mr. Moore "would have been sentenced to life imprisonment if even one juror found in his favor on this issue." Id. at 710; Carter v. Bowersox, 265 F.3d 705, 710 (8th Cir. 2001); see also Apprendi v. New Jersey, 530 U.S. 466, 484-97 (2001); In re Winship, 397 U.S. 358, 364 (1970). Under these circumstances, Mr. Moore's death sentence must be reversed because the jury never properly found that he was eligible for the death penalty. Furthermore, this Court has specifically held that "[f]ailure to [] instruct the jury [that the finding of aggravating circumstances must be unanimous] results in a failure to adequately guide the jury in its

sentencing determination, and mandates a new penalty hearing." Geary v. State, 112 Nev. 1434, 1449, 930 P.2d 719, 729 (1996).

The instruction is also unconstitutional because a reasonable juror would have understood the instruction about requiring a "unanimous verdict" to demand a unanimous finding as to mitigating circumstances. Federal constitutional law prohibits this. See Mills v. Maryland, 486 U.S. 367, 387 (1988); McKoy v. North Carolina, 494 U.S. 433, 444 (1990); see also Doleman v. State, 112 Nev. 843, 850, 921 P.2d 278, 282 (1996).

v. Improper Weighing Instruction

Mr. Moore's jury was never instructed that it had to find the second element of death-eligibility—that the aggravating circumstances were not outweighed by the mitigating circumstances—beyond a reasonable doubt. 15AA3484-85. The jury instruction given constitutes structural error. See Sullivan v. Louisiana, 508 U.S. 275, 279-82 (1993).

This Court held in McConnell v. State, 125 Nev. 243, 254, 212 P.3d 307, 314-15 (2009), that "[n]othing in the plain language of [the

statutes] requires a jury to find, or the State to prove, beyond a reasonable doubt, that no mitigating circumstances outweighed the aggravating circumstances in order to impose the death penalty," and "[s]imilarly, this court has imposed no such requirement." Id. at 314-15. The Court's first statement regarding the text of the statute is accurate, but that is the very reason why it is unconstitutional. The Court's second holding regarding its own case law is simply wrong: This Court has, in fact, held that the aggravating circumstances must be found by the jury to not be outweighed by mitigation beyond a reasonable doubt before the death penalty can be imposed. See Johnson v. State, 118 Nev. 787, 802-803, 59 P.3d 450, 460 (2002); cf. Rust v. Hopkins, 984 F.2d 1486, 1492-94 (8th Cir. 1993). However, even if this Court had not so held, both the statute and this Court's interpretation of it are nonetheless subject to federal due process and jury trial guarantees, which under controlling Supreme Court case law require any and all death eligibility factors to be found beyond a reasonable doubt. Ring v. Arizona, 536 U.S. 584, 602 (2002); Apprendi v. New

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Jersey, 530 U.S. 466, 483 (2000); United States v. Booker, 543 U.S. 220, 244 (2005).

Under Nevada law, the finding that the aggravating circumstances outweigh the mitigation exposes the defendant to a greater punishment than that authorized by the guilty verdict alone, and that factual finding is necessary to impose the death penalty.[38] Accordingly, under Apprendi and Ring, the finding that the aggravating circumstances are outweighed by the mitigation must be made beyond a reasonable doubt, whether the statute expressly says so or not. This Court held as much in Johnson:

> This second finding regarding mitigating circumstances is necessary to authorize the death penalty in Nevada, and we conclude that it is in part a factual determination, not merely discretionary weighing. So even though Ring expressly abstained from ruling on any "Sixth Amendment claim with respect to mitigating circumstances," we conclude that Ring requires a jury to make this finding as well: "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact-no matter how the State labels it-must be found by a jury

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[38]NRS 175.554(3) ("The jury or the panel of judges may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found."); see also Hollaway v. State, 116 Nev. 732, 745, 6 P.3d 987, 996 (2000).

beyond a reasonable doubt."

Johnson v. State, 118 Nev. 787, 802-803, 59 P.3d 450, 460 (2002) (quoting Apprendi, 530 U.S. at 482-483)). Thus, the failure to instruct the jury that it must find that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt violated Mr. Moore's due process and jury trial rights under Johnson.

This Court's decision in McConnell clearly misapprehends recent developments in the High Court's case law, which apply the reasonable doubt standard to all death eligibility factors. With the exception of DePasquale v. State, 106 Nev. 843, 803 P.2d 218 (1990), which was decided prior to Ring and Apprendi, and is now invalid under those cases, all of the cases cited by this Court in McConnell deal with the decision of whether to impose the death penalty, and not the decision of whether the defendant is eligible for the death penalty.[39]

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[39]See Gerlaugh v. Lewis, 898 F. Supp. 1388, 1421 (D. Ariz. 1995) (aggravating circumstances need not outweigh mitigators beyond reasonable doubt where, under Arizona law, weighing of aggravating circumstances against mitigators is not part of eligibility determination, but is part of selection process); Harris v. Pulley, 692 F.2d 1189, 1195 (9th Cir.1982) (weighing of aggravating circumstances against mitigators in California is part of selection determination, not the eligibility determination).

This Court held in McConnell that "the jury's decision whether to impose a sentence of death is a moral decision that is not susceptible to proof." McConnell, 125 Nev. at 254, 212 P.3d at 315 (citing Penry v. Lynaugh, 492 U.S. 302, 319 (1989)). While true, this fact is completely inapposite to the issue of whether the aggravating factors are outweighed by mitigation which must be made beyond a reasonable doubt where, under Nevada law, such a finding is necessary to render a defendant eligible for the death penalty. The issue in McConnell, as in this case, is not whether the decision to impose the death penalty must be made beyond a reasonable doubt, but whether one of the eligibility factors must be found beyond a reasonable doubt. As explained in detail above, High Court precedent clearly mandates that it must. Cf. Apprendi, 530 U.S. at 494.

This Court rejected the argument above in Nunnery v. State, 263 P.3d 235, 251 (Nev. 2011), by concluding that the weighing determination is not a fact-finding process, but instead involves the balancing of facts previously found. Regardless of how this Court

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characterizes the weighing process, however, it is still an element of the offense under Ring.

vi. Reasonable Doubt Instruction

The trial judge defined reasonable doubt in a manner which elevated the threshold for reasonable doubt, thereby easing the prosecutor's burden of proof and violating fundamental fairness and due process. See 22AA5460; 15AA3486-88. The Due Process Clause requires the prosecution to prove, beyond a reasonable doubt, every element of the offense. In re Winship, 397 U.S. 358, 364 (1970). While the Constitution does not require that any particular form of words be used to describe "beyond a reasonable doubt," the instructions taken as whole, must correctly convey the concept of to the jury. Victor v. Nebraska, 511 U.S. 1, 5 (1994) (quoting Holland v. United States, 348 U.S. 121, 140 (1954)). In Cage v. Louisiana, 498 U.S. 39 (1990) (disapproved of on other grounds by Estelle v. McGuire, 502 U.S. 62, 73 n.4 (1991)), the trial judge instructed the jury:

> [A reasonable doubt] is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the

> unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty.

Id., 498 U.S. at 40 (emphasis in opinion). The Supreme Court held that "the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable-doubt standard." Id. at 41. When the reference to "moral," as opposed to evidentiary certainty was added into the equation, the Court determined that a reasonable juror "could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." Id.

The reasonable doubt instruction in Mr. Moore's case suffered two defects similar to those in Cage which inflated the doubt required for an acquittal. The second sentence of the instruction stated that reasonable doubt "is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life." 22AA5460. This language, similar to the language in Cage requiring "such doubt as would give rise to a grave uncertainty," provided an

inappropriate characterization of the degree of certainty required to find proof beyond a reasonable doubt. It offered an explanation of reasonable doubt itself, rather than defining reasonable doubt, and elevated the standard by which reasonable doubt can be determined. This language has proven to be a historical anomaly. As far as can be discerned, no other state currently uses similar language in their reasonable doubt instructions, and the few states which previously used it, have since disapproved it.

The final sentence in the instant instruction was also constitutionally infirm. The trial judge stated that, for "[d]oubt to be reasonable," it "must be actual, not mere possibility or speculation." 22AA5460. Once again this language is similar to the "substantial" and "grave" language condemned by Cage. By describing reasonable doubt as "actual, not mere possibility or speculation" the trial judge elevated the threshold of reasonable doubt. The "govern or control" language created a reasonable likelihood that the jury would convict Mr. Moore based upon a lesser degree of proof than the Constitution required. As a result, the jurors in Mr. Moore's case received instructions which made

reasonable doubt unconstitutionally difficult to recognize while rendering the lack of reasonable doubt more accessible.

The characterization of standard of proof as an "abiding conviction of the truth of the charge," did not cure the defects in this instruction. That statement cannot be linked to any proper definition of reasonable doubt. In conjunction with the language which immediately preceded this statement, it provided prosecutors with an impermissibly low burden of proof. The Nevada Supreme Court rejected this argument in Guy v. State, 108 Nev. 770, 776-77, 839 P.2d 578, 582-83 (1992) (addressing "abandoned and malignant heart"), and Leonard v. State, 114 (Nev. 1196, 1208, 969 P.2d 288, 296 (1998) (addressing "a heart fatally bent on mischief"). See also Lord v. State, 107 Nev. 28, 40, 806 P.2d 548, 555-56 (1991); Ramirez v. Hatcher, 136 F.3d 1209, 1211-15 (9th Cir. 1998). However, these decisions do not address the early cases recognizing the problem with the language at issue. See Monk v. Zellez, 901 F.2d 885, 889-90 (10th Cir. 1990); McAllister v. State, 88 N.W. 212, 213-14 (Wisc. 1901); Com. v. Miller, 21 A. 138, 140 (Pa. 1891); see also Minich v. People, 9 P. 4, 13 (Colo. 1885); State v. Carter, 182 P.2d 90,

94 (Ariz. 1947); State v. Pedersen, 802 P.2d 1328, 1332 (Utah App. 1990) (dictum).

vii. Malice Instructions

The malice instructions given during the guilt phase of Mr. Moore's trial are unconstitutional because the description of the predicate facts upon which the inference is based—the "heart fatally bent on mischief" and "an abandoned and malignant heart"—are impermissibly vague and over-broad. 22AA5441-42; 15AA3489-91. The use of these concededly "archaic," Keys v. State, 104 Nev. 736, 740 766 P.2d 270, 272 (1988), and "cryptic," People v. Phillips, 64 Cal.2d 574, 586, 414 P.2d 353, 363 (Cal. 1966) (overruled on other grounds People v. Flood, 18 Cal.4th 470, 957 P.2d 869 (Cal. 1998)), terms could only have caused unnecessary prejudice. The language used in the instructions is unconstitutionally vague and, because it invites the jury to consider the defendant's general "badness" as a basis for finding this element, is over-broad as well. A reasonable juror—the standard by which the constitutionality of an instruction is judged, see, e.g., Boyde v. California, 494 U.S. 370, 382 (1990) (effect of language of instruction

on reasonable juror)—would also have understood the "abandoned and malignant heart" and "heart fatally bent on mischief" language to require an objective, rather than subjective, standard in determining whether the defendant acted with conscious disregard of life, thereby entirely obliterating the line which separates murder from involuntary manslaughter, in violation of the Constitution.

viii. Equal and Exact Justice Instruction

The "equal and exact justice" instruction given during the guilt phase of Mr. Moore's trial is unconstitutional. 15AA3492-93. A criminal trial is not a forum for achieving equality. The state must shoulder the entire burden of proving the elements of the offense beyond a reasonable doubt. The defendant is not required to prove anything; and, in the penalty phase, the jury is never required to vote for a death sentence, under any legal or factual circumstances.[40] Accordingly, such

[40] This Court's previous assertion that this "instruction does not concern the presumption of innocence or burden of proof," Leonard v. State, 114 Nev. 1196, 1209, 969 P.2d 288, 296 (1999), is not a fact that would be apparent to a reasonable juror viewing the instruction. See Francis v. Franklin, 471 U.S. 307, 316 (1985). The language from this instruction would make sense with respect to the burden of proof that exists in the civil law, where the parties truly are on an equal footing. At the very least, this instruction has the potential of confusing the

an instruction violates the Constitution and is prejudicial per se, because it deforms all the jury's findings. See Sullivan v. Louisiana, 508 U.S. 275, 278-279 (1993).

ix. Guilt by Association Instruction

The trial judge's "guilt or innocence of any other person" instruction improperly minimized the state's burden of proof, and tacitly endorsed a theory of "guilt by association." 15AA3494-95 (citing 22AA5461). This instruction created a reasonable possibility that the jury would not apply the presumption of innocence in favor of Mr. Moore, and would make an irrational inference that the culpability of other defendants could not be considered in assessing Mr. Moore's. See Gibson v. Ortiz, 387 F.3d 812, 820 (9th Cir. 2004) (citing In re Winship, 397 U.S. 358 (1970)); Leary v. United States, 395 U.S. 6 (1969). The defect is in the final clause where jurors were told to convict Mr. Moore if they find that the prosecutors had fulfilled their burden of proof regardless of whether "one or more persons are also guilty," but were given no guidance on what to do if they determined that the

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jury as to the burden of proof and has absolutely no other relevance to the guilt phase of a capital trial.

prosecutors had not met their burden regarding Mr. Moore.

x. Failure to Request Favorable Instructions

Trial counsel was ineffective by failing to request instructions favorable to Mr. Moore. 15AA3496. Trial counsel failed to request an instruction regarding prior inconsistent statements in light of Mr. Akers's two prior statements given to the police which were inconsistent with his testimony. See Chambers v. Mississippi, 410 U.S. 284 (1973). Trial counsel also failed to request limiting instructions on the use of character evidence, bad act evidence and hearsay evidence. See Musladin v. Lamarque, 555 F.3d 830,846 (9th Cir. 2009); see also Albrecht v. Horn, 485 F.3d 103, 127-28 (3d Cir. 2007).

xi. Aiding and Abetting Instruction

Trial counsel was ineffective by failing to challenge the court's instructions on aiding and abetting. 15AA3497-99 (citing 22AA5431, 5456, 5458). The Due Process Clause of the Fourteenth Amendment prohibits states from convicting persons of a crime without proving each element of the crime beyond a reasonable doubt. The jury instructions here lessened the state's burden of proof by not requiring

the state to establish the scienter element of first-degree murder and burglary, because they do not require a finding that the aider and abetter knowingly aided another with the intent that the other person commit the charged crime. Enmund v. Florida, 458 U.S. 782 (1982); Tison v. Arizona, 481 U.S. 137 (1987); In re Winship, 397 U.S. 358, 364 (1970); Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002) overruling Mitchell v. State, 114 Nev. 1417, 971 P.2d 813 (1998).. The prosecutor emphasized these instructions during his closing argument. 8AA1787.

7. Lack of Penalty Phase Jurisdiction

Prior to his third penalty phase hearing, Mr. Moore filed a habeas petition contending that his guilt verdict should be overturned for the same reason that his first penalty phase was reversed by the Supreme Court. The evidence of Satanic worship was not limited to the punishment phase of trial; substantial evidence of covens, and white and black magic was introduced leading to Mr. Moore's guilty verdict. The lower court denied his petition and his request that his third penalty phase hearing be stayed pending appeal of this issue. This Court denied a writ of mandamus regarding the denial of the stay. Mr.

Moore filed a notice of appeal from the denial of his guilt phase petition, which divested the district court of jurisdiction of Mr. Moore's penalty phase of trial, since the penalty hearing was dependent upon this Court upholding the constitutionality of the guilt phase verdict. See Buffington v. State, 110 Nev. 124, 126, 868 P.2d 643, 644 (1994); Rust v. Clark County School Dist., 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987); see also NRS 177.155. Absent an underlying and valid conviction, the district court did not have jurisdiction to hold a penalty phase trial, thereby rendering Mr. Moore's third penalty hearing invalid. 14AA3434-36.

Mr. Moore had a state-created, constitutionally protected liberty interest in the fair administration of state procedures governing his notice of appeal. Hewitt v. Helms, 459 U.S. 460, 466 (1983) ("Liberty interests protected by the Fourteenth Amendment may arise from two sources—the Due Process Clause itself and the laws of the States."); Hicks v. Oklahoma, 447 U.S. 343, 346 (1980) ("Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's

interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.") (internal citations omitted); Vansickel v. White, 166 F.3d 953, 957 (9th Cir. 1999) ("state right to peremptory challenges is a state-created liberty interest protected by the Fourteenth Amendment to the Constitution."); Walker v. Deeds, 50 F.3d 670, 672 (9th Cir. 1995) ("Nevada law creates a liberty interest in sentencing procedures protected by the Due Process Clause of the Fourteenth Amendment"); Moran v. Godinez, 57 F.3d 690, 698 (9th Cir. 1994) ("[T]he denial or misapplication of state procedures that results in the deprivation of a substantive right will implicate a federally recognized liberty interest."); Fetterly v. Paskett, 997 F.2d 1295, 1300 (9th Cir.1993) ("[T]he failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state.");

Baumann v. Arizona Dept. of Corrections, 754 F.2d 841, 844 (9th Cir.1985) ("A state may create a constitutionally protected liberty interest by establishing regulatory measures that impose substantive limitations on the exercise of official discretion.").

Mr. Moore has a constitutionally protected state created liberty interest where state law creates "'objective and defined criteria' which the decision-maker is required to respect." Baumann v. Arizona Dept. of Corrections, 754 F.2d 841, 844 (9th Cir.1985). Here, NRS 177.155. divested the lower court of jurisdiction when Mr. Moore timely filed his notice of appeal. This is an objective criteria that the state courts were required to respect. Because the state courts failed to respect the rule requiring lower court proceedings to cease once a notice of appeal has been properly filed, Mr. Moore's federally constitutionally protected liberty interests were violated. Mr. Moore's equal protection rights were also violated because the state courts have treated similarly situated defendants differently. Compare above with Middleton v. McDaniel, No. 62869, Order Granting Motion (Nev. April 28, 2014) (briefing suspended in light of remand); See Village of Willowbrook v.

Olech, 528 U.S. 562, 564 (2000) (per curiam); see also Bush v. Gore, 531 U.S. 98, 104-09 (2000) (per curiam); Myers v. Ylst, 897 F.2d 417, 421 (9th Cir.1990); Dugger v. Adams, 489 U.S. 401, 411 n.6 (1989); Moran v. McDaniel, 80 F.3d 1261, 1270 (9th Cir.1996).

8. The Execution Process is Unconstitutional

i. This Court's denial of Mr. Moore's lethal injection claim was erroneous.

Nevada's execution protocol is similar to the lethal injection protocol employed in California prior to the litigation in Morales v. Hickman, 415 F. Supp. 2d 1037 (N.D. Cal. 2006), aff'd. 438 F.3d 926 (9th Cir. 2006), cert. denied, 546 U.S. 1163 (2006). The use of sodium thiopental, pancuronium bromide, and potassium chloride without the protections imposed in Morales and Baze v. Rees, 553 U.S. 35, 62 (2008), to ensure the adequate administration of anesthesia, poses an unreasonable risk of inflicting unnecessary suffering.[41] 15AA3506-26.

[41]This Court is no doubt familiar with and may take judicial notice of the media reports of Arizona's execution of Joseph Rudolph Wood on July 23, 2014, which took nearly two hours, and was described by a reporter as "very disturbing to watch . . . like a fish on shore gulping for air." http://www.azcentral.com/story/news/local/arizona/2014/07/23/arizona-execution-botched/13070677/ (last accessed December 1, 2014). The Court will also recall the recent botched

Mr. Moore acknowledges that this Court has held that an attack on the method of execution is not cognizable in habeas proceedings. McConnell v. State, 125 Nev. 243, 246-49, 212 P.3d 307, 310-11 (2009). The McConnell ruling, however, amounts to an unconstitutional suspension of the writ, Nev. Const. Art. 1 § 5, based upon the construction of the habeas statute. Further, the state has not conceded that exhaustion of this claim in state proceedings is unnecessary to obtain federal review, see 28 U.S.C. § 2254(b), and has continued to argue that federal courts cannot address a claim that lethal injection is unconstitutional if it is not first raised in state proceedings (and that the claim can be procedurally defaulted if not raised in state court). Until the state ceases to invoke the doctrines of exhaustion and procedural default to attempt to bar this claim because it has not been raised in state court, Mr. Moore must raise it here.

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execution of Clayton Lockett in Oklahoma, on April 29, 2014, wherein state officials attempted to take Lockett's life by lethal injection for more than forty minutes before they were ultimately successful. See http://newsok.com/family-of-executed-inmate-sues-governor-executioners/article/5353204 (last accessed December 1, 2014).

ii. Death Penalty is Cruel and Unusual

Mr. Moore recognizes that the High Court has repeatedly upheld the general constitutionality of the death penalty, as has the Nevada Supreme Court. Given, however, that the High Court's present adherence to stare decisis has become increasingly tenuous, see Walton v. Arizona, 497 U.S. 639, 670 (1990) (Scalia, J., concurring) (overruled by Ring v. Arizona, 536 U.S. 584 (2002)), Mr. Moore asserts and preserves the argument that the death penalty is cruel and unusual punishment under the Eighth Amendment and Article I, Section 6 of the Nevada Constitution. See Gregg v. Georgia, 428 U.S. 153, 230-31 (1976); 15AA3557-58.

iii. Unavailability of Clemency

Nevada's clemency statute, NRS 213.005-213.100, does not ensure that death penalty inmates will receive procedural due process. 15AA3559-61. As a practical matter, since 1973, more than 119 individuals have been sentenced to death in Nevada. Bureau of Justice Statistics Report, Capital Punishment 1997 (December 1998 NCJ 172881). Mr. Moore is informed and believes that since the

reinstatement of the death penalty, only one death sentence in Nevada has been commuted, and in that case, the defendant was intellectually disabled and could no longer be executed. Where a remedy provided for by statute is granted so rarely as to frustrate the legislature's intent, the executive effectively usurps the power of the legislature thereby violating the separation of powers. The failure to exercise the clemency procedure has the practical effect of not having a procedure, which makes Nevada's death penalty scheme unconstitutional. See Ohio Adult Parole Authority v. Woodward, 523 U.S. 272, 290 (1998) (Stevens, J., concurring in part, dissenting in part) (clemency is an essential safeguard in states with capital punishment); Evitts v. Lucey, 469 U.S. 387, 401 (1985) ("when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution and, in particular, in accord with the Due Process Clause); Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

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iv. Death Penalty is Arbitrary and Capricious

Trial counsel was ineffective by failing to argue that the death penalty is arbitrary and capricious. See 15AA3562-65. Nevada Revised Statutes 177.055(2) requires this Court to review each death sentence to determine whether there was sufficient evidence to support the aggravating circumstances found by the jury and whether Mr. Moore's death sentence was imposed under the influence of passion and prejudice. Such a review is part and parcel to the Eighth Amendment's requirement of reliability. See Gregg v. Georgia, 428 U.S. 153, 195 (1976); see also U. S. Const. Amend. VIII; Nev. Const. Art. 1 §6. This Court has never enunciated the standards it applies in conducting its review under this statute. See Jones v. State, 107 Nev. 632, 637, 817 P.2d 1179, 1182 (1991). The complete absence of standards renders the purported review unconstitutional under federal due process standards. Harris ex rel. Ramseyer v. Blodgett, 853 F. Supp. 1239, 1291 (W.D. Wash. 1994), affirmed 64 F.3d 1434 (9th Cir. 1995) (absence of standards for proportionality review); cf. Campbell v. Blodgett, 997

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F.2d 512, 523 n.13 (9th Cir. 1992) (detailed standards for mandatory review of issues other than proportionality comply with due process).

v. Thirty years on Death Row Unconstitutional

The state has unjustifiably held Mr. Moore on death row for thirty years, replete with death warrants, stays of execution, and a despairing attempt by Mr. Moore to waive his appeals and proceed to execution. These facts point to the cruelty of the imposition of the death penalty so long after delays not of Mr. Moore's making. 15AA3566-67. See Jones v. Chappell, 31 F.Supp.3d 1050, 1061 (C.D. CA 2014) (citing Furman v. Georgia, 408 U.S. 238, 310 (1972); Gregg v. Georgia, 428 U.S. 153, 188 (1976)).

9. Popularly Elected Judges Unconstitutional

Mr. Moore's convictions and death sentence are invalid because the tenure of judges of the Nevada state district courts, and of the Justices of this Court, is dependent upon popular contested elections. 15AA3527-32; see Nev. Const. Art. 6 §§ 3, 5.

At the time of the adoption of the United States Constitution, the common law definition of due process of law included the requirement

that judges who presided over trials in capital cases, which at that time potentially included all felony cases, had tenure during good behavior. Nevada law does not include any mechanism for insulating state judges and justices from majoritarian pressures which would affect the impartiality of an average person as a judge in a capital case.

Making unpopular rulings favorable to a capital defendant or to a capitally-sentenced appellant poses the threat to a judge or justice of expending significant personal resources, of both time and money, to defend against an election challenger who can exploit popular sentiment against the jurist's pro-capital defendant rulings, and poses the threat of ultimate removal from office. These threats "offer a possible temptation to the average [person] as a judge . . . not to hold the balance nice, clear and true between the state and the [capitally] accused." Tumey v. Ohio, 273 U.S. 510, 532 (1927). One justice of the Nevada Supreme Court has acknowledged publicly that the time and expense of an election challenge involving a charge that a sitting justice was "soft on crime" due to a ruling that favored the defense "was not lost on" the elected Nevada judiciary.

Judges and justices who are subject to popular election cannot be impartial in any capital case within due process and international law standards because of the threat of removal as a result of unpopular decisions in favor of a capital defendant. Conducting a capital trial or direct appeal before a tribunal that does not meet constitutional standards of impartiality is prejudicial per se, and requires that Mr. Moore's convictions and death sentence be vacated.

10. Prejudicial Gruesome Photos

Over Mr. Moore's objection, prosecutors were allowed to introduce a number of prejudicial gruesome photographs depicting the deceased with close views of bullet wounds to their heads and upper bodies. 15AA3533 (citing 29AA7185-30AA7236); Spears v. Mullin, 343 F.3d 1215, 1225 (10th Cir. 2003). This evidence so infected the trial with unfairness that Mr. Moore was deprived of his rights to due process and a fair trial. Romano v. Oklahoma, 512 U.S. 1, 12 (1994) (it is settled that the Due Process Clause of the Fourteenth Amendment applies to the sentencing phase of capital trials, and that the improper admission

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of evidence can trigger this clause); Smallwood v. Gibson, 191 F.3d 1257, 1275 (10th Cir. 1999).

11. Biased Tribunal

The guilt phase trial judge, Judge Mosley, knew Mr. Moore prior to trial and had previously encountered Mr. Moore at the request of an acquaintance who did not want Mr. Moore to date his daughter, Terry Jones. Judge Mosley warned Mr. Moore not to continue his involvement with the young woman. Judge Mosley was ultimately disqualified from Mr. Moore's penalty phase trial because of the appearance of prejudice. See 34AA8229, 8235; 28AA6753. Mr. Moore's guilt phase conviction should be reversed due to both the appearance of prejudice, and because Judge Mosley displayed actual bias throughout Mr. Moore's trial. See 15AA3534-36. See Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 2263 (2009) ("probability of bias" "requires a judge's recusal" under due process clause); see also, Franklin v. McCaughtry, 398 F.3d 955, 960-61 (7th Cir. 2005); Cartalino v. Washington, 122 F.3d 8, 10 (7th Cir. 1997); Stivers v. Pierce, 71 F.3d 732, 745 (9th Cir. 1995).

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12. Unrecorded Bench Conferences and Absence During Critical Stages of the proceedings.

Significant portions of Mr. Moore's trial were closed to the public and occurred in "off-the-record" bench conferences, during which Mr. Moore was not present. See 15AA3547 . These conversations were never transcribed. In violation of the Constitution, the trial judge failed to take any measures to effectuate Mr. Moore's rights: to be present during all critical proceedings; to this Court's review of these judicial proceedings; and to public observation and comment. See, e.g., Draper v. Washington, 372 U.S. 487, 497 (1963) (defendant has a right to a "record of sufficient completeness" to ensure meaningful appellate review); Parker v. Dugger, 498 U.S. 308, 321 (1991) (emphasizing the need for meaningful appellate review in death penalty cases) (citing Clemons v. Mississippi, 494 U.S. 738, 749 (1990); Gregg v. Georgia, 428 U.S. 153 (1976)); Hamilton v. Alabama, 368 U.S. 52, 82 (1961) (right of defendant to be present during critical stages of his trial); see also Van v. Jones, 476 F.3d 292 (2007 (analyzing history of the critical stages doctrine); U.S. v. Rivera, 682 F.3d 1223 (9th Cir. 2012) (the right to a public trial extends to "those hearings whose subject matter inovlve[s]

the values that the right to a public trial serves") (citing United States v. Waters, 627 F.3d 345, 360 (9th Cir. 2010)).

13. Systematic Exclusion of African Americans

Mr. Moore was tried, convicted and sentenced to death by an all white jury in Clark County, Nevada. Clark County has systematically excluded from, and under represented, African Americans on district court juries. 15AA3553-56. See Taylor v. Louisiana, 419 U.S. 522 (1975); Duran v. Missouri, 439 U.S. 357 (1979); Berghuis v. Smith,559 U.S. 314 (2010).

14. Direct appeal counsel rendered ineffective assistance of counsel.

Criminal defendants have the right to effective assistance of counsel during their direct appeal. See Evitts v. Lucey, 469 U.S. 387, 396 (1985). The standard for determining whether counsel was ineffective is the same as Strickland. See Smith v. Robbins, 528 U.S. 259, 285 (2000) (citing Smith v. Murray, 477 U.S. 527, 535-36 (1986)). To succeed on a claim of ineffective assistance of appellate counsel, Mr. Moore must show only that counsel was "objectively unreasonable" and that there is "reasonable probability that, but for counsel's

unreasonable failure . . . [Mr. Moore] would have prevailed on appeal." Smith, 528 U.S. at 285-86 (citing Strickland, 466 U.S. at 687-91, 694). Here, Mr. Moore has made this showing because appellate counsel failed to raise numerous issues that have merit.[42] This Court should, thus, vacate Mr. Moore's previous direct appeal proceedings.[43]

Direct appeal counsel failed to raise the need for a change of venue as to both the guilt and third penalty phases. See 15AA3537. Additionally, counsel failed to challenge the introduction of irrelevant and prejudicial testimony during trial or the need to ensure Mr. Moore's presence at all proceedings. See 14AA3281-95; § VI.F.1.ii above; 15AA3547.

Appellate counsel also failed to raise the egregious prosecutorial misconduct, ranging from Brady violations, to witness intimidation, witness coaching, witness payments, and improper arguments, see

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[42]The counsel at issue here are Mr. Moore's first direct appeal counsel as to the guilt-phase issues and Mr. Moore's third direct appeal counsel, Mr. Leeds and Mr. Schieck, respectively.

[43]In the alternative, this Court should remand for an evidentiary hearing so that prior counsel may testify about their performance. See Mann, 118 Nev. at 354, 46 P.3d at 1230.

14AA3338-62; 14AA3363-64; 14AA3380; 14AA3383-423, nor did counsel raise substantial problems with the jury instructions in this case. See 14AA3467-15AA3473 (Kazalyn instruction); 15AA3479-81 (failure to instruct jury that unanimity was not required to find mitigating circumstances); 15AA3481-82 (failing to instruct jury that unanimity was required to find aggravating circumstances); 15AA3482-83 (failing to inform jury that imposing the death penalty is never required); 15AA3484-85 (weighing equation); 15AA3486 (reasonable doubt instruction); 15AA3489 (implied malice instruction); 15AA3492 (equal and exact justice instruction); 15AA3494-95 (guilt or innocence of another instruction). Counsel similarly failed to argue to this Court evidence of the prejudice resulting from presenting evidence of Satanism to the jury or that presenting evidence of Mr. Moore's alleged membership in a gang was unconstitutional. See 14AA3424-33.

Appellate counsel also failed to raise the issue of severing Mr. Moore's penalty phase from Mr. Flanagan, see 14AA3327-32, and counsel failed to raise a number of issues related to Mr. Moore's juries. For example, counsel for Mr. Moore's first direct appeal failed to raise a

claim that an unbiased juror was removed. See 14AA3453. On appeal from Mr. Moore's third penalty phase, counsel failed to raise a claim that one juror could not speak English and failed to challenge juror misconduct. 14AA3437-38; 14AA3446-48. On both appeals, counsel failed to challenge the systematic exclusion of African Americans from the juror pool. 15AA3553.

Insofar as counsel failed to federalize challenges to the aggravating circumstances or failed to raise constitutional challenges to the aggravating circumstances, counsel was ineffective. See 14AA3456; 14AA3457-59. See Jamison v. Collins, 100 F.Supp.2d 647, 741 (S.D. Ohio 2000). Counsel also failed to challenge the constitutionality of executions, namely that lethal injection is unconstitutional, that the death penalty is cruel and unusual punishment, and that the death penalty is applied in an arbitrary and capricious manner. 15AA3506-26; 15AA3557-59. Counsel did not challenge the use of elected judges or that this Court's mandatory appellate review lacks standards. 15AA3527-32. Finally, counsel failed to challenge the unavailability of clemency proceedings. 15AA3559.

Counsel's failures, both independently and cumulatively, require relief. Because the claims that counsel failed to raise were meritorious, Mr. Moore would have been entitled to relief had counsel raised the claims.

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VII. Conclusion

For the foregoing reasons, Mr. Moore respectfully requests that this Court reverse the order of the district court and vacate Mr. Moore's convictions and death sentence. In the alternative, Mr. Moore requests that this Court remand this case with instructions that the district court grant an evidentiary hearing to both demonstrate good cause and prejudice and to demonstrate the merit of his claims.

DATED this 4th day of June, 2015.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the type face requirements of NRAP 32(a)(5), and the type style requirements of NRAP 332(a)(6), because this brief has been prepared in a proportionally spaced typeface using WordPefect X6 in 14 font and in Century style.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 36,229 words.

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, including N.R.A.P 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 4th day of June, 2015.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that pursuant to NRCP 5(b)(2)(D), this document was filed electronically with the Nevada Supreme Court on the 4th day of June, 2015. Electronic Service of the foregoing APPELLANT'S OPENING BRIEF shall be made in accordance with the Master Service List as follows:

Steven S. Owens, Chief Deputy District Attorney
Adam Paul Laxalt

Felicia Darensbourg
An Employee of the Federal Public Defender