IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 66652

RANDOLPH LYLE MOORE,

Appellant,

v.

RENEE BAKER et al.,

Respondent.

Appeal from Order Dismissing Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County
The Honorable Michelle Leavitt, District Judge

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The promise of reliability has not been met in this case. Since its inception, error has pervaded Mr. Moore's case. This Court has already recognized that Mr. Moore's guilt-phase was awash with prosecutorial misconduct. 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 . . . ."). This Court has already recognized that presentation of satanic worship evidence was error. Id. at 1418, 930 P.2d at 697 ("the State's closing argument during the guilt phase of the trial also violated appellants' First Amendment rights under Dawson. The evidence was irrelevant to the crimes charges, and the prosecutor improperly used it in the guilt phase simply to demonstrate the appellants' bad character."). This Court has already recognized that two of the aggravating circumstances in this case are invalid. 19AA4719. This Court has also acknowledged that the trial court's unprecedented instructions that counsel object off the record was error. 20AA4727. This Court found harmless the errors in jury instructions, both as to aiding and abetting and as to the first-degree murder instruction. 20AA4730-31; 20AA4734. This is in addition to the

district court's previous holding that "trial counsel's performance was in some ways deficient." 36AA8847.[1]

Thus, this is a case where, based solely on the already acknowledged errors, a reliable conviction and sentence is impossible. An ineffective attorney faced misbehaving prosecutors helped by erroneous jury instructions, the unconstitutional presentation of highly prejudicial and wholly irrelevant evidence, and invalid aggravating circumstances.

These are not the only errors. In addition to the acknowledged errors in this case, Mr. Moore is now asserting numerous other errors. Each of these errors independently warrant relief. However, coupled with the errors this Court and the district court have already acknowledged, these errors prevent any possibility of reliability in Mr. Moore's conviction and death sentence. Thus, this Court must reverse the district court and grant Mr. Moore's petition for writ of habeas corpus. In the alternative, this Court should reverse the district court's

[1] See also Opening Br. at 6 n.2 (noting that the state all but conceded the deficient performance of guilt-phase counsel).

imposition of procedural defaults and remand for proceedings consistent with such relief.

The lack of reliability violates the Supreme Court's dictates for imposition of the death penalty. Furman v. Georgia, 408 U.S. 238 (1972) held that the death penalty could not be imposed "under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." See Gregg v. Georgia, 428 U.S. 153, 188 (1976) (Stewart, Powell, Stevens, JJ., joint opinion). When the Supreme Court overturned Furman, it did so observing that "[w]hen a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." Gregg, 428 U.S. at 187. Thus, the freedom to impose the death penalty was, and always has been, predicated on the promise of enhanced reliability. See Proffitt v. Florida, 428 U.S. 242, 247 (1972) (Stewart, Powell, Stevens, JJ. joint opinion); Jurek v. Texas, 428 U.S. 262, 268 (1972) (Stewart, Powell, Stevens, JJ., joint opinion); see also Woodson v. North Carolina, 428 U.S. 280, 304 (1972) (plurality) ("A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from

consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of human kind.")

Since Gregg, the Court has repeatedly emphasized the need for enhanced reliability in capital cases. See Oregon v. Guzek, 546 U.S. 517, 526 (2006); Sawyer v. Smith, 497 U.S. 227, 234 (1990) ("All of our Eighth Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy in some sense."); Caldwell v. Mississippi, 472 U.S. 320, 330 (1985) (recognizing "the Eighth Amendment's 'need for reliability in determination that death is the appropriate punishment in a specific case.'" (quoting Woodson, 428 U.S. at 305)); Zant v. Stephens, 462 U.S. 862, 884-85 (1983) (noting that qualitative difference between death and other punishments requires a corresponding difference in the needed reliability).

II. ARGUMENT

A. This Court's decisions require district courts to announce their decisions with "sufficient specificity to provide guidance to the prevailing party in drafting a proposed order;" the district court did not fulfill this basic obligation.

The district court's oral order in this case was a single sentence. See 41AA10063. From this, the state drafted an order twenty-two pages long and included relief not stated by the district court. 41AA10141-62. Despite this, the state argues that the court's verbal order contained "sufficient specificity to provide guidance to the prevailing party." Ans. Br. at 12-13 (citing Byford v. State, 123 Nev. 67, 70, 156 P.3d 691, 693 (2007)). It did not. Compare 41AA10063 ("At this time the Court's going to deny the petition and make a finding that it's a successive petition and the petitioner has failed to show good cause and prejudice.") with 41AA10141-62. Indeed, the Supreme Court has criticized the practice of adopting verbatim proposed findings: "We, too, have criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements unsupported by the record . . . . We are also aware of the potential for overreaching and exaggeration on the part of

the attorneys preparing findings of fact when they have already been informed that the judge has decided in their favor." Anderson v. City of Bessemer, N.C., 470 U.S. 564, 572 (1985). [2]

The state argues that "[t]here is no error where there is no reason to doubt that the findings issued by the court represent the judge's own considered conclusion." Ans. Br. at 13 (citing Anderson, 470 U.S. at 572). However, the state's cited case supports the conclusion that the district court's order did not represent the judge's own conclusion. Thus, in Anderson, the order went through a thorough vetting process: first, the court "provided the framework for the proposed findings when it issued its preliminary memorandum, which set forth its essential findings and directed petitioner's counsel to submit a more detailed set of findings consistent with them." Anderson, 470 U.S. at 572. After

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[2] United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964), cited in Anderson, 470 U.S. at 572, goes even further: "I suggest to you strongly that you avoid as far as you possibly can simply signing what some lawyer puts under your nose. These lawyers, and properly so, in their zeal and advocacy and their enthusiasm are going to state the case for their side in these findings as strongly as they possibly can. When these findings get to the courts of appeals they won't be worth the paper they are written on as far as assisting the court of appeals in determining why the judge decided the case." El Paso Natural Gas Co., 376 U.S. at 656 n.4 (quoting Judge J. Skelly Wright, Seminars for Newly Appointed United States District Judges 166 (1963)).

respondent had an opportunity to object, the district court did not "simply adopt petitioner's proposed findings: the findings it ultimately issued—and particularly the crucial findings . . . –vary considerably in organization and content from those submitted by petitioner's counsel." This did not occur here. The district court did not issue a preliminary memorandum setting forth its essential findings; and its order did not vary at all from the proposed order. Thus Anderson indicates that the findings do not represent the district court's considered conclusion.

Mr. Moore repeats: in adopting verbatim the state's proposed order, the district court erred in three ways: (1) the district court failed to provide the state with sufficient particularity to draft the order; (2) the court adopted the state's order even though it expanded the legal scope of its oral ruling; and (3) the court adopted the order even though it adopted factual findings without an evidentiary hearing. These errors require reversal. In the alternative, this Court should strike the portions of the order that are beyond the scope of the district court's verbal ruling.

B. Trial counsel were not effective during Mr. Moore's penalty phase.

The state does not dispute that overwhelming authority requires effective counsel to investigate a defendant's case. Ans. Br. at 16-26; see also Opening Br. at 18-20 (listing Supreme Court cases, this Court's cases, and secondary sources all indicating that effective assistance of counsel requires counsel to investigate). In the Opening Brief, Moore alleged that penalty phase counsel's investigation was inadequate.[3] Opening Br. at 18-44. The state does not dispute this. Nor does the state dispute that this renders counsel's performance deficient.

Instead, citing seven pages in the initial post-conviction petition, the state argues that "JoNell Thomas previously made these very same arguments in her 2003 supplemental petition in the first post-conviction proceedings." Ans. Br. at 17 (citing 18AA4376-83). The state points out that this Court has already ruled on the claim contained in the initial post-conviction petition. Ans. Br. at 18 (citing 21AA5158). Based on

[3] The state argues that "Moore fails to show how" the district court's order finding this claim procedurally defaulted "was in error." Ans. Br. at 17. The Opening Brief devoted a lengthy section to why his claims are not procedurally defaulted. See Opening Br. at 63-116.

these two points, the state concludes that "[a]lthough the federal public defender has compiled a substantial family history, Moore fails to show how his arguments today are any different than those raised by JoNell Thomas in 2003." Ans. Br. at 18.[4] The state does not argue that law of the case bars this Court's consideration of the claim. Indeed, the state makes no argument about how these contentions are at all dispositive to Mr. Moore's claim of ineffective assistance of penalty-phase counsel. Ans. Br. at 18.

Penalty phase counsel were ineffective for failing to investigate Mr. Moore's case and present important mitigation evidence, failing to hire experts, failing to adequately investigate and impeach witnesses, and suffering from a conflict of interest.

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[4] Despite the absence of any ostensible relevance to this point, Mr. Moore disputes it. As to the mitigation investigation, the initial post-conviction petition contained a cursory argument, consisting of roughly three pages, without citation to any supporting evidence. See 18AA4377, 4380-83; see also 21AA5132, 5135-37. In contrast, the instant claim spans forty-one pages and references a large number of exhibits. See 13AA3211-14AA3252. Indeed, this Court's resolution of the prior ineffective assistance claim was based on how "the evidence he argues should have been presented is insufficiently persuasive . . . ." 21AA5158. Given that the prior petition presented no evidence, this prior resolution cannot control here, where extensive evidence has been presented.

1. There is a reasonable probability that, but-for ineffective counsel's deficient performance, Mr. Moore's penalty proceeding would have turned out differently because penalty phase counsel failed to investigate and present important mitigation evidence.

Without any supporting argument, the state claims that "Moore fails to explain how it is even mitigating or how the outcome of the penalty hearing would have been any different." Ans. Br. 18. Evidence of Mr. Moore's difficult upbringing and his subsequent substance abuse is the type of evidence that the Supreme Court, this Court, and even the Ninth Circuit has recognized as mitigation evidence. See Wiggins v. Smith, 539 U.S. 510, 524 (2003) (recognizing that family and social history can be mitigation evidence); Porter v. McCollum, 558 U.S. 30, 33 (2009) ("Unlike the evidence presented during Porter's penalty hearing, which left the jury knowing hardly anything about him other than the facts his crimes, the new evidence described his abusive childhood, his heroic military service and the trauma he suffered because of it, his long-term substance abuse, and his impaired mental health and mental capacity."); Watson v. State, 130 Nev. ___, 335 P.3d 157, 171 (2014) ("Mitigation evidence includes 'any aspect of a defendant's character or

record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978)); Wilson v. State, 105 Nev. 110, 113, 771 P.2d 583, 584 (1989) (recognizing that "difficult childhood" constitutes mitigation evidence); Mitchell v. United States, 790 F.3d 881, 904 (9th Cir. 2015) ("Evidence that [defendant] was a chronic user of alcohol and drugs from a young age is the kind of 'classic mitigating evidence' that counsel must pursue at the penalty phase . . . ."); see also Douglas v. Woodford, 316 F.3d 1079, 1090 (9th Cir. 2003) (evidence of difficult childhood, brain damage, and being victim of abuse "was precisely the type of evidence that [the Ninth Circuit] has found critical for a jury to consider when deciding whether to impose a death sentence.").

Nor does Mr. Moore need to prove that "the outcome of the penalty hearing would have been different." Ans. Br. at 18. Rather, under Strickland, the proper inquiry is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.; see also Sears v.

Upton, 561 U.S. 945, 956 (2010) ("A proper analysis under Strickland would have taken into account the newly uncovered evidence of Sears' 'significant' mental and psychological impairments, along with the mitigation evidence introduced during Sears' penalty phase trial, to assess whether there is a reasonable probability that Sears would have received a different sentence after a constitutionally sufficient mitigation investigation."). The mitigation evidence that penalty-phase counsel failed to investigate and present undermines confidence in the verdict because it is vastly different than the evidence actually presented. Penalty-phase counsel presented a Randolph Moore who had a bad, but not unusually bad, childhood.[5] This was wholly insufficient, as Mr. Moore suffered a uniquely difficult upbringing that was followed by a serious substance abuse problem.

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[5] Nor does the fact that penalty-phase counsel presented some mitigation evidence prevent relief here; the Supreme Court has been clear that it has "never held that counsel's effort to present some mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. To the contrary, we have consistently explained that the Strickland inquiry requires precisely that type of probing and fact-specific analysis that the state trial court failed to undertake below." Sears, 561 U.S. 945, 955 (2010).

Mr. Moore's case is akin to Douglas v. Woodford, 316 F.3d 1079 (9th Cir. 2003). There, penalty-phase counsel presented some mitigation evidence.

> [Counsel] did introduce some sociological history. His family members testified in very general terms that Douglas had been orphaned and had a difficult childhood, running away from home at fifteen to join the Marines. They also indicated that Douglas was very poor growing up and always kept large quantities of food in his home, apparently as a result of this childhood deprivation.

Id. at 1087-88. In contrast, a proper investigation allowed post-conviction counsel to present "detailed testimony of a difficult childhood." Id. at 1088.

> Douglas was abandoned as a child and raised by foster parents, including an abusive alcoholic foster father who locked him in a closet for long periods of time. He grew up in an extremely poor Chicago neighborhood where children had to scavenge for food in garbage cans and often ate lard or ketchup sandwiches. After running away at the age of fifteen to join the Marines, Douglas was arrested and put in a Florida jail where he was beaten and gang-raped by other inmates.
>
> Additional character evidence was also available. In the Marines, Douglas earned a number of medals and commendations and also helped rescue two drowning sailors. Another

> witness testified that Douglas had been very helpful to her during her pregnancy and marital difficulties.
>
> Finally, Douglas presented additional evidence of possible brain damage. After the military, Douglas began working in furniture refurnishing and was exposed to toxic solvents daily. In 1967, Douglas was involved in a serious auto accident and suffered a concussion and damage to his left temporal lobe. He also consumed a great deal of alcohol on a daily basis from 1966 to 1977.

Id. The Ninth Circuit found the failure to present this evidence prejudicial. Id. at 1090. The court noted, "Evidence regarding social background and mental health is significant, as there is a 'belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" Id. (quoting Boyde v. California, 494 U.S. 370, 382 (1990)). And, regarding the fact that trial counsel had presented some mitigation evidence, the court concluded, "Although [counsel] introduced some of Douglas's social history, he did so in a cursory manner that was not particularly useful or compelling." Id.

This is what has occurred here. Penalty-phase counsel's presentation was vague and unpersuasive. He indicated that Mr. Moore lacked a criminal history. 13AA3080. He indicated that Mr. Moore was young. 13AA3082. He indicated that Mr. Moore had a good prison record without "a single disciplinary action." 13AA3084. As for substance abuse, counsel noted the possibility that Mr. Moore was intoxicated. 13AA3083 ("And I believe one of the witnesses testified that they were just too drunk to think about what they were doing."). As for Mr. Moore's upbringing, counsel stated:

> You heard testimony concerning the unstable childhood of Randy Moore. Certainly not to the extent of Dale Flanagan, but 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.
>
> You heard his mother testify concerning the changes in his personality as a result of entering into that marriage and not pursuing his education, and being involved in alcohol and perhaps drugs. Certainly an unstable youth up to that point.

13AA3083-84. This presented a mere fraction of Mr. Moore's upbringing, which included severe neglect, the absence of any attachments, the inability to escape his unstable home environment,

the loss of a grandmother and a baby, and a burgeoning substance abuse problem. See Opening Br. at 23-43. The substantial difference between these two mitigation presentations calls into question any confidence in the jury's death verdict.

2. Penalty-phase counsel was ineffective in failing to hire experts.

Counsel cannot make a reasonable strategic decision after failing to investigate. 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."). Thus, counsel's failure to discover the possible relevance of expert testimony is itself deficient performance. See Williams v. Taylor, 529 U.S. 362, 396 (2000) ("the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession . . . . they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough

investigation of the defendant's background." (citing ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980)).

The state nonetheless takes the position that "a competent attorney may strategically exclude [the expert reports] . . . if such expert may be fruitless or harmful to the defense." Ans. Br. at 20. And, further, that the penalty phase presentation "reflects an objectively reasonable strategy throughout the penalty phase hearing." Id. at 21. This is belied by the record. First, a competent attorney cannot strategically exclude information that he has failed to investigate. See Williams, 529 U.S. at 396; Wiggins, 539 U.S. at 526; see also Rompilla v. Beard, 545 U.S. 374, 388-89 (2005). Here, penalty-phase counsel did not strategically decide that they would not present evidence to the jury; they did not decide anything because they failed to seek expert assistance. Thus, even if "competent counsel may have found [Dr. Mack's report] to be not just unhelpful but actually detrimental to Moore's case in mitigation," Ans. Br. 20-21, counsel here made no such determination because counsel did not seek a report on Mr. Moore's mental state.

To bolster the argument that penalty-phase counsel's representation was sufficient, the state relies on Cullen v. Pinholster, 563 U.S. 170 (2011). Ans. Br. at 22. This reliance is misplaced because Pinholster is a case dealing with federal deference to state court decisions. Pinholster, 563 U.S. at 180-81 (describing deference required under 28 U.S.C. § 2254(d) for claims adjudicated on the merits by state courts). In Pinholster, the Supreme Court held that review under § 2254(d) is limited "to the record that was before the state court that adjudicated the claim on the merits." Id. at 181. And under § 2254(d), Pinholster could overcome the required deference only by showing that "there was no reasonable basis" for the state court's decision. Id. at 188. Given this standard, the Court looked to whether there was any reasonable basis for the state court's decision. Id. And, the Court noted, this required double deference. Id. at 190. This is not the standard here. Compare Strickland, 466 U.S. at 690 with Pinholster, 563 U.S. at 188.

Echoing the district court, the state argues that the "worth" and "validity" of Dr. Lipman's and Dr. Mack's reports "nearly 30 years after the murders is suspect." Compare Ans. Br. at 18 with 41AA10120. Without the benefit of an evidentiary hearing or a contrary expert from

the state, this Court may not resolve this apparent factual dispute. See NRS 177.025; Ryan's Express Transp. Serv., Inc. v. Amador Stage Lines, Inc., 279 P.3d 166, 172-73 (Nev. 2012) ("An appellate court is not particularly well-suited to make factual determinations in the first instance."). Moreover, mental health experts regularly perform retrospective analyses.[6]

The state argues that "[i]t is the prevailing standards of performance at the time that govern claims of ineffective assistance of counsel and the distorting effects of hindsight are to be avoided." Ans. Br. at 21. The state does not claim that, in the 1990s, counsel had no obligation to investigate their cases or to consider hiring experts. Indeed, the 1989 ABA Guidelines are clear that counsel did have such an obligation. See ABA Guidelines for the Appointment and

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[6] See Federal Judicial Center, Reference Manual on Scientific Evidence 817 (3d ed., 2011) ("a direct assessment can nonetheless be valuable in assessing the consistency of the reported symptoms with other aspects of the history and current status of the person . . . . information from persons who were in contact with the person before and during the time in question, including direct reports and contemporaneous records, is usually an essential part of the evaluation. . . . However, most experienced forensic evaluators appear to believe that conclusions regarding past mental state can often be reached with a reasonable degree of certainty if sufficient information is available.").

Performance of Counsel in Death Penalty Cases (1989) [hereinafter 1989 ABA Guidelines] 11.4.1(C); id. at 11.4.1(D)(7) ("Counsel should secure the assistance of experts where it is necessary or appropriate . . . ."); Welsh S. White, Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care, 1993 U. Ill. L. Rev. 323, 341-42 ("Constructing the capital defendant's complete social history is necessary in every capital case . . . . Obtaining expert defense witnesses is closely related to the defense investigation."); see also Caro v. Calderon, 165 F.3d 1223, 1227 (9th Cir. 1998) (with regard to counsel's performance in 1981, noting "[i]t is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase."); Clabourne v. Lewis, 64 F.3d 1373, 1384 (9th Cir. 1995) (counsel's performance in 1982 ineffective for failing to adequately prepare and present a case for mitigation at the sentencing hearing, noting, counsel "had nothing to lose by asking expert witnesses to testify at the sentencing hearing . . . ." [7]); Hendricks v. Calderon, 70 F.3d 1032, 1043 (9th Cir. 1995) (counsel's performance in the 1980s was

[7] Clabourne was convicted on November 23, 1982. State v. Clabourne, 142 Ariz. 335, 340, 690 P.2d 54, 59 (1984).

ineffective because counsel "did not make a strategic choice to forego a penalty phase investigation and . . . no discernible strategy could justify counsel's neglect."[8]).

Finally, the state argues that "Moore fails to explain how the belated psychological expert opinions would have resulted in a sentence of less than death with this particular jury." Ans. Br. at 21. Again, this applies the wrong standard of prejudice to Mr. Moore's Strickland claim. See § II.B.1 above. Applying the proper standard or prejudice, there is a reasonable probability that using appropriate experts would have resulted in a different verdict. Dr. Lipman's and Dr. Mack's reports confirm important—but undeveloped—mitigation themes. Namely, that Mr. Moore's cognition was compromised at the time of the alleged offense and that Mr. Moore's substance abuse was a response to his failed attachments growing up. See 24AA5811; 28AA6956. And the impact of this evidence is strengthened by the mitigation evidence discussed above. See § II.B.1 above; see also Opening Br. at 23-43.

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[8] Hendricks was sentenced to death before 1988. See People v. Hendricks, 44 Cal.3d 635, 639, 749 P.2d 836, 837 (1988).

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

Available impeachment evidence was not presented as to Mr. Lucas, Mr. Akers, Ms. Saldana or Mr. Wittig. See 14AA3256-63 (describing available impeachment evidence); see also Opening Br. at 46-47. Counsel was ineffective for failing to present this impeachment evidence. The state responds by asserting that these witnesses were already impeached based on other evidence, and that, as a result, any additional impeachment value is de minimis. Ans. Br. at 23-25. The state does not dispute that penalty-phase counsel's failure was ineffective. Id.

Rather, the state contests whether the failure to impeach these witnesses creates sufficient prejudice.[9] However, the additional impeachment evidence does create a reasonable probability of a different result: the evidence shows that the state was willing to put on any kind of witness, with large incentives to inculpate Mr. Moore, to receive its death verdict. See also II.C below; Opening Br. at 48-63.

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[9] Here, again, the state invokes the wrong prejudice standard under Strickland. Compare Ans. Br. at 25 with Strickland, 466 U.S. at 694.

4. Penalty-phase counsel suffered from a conflict of interest.

"In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). Here, while representing Mr. Moore, second and third penalty phase counsel, David Schieck, represented Mr. Moore's mother in some civil matters. See 26AA6464; see also 25AA5978. This occurred while Mr. Schieck had an obligation to investigate Mr. Moore's life history, including Mr. Moore's relationship with his mother. See 1989 ABA Guideline 11.4.1(D)(2)(C) (noting duty to "[c]ollect information relevant to the sentencing phase of trial including . . . family and social history (including physical, sexual or emotional abuse"). Thus, a complete investigation required Mr. Schieck to investigate information that Mr. Moore's mother might not want other people to know about; however, Mr. Schieck had a financial incentive not to investigate such matters because he had been retained by Mr. Moore's mother. This created an actual conflict of interest; and

given Mr. Schieck's failure to conduct an adequate investigation, it also adversely affected Mr. Moore's case.

C. Through a prolonged campaign of coercion and threats to her life, the state suborned perjury from Angela Saldana.

Only two types of evidence implicated Mr. Moore in this case: testimony from accomplices and testimony from Angela Saldana. The accomplices had strong incentives to inculpate Mr. Moore. Recognizing that accomplice testimony is suspect, this state requires corroborative evidence of accomplice testimony. See NRS 175.291(1) ("A conviction shall not be had on the testimony of an accomplice unless the accomplice is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense"); see also Heglemeier v. State, 111 Nev. 1244, 1250, 903 P.2d 799, 803-04 (1995).

Thus Angela Saldana's testimony was a crucial part of the state's proof of guilt. However, Ms. Saldana's testimony suffered from a serious defect: it was coerced by threats of prosecution, imprisonment, and execution. 22AA5394; 16AA3843; 27AA6608. Despite the clear impeachment value of this evidence, the jury never heard it. This

violated Brady v. Maryland, 373 U.S. 83 (1963), and Napue v. Illinois, 360 U.S. 264 (1959).[10]

"To prove a Brady violation, the accused must make three showings: (1) the evidence is favorable to the accused, either because it is exculpatory or impeaching; (2) the State withheld the evidence, either intentionally or inadvertently; and (3) prejudice ensued, i.e., the evidence was material." State v. Huebler, 128 Nev. ___, 275 P.3d 91, 95 (2012) (internal quotation marks removed). Mr. Moore has made all three showings.

Here, the evidence is favorable because it is both exculpatory and impeaching. The evidence shows that Ms. Saldana was threatened and manipulated into testifying; it provides evidence of an alternative source for her testimony (i.e., that she was fed information from police reports and invented the rest under pressure from her uncle). Thus, this evidence impeaches her testimony by discrediting it and providing an

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[10] Here, again, the state argues that Mr. Moore has not shown that this claim is entitled to merits review, despite the fact that the Opening Brief devoted an entire section to why the procedural defaults do not apply in this case. Compare Ans. Br. at 26 with Opening Br. at 63-116.

incentive for Ms. Saldana to lie. It is exculpatory because it undermines the state's theory and discredits the only witness fulfilling the corroborative evidence rule under NRS 175.291(1).

The state does not seriously contest that this evidence is favorable. See Ans. Br. at 32-36. The state argues that whether "Angela's uncle had other motives in getting Angela to assist law enforcement is simply not relevant nor exculpatory." Ans. Br. at 32. However, Mr. Peoples's ulterior motives are both relevant and exculpatory—that Mr. Peoples was beholden to the Clark County District Attorney's office for his own protection shows that he had strong incentives to pressure Ms. Saldana. See 27AA6609; 16AA3842-43 And Mr. Peoples's sordid past is relevant because it shows both what Mr. Peoples was capable of and why Ms. Saldana would feel threatened by him. Mr. Peoples was convicted of murder; he manipulated Wendy Hanley into marrying him by threatening her; he stabbed someone; he was involved in putting some pimps "in the ground." See Peoples v. Hocker, 423 F.2d 960 (9th Cir. 1970); 22AA5398; 27AA6609; 16AA3842; 27AA6608.

It was this Mr. Peoples who told Ms. Saldana, "you greedy little bitch, if you don't do what your [sic] told you will end up in prison." 27AA6608; see also id. ("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."); 22AA5394 ("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.'"); 16AA3843 ("Robert Peoples threatened Angie with prison and the death penalty . . . . Angie cried all the way home as Robert threatened her if she did not say what he told her to."). This is far more than "pressure," Ans. Br. at 33; these were threats to her life.

This evidence was also suppressed. The state never disclosed the campaign of threats and coercion leading to Ms. Saldana's testimony.[11] Nor does the state now allege that this evidence was disclosed to Mr.

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[11] Without explicitly so arguing, the state implies that because Ms. Saldana was not an agent of the state, there is no Brady violation. Ans. Br. at 28-30. It is not clear what this has to do with Mr. Moore's Brady claim. Insofar as the state implies that it was not aware of the coercion of Ms. Saldana, that is belied by the record, which shows that Mr. Avants, an investigator for the Clark County District Attorney's office was very involved with Mr. Peoples in coercing Ms. Saldana. See 22AA5394; 16AA3842; 27AA6607-09. Thus, Ms. Saldana's actions were at the behest of the Clark County District Attorney's office.

Moore. See Ans. Br. at 32-35. Instead, the state argues that "Moore has failed to show that local counsel at the time was not aware of this public and high-profile background in what amounted to a relatively small legal community in Las Vegas in the 1980's." Id. at 33. This equivocates between the issues. The suppressed evidence in this case was the high level of involvement of Mr. Peoples, at Mr. Avants's direction, and the extensive threatening and coercing of Ms. Saldana. This information was not publicly available. Thus, the state's argument, "That Moore subsequently was able to 'discover' these allegedly new facts on his own from public sources and belated witness interviews belies any claim that they were withheld from the state," Ans. Br. at 34, is beside the point: the suppressed information was held by the state and not disclosed. No other showing is required. See Strickler v. Greene, 527 U.S. 263, 281-82 (1999).[12]

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[12] The state appears to be implying that, because, "exercising reasonable diligence," Mr. Moore "could have obtained the information," he has failed to prove a Brady violation. See Ans. Br. at 31 (citing Rippo v. State, 113 Nev. 1239, 1257, 946 P.2d 1017, 1028 (1997), Ans. Br. at 34-35. Brady contains no reasonable diligence requirement, and this Court should abandon Rippo's contrary indication. See Banks v. Dretke, 540 U.S. 668, 690 (2004). Regardless, even with reasonable diligence, Mr. Moore could not discover this evidence without the state's

And the evidence was material. As noted above, Ms. Saldana's testimony was a necessary predicate for a conviction because of the corroborative evidence rule. See NRS 175.291(1); see also Opening Br. at 61-63. However, the evidence was also material because it confirmed a defense theme: that the state manufactured the testimony in this case through a coercion campaign of the witnesses. See Opening Br. at 62-63. The state argues that this evidence was not material because it was cumulative and because it is common to rehearse testimony. Ans. Br. at 33-34. This evidence was neither. This was not merely evidence that Ms. Saldana's family had "close ties not just to law enforcement, but directly with the District Attorney's office through family friend and district attorney Investigator Beecher Avants." Id. at 34. And it was not merely evidence that Ms. Saldana rehearsed her testimony. Id. Thus, the state is wrong to assert that this evidence was not material.

Without invoking the law of the case doctrine, the state argues that "these claims regarding Angela Saldana are not new." Ans. Br. at

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disclosure. See Milke v. Ryan, 711 F.3d 998, 1017-18 (9th Cir. 2013) ("Where a defendant doesn't have enough information to find the Brady material with reasonable diligence, the state's failure to produce the evidence is considered suppression." (emphasis in original)).

27. Based on the substantial and new allegations of coercion and threats, the instant claim is new. Compare Ans. Br. at 28-31 with 14AA3338-62. Moreover, even taking as true the state's allegation that the claim is not new, it is unclear both how the state would be entitled to any relief or what relief that state would be entitled to. See Ans. Br. at 27-31.[13]

D. The district court erroneously applied procedural defaults to bar consideration of Mr. Moore's claims.

Despite its verbal ruling applying only the successive petition bar under NRS 34.810, the district court procedurally defaulted Mr. Moore's petition on the basis of NRS 24.726, 34.800, and 34.810. The court did so without an evidentiary hearing and without any direction to the state as to what should go in the proposed order. This was error.

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[13] The state has not asserted law of the case as a defense. Nor is there, as asserted by the state, a pleading requirement that Mr. Moore distinguish between "new" facts and fact which "were known and previously presented." Ans. Br. at 32 (citing no authority). Mr. Moore asserts that the state violated his rights under Brady, that this entitles him to post-conviction relief, and that no procedural defaults apply to this claim. See Opening Br. at ____. No other assertions are required.

1. Laches does not bar this petition.

State v. Powell, 122 Nev. 751, 138 P.3d 453 (2006), recognizes that where the "time that has passed" in a case is not attributable to the petitioner, the state may not receive relief under NRS 34.800. Powell, 122 Nev. at 758, 138 P.3d at 458. Here, the delay in this case was caused not by Mr. Moore, but by the state's egregious prosecutorial misconduct, which resulted in two reversals of the penalty phase, and litigation before the district court, this Court, and the United States Supreme Court. See Moore v. State, 104 Nev. 113, 754 P.2d 841 (1988); Moore v. Nevada, 112 S. Ct. 1463 (1992); Flanagan v. State, 109 Nev. 50, 846 P.2d 1053 (1993); 19AA4715.

The state attempts to distinguish Powell by arguing that "[t]he delay at issue was not the extensive court proceedings beyond Powell's control, but the two year delay in filing the supplemental petition which raised a new claim that was available to Powell and could have been included in his timely original petition." Ans. Br. at 37-38. Based on this, the state concludes that this Court "held that statutory laches and other procedural bars apply only to original petitions and not to supplemental pleadings which a district court may permit to be filed

much later even if they raise entirely new claims." Id. at 38. This is not what Powell says.

Powell addresses two related, but distinct, issues. The first issue was whether Powell could supplement his petition and be free from the procedural bars. Powell, 122 Nev. at 757, 138 P.3d at 457 ("The State argues that the specific claim did not relate back to the initial claim and was therefore untimely."). This Court rejected the argument, noting that "we have never held that NRCP 15(c) governs amendments or supplements to habeas petitions." Id. Rather, supplements are controlled by NRS 34.750. Id. at 758, 138 P.3d at 457. This Court thus concluded, "the State has not shown that the district court erred in allowing Powell to supplement his petition," ending its discussion of this first issue. Id. at 758, 138 P.3d at 458.

This Court then turned to the second issue presented in Powell's case, whether laches barred consideration of his petition. Id. The entire analysis of laches does not once mention that the analysis was restricted to supplemental claims:

> The State also alleges that the passage of time has prejudiced it and cites NRS 34.800, which provides courts discretion to dismiss a petition if delay in its

> filing prejudices the State. We conclude that such relief is not appropriate here. The State points out that the original penalty hearing was almost 15 years ago, that it will be difficult to gather witnesses that came from California, Oklahoma, Texas, and Pennsylvania, and that the witnesses' memories will have faded. But the lengthy time that has passed in this case is not attributable to delay by Powell. Powell's judgment of conviction was entered in June 1991. On direct appeal, 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. It was not until 1997 that this court, after remand from the Supreme Court, applied the rule and finally decided Powell's direct appeal. Powell then timely filed his habeas petition in February 1998. The district court allowed it to be supplemented several times, as discussed, and granted him partial relief in July 2002. The State appealed, and this court reversed in August 2003 and remanded for an evidentiary hearing. The record indicates that Powell has not inappropriately delayed this case. The State is therefore not entitled to relief under NRS 34.800.

Id. Thus, where the state claims that in Powell, "the State did not dispute that the original petition with all its claims was timely filed, but only sought to apply the statutory laches bar of NRS 34.800 to a new claim raised for the first time in a supplemental petition," the state misreads Powell. Compare id. with Ans. Br. at 37. In Powell, the state was seeking to have the laches bar apply because of the fifteen year

delay between the petition and his original penalty hearing, not the two years between filing his original petition and his supplemental petition. Compare Powell, 122 Nev. at 758-59, 138 P.3d at 458 ("The State points out that the original penalty hearing was almost 15 years ago . . . .") with Ans. Br. at 37-38 ("The delay at issue was not the extensive court proceedings beyond Powell's control, but the two year delay in filing the supplemental petition . . . .").[14] This obtuse reading of Powell is only possible because rather than merely citing to the relevant paragraph in Powell, the state cites to four pages of the opinion, allowing the state to conflate separate discussions. See Ans. Br. at 37 (citing Powell, 122 Nev. 756-59, 138 P.3d at 456-58).

The state also equivocates different portions of the district court opinion. The district court applied the laches doctrine in a single paragraph, as follows:

> The State also affirmatively pleads laches under NRS 34.800. The instant petition had been

[14] Indeed, the state's own brief in Powell, written by the same deputy district attorney here, shows that the delay was the entire length between Powell's conviction and when his claim had been filed. See Appellant's Opening Brief at 11, State v. Powell, 122 Nev. 751, 138 P.3d 453 (2006) (No. 45263), Document #05-18114 ("To require the State to locate these witnesses again some fourteen years later would be prejudicial in the extreme.").

> filed approximately 28 years and 18 years respectively from the guilt and penalty phase trials and approximately 25 years and 17 years respectively from the decisions on appeal affirming guilt and penalty. Because these time periods well-exceeded five years, the State is entitled to a rebuttable presumption of prejudice. NRS 34.800(2). This can only be overcome by a showing that the petition is based upon grounds of which petitioner could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred or by a demonstration that a fundamental miscarriage of justice has occurred. NRS 34.800(1). Moore has failed to overcome this burden. Laches under 34.800 applies to the instant matter because the State was prejudiced in responding to the petition and in its ability to conduct a retrial of petitioner due to the long passage of time since the guilty phase of the jury trial in 1985 and the final re-do of the penalty phase in 1995. Therefore, the State is entitled to a rebuttable presumption of prejudice which has not been overcome.

41AA10143-44. Following this paragraph, the district court's order switches to discussing NRS 34.810. 41AA10144. After the discussion of NRS 34.810, the district court's order begins discussing Mr. Moore's good cause and prejudice arguments. Id. It is from the discussion of good cause and prejudice that the state plucks its quotations—not in the court's laches discussion. See Ans. Br. at 39 (citing 41AA10144-45,

10149, 10153). Thus, the state asks this Court to take quotations out of context to re-write the district court's order. This the Court should not do. Particularly so, given the fact that the state drafted this order over the objection of undersigned counsel. See Am. First Fed. Credit Union v. Soro, 131 Nev. ___, 359 P.3d 105, 106 (2015) (recognizing that "any ambiguity . . . should be construed against the drafter"); see also Antonin Scalia & Bryan Garner, Reading Law 427 (2012) (contra proferentem rule: "The doctrine that, in the interpretation of private documents, doubts and ambiguities are to be construed unfavorably to the drafter.").

Given this failed attempt to distinguish Powell, this Court must not apply laches to Mr. Moore's petition. Moreover, the state fails to respond to Mr. Moore's argument that a party who seeks an equitable defense must do so with clean hands or that Mr. Moore can overcome any possible prejudice. See Opening Br. at 67-68 (citing Truck Ins. Exchange v. Palmer J. Swanson, Inc., 124 Nev. 629, 637-38, 189 P.3d 656, 662 (2008). Thus, this Court must reverse the district court's order applying the laches doctrine.

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

Mr. Moore has raised multiple reasons why any procedural defaults do not apply in this case because he can show good cause and prejudice. See Opening Br. 68-188.[15]

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

Ineffective assistance of post-conviction counsel establishes good cause and prejudice to overcome procedural defaults. See Crump v. Warden, 113 Nev. 293, 303-04, 934 P.2d 247, 253-54 (1997). Here, post-conviction counsel failed to conduct an adequate investigation, failed to acquire relevant records, and failed to seek the appointment of any experts. See 25AA5990-93.

The state does not dispute that post-conviction counsel had an obligation to investigate Mr. Moore's case. Ans. Br. 46-51. Nor does the

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[15] The state asserts that "Moore devoted relatively few pages of his petition below to the demonstration of good cause." Ans. Br. at 40. The state does not claim that Mr. Moore's good cause arguments are improperly before this Court. Nonetheless, Mr. Moore notes that the state's claim is misleading: in the Opposition to Motion to Dismiss, Mr. Moore included a lengthy discussion explaining that he has shown good cause and prejudice. See 36AA8795-827. Thus, contrary to the state's suggestion, Mr. Moore did present these arguments to the district court.

state dispute that, pursuant to an adequate investigation, post-conviction counsel would have uncovered the claims raised in the instant petition. Id. Instead, the state contests the weight of post-conviction counsel's declaration and the professional guidelines for death cases.

Thus, as to the contents of Ms. Thomas's declaration, the state argues, "None of this bears on the issue of whether Ms. Thomas's performance fell below an objective standard of reasonableness in existence at the time." Ans. Br. at 47. However, the state offers nothing to show that a different standard controlled while post-conviction counsel represented Mr. Moore. In fact, as with trial counsel's performance, the need to investigate cases was well-established. See § II.B.2 above. Indeed, the state fails to explain how any difference between standards would benefit its position. Ans. Br. at 46-47. This is also the case with the state's position on the ABA Guidelines. The state does not dispute that counsel had an obligation to investigate, thus the discussion of the Guidelines is beside the point. See Ans. Br. at 48.

The ineffectiveness of post-conviction counsel was prejudicial. Counsel failed to raise meritorious claims, which create a reasonable

probability post-conviction proceedings would have been different. See Strickland, 466 U.S. at 694; Crump, 113 Nev. at 304 n.6, 934 P.2d at 254 n.6.

As noted above, one of these claims was the ineffectiveness of trial counsel during the penalty-phase. See § II.B above. Post-conviction counsel was also ineffective in failing to raise meritorious claims of ineffective assistance during the guilt phase. See Opening Br. at 75-76, 122-31; see also 14AA3280-326. The state disregards these claims as blocked by law of the case. See Ans. Br. at 51; see also 41AA10123. However, this argument does not address the important ways in which Mr. Moore's present claims differ from his previously raised claims. During the guilt-phase, counsel failed to hire a forensic expert or a substance abuse expert. See 27AA6640; see also 24AA5826-27. Moreover, as to the penalty phase, counsel failed to present a substantial mitigation narrative that differs greatly from that which was actually presented. See § II.B above; see also Opening Br. at 18-47. Again, the state asserts that Moore must show "how the outcome of his trial would have been any different and so he once again has failed to

show prejudice." Ans. Br. at 51. This is not the standard. See II.B.1 above; see also Strickland, 466 U.S. at 694.

The state argues that post-conviction counsel was not ineffective as to the Angela Saldana evidence because, according to the state, post-conviction counsel did raise these claims. Ans. Br. at 52 (citing 18AA4244-55). However, the claims that the state cites fail to allege the coercion and threats against Ms. Saldana alleged in the instant petition. Compare 18AA4244-55 with 14AA3338-62. Indeed, the state continues in their answering brief by arguing that post-conviction counsel could not have found the substantive basis for the Angela Saldana claims. See Ans. Br. at 52. Thus, the state contradicts itself by both arguing that post-conviction counsel raised this claim and that post-conviction counsel failed to learn of the factual basis for it. Id. And the state does not respond to Mr. Moore's contentions that the Clark County District Attorney's office has a pattern and practice of misconduct. See Opening Br. at 77-85.

Post-conviction counsel also failed to raise Juror Guerra's inability to speak English. See Opening Br. at 85-88. The state disputes this. Ans. Br. at 53. As noted below, a resolution of this factual dispute

requires an evidentiary hearing. See § II.E below. However, the state's position is not supported by the voir dire transcript. In response to "Are you acquainted with either the Defendants or their attorneys," Juror Guerra stated, "I don't understand that question." 2SA320. In response to "what do you think about the death penalty," he answered, "I never think it about." 2SA322-23. Finally, when asked, "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,'" Juror Guerra indicated, "No. I don't be involved in that case." 2SA323-24. Counsel asked, "Mr. Guerra do your parents still live in Cuba?" and he responded, "Yeah, I got a cousin and uncles over there," and then after a follow-up question, indicated that his parents passed away in the United States. 2SA325. This does not indicate a person comfortable with speaking and listening to English. And the state does not even try to address the declarations indicating that Mr. Guerra could not understand English well nor his revealing juror questionnaire. See Ans. Br. at 53-54; see also 27AA6594; 27AA6625; 28AA6895-903.

Finally, the state contends that post-conviction counsel was not ineffective for failing to present sufficient evidence in support of Mr. Moore's venue claim because this additional evidence would not "have changed the outcome." Ans. Br. at 54. However, post-conviction counsel failed to provide any outside evidence to support their claim. See 17AA4203-08 (citing only to transcripts and court documents). Substantial evidence supporting Mr. Moore's venue claim was available in the press. See 27AA6690-28AA6757. Post-conviction counsel's failure to present this evidence was prejudicial because, with it, Mr. Moore's right to a changed venue is clear. See Opening Br. at 88-96.

The state claims that Mr. Moore has not timely raised his allegations that post-conviction counsel was ineffective. See Ans. Br. at 43-44. The state makes this claim by arguing that the relevant time period is when JoNell Thomas ceased representing Mr. Moore, not when Mr. Moore's initial post-conviction proceedings ended on October 22, 2012. See 36AA8858. The state cites no authority to indicate that the "reasonable time" allowed to file a petition challenging the effectiveness of post-conviction counsel begins while the post-conviction petition is pending. Ans. Br. at 43-44. Nor does the state suggest that Mr. Moore

should have filed another petition while his first petition was pending. See id.; see also Nika v. State, 120 Nev. 600, 606-07, 97 P.3d 1140, 1145 (2004) (recognizing the difficulty of challenging effectiveness of trial counsel while direct appeal is still pending). The effect of the state's position is that it would be impossible for Mr. Moore to challenge the effectiveness of initial post-conviction counsel. This is contrary to this Court's law. See Crump, 113 Nev. at 303-04, 934 P.2d at 253-54.[16]

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

The state does not dispute that a Brady violation can establish good cause and prejudice to overcome a procedural default. See Ans. Br. at 54-58; see also Opening Br. at 100-02. Instead, the state argues that this good cause argument has not been raised within a reasonable time. See Ans. Br. at 55. This Court has noted that "a Brady claim still must be raised within a reasonable time after the withheld evidence was

[16] The state erroneously asserts that "the right to counsel only extends to first post-conviction proceedings and not any subsequent appeals . . . ." Ans. Br. at 43. This Court has already rejected this contention by affirming the right to counsel during the appeal of a post-conviction petition. See Middleton v. Warden, 120 Nev. 664, 668, 98 P.3d 694, 697 (2004).

disclosed to or discovered by the defense." Huebler, 275 P.3d at 95 n.3. To repeat from the Opening Brief: this evidence has still not been disclosed by the state. See Opening Br. at 101. Rather than focusing on their own failure to disclose evidence, the state argues that the withheld evidence was known to Mr. Moore starting when his codefendant, Dale Flanagan filed his federal petition in February of 2011. See Ans. Br. at 57; see also 37AA8982. The two and a half years between Mr. Flanagan's federal petition and Mr. Moore's instant petition, the state argues, was an unreasonable amount of time. Ans. Br. at 57.

However, Mr. Moore did, in fact, attempt to raise these issues, filing with this Court a motion for remand. 21AA5183. This Court refused to consider the issues, holding that "[a]ny challenge to the judgment of conviction must be made in a post-conviction petition for a writ of habeas corpus filed in the district court in the first instance." 21AA5183.[17] Mr. Moore has done precisely this. Nonetheless, the state

[17] Indeed, this Court's refusal to consider the claim—or the absence of any available forum—should constitute a basis to excuse most of the two and a half years that the state complains of.

argues, "Moore inexplicably delayed further by litigating his new Brady claims in federal court before finally returning to state court a year later on September 19, 2013." Ans. Br. at 58. But the delay the state refers to is not even a year. Remittitur from his initial post-conviction issued on October 15, 2012. 36AA8858. This petition was filed within a reasonable amount of time, roughly eleven months later. 13AA3185.[18]

The state is asking this Court to create a procedure that would require petitioners to file petitions piecemeal: for, to meet the state's onerous standards here, Mr. Moore would have been required to immediately file a petition with this Brady claim after this Court issued its remittitur and then either amend the petition or file additional petitions as counsel learned of new claims. This, however, would surely provoke the state's ire and motivate additional objections on the basis of the procedural defaults. These difficulties are compounded by the fact that, in this case, Mr. Moore still had a right to challenge the

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[18] The state notes that "[p]ursuit of federal remedies does not constitute good cause to overcome state procedural bars" as though Mr. Moore spent substantial time litigating his case in federal court. See Ans. Br. at 58 (citing Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989)). However, Mr. Moore only filed his initial petition in April of 2013 and his Amended Petition in August of 2013, in the federal district court, just before filing the instant petition with the district court below.

effectiveness of post-conviction counsel, which in turn requires a new attorney to evaluate post-conviction counsel's performance. Thus, the new attorney would have to file Mr. Moore's immediate petition without having had a chance to review his file or investigate his claims.

So, the state proposes a Hobson's choice for petitioners like Mr. Moore: either (1) immediately file a petition, without reviewing the record or investigating the facts, and risk objections to later amendments or (2) wait to file the petition until record review and an investigation are complete and risk objections for the delay. This is untenable. Mr. Moore filed this petition within a year of the issuance of remittitur; this was a reasonable amount of time for him to file this petition.

c. Mr. Moore has established good cause and prejudice because failing to consider his claims would result in a fundamental miscarriage of justice.

The state does not dispute that application of the great risk of death aggravating circumstance violates the constitution. Ans. Br. at 58-60. Instead, the state argues that this Court's prior determination is law of the case. This Court should not apply law of the case to block

consideration of an invalid aggravating circumstance. Mr. Moore is not arguing legal insufficiency—he is arguing that the aggravating circumstance is unconstitutional, and that a constitutional application of the aggravating circumstance would render him innocent of it and the death penalty. This Court has recognized that the actual innocence arguments apply when challenging the legal validity of an aggravating circumstance. See Lisle v. State, 131 Nev. ___ 351 P.3d 725, 730 (Nev. 2015) (citing Leslie v. Warden, 118 Nev. 773, 779-82, 59 P.3d 440, 445-46 (2002), and State v. Bennett, 119 Nev. 589, 597-98, 81 P.3d 1, 6-7 (2003)). This Court should decline to apply the law of case doctrine, strike the great risk of death to multiple people aggravating circumstance, and find Mr. Moore innocent of the death penalty.

Mr. Moore is also actually innocent of the death penalty because of this Court's improper reweighing analysis after two aggravating circumstances were struck. The state responds by arguing that "this is a purely legal argument and fails to advance any new facts to show his factual innocence." Ans. Br. at 59. However, Mr. Moore alleged substantial mitigation evidence that was never presented to the jury. See § II.B above; see also Opening Br. at 18-47; 13AA3211-14AA3279.

Mr. Moore urges that evidence in support of his actual innocence argument here.[19]

E. Mr. Moore is entitled to an evidentiary hearing.

The state does not dispute the standard for when an evidentiary hearing is required. Ans. Br. at 60-63. Thus, "when the petitioner asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief," that petitioner is entitled to an evidentiary hearing. Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002). The state argues that Mr. Moore has not met this burden, but does so primarily by disputing the facts alleged. Ans. Br. at 60-63. Without an evidentiary hearing, neither the district court nor this Court may resolve these factual disputes in the state's favor.

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[19] In this regard, the instant case is different than Lisle v. State, 351 P.3d 725 (2015). There, Lisle's arguments did not "present any issue of first impression as to the legal validity of the aggravating circumstance." Id. at 730. Here, however, Mr. Moore has successfully challenged two aggravating circumstances under McConnell, 20AA4721, and is currently challenging the great risk of death aggravating circumstance, see Opening Br. at 105-11. Whether this Court strikes the great risk of death aggravating circumstance or not, Mr. Moore is entitled to consideration of his actual innocence based on the substantial mitigation evidence that post-conviction counsel failed to uncover.

For example, the state invites this Court to find that post-conviction counsel had a strategic basis for failing to investigate Mr. Moore's case. Ans. Br. at 61. However, this is in no way supported by any record; counsel's affidavit indicates only that she did not conduct a "complete factual or mitigation investigation." 25AA5990. The affidavit does not indicate this was for strategic reasons. Thus the state asks this Court to make a factual finding with no record-based support, without an evidentiary hearing.

Or, to take another example, the state argues that the district court did not resolve the merits of Mr. Moore's Juror Guerra claim. Ans. Br. at 62. The state reasons, "The claim was not substantively resolved on the merits, but was denied as an untimely claim against first post-conviction counsel JoNell Thomas." Ans. Br. 62. This misreads the district court's order, which found that the voir dire transcript showed Juror Guerra's ability to speak English, that the claim was meritless, and thus counsel was not ineffective in failing it. 41AA10124. The

district court's reasoning is based entirely on its resolution of a factual dispute.[20] Id.

The state so argues as to Mr. Moore's Brady claim too. Namely, the state argues that the district court did not resolve any factual disputes, but instead merely found that the claims were procedurally defaulted. Mr. Moore's Opening Brief went through each of the factual disputes that the district court's order resolved without an evidentiary hearing. Opening Br. at 118-20. Mr. Moore reiterates that such fact-finding requires an evidentiary hearing. Insofar as this Court agrees that the district court's order did not rely on the findings of these facts, this Court should strike those findings. Nonetheless, the state's reasoning is circular: the state argues that an evidentiary hearing is unnecessary because these claims are procedurally defaulted. Ans. Br. at 62-63. However, Mr. Moore has requested an evidentiary hearing to show that the claims are not procedurally defaulted. Thus, under the

[20] Again, this Court should not hesitate to fault the state for any ambiguities in the district court's order because the state drafted and submitted the order over Mr. Moore's objection. See Am. First Fed. Credit Union, 359 P.3d at 106 (recognizing that "any ambiguity . . . should be construed against the drafter"); see also Reading Law 427.

state's reasoning, Mr. Moore would only be entitled to an evidentiary hearing to prove his claims are not procedurally defaulted if his claims were not procedurally defaulted—at which point, of course, Mr. Moore would not need an evidentiary hearing.

This Court should avoid such reasoning and instead apply the long established law for evidentiary hearings in post-conviction proceedings. Mr. Moore has made specific factual allegations. These allegations are not belied by the record. And, if these allegations are true, he is entitled to relief. Thus, he is entitled to an evidentiary hearing.

F. The cumulative effect of errors in this case require relief.

Constitutional errors that may be harmless in isolation can have the cumulative effect of rendering the trial fundamentally unfair. See Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). This is so in the habeas context as well. See Browning v. State, 124 Nev. 517, 539, 188 P.3d 60, 75 (2008); Evans v. State, 117 Nev. 609, 647-48, 28 P.3d 498, 524 (2001); Doyle v. State, 116 Nev. 148, 163, 995 P.2d 465, 474 (2000). McConnell v. State, 125 Nev. 243, 212 P.3d 307 (2009), did not overrule this long line of precedent. See id. at 259, 212 P.3d at 318. Nor

could it: the right to a trial "in accord with traditional and fundamental standards of due process" requires this Court to consider the errors in Mr. Moore's case cumulatively. See Chambers v. Mississippi, 410 U.S. 284, 302-03 (1973); see also Parle v. Runnels, 505 F.3d 922, 927-28 (9th Cir. 2007).[21]

Thus, Mr. Moore reiterates the errors noted in the Opening Brief, and repeats that he is entitled to relief on those claims, both individually and cumulatively. See Opening Br. at 121-87.

G. Mr. Moore has never confessed to these crimes.

Respondents claim, "By his own admission, Moore was a shooter and was the one who shot and killed the grandfather while Flanagan shot and killed his own grandmother." Ans. Br. at 25. This claim, repeated in different forms throughout the life of this case, is an overstatement. See 17AA4082; 19AA4566. Rather, they rely on co-conspirator testimony that Mr. Moore confessed. See, e.g., Ans. Br. at 25 (citing 11AA2545 (Mr. Lucas's testimony)), 11AA2628 (Mr. Akers's

[21] Insofar as McConnell implied that cumulative error review may not apply in post-conviction proceedings, McConnell is contrary to clearly established federal law. See Parle, 505 F.3d at 927-28.

testimony), 12AA2744 (court officer summarizing Mr. Luckett's testimony). Respondents present this evidence as though Mr. Moore himself confessed to these crimes—he did not, and this Court should not take seriously Respondents assertions to the contrary.

III. CONCLUSION

For the foregoing reasons, Mr. Moore respectfully requests that this Court reverse the district court's holding and order a new trial.

DATED this 23rd day of December, 2015.

Respectfully submitted,

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Federal Public Defender

/s/ Randolph M. Fiedler
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century, 14 point font: or

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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 either:

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[ ] Does not exceed pages.

Finally. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in

particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, 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.

Respectfully submitted,

/s/ Randolph M. Fiedler
RANDOLPH M. FIEDLER
Assistant Federal Public Defender

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on December 23, 2015. Electronic Service of the foregoing PETITIONER'S REPLY BRIEF shall be made in accordance with the Master Service List as follows:

Adam Paul Laxalt
Nevada Attorney General

Steven S. Owens
Chief Deputy District Attorney

/s/ Felicia Darensbourg
an Employee of the Federal Public Defender