IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM WITTER, Appellant, v. THE STATE OF NEVADA, Respondent.	)	Case No. 73431

RESPONDENT'S APPENDIX
Volume 2

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on June 30, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM WITTER, Petitioner, vs. E.K. McDANIEL, et al., Respondents.	Case No. C117513 Dept. No. 2 **PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)** Hearing Date: 4-10-07 Hearing Time: 9AM (Death Penalty Habeas Corpus Case)

The Petitioner, William Witter, by and through undersigned counsel, hereby files this petition for writ of habeas corpus pursuant to Nev. Rev. Stat. § 34.724 and Nev. Rev. Stat. § 34.820. Petitioner alleges that he is being held in custody in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the Constitution of the United States of America, and the rights afforded him under international law enforced under the Supremacy Clause of the United States Constitution. U.S. Const., Art. VI, and Article 1, Sections 3, 6, and 8, and Article 4, Section 21 of the Constitution of the State of Nevada.

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Procedural Allegations

1. Petitioner is currently in the custody of the State of Nevada at Ely State Prison in Ely, Nevada, pursuant to a state court judgment of conviction and sentence of death. Respondent

E.K. McDaniel is the warden of Ely State Prison, and Catherine Cortez Masto is the Attorney General of the State of Nevada. The Respondents are sued in their official capacities.

2. Petitioner William Witter was convicted by a jury of first-degree murder with use of a deadly weapon, attempted murder with use of a deadly weapon, attempted sexual assault with use of a deadly weapon, and burglary, and was sentenced to death in the Eighth Judicial District Court, Clark County, Case No. C117513. The trial was conducted by the Honorable Stephen Huffaker. Mr. Witter did not testify at trial. The jury found the aggravating circumstances that petitioner had been convicted of a prior violent felony, burglary, and attempted sexual assault. Judgment of conviction was entered August 2, 1995.

3. On July 22, 1996, Mr. Witter's conviction and sentence were affirmed on direct appeal by the Nevada Supreme Court. Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996), cert.denied, 520 U.S. 1217 (1997).

4. On October 27, 1997, Mr. Witter filed his proper person petition for writ of habeas corpus with the Eighth Judicial District Court in propria persona, alleging the need for assistance of counsel. State post-conviction counsel did not seek to conduct discovery or seek authorization to incur expenses for investigation or other services.

5. On August 11, 1998, post-conviction counsel filed a supplemental brief in support of the petition which did not refer to any material outside the record on direct appeal.[1] Following an evidentiary hearing on February 26, 1999, at which only petitioner's trial and appellate counsel testified, the state district court denied relief on September 25, 2000.

6. The Nevada Supreme Court affirmed the denial of relief in an unpublished order on August 10, 2001, Witter v. State, No. 36927, and issued its remittitur on September 5, 2001.

7. Petitioner filed a pro per petition for writ of habeas corpus on September 4, 2001. The Court appointed the Federal Public Defender's office to represent Mr. Witter on September 17, 2001.

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[1] Pursuant to Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997), Mr. Witter was entitled to effective assistance of counsel in the habeas corpus proceeding as a matter of state law.

8. On November 23, 2005, the petitioner filed an amended petition for writ of habeas corpus followed by a motion for stay and abeyance on March 7, 2006. On June 14, 2006, the Respondents filed a motion to dismiss the petition on the grounds that the claims are unexhausted, untimely, and not cognizable in federal habeas review. On the same date, respondents also filed an opposition to the motion for stay and abeyance. On November 30, 2006, the United States District Court issued its order granting petitioner's motion for stay and abeyance pending his exhaustion of state court remedies.

9. **Statement with Respect to Previous Proceedings**

A. The failure to raise any of the claims asserted in this petition which were susceptible to decision on direct appeal was the result of ineffective assistance of counsel on appeal.

B. The failure to raise any of the claims asserted in this petition which were susceptible of being raised in the state post-conviction proceeding and appeal was the result of ineffective assistance of counsel, in a proceeding in which petitioner had a right to effective assistance of counsel under state law and under federal law; was the result of representation by counsel that violated federal constitutional due process standards; and was induced by the state trial court's refusal to permit appointed counsel adequate time or resources to identify and present all of the available constitutional claims in violation of the right to an adequate opportunity to be heard guaranteed by the due process clause of the Fourteenth Amendment.

1) Petitioner was represented during post-conviction/state habeas proceedings by attorney David Schieck.

2) Nevada law recognizes an interest in the effective assistance of counsel in post-conviction proceedings. The denial of effective assistance of counsel in post-conviction proceedings violated petitioner's federal constitutional rights to due process of law and equal protection under the law.

3) Under state law, petitioner was entitled to effective assistance of counsel in the first proceeding available to enforce his constitutional rights. The first proceeding available for enforcement of a defendant's right to effective assistance of counsel is the proceeding

for post-conviction relief.

4) Post-conviction counsel failed to investigate and present evidence showing the meritorious claims of ineffective assistance of counsel that are alleged in detail in this petition. Additionally, post-conviction and trial counsel unreasonably failed, inter alia, develop available expert opinion regarding blood evidence and crime scene analysis. Post-conviction counsel and trial counsel failed to investigate and discover compelling mitigating evidence on behalf of petitioner. Post-conviction counsel also failed to discover evidence to rebut the aggravating circumstances alleged by the state. Post-conviction counsel failed to secure adequate discovery from petitioner's prior counsel or from the District Attorney. If counsel had conducted adequate discovery and investigation, as current counsel have, post-conviction counsel would have presented all of the claims which are alleged in the instant petition and incorporated by reference as if fully set forth herein.

5) Post-conviction counsel did not inform petitioner of all of the meritorious claims which could be raised in the post-conviction proceeding. Consequently petitioner did not knowingly and intelligently waive, or authorize counsel to waive any claim. Petitioner did not refuse to provide any information requested by previous counsel at any stage of the proceedings; and any delay resulting from the litigation of any prior proceeding, including post-conviction proceedings, is not the result of any fault on the part of petitioner.

6) Petitioner was prejudiced by post-conviction counsel's failure to perform effectively. The state district court relied on incomplete and inaccurate information in rendering its decision denying relief, and it is reasonably probable that the district court would have granted relief if it had been presented with all of petitioner's claims and supporting evidence.

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

D. The Nevada Supreme Court has deemed counsel's failure to raise

claims in prior proceedings or in a timely manner as sufficient cause to allow new claims to be considered and has disregarded such failures and addressed constitutional claims in the cases of similarly-situated litigants. Barring consideration of the merits of petitioner's claims would violate the equal protection and due process clauses of the fourteenth amendment to the United States Constitution, by which this Court is bound under the Supremacy Clause. U.S. Const. Art. VI.

1) The Nevada Supreme Court has exercised complete discretion to address constitutional claims, when an adequate record is presented to resolve them, at any stage of the proceedings, despite the default rules contained in Nev. Rev. Stats. §§ 34.726, 34.800, and 34.810. A purely discretionary procedural bar is not adequate to preclude review of the merits of constitutional claims. E.g., Valerio v. Crawford, 306 F.3d 742, 774 (9th Cir. 2002) (en banc); Morales v. Calderon, 85 F.3d 1387, 1391 (9th Cir. 1996). Although the Nevada Supreme Court asserted in Pellegrini v. State, 117, Nev. 860, 34 P.3d 519 (2001), that application of the statutory default rules, some of which were adopted in the 1980's, was mandatory, 34 P.3d at 536, the examples cited below establish that the Nevada Supreme Court has always exercised, and continues to exercise, complete discretion in applying them. See also Ybarra v. Warden, No. 43981, Order Affirming in Part, Reversing in Part, and Remanding (November 28, 2005), Ex. 1.48, and Ybarra v. Warden, No. 43981, Order Denying Rehearing (February 2, 2006), Ex. 1.49 (both reiterating that application of the statutory default rules is mandatory despite alleged inconsistencies in application).

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

3) The most recent example of the court's exercise of its power to address constitutional issues regardless of default rules is in the Rippo case. There, the Supreme Court, on appeal from the denial of post-conviction habeas corpus relief, sua sponte directed the parties to be prepared to argue an issue in a penalty phase jury instruction regarding whether the jury had to be unanimous in finding that the mitigating evidence outweighed the aggravating factors to

preclude death-eligibility. Rippo v. State, No. 44094; Bejarano v. State, No. 44297, Order Directing Oral Argument, at 2 (March 16, 2006), Ex. 1.50. The issue was addressed on the merits in its decision. Rippo v. State, 122 Nev.____, 146 P.3d 279, 285 (2006). This instructional issue had not been raised in any previous proceeding, cf. Nev. Rev. Stat. § 34.810 (1)(b), (2), or in the habeas proceedings in the trial court or the Nevada Supreme Court. The only issue raised with respect to this jury instruction was whether it adequately informed the jury that non-statutory aggravating evidence that was not part of the statutory aggravating factors could be considered in the weighing process for finding death-eligibility. Exs. 1.51, 1.53, 1.55. The supreme court first raised the issue sua sponte in its order directing oral argument in 2006, long after the one year rule, Nev. Rev. Stat. §34.726(1), and the five year rule, Nev. Rev. Stat. §34.800(2), had elapsed from the finality or the conviction and sentence. Rippo v. State, 113 Nev. 1239, 946 P.3d 1017(1997), cert. denied 524 U.S. 841 (October 5, 1998). Ex. 1.50. The court's decision in the habeas appeal makes no mention of the supposedly mandatory default rules. See, also, Bejarano v. State, 106 Nev. 840, 843, 801 P.2d 1388 (1990) (on appeal from denial of collateral relief, "[w]e consider sua sponte whether failure to present such [mitigating] evidence constitutes ineffective assistance"); Bejarano v. Warden, 112 Nev. 1466, 1471 n. 2, 929 P.2d 922 (1996) (addressing claim on merits despite default rules); Bennett v. State, 111 Nev. 1099, 1103, 901 P.2d 676 (1995) (addressing claims asserted to be barred by default rules; "[w]ithout expressly addressing the remaining procedural bases for the dismissal of Bennett's petition, we therefore choose to reach the merits of Bennett's contentions" (emphasis supplied); Ford v. Warden, 111 Nev. 872, 886-887, 901 P.2d 123 (1995) (addressing claim of error in court's mandatory sentence review on direct appeal raised for first time on appeal in second collateral attack, without discussing or applying default rules); Hill v. Warden, 114 Nev. 169, 178-179, 953 P.2d 1077 (1998) (addressing merits claims raised for first time on appeal from denial of third post-conviction petition because claims "of constitutional dimension which, if true, might invalidate Hill's death sentence and the record is sufficiently developed to provide an adequate basis for review."); see also, Lane v. State, 110 Nev. 1156, 1168, 881 P.2d 1358 (1994) (vacating aggravating factor finding based on instructional error on mandatory review without noting issue not raised at trial or on appeal); Lord v. State, 107 Nev. 28, 38, 806 P.2d 548 (1991) ("Normally a proper

objection is a prerequisite to our considering the issue on appeal. However, since this issue is of constitutional proportions, we elect to address it now.") (citation omitted); Powell v. State, 108 Nev. 700, 705-06, 838 P.2d 921 (1992) (addressing issue of delay in probable cause determination without indicating that issue not raised at trial or on appeal); Farmer v. Director, Nevada Dept. Of Prisons, No. 18052, Order Dismissing Appeal (March 31, 1988) (addressing two substantive claims on merits (guilty plea involuntary, insufficiency of aggravating circumstances) despite failure to raise on direct appeal), Ex. 1.09; Farmer v. State, No. 22562, Order Dismissing Appeal (February 20, 1992) (denying claim of improper admission of victim impact evidence on merits despite default), Ex. 1.10; Feazell v. State, No. 37789, Order Affirming in Part and Vacating in Part, at 5-6 (November 14, 2002) (granting penalty phase relief sua sponte (on appeal of first state habeas corpus petition) on basis of ineffective assistance of post-conviction counsel without requiring petitioner to plead "cause" under Nev. Rev. Stat. § 34.726(1) or 34.810)), Ex. 1.12; Hardison v. State No. 24195, Order of Remand (May 24, 1994) (addressing claims and granting relief despite timeliness and successive petition procedural bars raised by state), Ex. 1.14; Hill v. State No. 18253, Order Dismissing Appeal (June 29, 1987) (dismissing untimely appeal from denial of second post-conviction relief petition but sua sponte directing trial court to entertain merits of new petition), Ex. 1.15; Milligan v. State, No. 21504, Order Dismissing Appeal (June 17, 1991) (rejecting two substantive claims on merits (error to admit uncorroborated testimony of accomplice, death penalty cruel and unusual) despite failure to raise on direct appeal), Ex. 1.22; Neuschafer v. Warden No. 18371, Order Dismissing Appeal (August 19, 1987) (addressing merits of claims without discussion of default rules, in case decided without briefing, and in which court expressed "serious doubts" about authority of counsel to pursue appeal, but decided to "elect" to entertain appeal due to "gravity of appellant's sentence"), Ex. 1.25; Nevius v. Sumner (Nevius I) Nos. 17059, 17060, Order Dismissing Appeal and Denying Petition (February 19, 1986) (reviewing first and second collateral petitions in consolidated opinion, without addressing default rules as to second petition), Ex. 1.26; Nevius v. Warden (Nevius II), Nos. 29027, 29028, Order Dismissing Appeal and Denying Petition for Writ of Habeas Corpus (October 9, 1996) (entertaining claim in petition filed directly with Nevada Supreme Court despite failure to raise claim in district court; noting that district court had "discretion to dismiss appellant's petition

. . . . "), Ex. 1.27; Nevius v. Warden (Nevius III), Nos. 29027, 29028, Order Denying Rehearing (July 17, 1998) (same), Ex.1.28; Rogers v. Warden, No. 22858, Order Dismissing Appeal (May 28, 1993) (addressing two claims on merits (objection to M'Naughten test for insanity, error to place the burden on defendant to prove insanity) despite successive petition bar and direct appeal bar; claims rejected under law of the case), Ex. 1.37; Stevens v. State, No. 24138, Order of Remand (July 8, 1994) (finding cause on basis of failure to appoint counsel in proceeding in which appointment of counsel not mandatory, cf. Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247 (1997)), Ex. 1.41; Williams v. State, No. 20732, Order Dismissing Appeal (July 18, 1990) (addressing claim in third collateral proceeding on merits without discussion of default rules), Ex. 1.43; Ybarra v. Director, No. 19705, Order Dismissing Appeal (June 29, 1989) (addressing previously-raised claim without reference to default rules), Ex. 1.46.

4) The Nevada Supreme Court disregards the procedural bar arising from failure to raise claims in earlier proceedings. See Valerio v. Crawford, 306 F.3d 742, 778 (9th Cir. 2002); See also, Rippo v. State, 146 P.3d at 285; Bejarano v. Warden, 112 Nev. 1466, 1471 n. 2, 929 P.2d 922 (1996) (addressing claim on merits despite default rules); Bennett v. State, 111 Nev. 1099, 1103, 901 P.2d 676 (1995) (addressing claims asserted to be barred by default rules; "[w]ithout expressly addressing the remaining procedural bases for the dismissal of Bennett's petition, we therefore choose to reach the merits of Bennett's contentions" (emphasis supplied)); Ford v. Warden, 111 Nev. 872, 886-887, 901 P.2d 123 (1995) (addressing claim of error in court's mandatory sentence review on direct appeal raised for first time on appeal in second collateral attack, without discussing or applying default rules); Hill v. Warden, 114 Nev. 169, 178-179, 953 P.2d 1077 (1998) (addressing merits of claims raised for first time on appeal from denial of third post-conviction petition because claims "of constitutional dimension which, if true, might invalidate Hill's death sentence and the record is sufficiently developed to provide an adequate basis for review."); Farmer v. State No. 22562, Order Dismissing Appeal (February 20, 1992) (denying claim of improper admission of victim impact evidence on merits despite default), Ex. 1.10; Feazell v. State, No. 37789, Order Affirming in Part and Vacating in Part, at 5-6 (November 14, 2002) (granting penalty phase relief sua sponte (on appeal of first state habeas corpus petition) on basis of

ineffective assistance of post-conviction counsel without requiring petitioner to plead or prove "cause" in a successive petition), Ex. 1.12; Hardison v. State No. 24195, Order of Remand (May 24, 1994) (addressing claims and granting relief despite timeliness and successive petition procedural bars raised by state), Ex. 1.14; Neuschafer v. Warden No. 18371, Order Dismissing Appeal (August 19, 1987) (addressing merits of claims without discussion of default rules, in case decided without briefing, and in which court expressed "serious doubts" about authority of counsel to pursue appeal, but decided to "elect" to entertain appeal due to "gravity of appellant's sentence"), Ex. 1.25; Ybarra v. Director No. 19705, Order Dismissing Appeal (June 29, 1989) (addressing previously-raised claim without reference to default rules), Ex. 1.46.

5) The Nevada Supreme Court consistently fails to apply the time bar provisions of Nev. Rev. Stat §34.726, or the rebuttable presumption of Nev. Rev. Stat. § 34.800 (2) to capital habeas petitioners. Rippo v. State, 122 Nev. ___, 146 P.3d at 285 (issue raised by Nevada Supreme Court sua sponte in 2006, when conviction and sentence final in 1998); Bejarano v. Warden, 112 Nev. 1466, 1471 n. 2, 929 P.2d 922 (1996) (addressing claim on merits despite default rules; successive petition filed approximately five years after direct appeal remittitur issued on January 10, 1989); Ford v. Warden, 111 Nev. 872, 886-887, 901 P.2d 123 (1995) (addressing claim of error in court's mandatory sentence review on direct appeal raised for first time on appeal in second collateral attack, without discussing or applying default rules; successive petition filed November 12, 1991, approximately five years after direct appeal remittitur issued on April 29, 1986); Hill v. State, 114 Nev. 169, 953 P.2d 1077 (1998) (addressing claims on merits filed directly with the Nevada Supreme Court; successive petition claims filed September 19, 1996, approximately ten years after direct appeal remittitur issued on September 5, 1986); Farmer v. State, No. 29120, Order Dismissing Appeal (November 20, 1997) (successive petition filed August 28, 1995, approximately ten years after direct appeal remittitur issued on September 17,1 85), Ex. 1.11; Jones v. McDaniel, No. 39091, Order of Affirmance (December 19, 2002) (addressing all three-judge panel claims on merits; successive petition filed May 1, 2000, approximately nine years after direct appeal remittitur issued on October 25, 1991), Ex. 1.17; Milligan v. Warden, No. 37845, Order of Affirmance (July 24, 2002) (successive petition filed December 1992, approximately seven years after direct appeal

remittitur issued on October 15, 1986), Ex. 1.23; Nevius v. Warden, No. 29027, Order Dismissing Appeal (October 9, 1996) (successive petition filed August 23, 1996, approximately eleven years after direct appeal remittitur issued on December 31, 1985), Ex. 1.27; Nevius v. Warden, No. 29027, Order Denying Rehearing (July 17, 1998) (successive petition filed February 7, 1997, approximately twelve years after direct appeal remittitur issued on December 31, 1985), Ex. 1.28; O'Neill v. State, No. 39143, Order of Reversal and Remand, at 2 (December 18, 2002) (petition filed "more than six years after entry of judgment of conviction" and issuance of remittitur on direct appeal on March 13, 1996), Ex. 1.30; Riley v. State, No. 33750, Order Dismissing Appeal (November 19, 1999) (successive petition filed August 26, 1998, approximately seven years after direct appeal remittitur issued on July 18, 1991), Ex. 1.36; Sechrest v. State, No. 29170, Order Dismissing Appeal (November 20, 1997) (successive petition filed July 27, 1996, approximately eleven years after direct appeal remittitur issued on September 18, 1985), Ex. 1.39; Williams v. Warden, No. 29084, Order Dismissing Appeal (August 29, 1997) (addressing claim that trial counsel failed to rebut aggravating evidence; claim rejected under law of the case, successive petition filed December, 1992, approximately five years after direct appeal remittitur issued on July 17, 1987), Ex. 1.44.

6) The Nevada Supreme Court has also applied inconsistent rules when deciding whether a petitioner can demonstrate "cause" to excuse a procedural default. One particularly striking inconsistency is the court's treatment of cases in which trial and/or appellate counsel acted as habeas counsel in the first state post-conviction petition. Compare Moran v. State, No. 28188, Order Dismissing Appeal (March 21, 1996) (finding that trial and appellate counsel's representation in first habeas proceeding did not establish "cause" to review merits of claims in subsequent habeas proceeding), Ex. 1.24, with Nevius v. Warden, Nos. 29027, 29028, Order Dismissing Appeal and Denying Petition (October 9, 1996) (Petitioner "arguabl[y] established "cause" under same circumstances), Ex. 1.27; Wade v. State, No. 37467, Order of Affirmance (October 11, 2001) (holding sua sponte that petitioner had established "cause" to allow filing of successive petition in same circumstances), Ex. 1.42; Hankins v. State, No. 20780, Order of Remand (April 24, 1990) (remanding sua sponte for hearing and appointment of new counsel on first habeas petition due to representation by same office at sentencing and in post-conviction proceeding), Ex.

1.13.

7) The Nevada Supreme Court has reached inconsistent results on the issue of whether a procedural rule that does not exist at the time of a purported default may preclude the review of the merits of meritorious constitutional claims. Compare Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) (applying Nev. Rev. Stat. § 34.726 to preclude review of merits of successive habeas petition when one-year default rule announced for the first time in that case); Jones v. McDaniel, No. 39091, Order of Affirmance (December 19, 2002) (same), Ex. 1.17; with State v. Haberstroh, 119 Nev. 173, 180-181, 69 P.3d 676, 681-82 (2003) (refusing to retroactively apply rule that parties may not stipulate not to apply procedural default rules); Smith v. State, No. 20959, Order of Remand (September 14, 1990) (refusing to apply default rule that was not in existence at the time of the purported default), Ex. 1.40; Rider v. State, No. 20925, Order of Remand (April 30, 1990) (same), Ex. 1.35.

8) The Nevada Supreme Court has taken opposite positions on whether application of procedural default rules is waivable by the State. State v. Haberstroh, 119 Nev. 173, 180-181, 69 P.3d 676, 681-682 (2003), holding that parties could not stipulate to overcome state's procedural defenses, but construing a stipulation as establishing cause to overcome default rules without identifying any theory of cause that such a stipulation would establish or how it existed before the stipulation was entered; contra Doleman v. State, No. 33424, Order Dismissing Appeal (March 17, 2000) (finding stipulation with state to allow adjudication of merits of claim ineffective because of petitioner's failure to seek rehearing on claim and failing to find "cause" on the basis of the stipulation), Ex. 1.08. See also Jones v. State, No. 24497, Order Dismissing Appeal (August 28, 1996) (holding challenge to jurisdiction of court waived by guilty plea), Ex. 1.16. The definition of cause is completely amorphous, because it is whatever the Nevada Supreme Court says it is on any particular occasion. See also Leslie v. State, 118 Nev. 773, 59 P.3d 440, 445 (2002) (sua sponte expanding definition of miscarriage of justice exception to default rules to include "innocence" of aggravating factor); contra Colwell v. State, 118 Nev. 807, 59 P.3d 463 (2002)(case decided same day as Leslie with the same aggravating factor and similar factual circumstances (a robbery case) but failing to take notice of petitioner's "innocence" of aggravating factor), Ex. 1.05,

1.06 (verdict form showing conviction of random and motiveless aggravating factor); Rogers v. Warden, No. 36137, Order of Affirmance, at 5-6 (May 13, 2003) (raising miscarriage of justice exception sua sponte but failing to analyze petitioner's challenge to aggravating circumstance under actual innocence standard), Ex. 1.38. See also Feazell v. State, No. 37789, Order Affirming in Part and Vacating in Part (November 14, 2002) (sua sponte reaching both theory of cause not litigated in District Court or Supreme Court, and substantive issue, post-Pellegrini), Ex. 1.12.

9) The State has admitted that the Nevada Supreme Court disregards procedural default rules on grounds that cannot be reconciled with a theory of consistent application of procedural default rules. Bennett v. State, No. 38934, Respondent's Answering Brief at 8 (November 26, 2002) ("upon appeal the Nevada Supreme Court graciously waived the procedural bars and reached the merits" (emphasis supplied)), Ex. 1.04; Nevius v. McDaniel, D. Nev., No. CV-N-96-785-HDM(RAM), Response to Nevius' Supplemental Memorandum at 3 (October 18, 1999) (Nevada Supreme Court noted issue raised only on petition for rehearing in successive proceeding, "but it did not procedurally default the claim. Instead, 'in the interests of judicial economy' and, more than likely, out of its utter frustration with the litigious Mr. Nevius and to get the matter out of the Nevada Supreme Court once and for all, the court addressed the claim on its merits"), Ex. 1.29.

E) Default bars that can be "graciously waived," or disregarded out of "frustration," are not "rules" that bind the actions of courts at all, but are the result of mere exercises of unfettered discretion; and such impediments cannot constitutionally bar review of meritorious claims. Lonchar v. Thomas, 517 U.S. 314, 323 (1996) ("'There is no such thing in the Law, as Writs of Grace and Favour issuing from the Judges.' Opinion on the Writ of Habeas Corpus, Wilm. 77, 87, 97 Eng. Rep. 29, 36 (1758) (Wilmot, J.)."). The Nevada Supreme Court's practices make review of the merits of constitutional claims a matter of "grace and favor," and they cannot constitutionally be applied to bar consideration of Mr. Witter's claims.

F) The Nevada Supreme Court could not apply any supposed default rules to bar consideration of Mr. Witter's claims when it has failed to apply those rules to similarly-situated petitioners, and thus has failed to provide notice of what default rules will be enforced,

without violating the equal protection and due process clauses of the Fourteenth Amendment. Bush v. Gore, 531 U.S. 98, 104-109 (2000) (per curiam); Village of Willowbrook v. Olech, 528 U.S. 562, 564-565 (2000) (per curiam); Ford v. Georgia, 498 U.S. 411, 425 (1991).

10. Petitioner is filing this petition more than one year following the filing of the decision on direct appeal.

A) Petitioner alleges that any delay in filing this petition is not his "fault" within the meaning of Nev. Rev. Stat. § 34.726(2). Petitioner has been continuously represented by counsel since the beginning of the proceedings in this case, and counsel have been responsible for conducting the litigation. Petitioner has not committed any "fault," within any rational meaning of that term as used in § 34.726(1), in connection with the failure to raise any issue in the litigation. Petitioner incorporates the allegations of Section 21 (a, b), above. Any failure to raise these claims has been the fault of counsel, which is not attributable to petitioner under Pellegrini v. State, 117 Nev. 860, 36 P.3d 519, 526 n. 10 (2001).

B) Petitioner alleges that Nev. Rev. Stat. §34.726 cannot properly or constitutionally be applied to bar consideration of the merits of his claims.

1) Nev. Rev. Stat. § 34.726 has not been applied consistently to bar consideration of the claims of similarly-situated litigants. Petitioner incorporates the allegations of Section 21 above. Applying § 34.726 to bar consideration of petitioner's claims would violate the due process and equal protection provisions of the Fourteenth Amendment.

2) Nev. Rev. Stat. § 34.726 cannot properly or constitutionally be applied to this petition, because the legislature did not intend it to apply to successive petitions. In holding that the section does apply to successive petitions, the Nevada Supreme Court's decision in Pellegrini v. State, 117 Nev. 860, 36 P.3d 519 (2001), arbitrarily ignored its own statutory construction precedents in order to apply a new procedural bar in capital cases.

i) Nev. Rev. Stat. § 34.726 was enacted in 1993 as part of legislation to consolidate the former statutory post-conviction procedure under Chapter 177 and the habeas procedure under Chapter 34. The legislature was assured that the legislation would have the limited effect of requiring the trial court to hear all the collateral proceedings, and of consolidating

the procedures.

ii) The proposed amendments combining the two statutory collateral procedures were generated by a committee created by the Nevada Supreme Court to study the post-conviction process. Nevada Legislature, 66th Sess., Assembly Committee on Judiciary, Minutes at 3 (February 6, 1991).[2] The chair of the committee, who was staff counsel to the Chief Justice, explained to the Assembly that the bill was intended to eliminate the chapter 177 proceedings. Those proceedings would be "unnecessary" if a related constitutional amendment was approved to allow the district court in which the trial was conducted to exercise habeas jurisdiction, rather than restricting habeas jurisdiction to the district in which the petitioner was incarcerated. Id. District Judge Fondi emphasized the problems of increased workload in the district of confinement due to the rising prison population, and stressed the propriety of habeas cases being heard in the original trial district. Id. at 4. Judge Fondi represented that the proposed procedure "would lead to a simplification of the process, judicial economy and the betterment of not only the courts but also the individuals seeking relief and their attorneys." Id. David F. Sarnowski, the Chief Deputy Attorney General for the Criminal Justice Division, argued in favor of the amendment that "[t]he best forum for the consideration of any claim is in the original trial court. . . ." Id. at 5. In response to the question "who would be ahead and who would be behind?" under the proposed amendments, the staff counsel to the Chief Justice explicitly represented to the assembly committee, "the system would be ahead and no one would be behind. No access to the courts would be cut off, but rather the process was being simplified by eliminating a redundant procedure." Id. (Emphasis supplied). Following these representations, the Assembly committee recommended passage of the bill. Id. at 6-7. The representations made to the Senate were equally unequivocal. Staff counsel to the Chief Justice again characterized the proposed amendments as simply making "a two-tier system for post-conviction relief into a one-tier system." 15 App. 3523, Nevada Legislature, 66th Sess., Senate

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[2] The legislative history of the provision is in the 1991 legislative materials, although the statutory amendments took effect on January 1, 1993, because of the necessity of amending the constitution to allow the statutory change. Nev. Const. Art. 6 § 6(1); Art. 16 § 1(1).

Committee on Judiciary, Minutes at 3 (March 20, 1991). He explicitly "affirmed" to the Senate committee that "a defendant would lose no procedural safeguards currently afforded him under Chapter 177"and that the bill only "removes process for the sake of process." Id. Most important, Chief Deputy Attorney General Sarnowski, again testified on behalf of his office in support of the bill, which he represented "as doing nothing more than transferring jurisdiction where it should be: in the court where the case was originally heard." Id. (Emphasis supplied). Following these representations, the Senate committee recommended the bill for passage. Id. at 4.

iii) In Pellegrini, the Court recognized that its interpretation of § 34.726 would add a new procedural hurdle to successive petitions that had not existed under prior law, 34 P.3d at 528, but it did not apply its normal rule that a statute should be interpreted consistently with the legislative intent even if the plain language appeared to contradict that interpretation. In Moody v. Manny's Auto Repair, 110 Nev. 320, 325, 871 P.2d 935 (1994), the Nevada Supreme Court construed a statute as codifying a court-created limitation on a rule of civil liability, rather than as a codification of the rule itself, although it was not "explicitly stated" in the statute, relying specifically upon the legislative history. See also Nevada Power Company v. Haggerty, 115 Nev. 353, 367 989 P.2d 870 (1999) (referring to legislative history in construing statutory term); Banegas v. S.I.I.S., 117 Nev. 222, 19 P.3d 245, 249 (2001) (reviewing entire statute and legislative history to construe apparently unambiguous phrase); Advanced Sports Information, Inc. v. Novotnak, 114 Nev. 336, 339-341, 956 P.2d 806 (1998) (reviewing legislative history to determine that term "product" ambiguous, relying on principle that legislative intent prevails over "literal sense" of terms, and concluding that "product" includes intangible services).

iv) In Guinn v. Legislature, 119 Nev. 460, 76 P.3d 22 (2003) (on denial of rehearing), decided after Pellegrini, the same Court was faced with two constitutional provisions (the requirements of funding education and of a legislative super-majority to impose taxes) that were "clear on [their] face" yet still subject to "conflicting interpretations." 76 P.3d at 29. In construing the provisions, the Court resorted to "extrinsic evidence" to determine legislative intent based upon the fact that the voters were not informed of the conflicting interpretations before the passage of the constitutional provision. Id. at 29-30. Consequently, the Court in Guinn resorted

to a review of legislative history - focusing specifically upon the assurances made by proponents of the constitutional provision, id. at 25-27, in order to discern the intent of the legislation. Id. at 30. In particular, the Court focused upon consequences of the legislation that its proponents failed to warn about to conclude that the super-majority requirement for tax legislation had to yield to the education funding requirement. Id. 29-30. Had the court applied the same neutral principles of statutory construction that it applied in Guinn to the Pellegrini case, it could not rationally have concluded that § 34.726 applied to successive petitions.

v) The Court's failure to apply neutral principles, in Pellegrini, and the resulting unanticipated creation and retroactive application of a new default rule, makes the application of § 34.726 to petitioner's case impermissible under the due process and equal protection guarantees of the state and federal constitutions. Bush v. Gore, 531 U.S. at 104-109; Village of Willowbrook v. Olech, 528 U.S. at 562-565; Myers v. Ylst, 897 F.2d 417, 421 (9th Cir. 1990); Hicks v. Oklahoma, 447 U.S. 343, 346 (1980); see Hoffman v. Arave, 236 F.3d 523, 531 (9th Cir. 2001) ("if a state procedural rule frustrates the exercise of a federal right, that rule is 'inadequate' to preclude federal courts from reviewing the merits of the federal claim...[and] federal courts may reach the merits of the underlying claim"); Williams v. Lockhart, 873 F.2d 1129, 1131-32 (8th Cir.), cert. denied, 493 U.S. 942 (1989) ("new [state] rule designed to thwart the assertion of federal rights" is not adequate, and its violation will not be allowed to defeat federal jurisdiction).

11. No prejudice will result to the state from any delay in the filing of this petition, as all the evidence used in the first trial remains available, and the accuracy and reliability of the proceedings will be increased by the additional information disclosed in this petition.

12. The attorneys who previously represented petitioner were all appointed by the court and they were:

A. Pretrial Proceedings

Philip Kohn

Kedric A. Bassett

B. Trial and Sentencing Proceedings:

Philip Kohn

Kedric Bassett

C. Direct Appeal:

Robert Miller

D. State Post-Conviction and Post-Conviction Appeal:

David Schieck

13. Grounds for Relief:

Petitioner alleges the following grounds for relief from the judgment of conviction and sentence. References in this petition to the accompanying exhibits incorporate the contents of the exhibit as if fully set forth in this petition.

CLAIM ONE

Mr. Witter's death sentence is invalid under the federal constitutional guarantees of due process, equal protection, and a reliable sentence due to substantial and injurious effect of extensive prosecutorial misconduct and overreaching, which distorted the fact finding process and rendered the sentencing hearing fundamentally unfair. Concurrently, defense counsel's failure to investigate these same facts deprived Mr. Witter of his right to the effective assistance of counsel. Both of these claims violated Mr. Witter's state and federal constitutional rights. U.S. Const. Amends. V, VI VIII, & XIV. Nev. Const. Art. 1, §§ 3, 6, and 8; Art. 4, § 21.

SUPPORTING FACTS

The state violated Mr. Witter's clearly established due process rights by withholding exculpatory evidence and knowingly offering false or misleading testimony and evidence during the punishment phase in violation of Brady v. Maryland, 373 U.S. 83 (1963) and Napue v. Illinois, 360 U.S. 264 (1959). Concurrently, defense counsel failed to investigate, on his own, these allegations; defense counsel in a capital case are under a duty to investigate the allegations and supporting facts the prosecution plans to rely upon to return a sentence of death. Rompilla v. Beard, 545 U.S. 374 (2005).

During the penalty phase, the prosecutor misled the jury by presenting materially unreliable, false, and misleading evidence that Mr. Witter was an active member of a violent street and prison gang called the Nortenos. The state linked its misleading and false gang evidence to its future dangerousness argument to create the misleading perception Mr. Witter would, without question, kill again or violently assault another inmate or prison official in prison. The state further misled the jury, in violation of its due process duties, when it failed to disclose material evidence in possession of both local and testifying law enforcement refuting the argument that Mr. Witter was a known gang member. This presentation of unreliable, misleading, and false evidence, and the attendant failure to disclose material evidence so tainted and skewed the jury's deliberations that Mr. Witter's death sentence should be overturned and a new sentencing hearing ordered.

After the guilt conviction, trial counsel and the state met on Thursday July 6, 1995 to discuss penalty phase discovery. See ROA at 1553-1560. Mr. Witter's penalty hearing was

scheduled for Monday, July 10, 1995. See id. at 1558.

During the hearing, the state alerted the trial court that it had filed a motion, under Nev. Rev. Stat. § 175.552(3), to permit the state to introduce evidence that Mr. Witter was affiliated with a gang. See ROA at 1558. According to the state's motion: "At the time of [Mr. Witter's] arrest, the "Defendant told Officers Candiano and Webb that he was a gang member from California. . . . Photographs of the Defendant confirm the Defendant's gang affiliation as they depict various tattoos which denote the Defendant's gang affiliation, gang set, and gang symbols." ROA at 1564. The state also informed the trial court it planned to use two San Jose Police Officers, already named as witnesses on the state's penalty phase witness list, as gang experts. See ROA 1568-1569.

On Monday, July 10, 1995, defense counsel, Mr. Kohn and the state presented their arguments about the admissibility of the gang affiliation evidence the state wished to introduce. See ROA at 1575-1599. The state argued that Mr. Witter was a current member of the Nortenos gang, a Northern California street and prison gang. See ROA at 1575. According to the prosecution, the San Jose Police Department had documented evidence that Mr. Witter was a Nortenos gang member. See id. at 1575. Various tattoos on Mr. Witter also signified his status as a Nortenos gang member. See id. Mr. Witter made incriminating gang statements to Officer Candiano and Detective Thowsen at the time of his arrest. See id. Mr. Witter allegedly made gang statements to Dr. Lewis Etcoff during his August 10, 1994 evaluation. See id. at 1576. Lastly, Mr. Witter allegedly made gang signs when he was being booked and photographed. See id. at 1578. The trial court allowed the evidence.

During the penalty phase, the state introduced two San Jose Police Officers, Officers Ford and Jackson, who testified as gang experts.

According to Officer Ford, San Jose formed the Violent Crime Enforcement Team (VCET) in early 1994 to combat the growing gang problem in San Jose. See ROA at 1700. Ford was an original member of VCET. Id. He testified the gang problem had existed "for quite some time" before VCET was formed in 1994. Id. With Latino or Hispanic gangs, Officer Ford testified there were "two major street gang bodies in California," the Nortenos and the Sorenos. Id. at 1701. The Nortenos, according to Officer Ford, are located in Northern California (Norteno means north in Spanish) and "identify with the (number) 14, N being the 14th letter of the alphabet . . . or a one

four or XIV, which is 14 in Roman Numeral." Id. The Sorenos, on the other hand, are indigenous to Southern California (Soreno means south in Spanish) and identify with the number 13. The Nortenos and Sorenos were at one time, one large prison gang, but split into two different factions. Id.

The San Jose Nortenos, Ford testified, were involved in the "criminal enterprise of violence," because they "stab and shoot" Soreno gang members. Officer Ford noted "several" identifiers, including their willingness to pose for photos,[3] their display of a certain gang sign, [4] the use of certain tattoos, [5]the use of the color red [6] and the use of the San Francisco 49er's team logo. [7] Id. at 1702-74.

Ford connected these identifiers to Mr. Witter through various photographs. He initially said Mr. Witter's XIV and San Jose tattoos supported the inference Mr. Witter was a Nortenos gang member but qualified the opinion by stating that these tattoos "are just identifying what area they belong to." ROA at 1705 (emphasis added). Ford next noted that the "14" tattoo on Mr. Witter's right wrist while not a singular meaning, had both an alleged gang connotation as well as a geographic connotation (i.e., Latinos who have this tattoo are from Northern California). Id. at 1705. Mr. Witter's "Trust no man" tattoo was equally ambiguous. "I don't know if these are actually Chinese letters or what, but it's the symbol for "Trust no man." ROA at 1705. According to Ford, he learned this by talking with an unspecified number of self-proclaimed San Jose gang members who apparently told him this symbol meant "Trust no man."

Mr. Witter's tattoo depicting "two birds fighting" also had a gang significance. Ford

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[3] "[T]hey pose for pictures freely because they have their pride."

[4] "They would pose like this with a one and four or go like this with a four."

[5] These tattoos include "four dots across their knuckles," "an Aztec eagle" tattoo, tattoos that "spell out NF," and a "trust no man" tattoo.

[6] "Red is primarily worn by Nortenos and blue by Sorenos."

[7]. Officer Ford also testified that while Nortenos, per se, are not associated with any sports teams, "the Bay Area [Nortenos] are associated with the 49er gear or anything red... because that's the sports team of the [Bay] area..."

testified that "it looks like one bird or peacock has four feathers on top and one peacock has three feathers on top depicting a fight between the–three Soreno and four Norteno or northern." ROA at 1706 (emphasis added). Officer Ford admitted this was not a common gang tattoo. ROA at 1706.

Ford then asserted that the "San Jo" tattoo on Mr. Witter's back, while "not directed to any specific gang," "identif[ies] where you're from, prison or a gang." ROA at 1706. Nothing in the record supports this claim. [8]

Ford opined that Mr. Witter's red and white tennis shoes, which have an S.F. logo on them, also denoted the Nortenos gang. According to Ford: "I can tell you Nortenos do wear a lot of 49 wear like this." ROA at 1706. This is an obviously specious assertion; a significant number of football fans in San Jose also wear San Francisco 49er football attire because the 49ers are the closest professional football team to San Jose. Ford provided no empirical data to substantiate his claims. This alleged "gang affiliation evidence" could equally mean that Mr. Witter was an enthusiastic San Francisco 49er fan, which, in Mr. Witter's case, is a more legitimate argument. See Exs. 2.1, 2.11 and 2.12.

Ford was then shown a series of photographs; no evidence was adduced on how these photos were taken. State's exhibit 10, for example, a photo of two hands facing palms down with the thumbs tucked into the palms, was simply shown to Officer Ford and later, without objection from defense counsel, introduced into evidence. Ford opined that this photo was indicative of gang association because it displayed only four fingers on each hand. Nothing about that photo however, demonstrates that the hand posture was intended by Mr. Witter to be a display of gang affiliation, i.e. "Throwing gang sign." It simply shows the backs of his hands and could just as easily been explained as compliance with the order of a police officer or corrections official. Despite these ambiguous circumstances, Officer Ford opined that the pictures, including Exhibit 10 were

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[8] Indeed, as will become clear below, there is no evidence anywhere to support this assertion of gang identification. Nothing in Mr. Witter's California Youth Authority records, his California Department of Corrections records, or the San Jose Police Department records supports the assertion. Indeed, his parole officer, had she simply been asked, would have denied the gang association. Records from the California Department of Corrections specifically noted that Mr. Witter was not a gang member.

"indications that [Mr. Witter] is possibly a gang member." ROA at 1708. [9]

Officer Timothy Jackson also offered very damaging (and aggravating) testimony about Mr. Witter's alleged involvement with the Nortenos. Like Officer Ford, Jackson arrested Mr. Witter on the same charge of domestic violence. He testified to many of the same supposed gang characteristics as Ford. See ROA at 1743 (mentioning how the number 14 or XIV and the color red is associated with the Nortenos). Jackson opined that Mr. Witter's statement to Officer Candiano, the Las Vegas arresting officer, (i.e., "All I need to do now is to kill an officer and my reputation will be higher") was "indicative" of gang membership. See ROA at 1744 ("It's indicative of gang members to say that to heighten their reputation, and it's a threat that is taken very seriously."). Jackson also opined that Mr. Witter's "happy clown face and sad clown face" tattoo, state's exhibit 8, was indicative of gang involvement. See ROA at 1745 ("Talking with several gang members, what they tell me is the gang life, we smile now when you are on the outs and do your gang banging, your legal, fights or whatever it is; and when you get locked up for it, if and when, that's the cry side, the sad part of it; the smiling when you're out with your buddies doing whatever you do; and you're locked up, that's the crying side of it."). What was ignored about Mr. Witter's statement to Candiano was that virtually every inmate would make that assessment; it is common knowledge that there is a hierarchy within a penitentiary and those who would kill police officers rank at the top.[10] There is no evidence to support the claim that a clown face was indicative of gang membership.

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[9] The ambiguous circumstances are even more apparent when Exhibit 10 is compared to Exhibit 11. Mr. Witter was wearing the same clothing in both exhibits. Exhibit 10 shows the tops of his hands; 11 the palms with thumbs outstretched. It seems clear that, rather than "throwing gang sign", Mr. Witter was simply following the orders of the person taking the photos.

[10]. As Criminalist Alan Galaspy's testimony indicates, Mr. Witter was quite inebriated when he made these statements. At trial, Mr. Galaspy opined that Mr. Witter's blood alcohol level was between .13 to .19 when he committed these offenses and was apprehended by authorities. See ROA at 1252-1254. Mr. Galaspy has since altered his opinion and now claims that Mr. Witter's blood alcohol level was between .15 to .20. See Ex. 2.31. The reliability of Mr. Witter's statements or their relevance to gang activity is even more suspect.

The impact of Officers Ford's and Jackson's dubious gang testimony was accentuated, many times, during the state's closing argument. Specifically, both prosecutors effectively used Mr. Witter's alleged gang affiliation to strengthen its future dangerousness argument.

> Mr. Owens: Don't let him go back to prison where he can glory in what he has done, where he can glory like this, with the dried blood of James Cox still on his hands
>
> Just hours after murdering James Cox, what does the defendant think to do? He throws us a gang sign. He's proud of his gang.
>
> Don't let him go back to prison and be proud for what's he done. Don't let him go back where he can brag about what he has done. Don't let him go back with a higher reputation and get respect from the other inmates in the prison, where he can profit, from his crime by reaping the benefits of this murder, by taking a step above everyone else in the prison in esteem and power.
>
> Don't let him go back where he can murder again, and perhaps this time a corrections officer, because that is exactly what he has threatened to do. He told the police officers that "Take these handcuffs off of me so I can kill a police officer. That's all I need to do to raise my reputation higher."

ROA at 2157.

> Mr. Guymon: If history repeats itself, we begin to look at his life and we find when he was in the California Youth Authority, he was fighting all the time, involved in gang violence, fighting his enemies from L.A., Nortenos and Sorenos, northern and southern; that he witnessed stabbings, jumpings, was involved in those fights, got extra time, got extra punishment.
>
> The defense wants you to warehouse him. They want you to put him where he enjoys being, where he can fight, get drugs, where he can see them, where he can heighten his reputation.
>
> There are not many children with a perfect childhood and every parent would make some changes, but there are many that smile now and cry later. The defendant smiled then and leaves others to cry later.
>
> Interesting enough, the defense didn't ask their witnesses perhaps the most important question for you people: "Doctor, let's talk about the future dangerousness of this man. Can anybody in your profession predict future

> dangerousness?"
>
> I submit to you he was a learned man, well studied, honest and fair, and he said while the literature says we are not real good at it, maybe about 50 percent, but we can't predict with certainty. We can tell you the best indicator is history.
>
> So I took [Dr. Etcoff] through a history of violence and asked: Does history repeat itself? Are the acts of the defendant indicators of his future dangerousness?
>
> Because you people need to know what kind of danger rests in the future of lives of other individuals that come in contact with the Defendant.
>
> Now that's a question they didn't ask. It's a question I wanted to know; and the answer was clear: History repeats itself.

ROA at 2189-2192.

The prosecution had more than good reason to know that the testimony of Ford and Jackson was false. Before trial, the state contacted Mr. Witter's half-sister Tina Whitesell. During their phone conversation, according to Ms. Whitesell, the state asked her if Mr. Witter was in a gang or had ever been in a gang. She clearly informed the state that Mr. Witter had never been in a gang.

> Before William's trial, somebody called me on the phone and he said he was an investigator. He said he was getting background information on William and that he was helping on the case. He asked me if William was a member of a gang and I said no, he was a loner. I said no, I didn't think he was in a gang, that he didn't hardly hang out with anyone. He asked if William worked? And how did he support himself? I told him basically that it was his family, that he didn't work much, and that he always had a place to live because of different family members and women.

See Ex. 2.2. There was clearly evidence in the state's possession, evidence which was not disclosed to the defense. [11]

Ms. Whitsell's statement was not the only basis for doubting the veracity of Ford and Jackson. The state claimed, during the pre-penalty phase discovery hearing, that it had San Jose

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[11] Defense counsel, Phil Kohn interviewed Ms. Whitesell 2-3 times before the trial but never asked her about these allegations.

Police Department documentation establishing Mr. Witter as a Nortenos gang member. See ROA at 1575. During trial, however, the state failed to produce any of these alleged documents and for good reason: they did not exist. Rather than produce documentation (e.g., arrest reports, gang intelligence reports, etc), the state relied on the dubious testimony of two questionably qualified gang experts.

In 2005, Mr. Witter's current counsel contacted the San Jose Police Department and made the following request to the Custodian of Records:

> Our office is seeking to determine whether Mr. Witter was a member of a street gang In the San Jose area or, alternatively, was ever identified as a member of a prison gang. Mr. Witter lived in the San Jose area between 1979 and 1993. This is the only period of time that he lived in the San Jose area. In July and September 2002, and in May and August 2003, we received records from the San Jose Police Department in response to our informal requests for all those records relating to Mr. Witter. We have reviewed the records that were provided by your office; and there is no documentation that shows that Mr. Witter was affiliated with a street or prison gang.
>
> We seek confirmation from your office that you have no records, documentation, intake forms, photos, that would indicate that Mr. Witter was ever identified by the San Jose Police Department as a member of a street gang or prison gang. This request would encompass any and all documents and records maintained by or under control of the San Jose Police Department Suppression Unit and/or any gang-related files regarding Mr. Witter's involvement, affiliation, or identification with a street of prison gang.

See Ex 6.10. In a June 6, 2005 response letter, the San Jose Police Department wrote:

> We are in receipt of your request in which your office is seeking to determine whether Mr. Witter was a member of a street gang in the San Jose area, or alternatively, was ever identified as a member of a prison gang.
>
> Please be advised that this department has conducted a thorough search of our records and did not locate any documentation, intake forms, photos or otherwise that would indicate that Mr. William Lester Witter, DOB 7/19/63, SSN 548-15-8154, is a member of a street gang or was ever identified as a member of a street or prison gang.

See Ex. 6.11. (Emphasis added).

The prosecution violated Napue by presenting law enforcement witnesses knowing

their statements were not and could not be supported by records from their own office The state presented witnesses based on alleged documents that never existed. Mr. Witter was sentenced to death based on false, unreliable accusation by law enforcement. This issue demands that Mr. Witter's death sentence be set aside and a new sentencing hearing ordered.

Linda Rose testified for the prosecution. She was interviewed by trial counsel prior to trial and was the law enforcement professional who had the greatest amount of knowledge about Mr. Witter's activities, in and out of prison. She was never asked, prior to or during the penalty hearing, whether Mr. Witter was a member of the Nortenos or any other gang. When the state questioned Ms. Rose during the penalty hearing, there were no questions about Mr. Witter's gang activity and affiliation. See ROA at 1663-1679, 1684-1686.

Neither Ms. Rose nor the California Probation and Parole Department had any evidence whatsoever indicating Mr. Witter was a violent gang member. See Ex. 2.22. During federal habeas discovery, Mr.Witter obtained copies of his parole reports written by his former parole officers, Ms. Rose included. None of these reports mention gang involvement by Mr. Witter. See Exs. 5.13; 6.14. In August 2005, Ms. Rose provided the following information:

> I don't recall him having any gang conditions, like not associating with gang members or not being in areas where gang activity occurs. The one condition I recall was no alcohol. After the DUI on the lawn, we may well have added a curfew condition. Gang conditions are for known gang associates. The lack of gang affiliation meant if he had gang associates, it was with prison gangs, not street gangs. The way he wore his red bandanna, he looked more like a pirate than a gang member. If he had gang conditions, I wouldn't have allowed that [the bandanna].
>
> The biggest condition, I recall, was the alcohol condition. He was a high-control case because of his prior conviction. So I saw him a minimum of twice a month, and one had to be out in the field or at his residence.
>
> I never had any suspicions he was a gang member. It was not one of my considerations. If he had been a gang member, it would have been in his pre-sentence report and we'd know from the institution investigator if he was a member of a prison gang. We meet with local officials and they would tell us if they had any concerns with particular parolees. There would be a paper record of that. In police reports, if there were any suspicions of gang involvement, it would be stated in the police reports, like he was

seen with three known gang members.

Anybody can go from not being a gang member, and then it can reverse, where they're in a gang, say at 18, and then they get out. If a person was documented as a prison gang member once, then it's always. It would follow them in their records.

. . . .

If no one had your back, you can have trouble in prison. You do what you have to do to do time. If they are low-level, they are often defined as associates or having friends in gangs. Anyone who goes to a Level 2 facility or higher, you're going to have some type of gang affiliation.

Nortenos are generic to Northern California. The Nuestra Familia sort of dissolved to the Nortenos. Nortenos is not a specific -defined prison gang. I guess they are splitting groups that define themselves as Nortenos and may have some bylaws and people trying to gain control over larger gangs. The Mongols and the Mexican Mafia have a connection and the Hells Angels and the NF have some kind of connection.

. . . .

If asked if Will was in a gang, I'd have to say at this point, my answer would be, "Not that I remember." If I was shown records, then I would say I don't see any gang involvement.

A lot of ex-inmates in San Jose have a 14 or XIV tattoo. The XIV tattoo is like the shark on the neck with a lot of CYA [California Youth Authority] who are from Northern California. It's a geographic thing like the 415 (San Francisco/Oakland area code) black group from Oakland. `San Jo' is frequently on there. A 'Huelga Bird' is another. It's not necessarily an indication of gang involvement. A lot of copycats, teenagers, and wannabes put them on. The Huelga Bird also represents the farm workers. That's why tattoos are not good indicia of gang activity. Tattoos on the back of fingers are kids' tattoos. You first see them in juvenile hall. They form dots. I've seen them on most kids in juvenile hall here. The tears are often indicators of serving time and nothing else. Yes, they often use tattoos for protective reasons.

We may have talked about Will's tattoos a little bit, like you do all of this, now how do you expect to get a job? You look scary. People get scared of you. The tattoos never bothered me. I would see him by myself. I would do home visits without backup. When I have a serious gang member or dropout, I always take backup so there won't be any problems. I had no concern about the tattoos. I would have testified to that.

The four dots on the hand, Huelga Birds, spider webs, 14's, 49er's clothing are all signs for Northerners. Three elements are still needed for gang validation. Among those are being self-identified

> as a gang member, tattoos, a reliable informant, certain activity on view, and gang indicia like clothing, like wearing red, and pictures with other gang members.
>
> Tattoos are only one indicator. You need a physical act in furtherance of gang activity and you need a significant number of relationships with people known to be prison gang members. It has to be on an ongoing basis. You need other actions, other behaviors. Tattoos are only one. You need three solid pieces of evidence to establish gang membership or affiliation.
>
> We always follow up in person if someone says he's in a gang. We need more to validate it. If a person says he's a gang member there's a whole list of things to follow up on. If that wasn't done, then on the report it should have noted, "To Be Followed Up."

See Ex. 2.22.

Ms. Rose wasn't the only California official who could have offered relevant information on this issue. Judy Foster was a gang expert with the CDC's Special Services Unit in Sacramento, California. Ms. Foster, just as with Ms. Rose, acknowledged that the CDC [California Department of Corrections] never validated Mr. Witter as a prison gang member. Ms. Foster said before a prisoner can be classified as a member of a prison gang or disruptive group, he has to go through a validation process. According to Ms. Foster, each CDC prison has an Institutional Gang Investigator [IGI]. The IGI will generally initiate the validation process for a prisoner only after the prisoner has come to the IGI's attention. A prisoner usually comes to the IGI's attention if he has caused problems.

The validation process is performed for security and legal reasons. If an inmate is validated as a member of a particular prison gang or disruptive group, the institution will house him in a secure area where potential gang enemies cannot harm him. The validation process also gives the prison the right to house certain inmates in different security pods, like administrative segregation or secured housing. According to Ms. Foster, once the IGI initiates the validation process, it is relatively easy to validate an inmate. The process is premised on a point system. If an inmate presents with certain criterion they will receive a point. Three points is all that is needed to validate an inmate as a member of a prison gang or disruptive group. Mr. Witter was not validated as a gang member by CDC. This lack of a gang validation was confirmed by the CDC records.

Once the state made its gang affiliation argument and secured a death sentence against Mr. Witter, the state should have informed the Nevada Department of Corrections (NDOC) of Mr. Witter's gang affiliation so that he could be properly housed in a secure area of the penal institution. There was not a shred of paper in Mr. Witter's NDOC file documenting his alleged gang affiliation. See Ex. 6.14.

Mr. Witter's family, friends, and former co-workers also would have supported Mr. Witter's claim that he is not a member of any gang – street or prison, had they simply been asked. Cary Jones is Mr. Witter's very good friend who has known him since the early 1980s. According to Mr. Jones:

> Will was not a member of a gang. When you go into CYA, you have gang subcultures and have to hang out with Nortenos or Surenos. In CYA, you have to side with your own culture. If you're Mexican, you join the Nortenos or the Sorenos. You don't have a choice. CYA's a lot more brutal than prison. I did five years in Preston, CYA. It was 18 to 25 and I've done four prison terms in the joint. It's mandatory to join. You have to do it to survive. It's just bad. I'm a known gang member, but I'm a dropout now. I've been in Special Programs. It's all gang dropouts. The Gang Task Force has records.

Ex. 2.20.

David Sanders is Mr. Witter's very good friend who has known him since the early 1980s:

> Will never told me anything about gangs. I've never seen him ever hang out with any Mexican gang-bangers, never once, and I'll swear to that. I don't even think he knew any Mexican gang-bangers.
>
> The roman numerals XIV are a symbol for the "Nortenos." Nortenos means Northern California. The boundaries are like from Bakersfield. Those from Southern California are Sorenos. It just means one's from Northern

> California and one's from Southern California. The whites call whites 'peckerwoods.' It's like the Nortenos for Northern California. Like I say, "What's up, Wood?" meaning he's white. Will probably got the tattoos just to survive in prison. From what I hear, if you don't claim something in prison, then you're pretty much on your own. Like if the whites jump you, the Mexicans won't back you. Or if you're Mexican and don't claim and the whites and blacks jump on you, then no one will come to help you. You do what you've got to do. If I was in prison, I'd probably have peckerwood tattooed on me. As far as I know, he did that to survive. Cary is a lot like Will, in and out of prison. Cary's a smart guy when he's not drinking, real smart. I'd say that was on his body because he did it to survive, and I'd probably do the same thing.
>
> Will did not hang out with Mexicans. He hung out with the Martin brothers, Steve and Scotty Martin, and me and my brother, the Chacones, Mark, Steve, and Paul, and Cary. Donny, me and Cary are white. We all knew Will well. There was also Steve Ahern. Cary and William were the ones in and out of prison. That started with CYA. All the people he hung out with were white. He always hung out with white people. We were always here in southwest San Jose.
>
> I guarantee all these guys tell you Will never hung out with any gang-bangers. It's a long time ago, but we never hung out with any gang-bangers. Will wore baggy pants, but so do all the white kids now. We didn't knock him and he didn't knock us for wearing bell bottoms pants and steel-toed boots. None of us ever carried guns or anything.

Ex. 2.21.

Adele Chapple was also Mr. Witter's very good friend who has known him since the early 1980s:

> Will wasn't in a gang. If Will wasn't working, he hung out with very few people, mostly, Cary, David, and Donny. Cary, David, and Donny were never in any gangs. I never saw him with any gang members and I never heard of him getting in any gang-related fights. I never knew Will to carry a weapon. When Will was arrested he was always drunk, always by himself, and always arrested for alcohol related offenses, like DUIs and domestic violence. He's never been arrested for any gang-related offense. He's just not the gang type. He's too caring, sensitive, and independent.
>
> I've never felt afraid or threatened of Will when he was sober. Hell, I trusted him so much, I let him take my 8-year-old out on her 8th birthday. Will was never a threat when he was sober.

Ex. 2.17.

Lillian Reyes had a similar story to tell:

> William didn't have a mean bone in his body. He was a very giving and caring person. There were many times when my family and I needed money for groceries, school supplies, or school clothes. William would give me a hundred dollars and say, "Here homegirl, . . ." William frequently came by our house with many bags of groceries when he knew my family and I were running low on groceries. William did this even though he didn't make or have a lot of money. That was just William–he was just so nice and respectful to me and my family. He was a sweetheart. William also had a great sense of humor. He was always trying to make us laugh by playing pranks on each of us.
>
> William wasn't in a gang. He wore a lot of San Francisco 49er gear, like hats, jerseys, and bandanas, but you have to realize the 49ers were huge. William was just a 49er super fan. He was always sporting some sort of 49er

> gear. For the longest time I thought William was bald because he always wore hats, particularly 49er hats.
>
> William couldn't have been in a gang. He rarely went out. That wasn't his scene, to go and back up other guys. William would simply go buy a 12-pack or a 24-pack and bring it home and drink it with me or his sister Lani. William was too old and independent to be in a gang. In the four years William and I hung out together before he got arrested the last time, I never saw him with any gang members. That just wasn't his scene. I know a lot kids in CYA go through a phase of being involved in groups. My son, Aaron, went through the same thing. William wasn't in a gang when he was older and around me.

Ex. 2.18.

As did Eric Reyes:

> I don't recall Will ever being in a gang. He didn't have the personality to be in a gang, he's a loner, he was alone most of the time. When I saw him, he was always home. Will lived like two blocks away from my family. He was a huge 49er fan. This doesn't automatically mean he's a gang member though. Most northern male Latinos wear 49er gear or colors.
>
> Will was always working if he wasn't at home. It's kinda hard for him to terrorize the streets when he was either at home drinking or at work working.

Ex. 2.19.

Gina Reyes was Mr. Witter's girlfriend after his release from CYA in 1984:

> William was never in a gang. He liked to wear red because of the San Francisco 49er's; he was a huge 49er fan. William was more of a loner. He didn't associate with many people. It was his family and some close friends. Outside of his family, William's

didn't get close to anyone besides Cary, David Sanders, and Donny Sanders.

When we were dating I never saw him with any gang members or any shady individuals who could've possibly been gang members. Will never talked about the Nortenos. He never brought around anyone who he served time with in CYA or prison.

Will wore red simply because he was a huge 49er fan. For Christmas in 1988, after he got out of Soledad, I got him a 49er hat, 49er sweatshirt, and 49er beanie. I also got him a 49er jacket, a 49er beer mug, and a 49er coffee mug. I didn't buy these things for him because he was in a gang, I bought them for him because I knew he loved the ewers.

Ex. 2.12.

Bobby Seeger worked with Mr. Witter at Piedmont Moving Systems in San Jose, California during the early 1990s:

He always complained that these gang-bang guys wouldn't leave him alone. He said the guys wouldn't leave him alone, that he didn't want anything to do with it. I never saw him with any gang guys. He just wanted to be left alone.

I never saw him fly off the handle with customers. Customers are always very demanding in this business. Willie was a very hard worker and a very conscientious worker. I liked working with him. He took pride in his work. At work, the owner of Piedmont wanted Willie to wear long shirts to hide the tattoos.

We used to work a lot together. Willie respected me the most of anyone here. He liked working with me and I liked working with him. His brother-in-law, Donny Sanders, started taking him interstate because Donny always wanted someone with him.

I never experienced him drinking. The owner was a real stickler. He was against alcohol or drugs. He didn't want anyone around like that. I don't remember that ever happening with him. I never saw Willie acting strange or having to send him home. He was a very dedicated hard worker. I was kind of the psychologist back then and a lot of the guys used to use me as a shoulder to lean on. He talked about the gangs and the guys wouldn't leave him alone. He said he didn't want anything to do with them, but he didn't know what to do. With the tattoos, I always told him, "Willie, you've got to cover them up. They'll get you into trouble."

We had to wear a uniform back then and had to get him a long-sleeved shirt. Only two kinds of people had tattoos back then: military men or prisoners. I told him several times to get that stuff off him, that it causes nothing but trouble. We talked about it. He had to wear long-sleeved shirts. Otherwise, my boss wouldn't let him go out. He had to wear the collar high so you couldn't see his neck. He did it. He had no problems with it.

He said he didn't want to be in a gang. He wanted to continue with his life. He was more comfortable with me than anyone else around. I was kind of his big brother back then. Several times he told me these guys wouldn't leave him alone, that he was thinking of moving and he didn't know what to do.

I did several local jobs with him. We'd go out and do jobs. The customers loved us and would give us tips. I never had any problems with Willie. I liked working with him. He worked regularly. He had that goofy walk and would make everyone laugh. I still think if he had gotten rid of those tattoos, he would have had a better life. I told him to get that stuff off. The guys started work at 7 and might not get back 'til 6, 7, or 8. You never know in the moving business.

> He worked long hours. It's hard to believe he would go home and get drunk and come in the next day. It's pretty demanding, this work that we do.
>
> A big key thing is that when Willie was here he had to serve the public. He had to be on his best behavior, and he was. We never got complaints on him, and those customers, if they have a problem, they'll call right away and say, `Hey, get rid of this guy. I don't want him in my house. Get him out of here. But Will wasn't like that. He worked hard and he respected the customers and they liked him. No one ever complained about him taking anything. I never heard anything like that. I probably dealt with Willie more than anyone here. He worked directly under my supervision.

Ex. 2.24.

Scott McElfresh also worked with Mr. Witter at Piedmont Moving Systems in San Jose, California during the early 1990s:

> I never saw him involved in any gang activity or heard of it. He was a very independent guy. As far as I know, Willie was never associated with any gangs or anything like that. I never knew him to be a violent man. He never got angry. If he did, it never came out. That's why we were so shocked. We were saying, `Willie? Are we talking about the same Willie?'

Ex. 2.25.

Keith Miller, another co-worker had a similar story:

> He always kept his tattoos covered around us. No, I never had any problems with Will. He was always in uniform.
>
> I would often send him out on jobs. He came in every day I needed him. He would come in ready to work. The only people I really saw him around were his relatives, Donny and David Sanders. They were the two guys who

got Will the job at Piedmont.

Will never came in drunk or high. He never brought his personal life to work.

I don't think Will was ever part of a gang. He wasn't one of the guys who went along with the crowd. I don't see him ever doing that. He was independent. He didn't have time to be in a gang when he was around us. He'd come home for a day and be out on the road again. He'd be out on the road for weeks. If he was out on the road, he'd stay out there until the job was done, and then come back. He didn't talk like a hard guy. He looked like a hard guy, but he spoke like a nice, soft-talking guy.

Will was a respectable, dependable, friendly, happy guy who I would like to set down and talk to day or night. I'd like to hear what he had to say. He was a likable guy. I never knew him to use alcohol or drugs on the job. If he came to work drunk, we would have sent him home. But that never happened.

I'd have no problems testifying to this. I'd think you'd run into a lot of people who would speak well of him. I've heard a lot more good things he's done than anything bad.

Ex. 2.23.

Donny Sanders is Mr. Witter's brother-in-law and has known Mr. Witter for more than twenty-five years:

Will was never directly involved with a gang. Everything he wore was red, but that because he was a huge 49er fan. The red merely indicated where he was from–specifically, Northern California. It was more of a geographic indicator. Cary, David, and I, the three people who hung out with Will the most, weren't gang members. We were never involved with any gangs. Will never talked

about gangs.

He was not involved in a gang. But he does have the tattoos because he represented Northern California. There were no gang members around Will, that's the point. My brother wasn't in a gang. It was more of a geographic thing. He wore the colors because he was from Northern California, but actually being involved in a gang? No. He was never associated with any gang members. Never.

Will told me that the gangs approached him while he was in CYA. In CYA you have to affiliate with a gang for protective reasons. Likewise, you have to do something in CYA to prove yourself. It's either you do something or something is done to you.

Will told me about a prison incident while he was serving time for the Rumsey offense. He was sent to one of the southern prison facilities. He wasn't a Norteno, but his tattoos signified he was from northern California. This placed him in a lot of danger at the southern facility because of the large number of southern Latinos at this facility. Once he got off the bus he immediately got into a fight so he could be put in the hole by himself. Will knew if he was in the hole he'd be protected. It was more about geography than anything. He wasn't in a gang, he just looked like a northern Latino. And if you're a northern Latino, for some reason the prison system thinks you're a Norteno.

Will never hung out with any ex-CYA or prison inmates. He never brought any of his prison friends over. Once he'd get out of CYA or prison he left all that behind him. When he got out, he left all that alone. It was only us, my brother David, Cary, and a whole bunch of women. I never saw Will with any gang members. He was never arrested for any gang crimes. Every time he was arrested he was

> drunk, out of control, and by himself. Will did his own thing. He was too independent. He didn't need a gang for protection. He could protect himself.

Ex. 2.11.

Lani Sanders is Mr. Witter's biological sister:

> William wasn't in a gang. He was too independent, too much of a loner to be in a gang. He might have been in one in CYA because, without one, he might get hurt. Outside of CYA and prison he wasn't in a gang. He'd either work all day and then drink at night at home with his friends David and Cary, or he'd drink all day until he passed out. He was too much of a drunk to be in a gang. He never brought around any ex-prison or CYA friends. He never brought around or hung out with any gang members. Hell, he was never even arrested for any gang-related offenses. Every time he's arrested, he was drunk as a skunk and by himself. One of the gang officers who testified against Will even arrested him before for public drunkness and not for any gang crimes.
>
> He got most of his tattoos in CYA and prison. His good friend, Cary Jones, did most of the tattoos. They're not gang tattoos. Hell, he has so many tattoos, I lost track. He has "Martha" on his neck, I know that. He has a bunch of ex-girlfriends' names tattooed on him also.
>
> Will was also a huge San Francisco 49er football fan. That's why he wore red all the time. It wasn't gang-related.

Ex. 2.1.

Tina Whitesell is Mr. Witter's half-sister:

> William was too much of a loner to be in a gang. He hung out with Lani and

> their friends or he was with a woman who I didn't know who was taking care of him. Most of what he did was within walking distance. Most of his friends didn't have cars. A lot of the times they'd be at Gina's or her mom's.

Ex. 2.2.

Each of these witnesses was available to trial counsel, prior to trial. Trial counsel never investigated these issues or presented them to the jury.[12]

All of this evidence were either known to the prosecution or its law enforcement witnesses. The prosecution put on evidence that they either knew was false or should have known. These witnesses and those attorneys representing the state had information that would have demonstrated just how false these allegations were; they failed to disclose it to defense counsel. Even if none of these allegations of prosecutorial misconduct were true, defense counsel could easily have rebutted the assertions of gang membership by conducting a reasonably competent investigation, the failure of which constitutes ineffective assistance of counsel. See Claim Two. Whether harm is measured by materiality or prejudice, the result is the same. The state relied on the gang argument to get a death sentence when information existed that would have proven that argument wrong and substantially undermined the state's argument that Mr. Witter was a threat of future danger. Without that argument, Mr. Witter's mitigation claim was correspondingly, substantially stronger. Mr. Witter should get, at the least, a new punishment hearing.

The above stated claim is of obvious merit. Competent appellate counsel would have raised and litigated this meritorious issue on direct appeal and in state post-conviction. There is no reasonable appellate strategy, reasonably designed to effectuate petitioner's best interest, that would justify appellate counsel's failure in this regard. Petitioner is entitled to relief in the form of a new trial, a new sentencing hearing, and where appropriate, a new appeal.

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[12] Some, especially Donny Sanders, were in the courtroom throughout the trial.

CLAIM TWO

Mr. Witter's death sentence is invalid under the federal constitutional guarantees of due process, equal protection, and a reliable sentence due to ineffective assistance of counsel because of his failure to investigate both readily available mitigating evidence and the state's evidence to support the state's argument for death in violation of the state and federal constitutions. U.S. Const. Amends VI, VIII, and XIV. Nev. Const. Art. 1, §§ 3, 6, and 8; Art. 4, § 21.

SUPPORTING FACTS

Despite readily available evidence, defense counsel failed to conduct the requisite investigation of both the evidence the state planned to use to argue for a death sentence and the evidence available in mitigation. Defense counsel knew about Mr. Witter's past record and that the prosecution would try to argue that his client was a gang member and thus would pose a threat of violence to prison inmates should he be given a life sentence. Counsel failed to conduct an investigation that would have allowed him to rebut that claim. He knew that his client might well have been a victim of Fetal Alcohol Syndrome but failed to secure an expert to present that issue. He failed as well to conduct a full investigation into his client's past.

Evidence Adduced at trial.

The prosecution's case for death centered on Mr. Witter's past criminal offenses and his gang associations. Ronald Ezell was the first witness; a San Jose California police office, he arrested Mr. Witter in January, 1986 for stabbing David Scott Rumsey during a fight. ROA-7/10/1985, p. 59-68. Mr. Witter admitted his involvement to Officer Ezell. Mr. Rumsey also testified about the fight. Id. at 72-84. He suffered injuries to his intestines from the stab wounds. Michael Pomeroy, another San Jose police officer, also testified about his investigation into the offense. Id. at 86-93.

Linda Rose, a California Parole office whose declaration is set forth in detail in Claim One, testified. ROA-7/10/85, p. 93. She told the jury of Mr. Witter's prior convictions, including his five year prison sentence for the Rumsey assault, Id. at 96. She was his supervising officer and told the jury of his problems while on parole. Id. at 99. Mr. Witter spent two years and seven months in prison before being paroled. He was given a 30 day time loss because of misconduct, the nature

of which was not discussed. Id. at 99. Before he could be released, a "hold" was placed on him by authorities from San Jose. Id. at 100. The parole was suspended in 1989 because Mr. Witter absconded, that is, he failed to report to his parole office and failed to tell them where he was. Id. at 101. He was sent back to custody for three months. Id. at 101. While in prison, he got into a fight and stayed in custody an additional 120 days. Id. at 102. After his release, he was again sent back to prison in 1990, for drug (methamphetamine) and alcohol use. Id. at 103. These were violations of his parole conditions and he went back to prison for a 30 day detoxification program. Id. at 104. He was arrested again in 1991 for drug and alcohol use as well as for Driving Under the Influence. Id. at 104. Mr. Witter went back to prison, this time for six months. Id. at 105. He was discharged from parole in 1993. Ms. Rose also noted that the California prisons had summarized Mr. Witter's criminal history and noted that he had been charged with arson, resisting arrest, fighting, drunk driving, burglary, vandalism and drugs. Id. at 110. He had also been arrested for rape when he was 15, for which he was placed into the custody of juvenile authorities. Id. at 110.

San Jose officer James Ford then testified. His testimony about Mr. Witter's gang association was detailed in Claim One and won't be repeated here. Officer Ford arrested Mr. Witter in July, 1993 for vandalism. When Officer Ford arrived, Mr. Witter was in the front yard of a home, yelling and trying to get into the house. Id. at 123. He was angry and armed with a knife. Id. at 124. The offense arose because Mr. Witter's ex-girlfriend lived at the crime location and wanted nothing to do with Mr. Witter. Id. at 128. The owner of the home, Shanta Franco, also testified, Id. at 150, as did Officer Tim Jackson, whose gang testimony was also discussed in Claim One. Id. at 165.

Thomas Pipitone of the Las Vegas Metropolitan Police Department, testified that in August of 1994, he searched William Witter's cell while Mr. Witter was in custody awaiting trial. Id. at 179-181. Pipitone found a metal piece of a clipboard, an item not permitted inmates. Id. at 183-84. Such an item could have been fashioned into a weapon. Id. at 184-85.

Finally, the victims' family members testified about the effect of their murder on them. ROA - 7/11/95 - pp. 6-34 (James Cox), pp. 34-54 (Phillip Cox) and pp. 54 to 84. (Kathryn Cox). The prosecution rested.

Ruth Fabela was Mr. Witter's first witness; she was Mr. Witter's aunt, the sister of

his dead mother. ROA-7/11/95, p. 86-7. At the time of the trial, she had not seen him for 15 years. Id. at 87. In the early 1960's, he lived across the street from Ms. Fabela. Emma Witter had four children; two of which, Mr. Witter and his older sister, were raised by her and the other two by her mother. She had another younger child named Lonnie and another child that was kept hidden from the family. Id. at 88. His name may have been David. Id. at 89.

Emma Witter was a serious alcoholic and drug addict and had been so addicted since she was 15 years old. Id. at 89. Their father was also an alcoholic and Ms. Fabela herself was addicted to drugs. Id. Ms. Fabela thought her sister a terrible mother; she often paid the rent for her sister and brought her food. Id. at 90. Ms. Fabela did not know Ms. Witter's husband, Lewis very well.

The cross examination of Ms. Fabela was predictable. The prosecution brought out that she had been able to obtain sobriety on her own initiative, after attending only a 28 day program. Id. at 92. Her addiction did not cause her to commit any violent crimes. Id. at 93. She noted that the children's paternal grandmother loved them, wanted the best for them, tried to teach them and tried to help raise them. Id. at 96. When Mr. Witter was 15 years old, his grandmother was still trying to care for him. Id. at 97. The prosecution was able to establish through Ms. Fabela that Mr. Witter's sister, Tina, turned out well despite their mother's problems. Tina entered the Coast Guard, got an education, and was a caring and kind mother, Id. at 98, and raised by the same family as Mr. Witter. Id. at 99.

Tina Whitesell, Mr. Witter's sister, then testified. Id. at 100. She and Mr. Witter were taken from their mother's custody and awarded to their grandparents. Id. at 102. Living with their mother was "awful." Id. at 103. Emma Witter's only concerns were "drugs and alcohol and men." Id. Ms. Whitesell remembered "lots and lots of parties, lots of people at our house, spoons, cotton, syringes and pills." Id. at 103. Her mother refused to get her to school, resulting in Ms. Whitesell being held back a year. Id. at 104. Their father Lewis was in prison but when he was home, he and his wife fought all the time. The fights weren't limited to yelling; the fighting included assaults, sometimes with knives. Id. The children often found their mother in bed with other men, Id. at 105, some of whom hit her brother, Mr. Witter. At one point, their home was raided by the FBI looking

for an escaped prisoner. Id. at 106. They often went without food.

When Ms. Whitesell was ten and Mr. Witter nine, the children went to live with their grandparents who spoiled Mr. Witter. Id. at 107. Their grandmother was strict with the other children but pampered and protected Mr. Witter from "everything that he did that was wrong." Id. The grandparents were heavy drinkers who drank non-stop every weekend. Id at 108. Ms. Whitesell joined the military to get out of the home. Id. at 109.

The prosecution, of course, pointed out to the jury how much Ms. Whitesell had accomplished despite her disadvantaged family background. They noted her Coast Guard service, her skills, her success in schools, her lack of criminal violence. Id. at 111-13. They noted that she tried to look out for Mr. Witter, even though he was treated more badly by Emma Witter. Id. at 113.

Lewis Witter, Mr. Witter's father testified that he had been in and out of prisons since 1969. Id. at 136-37. He had long history of drug and alcohol abuse. His son, Mr. Witter, was born while he was in prison. Id. at 138. He confirmed Emma Witter's drug and alcohol abuse. Id. at 139. He confirmed the domestic violence. Id. at 140. The fights occurred in front of the children, including Mr. Witter. Id. at 141. The relationship with Emma was very similar to that between his own parents, the same grandparents that raised Mr. Witter when Emma no longer could do so. Id. They were drunks and would drink excessively every weekend. Id at 142. Lewis Witter would share alcohol and drugs with his son. Id at 146. They would inject drugs together.

The prosecution focused on the personal choices his daughter Tina made, leaving the jury with the inevitable conclusion that Mr. Witter's problems were the result of similar voluntary choices. Id. at 148. They established that it was easy to get drugs and homemade alcohol in prison. Id. at 151-53.

Elisa Sanders, Mr. Witter's sister, testified and confirmed the same home environment as the other witnesses. ROA-7/12/95 - 11-24. Michael Ritchison, Mr. Witter's cousin, also confirmed these facts. Id. at 37-44.

Dr. Louis Etcoff was the defense's last witness. He examined Mr. Witter as part of a competency evaluation on August 10, 1994. Id. at 60. He reviewed the offense reports and other records of the District Attorney's office and admitted that it was essential to "amass as many records,

independent of the person's interview, as possible." Id. at 60. The interview lasted three hours. Id. at 61. He administered some neuropsychological testing and an IQ test as well as two objective personality tests.

Dr. Etcoff provided a provisional diagnosis of Attention Deficit Hyperactivity Disorder, as well as drug and alcohol abuse and antisocial personality disorder. Id. at 67-8. He described the Witter family as the "quintessential family that would produce a violent person." Id. at 69. "If you took a thousand babies and had them raised by his parents, I would say a huge majority of them would be abnormal psychologically." Id. A significant number of these thousand hypothetical infants would be violent; very few "would function successfully in life. . . ." Mr. Witter grew up " in one of the most dysfunctional families that I can remember studying." "For all intents and purposes, he would have been better off without parents than having the parents he had." Id. at 70. That his grandparents, specifically his grandmother, chose to be overly protective, probably made matters worse because no limits were set. Id. at 72.

Dr. Etcoff noted that children of alcoholic parents are more likely to abuse drugs and alcohol. Id. at 73. He proffered two reasons for this development. First, parents are role models and if they drink or are alcoholic, children will likely follow that model. Second, there is a genetic component to alcoholism and drug abuse. Id. at 74. The role model theory also, in Dr. Etcoff's mind, applied to violence in the family: "if you grow up in a household in which you witness [regular] violence, . . ., then the likelihood of you as a child losing control of your own angry impulses as an adult or teenager or child is greatly increased. . ." Id. at 75. He noted a genetic component to family criminality. Id. at 76.

Etcoff addressed the effects of alcohol abuse on such a family dynamic. He noted the disinhibiting effect of alcohol abuse on human beings. Id. at 76. Its use cuts off the ability to control angry impulses. Id. at 77. "Alcohol is not something you want an angry person to have access to." Id. at 78. He noted the history of anger issues in Mr. Witter's record. "Anger is a huge, huge important characteristic of this person."

Etcoff address the issue of abandonment and noted that the effect of childhood rejection never disappears and is often found in "murderous behavior of abandoned adults." Id. at

81.

Despite this compelling presentation, the prosecution's cross examination was expected. Etcoff had to admit that the killing of the Cox's was, at least in part, the act of a free will, though one impaired by alcohol. Id. at 90. He admitted the obvious that not all of those who suffer from Attention Deficit Hyperactivity Disorder commit murder. Id. at 93. Mr. Witter's childhood did not mandate the Cox murders. He admitted that someone in a bad environment could still choose to be a lawful person. Id. at 96. The same was true of those who had been sexually abused as a child. Id. Even those with drug and alcohol problems can rectify that problem with Alcoholics Anonymous and live a "lifetime of sobriety." Id. at 97.

Closing Arguments of counsel at the Penalty Phase

During their closing arguments, the prosecutors sought to rebut Mr. Witter's argument for mitigation by focusing on personal responsibility and exploiting the "evidence" of his gang associations. Mr. Owens argued that the effect of Mr. Witter's mitigation claim was that all of society was now responsible for Mr. Witter. ROA-7/13/1995 - 31.

> At some point in growing up, we all develop a conscience, the ability to know right from wrong. The psychologist who testified, Dr.Etcoff testified that William Witter knows right from wrong. He developed the ability - we develop the ability to make decisions for ourself and choose the path we will follow. William Witter chose his path.

Id. at 32. He asked that the jury not allow Mr. Witter to return to prison where "he can glory in what he has done, where he can glory like this, with the dried blood of James Cox still on his hands." Id. Owens noted that within hours of the murder of James Cox, Mr. Witter "throws us a gang sign. He's proud of his gang." Owens asked that Witter not be sent back to prison where he could "be proud of what he's done. . . brag about what he has done. . . with a higher reputation and get respect from other inmates in the prison. . . by taking a step above everyone else in the prison in esteem and power." He argued that Mr. Witter would murder again if incarcerated. Id. at 33.

After the defense presentation, Mr. Guymon delivered the State's rebuttal and emphasized the same points as his colleague. He argued that to accept the defense's argument in mitigation would be to place "him hin prison, where he can heighten his reputation and perpetrate unspeakable crimes on perhaps unsuspecting guards." Id. at 57. He noted that other prisoners might

be victims as well. Id. at 58. He insisted that Mr. Witter never followed the rules, that he was always fighting, "fighting all the time, involved in gang violence, fighting his enemies from LA, Nortenos and Sorenos, northern and southern. . . . " Guymon continued to emphasize Mr. Witter's threat of future danger. Id. at 64-5.

Evidence discovered during habeas proceedings

While defense counsel's presentation was both compelling and commendable, he failed to investigate certain areas of Mr. Witter's life, a failure which allowed the jury to have a false and incomplete understanding of Mr. Witter's life. The Standards of the American Bar Association for Criminal Justice make clear counsel's duties; counsel must investigate the State's case for death. He or she must investigate those facts and circumstances that the state will rely upon to urge the jury to sentence a capital defendant to death. Defense counsel must conduct, as well, a thorough investigation into his client's social and mental health history, an investigation which did not occur here.

A. Defense counsel's investigation.

Mr. Witter was arrested and charged on November 14, 1993. Trial counsel were appointed on November 22, 1994, and first interviewed Mr. Witter on April 15, 1994, approximately two months after the state filed its Notice of Intent to Seek Death, and nearly five months after appointment. See Ex. 3.6.

During the April 15, 1994 interview, trial counsel uncovered part of Mr. Witter's social history: Mr. Witter's mother, "Emma Witter . . . was [an] alcoholic and drug user. Was sent to prison for drugs when William was eight years old." Mr. Witter "and his sisters went to live with grandparents because father was in prison." Mr. Witter and his siblings moved to Hawaii with his grandparents. His sister, Lani Sanders, "has his psych report from California Youth Authority." Mr. Witter "had lots of problems in school. While in Hawaii he was sent to Storefront, an alternative school for problem students." He "was busted for possession of couple pounds of weed in Hawaii when he was fourteen or fifteen . . . Says he has been drinking since he was twelve." Mr. Witter "was in alcoholic rehabilitation at the Sullivan House in San Jose." He "was sent to California Youth Authority for Arson in 1981. Spent thirty to forty months; Was sent to Soledad in 1986 for

Assault with Deadly Weapon. Spent thirty-some months. Was violated for drug possession three or four times." His "parole officer was Linda Rose . . ." Mr. Witter "was very drunk at the time of the [David Rumsey] stabbing." Mr. Witter "does not deny the offense, but says, 'If I had not been drunk I never would have done that. That's not me. I know drunk is no excuse. Anyway, when I'm drunk I have done stupid things before." Ex. 3.6.

Thus, in April 1994, trial counsel knew: (1) Mr. Witter had a significant problem with alcohol since a very early age; (2) his mother was an alcoholic, drug user who spent time in a California jail or prison; (3) his father spent time in a California jail or prison; (4) he himself spent time in CYA as a juvenile where he underwent at least one mental health evaluation;(5)he had spent time in a California jail and prison; (6) his parents lost custody of their children; and (7) once his grandparents gained custody of him and his sisters they moved to Hawaii where he attended at least two different schools and was involved in the Hawaiian juvenile justice system. By April 1994, trial counsel also knew that documentation relevant to petitioner's background would be found in the records of the California Youth Authority, the California Department of Corrections, his mother Emma's and his father Lewis Witter's criminal background records, the records of sister Lani Sanders' possession (CYA psychological reports), Emma and Lewis Witter's medical records, the records of a San Francisco family court relating to Emma and Lewis Witter's loss of parental rights, school district records frm Hawaii, and the records of the Hawaii juvenile justice forum.

Between November 1993 and August 1994, trial counsel, however, sent only one record request, to Mililani High School in Hawaii in April 1994. See Ex. 6.17. Trial counsel requested a juvenile court file in California on March 21, 1995, but never got it and did not follow up on that request. Trial counsel did not receive petitioner's criminal history until April 17, 1995, two weeks before Mr. Witter's continued trial date of May 10, 1995. Similarly, on March 20, 1995 trial counsel finally received (after a March 9, 1995 request) a "copy of the Child Welfare Agency report regarding the removal of William and his sisters from their mother in 1972." Trial counsel failed to request Emma Witter's medical, psychiatric, or criminal records until February and March 1995 and never followed up. See Exs. 3.13, 3.15, 3.16, 3.17, 3.18.

Trial counsel knew that petitioner's parents Emma and Lewis Witter lost custody of

their children during petitioner's childhood but made no effort to secure any of those records. He never collected the social history records of Mr. Witter's brother, Donald despite being told of Donald by other family members. He failed to obtain the criminal history records of Mr. Witter's mother Emma. Despite knowing that Mr. Witter had been placed into the custody of the California Youth Authority, counsel never obtained them. Counsel also failed to obtain Mr. Witter's records from the California Department of Corrections. He failed to interview witnesses who could have presented a more complete picture of the dysfunctional Witter family.

Most significantly, trial counsel failed to investigate and obtain the services of an expert to establish that Mr. Witter was a victim of Fetal Alcohol Syndrome. Trial counsel first learned of Fetal Alcohol Syndrome (FAS) and FAE during the spring of 1994, see Ex. 4.2 at 5, when he read a book about FAS/FAE children and realized that Mr. Witter might be affected by FAS or FAE. Ex. 2.26.

Trial counsel interviewed Mr. Witter's family members in California prior to trial. In a memorandum dated August 19, 1994, trial counsel noted aunt Ruth Fabela's comments, "I asked about the possibility of Emma drinking alcohol while William was in the womb, and she indicated as has everyone else, that Emma was always drunk. Emma drank a lot. She was drinking heavily from the time she was 15 years old until the time she died, and there was never a time she wasn't drinking; so she clearly would have been drinking when he was in the womb;" "[S]he could not remember a day that Emma did not drink and it would be absolutely impossible for her to have gone nine months without drinking." Exs. 3.8; 4.2 at 7.

Ms. Fabela testified in the penalty phase that Emma drank excessively since she was fourteen or fifteen years old. See ROA at 1895. During another pre-trial interview, Lewis Witter, Mr. Witter's father, told trial counsel, "Emma was a heavy drug and alcohol user while she was pregnant. She was drunk when I met her and when we got together at eighteen we drank all the time, always to excess." Ex. 3.8. Lewis Witter testified that Emma Witter was an alcoholic who started using heroin after he went to prison the last time [in 1971]. See ROA at 1945-46. Trial counsel interviewed Mr. Witter's grandfather, William Lester Witter, pre-trial. The elder Mr. Witter said, "Emma was a drug addict and an alcoholic. She used both during her pregnancy with William." Ex.

3.8. The elder William Witter did not testify.

On October 19, 1994, and on October 25, 1994, trial counsel informed Mr. Witter he intended to present an FAS/FAE defense. See Ex. 3.10. Trial counsel intended to urge a defense of "not guilty by reason of insanity because a victim of FAS was unable to control the urge to drink." On this date, trial counsel informed Mr. Witter he had yet to request and receive "records that would show Emma's alcohol use." See Ex. 3.11. On December 12, 1994, trial counsel reminded Mr. Witter of his intent to present an FAS/FAE defense. Trial counsel told Mr. Witter he was making arrangements to have him evaluated by an FAS/FAE expert. On this same date, trial counsel informed Mr. Witter he finally received his father's signed release forms relating to Emma's records and that he could finally "start the records gathering process for Emma." See Ex. 3.12. Trial counsel never had Mr. Witter evaluated for FAS/FAE. [13]

Trial counsel realized, pre-trial, that a defense regarding FAS/FAE would be necessary. Ex. 2.26 at ¶ 29. Trial counsel realized that pictures of Mr. Witter as a child displayed some of the facial stigmata of FAS. Ex. 4.2 at 9. He knew that Mr. Witter's mother drank abusively while pregnant with Mr. Witter. He understood that Mr. Witter's behavior when intoxicated was similar to behaviors discussed in FAS/FAE literature in that "especially when he drank . . . there was no rules, he could not put together his actions and the effect they would have . . ." Ex. 4.2 at 8. Trial counsel did not request resources from his office to retain an expert in Fetal Alcohol Effect or hire, for consultation or testimony, an FAS Expert. Exs. 2.26; 4.2 at 7.

Trial counsel attempted to locate an FAE/FAS expert but did not read additional literature about it or 'look into it' further during his preparation for Mr. Witter's trial. Ex. 4.2 at 9.

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[13] Trial counsel had Mr. Witter evaluated by Dr. Lewis Etcoff. The engagement letter asks Dr. Etcoff to evaluate Mr. Witter for competency and to see if there are any "psychiatric issues" relevant to the defense. See Ex. 3.3. Trial counsel asked another local doctor, Dr. Hess, to perform some different testing. In the engagement letter to Dr. Hess, trial counsel noted, "Dr. Etcoff was looking into the social history of Mr. Witter and was not requested to consider the effects of alcohol on Mr. Witter." Dr. Hess was limited in compensation to $300.00; "Complete your examination and write a report. The County limits payment at $300 but if you need more money let me know." See Ex. 3.5.

In the post-conviction hearing, trial counsel said he "absolutely" should have used an FAS expert at the penalty hearing. Id.. at 12. On May 5, 1995, approximately a month-and-a-half before Mr. Witter's trial was scheduled to start, trial counsel contacted an expert from the University of Washington. From this conversation, trial counsel believed he had to have a geneticist "cross-examine" Mr. Witter before an expert would accept a role in Mr. Witter's case. Trial counsel contacted a Las Vegas geneticist but the geneticist refused involvement in Mr. Witter's case. Trial counsel was informed that there was no genetic test that could determine FAS. Ex. 3.25. Trial counsel made no more effort to retain an expert once he failed to retain a geneticist.

On June 20, 1995, three days before Mr. Witter's trial was scheduled to start, trial counsel requested a third continuance to secure an FAS/FAE expert. Trial counsel had been appointed during November, 1993. He had already asked for and obtained two continuances, from October 1994, see ROA at 072-074, and May 1995, see ROA at 160-165, to prepare for trial and locate experts. See also Ex. 4.3 at 16-18. The trial court had already granted trial counsel's second motion informing trial counsel there would be no more extensions. The trial court set the new trial date for June 19, 1995. See ROA at 163-165. The trial court denied trial counsel's third request for a continuance arguing it had already given him two continuances and more than a year to locate an FAS/FAE expert. See ROA at 360-369. Trial counsel believed that, even if granted the continuance, his office, the office of the state Public Defender, would not have funded the geneticist or the FAS/FAE expert. Ex. 4.2 at 11-19. Trial counsel did not ask for the resources regardless of his office's supposed position on expert funds, but merely assumed that the funds would not be authorized. The jury heard no evidence or allegation that Mr. Witter was impacted by Fetal Alcohol Effect. Evidence and expert testimony was readily available regarding FAE.

B. Gang Evidence

The factual allegations about the false allegations of Mr. Witter's gang membership have been detailed in Claim One and won't be repeated in full here. It is sufficient to note that trial counsel failed to obtain Mr. Witter's California Youth Authority records, failed to obtain his California Department of Corrections records and failed to request and obtain the records of the San Jose Police Department. All of these records would have demonstrated the falsity of the state's

allegation of gang membership. Despite interviewing Linda Rose, trial counsel never asked her whether Mr. Witter had in fact been a member of either a street gang, known as the Nortenos, or its prison equivalent. Despite talking to family members, he never asked them about these issues. His omission allowed the state to argue, unrebutted, that Mr. Witter was in fact a gang member and would likely use that status to inflict violence on other Nevada inmates were the jury to sentence him to life imprisonment. Had counsel taken these very simple and easily available steps, i.e. obtain records, appropriately interview family members, etc, he could have substantially undermined the prosecution's case for death, substantially strengthened his own case for life and probably saved his client from the death penalty.

C. Fetal Alcohol Syndrome.

Dr. Natalie Novick Brown is a psychologist who specializes in FAE. She informed current counsel:

> FAS was first recognized and discussed in a public paper by researchers at the University of Washington in 1973 (Jones & Smith, 1973). In addition to a determination of maternal alcohol consumption, these researchers identified three diagnostic features associated with the syndrome: 1) pre- and/or postnatal growth deficiency, 2) a characteristic set of facial anomalies (referred to as "facial dysmorphology"), and 3) central nervous system damage/dysfunction. Several years later, a study of alcohol related damage in the central nervous system suggested that structural brain damage might be the basis for many of the neurodevelopmental abnormalities classified under the broader heading of "central nervous system dysfunction" (Clarren & Smith, 1978).
>
> By 1978, after more than 250 published case reports, it was clear that FAS was only one of several identifiable forms of disorders associated with maternal alcohol abuse. Hence, the term Fetal Alcohol Effects, or FAE, was developed to classify these additional manifestations (Clarren & Smith, 1978). While individuals with FAE did not display all three of the primary facial abnormalities associated with FAS (i.e., short palpebral fissures, flat philtrum, and thin upper lip), research consistently showed that compared to individuals diagnosed with FAS, those with FAE could suffer from as many or more of the neurodevelopmental disorders (Streissguth & O'Malley, 2000). That is, even without the facial evidence of FAS, the brain damage and resulting

> cognitive-behavioral problems could be as severe in individuals with FAE as in those with FAS.
>
> The diagnostic labels applied to fetal alcohol impairment have changed over time to reflect increasing diagnostic precision. For example, in 1996, there was refinement in the diagnosis by the Institute of Medicine to include five categories of diagnosis: FAS With Confirmed Maternal Alcohol Exposure (Type 1), FAS Without Confirmed Maternal Alcohol Exposure (Type 2), Partial FAS With Confirmed Maternal Alcohol Exposure (Type 3, and the condition with which William Witter was diagnosed by Dr. Levin), Alcohol-related Birth Defects (Type 4), and Alcohol-Related Neurodevelopmental Disorder (Type 5). More recently, the term Fetal Alcohol Spectrum Disorders (or FASD) was promulgated as a general term for all five of these diagnostic categories (Streissguth & O'Malley, 2000). However, while the labels have changed, the original diagnostic criteria for FAS established in 1973 have changed very little over time, even after being reconsidered by other groups such as the Fetal Alcohol Study Group of the Research Society on Alcoholism (1980s), the Institute of Medicine (1990s), and the Center for Disease Control (2000). By the time of William Witter's trial in 1995, which was around the same time I was doing my FAS/FAE postdoctoral fellowship, the syndrome was definitely not a new or novel concept to medicine or psychology.

Ex. 2.27.

By 1995, not only medical and psychological professionals knew about FAS/FAE, but the legal community knew of it as well. By 1987, Nevada's family and appellate courts recognized Fetal Alcohol Syndrome as a deleterious birth defect. See Kobinski v. State Welfare Div., 738 P.2d 895 (Nev. 1987). By the late 1980s and early 1990s, capital litigants around the country were investigating how FAS adversely impacted a capital defendant's development. See, e.g., Francis v. Dugger 697 F.Supp. 472 (S.D. Fla 1988); State v. Rose,, 451 S.E.2d 211 (N.C.1994); State v. Brett, 892 P.2d 129 (Wash. 1995); Hunter v. State, 660 So.2d 244 (Fla. 1995); Ex Parte Dobyne, 672 So.2d 1354 (Ala. 1995). By 1991, the Nevada Legislature debated a bill regarding criminal sanctions against mothers when babies were born with Fetal Alcohol syndrome. Sheriff, Washoe County, Nev. v. Encoe, 110 Nev. 1317, 1320, 885 P.2d 596 (1994).

In 1986, the Indian Health Service had published a booklet titled A Manual on

Adolescents and Adults with Fetal Alcohol Syndrome. This publication noted:

> Arithmetic is the most difficult academic task for patients with FAS / FAE. The average arithmetic level is at the 2nd grade, 8th month level. . . .Poor arithmetic skills present a major obstacle to independent living, as many patients have trouble making change at the store, let alone managing their finances. Poor arithmetic scores also reflect poor memory, poor abstract thinking and difficulty with basic problem solving.
>
> . . . .
>
> Impulsiveness, lack of inhibition and naivete is common among the patients we have seen, regardless of age or gender. . . . Aggressive behavior was mentioned as sometimes a problem for about 40% of the boys . . . .Some of the boys, particularly those from less protective and structured environments, had a feisty attitude in that they were quick to anger when crossed and quick to strike out impulsively
>
> . . . .
>
> The adolescent patients with FAS / FAE who had a strong overlay of psychosocial problems were often those without structures, nurturant environments, or those whose early environmental situations had been particularly traumatic.
>
> . . . .
>
> These patients were commonly described as very 'people-oriented,' and gregarious. the outgoing, excessively friendly manner seen as positive in younger children with FAS became more of a problem as these people grew up. . . most adolescents and adults with FAS/FAE remained sweet in temperament and helpful and considerate in their interpersonal interactions as they matured. Thus many of the characteristics noted in young children continued into adult hood.

See Ex. 4.4 at 29, 32, 33, 34, 36, 45.

FAS information was readily available. Any competent attorney would have developed an understanding of FAS sufficient to realize that any medical doctor, and not just a geneticist, could identify and diagnose FAS/FAE. Trial counsel was informed during the search for an expert that there was no genetic test for FAS at the time of trial, yet he continued to pursue a geneticist and allowed the difficulty in retaining a geneticist to prevent him from developing this defense. Ex. 3.25. Competent trial counsel would have developed an understanding of FAS/FAE

that would also have enabled him to present FAS/FAE evidence to the jury even without a diagnosis from a medical doctor. See State v. Brett, 126 Wash.2d 136 (1995) (testimony was presented regarding Brett's upbringing and behavior which allowed the defense to argue and the jury to infer that Brett suffered from FAS or FAE even though no medical doctor testified). During the penalty hearing, the trial court offered to allow trial counsel to show the jury a photo of Mr. Witter as a child to argue that the picture suggested Mr. Witter suffers from FAS without any expert testimony. See ROA at 1598-99; Ex. 5.17. Trial counsel did not take advantage of this opportunity to develop an FAE defense.

Trial counsel was also prevented from offering such a defense because his employer, the Clark County Public Defender's Office (CCPD) would not provide financial resources. The CCPD's lack of resources, particularly for a capital case, fell well below that required by the Sixth Amendment. See Ex. 2.26.

Trial counsel had a duty to develop and present a defense explaining Mr. Witter's repeated violence while intoxicated as a by-product of the birth defect known as Fetal Alcohol Effect. Michael L. Levin, M.D., M.P.H., a Las Vegas medical doctor, evaluated Mr. Witter by performing a physical examination, reviewing records provided by counsel, and reviewing photos of Mr. Witter. Dr. Levin concluded:

> William Witter meets the diagnostic criteria for Type 3 Fetal Alcohol Syndrome. He has confirmed alcohol exposure in utero and some, albeit mild, components of the facial features associated with prenatal exposure to alcohol. . . . William's childhood and past history as well as the neuropsychological testing performed perfectly describe the complex behavioral cognitive profile of the alcohol related neurodevelopmental disorder.

Ex. 3.1. Competent counsel could have developed and presented this evidence.

The impact of FAS/FAE on Mr. Witter's development was readily available. The medical doctor who evaluated Mr. Witter and diagnosed the FAE generally does not counsel or offer psychological support for patients but he recognized:

> Mr. Witter has proven that he cannot function in the absence of a severely structured environment and this is unlikely to change. From his experiences as a

> young child, William harbored deep-seated anger which manifested itself in violent acts while under the influence of alcohol. Anything that made William angry while under the influence of alcohol could trigger a violent outburst. The records indicate that William had little recollection of his activities during these events. Certainly William's criminal acts were the direct consequences of alcoholism with the phenomenon of blacking out, acute intoxication, deep-seated anger and resentment, and general maladaptive and antisocial behavior. These characteristics are the secondary disabilities associated with William Witter's unrecognized diagnosis of Fetal Alcohol Syndrome.

Id.

An FAS/FAE expert could have persuasively offered the jury an explanation of how FAS/FAE adversely affected Mr. Witter's life. Dr. Novick Brown is an FAS/FAE expert, retained by current counsel. Dr. Novick Brown first agreed that Mr. Witter was properly diagnosed as FAE:

> In 2002, Dr. Levin diagnosed William Witter with FAS Type 3, or FAE. To clarify this diagnosis, FAS Type 1 is the "classic" FAS diagnosis and includes all of the features typically associated with the syndrome: confirmed maternal alcohol exposure, the characteristic facial abnormalities, growth retardation, and evidence of central nervous system neurodevelopmental abnormalities. FAS Type 3 is differentiated from FAS Type 1 by virtue of the fact that only some of the facial abnormalities are present, and the individual manifests either growth retardation, evidence of central nervous system neurodevelopmental abnormalities, and/or evidence of cognitive-behavioral abnormalities that are inconsistent with developmental level and cannot be explained by familial background or environment alone. These abnormalities include learning difficulties, deficits in school performance, poor impulse control, problems in social perception, communication deficits, abstraction deficits, specific deficits in mathematical skills, and/or problems in memory, attention, or judgment. Based upon my knowledge of the syndrome and its cognitive-behavioral manifestations and review of the case documents listed above, I believe that William Witter was properly diagnosed by Dr. Levin as having Fetal Alcohol Syndrome Type 3, or FAE as it is also known.

Ex. 2.27.

Dr. Novick Brown reviewed declarations from Lewis Witter, Ivy Witter, Lani

Sanders, Donny Sanders, Tina Whitesell, Arlene Ritchison, Michael Ritchison, Louise Hemming, Lisa Reyes, Lillian Reyes, Marty Amador, Valerie Sanseverino, Gina Reyes, Mary Byrd, Adele Chapple, Keith Miller, Carmen Apodoca, and Scott McElfresh. She reviewed summaries of medical interventions and criminal actions involving Emma Witter, school records from California and Hawaii for William Witter, police reports of offenses committed by William Witter in Hawaii and California as a juvenile and as an adult, and records from juvenile courts and probation in California, an evaluation conducted by Lewis Etcoff, PhD, including test data, and a medical evaluation conducted by Michael Levin, M.D., M.P.H..

Dr. Novick Brown explained that FAE impacted Mr. Witter's life in many ways, and that FAE persons are much more likely than non-FAE persons to be in trouble with the law or have substance abuse problems:

> William Witter displayed multiple cognitive-behavioral disabilities consistent with the type of primary disabilities typically seen in individuals diagnosed with FAE. He also displayed a number of adverse life outcomes because his primary disabilities were not diagnosed and treated. According to research in the 1990s, disabilities stemming from FAS/FAE are categorized as either "primary" or "secondary" depending upon whether they are a direct manifestation of central nervous system malfunction (i.e., primary disabilities) or whether they are mediated by environmental influences (i.e., secondary disabilities). "Primary disabilities" are defined as functional deficits that stem directly from the structural brain damage and central nervous system dysfunction caused by prenatal alcohol exposure (e.g., Streissguth et al., 1996). Individuals with FAS/FAE are born with these primary disabilities, which manifest as deficits in general intelligence, learning (particularly arithmetic), attention and activity level (e.g., hyperactivity), communication, socialization, planning and problem solving, and difficulties with adaptive functioning. "Secondary disabilities" are functional difficulties an individual is not born with that presumably could be ameliorated through accurate diagnosis and appropriate intervention. Environmental factors exert positive or negative influence on the expression of secondary disabilities but have nothing to do with primary disabilities. With effective treatment of primary disabilities, secondary disabilities can be prevented or at least reduced (Streissguth, 1997). However, without accurate diagnosis and treatment, secondary disabilities often

> emerge when the child approaches adolescence and adulthood, manifesting over time as extreme problems in psychosocial functioning that lead to adverse life outcomes. Secondary disabilities include mental health problems, disrupted school experience, trouble with the law, confinement, inappropriate sexual behavior, alcohol and drug problems, dependent living, and problems with employment. It was surprising to researchers in the 1990s that a large number of individuals with fetal alcohol impairment displayed these secondary disabilities (Steissguth et al., 1996; Streissguth & O'Malley, 2000). For example, 60% had been arrested, charged, and/or convicted of a crime; 50% had been in a confinement setting (i.e., psychiatric hospital, jail, prison, residential substance abuse treatment); and 30% had alcohol or drug abuse problems.
>
> Review of data in this case leads to a strong conclusion that William Witter displayed secondary as well as primary disabilities related to his FAE diagnosis. To my knowledge, he never received treatment for any of his primary disabilities. This lack of treatment in childhood for his primary disabilities is a critical issue that affected his later substance abuse, his physical violence, and, in particular, his unrestrained brutal aggression in the 1993 sexual assault and murder. Had he received appropriate treatment for his primary disabilities, it is highly likely that his secondary disabilities would have been more manageable and less extreme, if they had developed at all. This conclusion is based upon multiple studies of secondary disabilities in the 1990s (Streissguth et al., 1996; Streissguth et al., 1999; Yates et al., 1998).

Id.

Dr. Levin opined about secondary disabilities:

> The secondary disabilities of Fetal Alcohol Syndrome usually occur after age 12 years (for William, this is about the time when his behavior and function started drawing attention). In general, this refers to adaptive living impairments (disruptive school experiences, problems with drug and alcohol abuse, irresponsible parenting, joblessness, homelessness, mental health problems, victimization, trouble with the law, early sexual experimentation, and premature death). These secondary disabilities occur if the primary disabilities are not treated. In the results of the Centers for Disease Control secondary disability study conducted on 415 individuals, mental health problems were seen in over 90% of individuals. Sixty percent of children had attention deficit disorder, and 50% of adults had depression. Disruptive school experience was present

in 43%, and trouble with the law was present in 42%. 49% of adolescents had inappropriate sexual behavior.

See Ex. 3.1.

According to Dr. Novick- Brown, Mr. Witter's FAE problems were not limited to criminality or violence:

> With respect to primary disabilities, William Witter not only had documented evidence of intellectual deficits but a specific math deficit as well. His IQ was tested twice prior to trial, with a WAIS, by Dr. Etcoff on August 10, 1994, and with an unidentified test by Dr. Hess on March 28, 1995. In one test, he obtained a Full Scale IQ of 83, with a specific impairment in mental arithmetic. In a second IQ test, he obtained a Full Scale IQ of 78. These scores fell in the Low Average to Borderline range of intellectual functioning (i.e., more than one standard deviation below average). While not all individuals with FAS/FAE obtain below-average IQs, the majority do. Learning disorders are prevalent, and arithmetic seems to be a particular challenge. Dr. Hess noted Mr. Witter was not capable of performing serial 7s. When evaluated by Dr. Etcoff and asked how he did in school, Mr. Witter reported that although he had poor grades in general, he found arithmetic especially difficult. He reported attention problems throughout school and poor grades beginning in fifth grade, and he eventually dropped out of school in ninth grade after repeating the grade twice. Available grade reports partially confirm his self-report, showing that while he obtained a C his first semester of math in seventh grade, his math grade fell to an F by the second semester (i.e., a D average for the year). He obtained a D- average for the eighth grade year, and by ninth grade, he was earning Fs in math. An achievement test in the ninth grade indicates only a fifth grade skill level (18th percentile) in arithmetic application. As Dr. Levin noted, Mr. Witter's scores on this achievement test indicated significant areas of weakness within each broad category of reading, language, and mathematics. Dr. Etcoff opined that an attention deficit might account for Mr. Witter's academic problems and consequently gave him a provisional diagnosis of Attention Deficit/Hyperactivity Disorder (ADHD) and Developmental Arithmetic Disorder. Prior to 1994, there is no indication that Mr. Witter had ever been diagnosed with or treated for these disorders. It should be noted that attention and hyperactivity disorders as well as learning disorders are frequently encountered comorbid diagnoses in individuals diagnosed with FAS/FAE (e.g., Streissguth & Kanter, 1997; DSM-IV-

TR).

> William Witter also had a socialization deficit, which is another common primary disability for individuals with FAS/FAE. Such deficits manifest in a number of ways, including a tendency to be overly social, friendly, and communicative to the point of not being wary of strangers. Individuals with FAS/FAE tend to be very gregarious but superficial in their friendships. They can talk easily to anyone and crave attention, but they tend to have difficulty with emotional attachment. William Witter was repeatedly described as being unusually gregarious when not under the influence of alcohol. For example, former girlfriend Gina Reyes testified[14]:
>
> "When sober, you can't but fall in love with the guy. He was truly remarkable. He had a magical personality, one that could win over anyone. Very charismatic. It was like instant love....William was the most personable individual I knew when he was sober, in that he was able to get along with anybody, anywhere, and he could fit into any situation. When sober, William simply had an electric personality."
>
> Gina Reyes's mother Mary Byrd, who lived with Mr. Witter for more than a year, testified: "He could talk to anyone about anything....He could tell good stories and talk on any subject."
>
> Lillian Reyes, Mr. Witter's friend, testified: "William had a great sense of humor. He was always trying to make us laugh by playing pranks on each of us."
>
> Valerie Sanseverino, paternal cousin, testified: "He could start a conversation with anyone."
>
> Lewis Witter, William Witter's father, testified: "In Hawaii, he had girlfriends coming out of his ass. Hell, in San Jose he had girlfriends all the time. The women loved him. He didn't have any trouble picking up women. . . . He was very charming. Even strangers liked him. He's a social person."

Ex. 2.27.

The primary disabilities that most prominently affected Mr. Witter were the lack of impulse control and judgment disabilities. These disabilities are directly related to FAE:

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[14] Current counsel provided Dr. Novick Brown the declarations from friends and family included with this petition. Dr. Brown described statements in the declarations as "testimony".

Impulse control and judgment deficits are two additional primary disabilities typically seen in individuals affected by prenatal alcohol exposure and are factors that have important implications in the current matter. The ability to control one's urges and emotional reactions and make appropriate choices are skills essential for prosocial behavior. Consistent with his FAE diagnosis, William Witter was described in adult conviction records as "immature" in general, and, when intoxicated, he displayed a chronic pattern of severe impulse control and judgment problems. An arrest in 1992 typifies the extremity of his impulse control problem when under the influence of alcohol. After throwing a shopping cart through a former girlfriend's window, he was approached by police officers who shone a light on him and asked if they could talk to him. When he ignored them and kept walking, an officer walked in front of him and asked him to stop. Mr. Witter took his shirt off and started to "shadow box" and yell at the officer. He then ran into a parking lot, screaming that he was going to kill the officers. As he was taken into custody, he continued to scream and threaten over and over, "I'm gonna bomb you." While in custody, he spontaneously yelled, "Yeah! I just fucked Brenda, and I'll fuck her again right now!" He continued to threaten that if the officers removed his handcuffs, he would kill them. In addition to this incident, I understand that he acted in a similar manner when arrested for public intoxication in Euless, Texas, in November 1993, a few days before the murder.

The record documents numerous incidents of severe dyscontrol while under the influence of alcohol. Family and friends unanimously testified that when he became intoxicated, Mr. Witter often became enraged at the slightest provocation. Consistent with his exquisite sensitivity to the effects of alcohol, family and friends consistently described him as a "Jekyll and Hyde" personality when drunk. They provided the following testimony in post-conviction affidavits:

"William had an amazing personality when sober. His demeanor would drastically change, like Dr. Jekyll and Mr. Hyde, when he began drinking. When he got drunk, he'd get this evil look in his eyes like he was an entirely different person." -- Gina Reyes, Mr. Witter's girlfriend

"When William was drinking, there would be a point he'd reach when he would become someone else. It was exact....When he got like that, he'd go out usually. He'd have an angry look. His eyes would be glittery." -- Mary Byrd, Gina Reyes's mother

"William would snap once he drank too much. When he drank he, more often than not, became absolutely crazy. He never did anything violent when he was sober. If there was alcohol, then he snapped....If you said the wrong thing, he'd snap and become very angry and violent. When Will started drinking, you couldn't stop it. It was like a snowball effect. You couldn't stop the rage. He was either going to pass out or he was going to end up in jail." -- Carmen Apodoca, former girlfriend

"When William didn't drink, he was a great person....When he drank, though, he was a totally different person. He was a violent drunk. It was like a Dr. Jekyll and Mr. Hyde thing. If he was drinking and you looked at him wrong, you better watch out. It's amazing how he changed, just amazing. You could actually see him changing before your eyes." -- Adele Chapple, friend of the family

"When Will got drunk, it was like Dr. Jekyll and Mr. Hyde." -- David Sanders, friend.

"When Will drank . . . his personality drastically changed like his father's and grandfather's . . . Will went berserk after Martha refused to give him the car keys. Will busted everything around the house and eventually pushed Martha down, took the keys from her, and took the car. Another time Will actually went in search of a butcher knife to confront someone who had been invited over to the house but Will didn't want there....Will's 'Jekyll and Hyde' drinking personality got him kicked out of various bars....Will didn't act like that when he was sober." -- Arlene Ritchison, paternal aunt

"I first noticed William's Jekyll and Hyde behavior after he was released from CYA. He trashed my kitchen when he was drunk.... tore up the kitchen and threw a chair through the sliding glass door and a window. Everything was upside down and turned over. . . Will never would've done this to grandma Martha, or anyone for that matter, if he were sober." -- Lani Sanders, sister

"Will is 'Dr. Jekyll and Mr. Hyde' when he drinks. Every time Will was arrested, he was drunk, or he was drunk and on meth. I first noticed Will's Jekyll and Hyde behavior after he got out of CYA, when he trashed our kitchen when he was drunk. I also remember an incident where he trashed Grandma Martha's house. I remember another drunken rampage where Will smashed grandpa's big screen T.V. and the patio windows. There was glass everywhere." -- Donny Sanders, brother-in-law

"...he'd pull a "Jekyll and Hyde" when he drank. He'd turn into a very mean and angry drunk like me. If he wasn't drinking or using, he was the greatest guy. Everybody loved him. He was very charming. Even strangers liked him....Almost every time he drank he'd flip. His buttons were easy to push. It didn't take much to set him off. He'd feel good at first, he'd be gregarious, want to dance, and then there's the red zone....Once he hit the red zone, watch out. William put numerous holes in the walls of my house with his fists." -- Lew Witter, father

"Will mimicked Lew when he drank. Lew changed when he drank, so did Will. They're both "Jekyll and Hyde" drinkers. You could see him change as he drank more and more alcohol. Will would drink too much and black out. He'd never remember what he did. He'd drink hard liquor, go into a blackout stage, and get really violent." -- Lisa Reyes, cousin

"Will's personality changed as he drank more. It was like a "Jekyll and Hyde" thing, where he'd be one person one minute and another person the next minute. Once he changed, it was as if you didn't even know him. He was completely different, he was just out of control....I remember one incident at the Almaden Lounge when Will took a cue stick to a guy's head after he said something about Will being Mexican. Will broke the pool cue on the guy's face without much warning. The guy's nose was broken....If anybody looked at him wrong, Will would want to fight. It didn't take much to flip his switch." -- Michael Ritchison, cousin

"William was a Dr. Jekyll and Mr. Hyde. He was definitely not the same person he was when drunk....He broke a lot of windows at Grandma's and Grandpa's in San Jose when he was drunk. He'd put his fist through walls. William was always doing stuff, even stupid stuff....he was a walking time bomb. You always had to walk carefully around him. You never knew what would set him off. You had to watch what you said because it always escalated into a fight." -- Tina Whitesell, sister.

Ex. 2.27.

Dr. Novick Brown explained the neurological origin of the dyscontrol and judgment deficits and how these problems impacted the murder:

Research has shown that prenatal alcohol exposure causes structural brain damage that affects functioning in the frontal lobe of the brain, particularly the prefrontal cortex, which is an area

that is especially sensitive to the teratogenic effects of alcohol (e.g., Bookstein et al., 2002). Brain imaging research has found that **prenatal alcohol exposure seems to target the corpus callosum in particular and is associated with a pattern of deficits in executive functioning in individuals diagnosed with FAS/FAE** (Bookstein et al., 2001). Executive functions, which control impulses and channel them into prosocial rather than antisocial behavior, involve cognitive skills such as inhibition, planning, internal ordering, working memory, self-monitoring, verbal self-regulation, motor control, regulation of emotion, and motivation. Obviously, socialization (i.e., good executive functioning) depends on intact basic cognitive functioning (Connor et al., 2000). **When executive functions are compromised by prenatal alcohol exposure, an individual will:**

1. **engage in socially inappropriate behavior,**
2. **be unable to apply consequences from past actions,**
3. **have difficulty processing information,**
4. **have difficulty with storing and retrieving information,**
5. **need frequent cues or "policing" by others,**
6. **need external motivators,**
7. **display exaggerated emotions, and**
8. **lack remorse.**

Executive functions are particularly relevant to individuals with FAS/FAE because poor self-regulation and judgment, deficient response inhibition, and failure to consider consequences are often described clinically in this population (Connor et al., 2000).

Lack of impulse control is one of the hallmark behavioral symptoms in individuals with FAS/FAE. **This deficit often leads to compulsive use of alcohol and drugs as well as other uncontrolled behaviors such as rage reactions, physical aggression, stealing, and high risk behaviors.** In some FAS/FAE-impaired individuals, there is very little self-control even when they are not under the influence of disinhibitory substances such as alcohol. In others, while they may generally function in a prosocial manner under the best of circumstances, when their central nervous system is affected by something that erodes executive functioning, there can be a significant and abrupt change in their ability to control their impulses. Alcohol is a powerful disinhibitor because of its impact on the neurochemistry of the brain. In FAS/FAE-affected individuals, the disinhibitory effects of alcohol tend to be greatly magnified. As a result, when faced with events that trigger negative emotion, individuals with

FAS/FAE often overreact and behave impulsively without the 'in between' moderating (i.e., socializing) steps involved in healthy executive functioning. **Impulse control is not a dichotomous issue in individuals with FAS/FAE. In some, executive functions are severely affected, and there is constant difficulty in functioning in a prosocial manner.** In others, executive function impairment may appear more noticeable only at certain times, such as when the individual is severely stressed or is under the influence of a substance that compromises central nervous system functioning (e.g., alcohol).

Such sensitivity to alcohol clearly appears to be the case in Mr. Witter's situation. Without exception, those who knew him best described him as polite and affable one moment and belligerent and explosive the next. They described the change in him as an abrupt transformation from one emotional and behavioral state to another. **Data reviewed in this case indicate clearly that this transformation occurred *only* in the context of alcohol intoxication.** Thus, while anger and violence were modeled for him by his parents and others in his life, it appears he was able to behave in a prosocial manner when not under the influence of a disinhibiting substance. However, the moment alcohol began to affect his fragile executive functioning, he lost the ability to restrain his destructive impulses. The extreme nature of his aggression (i.e., beyond that which is typically seen in individuals with Substance Intoxication), the abrupt change and significant discrepancy between his inhibitory control when sober versus his self-control when intoxicated, and his inability to moderate his behavior over time following serious legal consequences are consistent with the kind of severe impulse control deficits seen in individuals affected by prenatal alcohol exposure.

The fragility of William Witter's executive functioning is a critically important issue in terms of his volitional control ability. According to the text edition of the Diagnostic and Statistical Manual, Fourth Edition (DSM-IV-TR), the essential feature of Substance Intoxication is the development of a reversible substance-specific syndrome caused by recent ingestion of a substance (in Mr. Witter's case, alcohol). Consistent evidence from multiple collaterals who knew him in different contexts provides convergent validity for a conclusion that he not only experienced this disorder whenever he drank alcohol but that **the loss of volitional control caused by alcohol combined with the volitional control impairment he already possessed due to his birth defect, causing an exaggerated behavioral response**

> **to alcohol beyond what is typically observed in people not impaired by prenatal alcohol exposure.** According to the DSM-IV-TR, in unimpaired individuals, Substance Intoxication can cause "clinically significant maladaptive behavioral or psychological changes" associated with the intoxication, such as belligerence, mood liability, cognitive impairment, impaired judgment, and impaired social functioning – all of which are due to the direct physiological effects of the substance on the central nervous system. The Manual further notes that the specific clinical picture in Substance Intoxication "varies dramatically" among individuals and also depends on "the person's tolerance for the substance." In Mr. Witter's case, he had almost no tolerance for alcohol. Not only did he display all of the classic symptoms of Substance Intoxication whenever he passed a certain point in his drinking, but those symptoms were significantly magnified. This exaggerated response stems from an interaction between the *temporary* changes that alcohol causes in the frontal cortex of the brain where impulses are controlled and the *permanent* deficit in frontal cortex functioning that he suffered as a result of his prenatal alcohol exposure. Moreover, because of chronic impulse control and judgment deficits even when he was not drinking, he was unable to stop his substance use despite the fact that it resulted in repeated serious consequences to himself and others.

Ex. 2.27. (Emphasis added). In other words, Mr. Witter's violent behavior was not "caused" by his family background, though as Dr. Novick-Brown makes clear, it was exacerbated by it. Instead, this behavior was the direct result of parental conduct occurring before Mr. Witter was even born. Contrary to the prosecution's argument, this wasn't about Mr. Witter's own personal choices; he was doomed to failure before he was ever old enough to have a real choice.

Mr. Witter was poisoned *in utero*, which permanently diminished his ability to exercise self-control and judgment. This permanent disability was grossly exaggerated when he consumed alcohol. This permanent disability affected his ability to stop consuming alcohol. Dr. Novick Brown concluded:

> William Witter is sentenced to death for a brutal crime that he committed while intoxicated. Given data in this case that support the FAE diagnosis he received in 2002 from Dr. Levin, it is clear that alcohol intoxication (a secondary disability) and lack of impulse control and judgment (primary disabilities) rendered Mr. Witter a very dangerous man and were

> significant factors in his violence. It is equally clear that given his birth defect and the pervasive short-term and long-term ramifications of that condition, **he had virtually no ability on his own to change the negative course of his life.**

Id.. (emphasis added)

Mr. Witter suffered from a mind-altering permanent disability that bore upon his behavior from his ability to exercise arithmetic concepts to his ability to control himself when intoxicated. Mr. Witter did not develop these deficits on his own free will. External intervention might have alleviated some of these deficits but it was not available to Mr. Witter. Dr. Brown opines:

> By the time of William Witter's trial in 1995, FAS and FAE had been recognized for 20 years as major known causes of developmental disability, and the life-long implications of these disabilities had been recognized for 10 years. Follow-up studies in four countries had demonstrated the continuing adverse effects of prenatal alcohol exposure into adolescence and adulthood (Streissguth & Kanter, Eds., 1997). However, when he was a child and teenager, no one knew about the damage and long-term effects that prenatal alcohol exposure could cause. Thus, while he might have been identified as a child at risk and referred for evaluation had he been born in the 1980s, unfortunately he was born 20 years too early to be detected in routine screening by medical or school personnel and referred for medical evaluation. Thus, it was the timing of the recognition of this syndrome that prevented him from being identified and treated for FAS/FAE as a child.
>
> All of Mr. Witter's caregivers, with the exception of his paternal grandmother, regularly abused alcohol. This unbridled use of alcohol by these caregivers undoubtedly interfered with adult recognition that William Witter had even a learning disability, much less a pervasive birth defect that caused significant problems in his functioning. Had some of his primary disabilities been treated in childhood, the severity of his secondary disabilities might have been reduced.
>
> Secondary disabilities associated with fetal alcohol impairment are preventable if an individual is diagnosed early and receives appropriate interventions. According to a four-year study at the University of Washington funded by the Centers for Disease Control and Prevention (1996), specific "risk factors" *increase* the probability that a fetal alcohol

impaired individual will go on to develop secondary disabilities, and specific "protective factors" *reduce* that probability. These risk and protective factors apply to an individual's childhood up to 18 years of age and are mutually exclusive. These mediating factors include the following: living in a nurturing and stable home for at least 72% of childhood, receiving a diagnosis of fetal alcohol impairment prior to age six (which permits positive interventions to be applied early in life), never having experienced violence, living for at least 2.8 years in each household, experiencing a good quality home ("good quality" was operationally defined by 12 specific factors), being FAS rather than FAE (because the facial characteristics make the condition more noticeable to others and therefore more prone to positive intervention), and having basic needs met at least 13% of the time during childhood. Follow-up research (Streissguth et al., 2004) also found that having been sexually or physically victimized in childhood was an additional mediating factor that affected the later expression of inappropriate sexual behavior.

Data reviewed in this case reveal that William Witter experienced most of these mediating factors as *risk* factors rather than *protective* factors: he never lived in a "good quality" home (i.e., his early childhood was spent in a non-nurturing, unstable home; his adolescence was spent in an unstable home that involved caregiver alcohol abuse, domestic violence, child physical abuse, and lack of structure), he was not diagnosed until the post-conviction process began (i.e., well into his adult years), he was frequently the target of violence as a child and adolescent by caregivers, he was the victim of physical and sexual abuse, and he was diagnosed as FAE (i.e., FAS Type 3) rather than FAS. With respect to having his basic needs met in childhood, data indicate that this was a risk factor during at least the first nine years of his life when he lived with his mother. Regarding the final factor (i.e., living for at least 2.8 years in each household), data indicate that he lived for nine years in multiple locations with his mother and spent the remaining nine years of his youth in his grandparents' care or committed/incarcerated in juvenile facilities. Collateral affidavits provide data supporting the conclusions reached above with respect to these risk factors and note in general:

- during the first nine years of his childhood, he was exposed to domestic violence, neglect, caregiver substance abuse, sexual abuse, and physical abuse in his mother's care;
- during the last nine years of his childhood, he was exposed to domestic violence, caregiver

substance abuse, physical abuse, and permissive (unstructured and undisciplined) parenting in his grandparents' care;
    - he frequently observed his father's physical violence toward his mother and grandfather's physical violence toward his grandmother;
    - he frequently observed both parents and his grandfather abusing alcohol and/or drugs;
    - during the first nine years of his life, he was permitted to wander the streets, where he observed drug addicts, prostitutes, homeless people, and gang members; he did not receive basic medical and dental care during childhood until he began living with his grandparents at age nine;
    - he experienced residential and school instability throughout his childhood;
- when he was in junior high, his father encouraged him to drink alcohol and smoke marijuana by participating in these activities with him;
- his grandmother nurtured him but did so in a permissive way that did not hold him responsible for any misbehavior; and
- he was not diagnosed with FAS Type 3 until 2002, well into his adult years.

Behavior problems in children are often blamed on poor parenting skills, but by the time children reach adolescence, any antisocial behavior they might display is often interpreted as willful misconduct. Adolescents and adults are expected to have the developmental capacity to behave in prosocial ways, even if they are exposed to poor parenting and multiple traumas in their childhoods. However, for individuals with fetal alcohol impairment and deficits in executive functioning, maintaining good behavior is beyond their control, especially in disinhibited states such as alcohol intoxication. While good parenting skills and other protective factors are required for good outcomes, even FAS/FAE children raised in stable, healthy homes can exhibit antisocial behaviors (Streissguth et al., 1996). This is due to their defective executive functioning which causes them to be highly suggestible and prone to direct influence from others in their lives. If that influence is antisocial, they are not neurologically equipped to consider alternative choices and behaviors. William Witter had very little positive influences in his life and no interventions for his FAE. As a result, he had virtually no chance to avoid the adverse life outcomes associated with untreated FAS/FAE.

Ex. 2.27. Dr. Novick Brown concluded:

The awareness that both FAS and FAE are birth defects caused by maternal alcohol abuse has led to increasing awareness in the legal profession that a different level of attribution is warranted for individuals with fetal alcohol impairment (Fast, Conry, & Loock, 1999; Baumbach, 2002). **Rather than assuming these individuals became unmotivated, manipulative, antisocial, and/or self-defeating solely because of poor parenting experiences and free**

> **will, research over the last 15 years has shown consistently that *untreated primary disabilities* are the basis for their maladaptive behaviors. Notwithstanding the fact that environmental influences can play a significant role in the expression of secondary disabilities, it also has been established in the scientific research that individuals with FAS/FAE have structural brain damage that makes it highly unlikely that they will be able to withstand the negative influence of environmental risk factors without appropriate treatment.** As Streissguth and colleagues noted recently (Streissguth et al., 2004), one of the strongest correlates of adverse outcomes in individuals with FAS/FAE is lack of an early diagnosis: "The longer the delay in receiving diagnostic information, the greater the odds of adverse outcomes." The research indicates that for William Witter's debilitating substance abuse and antisocial behavior to have been prevented, he needed appropriate intervention in childhood to eliminate or reduce the risk factors he was exposed to and substitute protective factors. **Through no fault of his own, this did not happen. Thus, while environmental risk factors were clearly important in his outcome, unlike individuals without brain damage who have the capacity to withstand negative environmental influences and emerge from childhood as prosocial adults, those like Mr. Witter who are affected by prenatal alcohol exposure and untreated do not have that ability.**

Ex. 2.27.(emphasis added).

Mr. Witter was poisoned while he was in his mother's womb. His capacity to exercise judgment and control impulses were significantly and adversely impaired. The negative impact had disastrous consequences for Mr. Witter, James Cox, Kathryn Cox, David Rumsey, and many other people Mr. Witter came in contact with when intoxicated. Trial counsel's ineffectiveness prevented Mr. Witter from explaining to the jury how FAE impacted his life and his actions on the night of the murder. Competent trial counsel would have thoroughly understood FAE and would have retained an FAE expert to present Mr. Witter's compelling story to the jury. Dr. Novick Brown recognizes that such testimony was available at Mr. Witter's trial:

> When William Witter was born in 1963, nothing was known about the long-term effects of FAS/FAE on adult functioning. When he was ten, the term "Fetal Alcohol Syndrome" was just being identified publicly (Jones & Smith, 1973). It was not until he was 21 that researchers began to publicize information about Fetal Alcohol Effects (Abel, 1984), and he was 26 (i.e., 1989) when Congress finally passed legislation to mandate labels on all alcohol beverage containers sold in the United States that warned against drinking alcohol during pregnancy. Although the term "secondary disabilities" was not widely recognized before the mid-1990s, by the late 1980s there was growing awareness that fetal alcohol impairment caused structural brain damage (West, 1986) and that this damage in turn caused long-term behavioral and developmental disturbances (Spohr

> & Steinhausen, 1987; Streissguth & Randels, 1988; Streissguth, 1990). By the time of William Witter's trial in 1995, knowledge about secondary disabilities was widespread (e.g., Meyer et al., 1990; Phillips, 1992; Streissguth, 1992). For example, in 1992 the Centers for Disease Control and Prevention (CDC) funded a major research project at the University of Washington to study secondary disabilities, and in early 1994, *Alcohol Health and Research World* (now titled *Alcohol Research and Health)* devoted a full issue to the topic of FAS and other alcohol-related birth defects (see Volume 18, Number 1, 1994) that provided a comprehensive overview of the existing knowledge on the effects of prenatal alcohol exposure. (This issue was later awarded first prize in the technical publications category by the National Association of Government Communicators.) Thus, in 1995, at the time of William Witter's trial, any expert in FAS/FAE could have testified in general about the effects of this birth defect on cognitive functioning, and any expert armed with the data provided to me by post-conviction counsel could have testified about the impact of this condition on Mr. Witter's behavior.

Ex. 2.27.

Trial counsel admitted, in a post-trial memorandum:

> The problem in this case is not that I did not call a witness but rather that I did not present a specific defense i.e., FETAL ALCOHOL SYNDROME. . . . .As my memorandums indicate, I spoke with various experts and went nowhere. . . . When Judge Huffaker denied my last request for a continuance to find an expert on FAS, he opined in chambers that if I had "OJ money" I could secure an expert, but without that kind of money I would be out of luck. It is important to note that when we started this case, it was the practice of this public defenders office to use experts in death cases such as Dr. Hess and Dr. Masters who charged in the are of $150.00 and did work consistent with that price. . . . .As I write this memorandum, there is no doubt in my mind that William Witter was FAS or at least FAE. . . . . I should never have agreed to start that trial without a FAS expert.

Ex. 3.33.

Trial counsel knew that FAE and alcohol dominated Mr. Witter's life. Trial counsel knew this was a case about the appropriate penalty. See Id.. at 2, ¶4. Trial counsel did not develop a reasonable understanding of FAS/FAE. If he had a reasonable understanding, he would have secured at least a general medical doctor and not searched exclusively for a geneticist to diagnose Mr. Witter, realized he could put on testimony from an expert without a medical doctor, and offered the jury an understanding of Mr. Witter and the FAS/FAE disorder. If trial counsel could not have secured an expert because of a lack of resources, trial counsel still rendered ineffective assistance.

Trial counsel's failure to present this powerful mitigating evidence, the only evidence that

could explain Mr. Witter's behavior to the jury, prejudiced Mr. Witter. Trial counsel presented testimony from family members that described Mr. Witter's mother and father as drinkers and drug abusers. Trial counsel presented testimony that Mr. Witter was not cared for by his mother as a child and that his sister had been sexually abused. Trial counsel did not tie the testimony presented to Mr. Witter's alcohol-induced criminality and violent behavior. Mr. Witter was neurologically damaged and incapable of adjusting to his background and becoming a productive citizen. Had the jury been presented with an accurate picture of Mr. Witter, including his capacity and ability, it is reasonably probable that a sentence less than death would have been imposed. Trial counsel's ineffectiveness had a substantial and injurious effect on the fairness of Mr. Witter's trial and the reliability of the sentence.

D. Other Mitigating Evidence.

As noted above, trial counsel knew that petitioner's parents Emma and Lewis Witter lost custody of their children during Mr. Witter's childhood. Trial counsel had a duty to investigate and explain this situation to the jury, including the cause for losing custody. Records were available from the family court in San Francisco that reflected the cause for termination of parental rights. Had trial counsel collected and presented these records, jurors would have seen the extent of neglect and abuse experienced by Mr. Witter and his siblings in their early home. The family court records show:

> -This matter concerns the welfare of four young children whose weak and passive mother appears to have little to offer them at this time. She is presently without income, housing of her own, and is involved in drug abuse. The unavailability of a father, who might assume the parental responsibilities, points up the need for dependency status and Court protection.

Exs. 5.14, 5.16.

> -On August 14, 1972, dependency (amended) petition was filed alleging that while Petitioner's father has an extensive criminal record and is currently incarcerated; Petitioner's mother, has a history of child neglect, evidences irresponsibility and instability to such degree as to make her inadequate to the care and supervision of said person at this time; and that Mr. Witterand his siblings are in need of proper and effective parental care and control and have no parent or guardian actually exercising such care and control.

Id..

> -Dependency Petition notes Emma Witter's "behavior and attitude has deteriorated in the past year, since the father was incarcerated for rape. The grandfather believes

the mother has been abusing drug usage, with resultant neglect of the children. Mr. William Witter [Petitioner's grandfather] related the whereabouts of the mother was unknown and that the maternal aunt, with whom the children stayed for a few days in July, returned the youngsters to the Witters [grandparents] following a telephone call from the mother."

Id..

-Mrs. Emma Witter [Petitioner's mother] advised that it had become necessary to place the children with relatives because the family was being evicted and had been unable to find other suitable housing. The mother maintained that the grandparents could always have contacted her through the maternal aunt. Ms. Witter related she was on heroin and that she had her last fix two weeks previously but she usually takes amphetamines.

Id..

-Copy of the mother's arrest record... shows she was arrested on April 18, 1972, for transporting narcotics, possession of marijuana, and unlawful possession of a hypodermic needle or syringe. Mrs. Witter was convicted of the possession of marijuana and on May 24, 1972, given a 90 day suspended sentence, with two years probation. [She was arrested for transporting narcotics on October 08, 1973. She was charged with possession of marijuana, using a minor to violate the controlled substances act, possession for sale - heroin, and forgery on January 15, 1975].

See Exs. 5.1, 5.3, 5.16.

-Copy of father's arrest record - establishes that the father was last arrested on October 28, 1970, for rape by force and violence, and that on March 18, 1971, he was sent to state prison.

-Martha Witter [grandmother] says that the children never inquire about their mother... Mrs. Witter said that the sister had to evict Emma... because she was taking drugs again. Emma was selling furniture from the sister's house to finance her drug taking. According to Martha Witter, Emma is also pregnant again and lives somewhere on Fulton street.... Apparently, the gentlemen who is the father of Emma's unborn child is married, so there is no future in this relationship. Apparently, [Emma] is not doing anything to help herself to get the children back.

-The problem here is the mother of these four children, Emma Witter. According to [Petitioner's grandparents], Emma has not been heard from since last fall... the only thing known about Emma is that last fall she had a child by some other man and no one know where she is and none of the relatives, including her sister, have seen her. According to Mr. and Mrs. Witter, she has asked everyone including Emma's mother, and nobody has any idea where she is. According to Mrs. Martha Witter, there has been no contact from Emma for at least six months.

-Neither parent has a suitable home to offer the children at the present time. The mother is dependent on general assistance and the father was recently paroled from State Prison and looking for employment.

-Mrs. Emma Witter is residing with friends at 2919-A Folsom Street in San Francisco. She has a three-year-old son, John Lopez, for whom she is receiving AFDC. She does not keep in touch with the children, nor with the parental

> grandparents, but through other members of the family, she is sure that the children are still living with the grandparents and still in Hawaii.

See Ex. 5.14, 5.16.

Trial counsel was ineffective for not investigating, collecting and offering these records to the jury. Trial counsel had two of petitioner's sisters, his father, his paternal cousin, and his maternal aunt testify about his mother's shortcomings in raising him, including neglect, physical abuse, drinking and drug use. The records trial counsel did not collect were created during or shortly after the periods the family addressed in their testimony and would have provided powerful corroboration of the family's testimony about the household conditions during early childhood. California family court records confirmed that petitioner's mother did not care to even contact her children, that she was abusive, promiscuous, and abusing drugs and alcohol.

Trial counsel could have further explained the first years of Mr. Witter's life by collecting social service records for his brother, Donald. Trial counsel knew Emma Witter gave birth to a child named Donald, severely neglected Donald, and lost custody of Donald. Prior to trial, Debbie Muela told trial counsel:

> Emma had a son while Lewis was in prison. His name was Donald and I used to take care of him. Emma always left him in a crib in a dark room. He was never cleaned up and the room always smelled like poop and urine. Emma would beat him for pooping in his diaper and she would beat William because he wouldn't play with Donald.

Ex. 3.9. This child was severely neglected while Mr. Witter resided with his mother Emma Witter. Donald's juvenile removal records showed:

> -Medical report on Donald, prepared shortly after being removed from Emma Witter's custody indicates that this 2 year 11 month old boy weighed only 20 1/4lbs, and was suffering from malnutrition, physical and neurological retardation, and possibly rickets.
>
> -In June of 1969, Donald Witter was admitted to San Francisco General Hospital with a diagnosis of "malnutrition due to parental neglect" and was quite under-developed. Upon release from the hospital. Donald Witter was placed in a foster home. During a year in the foster home Donald made much progress. He began walking, is toilet trained, and is able to say a few words.
>
> -Mrs. Witter has never visited Donald since he was removed from the home. She decided that she wanted to relinquish Donald for adoption and finally after many cancelled appointments signed the relinquishments on May 6, 1970.

-Mrs. Witter just applied for Food Stamps. Mr. Witter remains unemployed. . . . . Mr. Witter is... considered socially unemployable.

-Donald Witter came to the attention of the Probation Department through letter dated February 18, 1969 from the Department of Social Services. ... The referral letter... advises that the child was conceived and born during a period of time that Mr. Witter was incarcerated. Upon his birth Donald was placed in a foster home by the mother as she wished to keep his existence a secret from Mr. Witter. He was returned to the mother in October 1967 and since been a part of the household, comprised of Mr. and Mrs. Witter, and four half siblings.

-[The social worker] noted in subsequent contacts with the family that Donald has not progressed normally, making no attempts to walk or talk, and receiving no medical attention. Mr. and Mrs. Witter indicated a desire to place Donald out for adoption but failed to follow through. Both expressed feelings of resentment toward the child.

-Lewis Witter who is the legal father but not the natural father, evidences unwillingness to assume parental responsibilities; the mother evidences attitudes of rejection to such degree as to jeopardize the physical and emotional development, the child has failed to thrive in the care of the mother; the child is in need of proper and effective parental care and control and has no parent or guardian actually exercising such are and control.

-The family has been supported for the most part by AFDC and Mr. Witter has been continuously unemployed for the past two years. The mother advises that Mr. Witter informed her he would not seek work "as long as Donald lived in the home."

-Donald's developmental history has been very poor and shows retardation in almost every area. Because of this retardation it is important that he receives extremely close medical supervision.

-This matter concerns the welfare of an almost 3 year-old boy who has failed to thrive in the parental home and who gives every indication of having been almost totally rejected by the mother and legal father.

Ex. 5.15.

Trial counsel performed ineffectively by not collecting and investigating from these records. This was not a case of a family ignoring the needs of their children but, instead, a picture of a family that had completely abandoned its responsibility to the extent that the very lives of their children were endangered. Lani Sanders testified that Emma Witter had a child named Donald that lived with them in San Francisco. She said the child was retarded and handicapped and she did not know what happened Donald after he was removed from their house. See ROA 1986-1989. Had trial counsel collected these records, he would have realized the disturbing condition Donald was in when he was removed from the house, a condition which graphically demonstrated the tragic conditions of Mr.

Witter's life as well. Donald was three years old, weighed twenty pounds, and could not walk or talk. Maternal care was non-existent for Donald. If trial counsel had collected these records and asked family members about Donald, he would have discovered much more disturbing evidence of Emma's parenting skills. Mr. Witter's family told current counsel about Donald:

> - I once had a little brother named Donald. I don't remember too much about Donald because he was there and then he was gone. Donald was born while my father was in prison for rape. I don't know who Donald's father is. I have very few memories of him. Like I said, he was there and then he was gone. He definitely wasn't one of us. He was way too white. His father was probably a white guy. There was definitely something physically wrong with Donald. He really couldn't walk. I remember Emma trying to get him to walk. She'd take him into the kitchen and try to show him how to walk, but when he'd fall or something, she'd spank him. She'd spank him when he'd fall. According to Debbie Muela, Emma used to lock him in one of the rooms or basement. She'd rarely change his diapers. He always smelled like pee or worse.

Ex. 2.1, Declaration of Lani Sanders.

> - I had to deal with Emma's third son, Donald. Emma had Donald while I was locked up on the gun charge. I wasn't Donald's father. I have horrible memories of Donald. I get really uncomfortable just thinking about it because it was partly my fault for what happened to him and how Emma treated him. I was very, very unhappy when Donald was there. My attitude for him definitely influenced how Emma treated him. Emma took her anger out on Donald. She abused him badly. Emma tried to keep him out of sight by locking him in a room for long periods of time. Donald was way underweight because he was underfed. She didn't feed him. He had bed sores because she'd leave him in the crib for so long. She didn't keep up with his hygiene. She didn't change his diapers. I can still remember the strong smell of urine in the room where he was kept. I also remember Emma pinching him when he cried. I never mistreated Donald.

Ex. 2.3, Declaration of Lewis Witter.

> - I don't have too many memories of the Mission District, but I remember some things pretty good. I remember one time when my mom dropped me, Michael, and Valerie off at my grandma Martha's. Grandma Martha took us to Emma's. When we got to Emma's she had food ready for us, so we ate. After we ate, Emma was nowhere to be found. She disappeared. Since Emma wasn't there, we started roaming about the apartment. We went in one room and saw what looked like a neglected baby. The baby was laying on the bed in a filthy diaper in the dark. The baby was crying. I also remember seeing a bent spoon in the room. I didn't know what the spoon was for then, but I know now these spoons are used for heroin. I think the baby was Donald, and I think Emma put him up for adoption and he was eventually adopted. This was the only time I remember seeing Donald.

Ex. 2.8, Declaration of Lisa Reyes.

Emma Witter treated Donald and Mr. Witter as something less than human beings. Emma raised Mr. Witter for almost ten years. Had trial counsel collected and presented these records, jurors

would have had documentary proof, created by someone outside petitioner's family (e.g., an objective state agency), reflecting the total absence maternal skills while Emma Witter was raising her children. Had this documentary proof been presented, a reasonable probability exists that the jury would have voted for a sentence less than death.

Trial counsel also failed to collect and introduce Emma Witter's criminal records despite his knowledge that Emma Witter had an extensive criminal history that adversely impacted Mr. Witter and his siblings. See Exs. 5.1, 5.3. Mr. Witter was eight years old when Emma was arrested on April 18, 1972, and charged with transportation of narcotics, possession of a syringe, and possession of marijuana. She was again arrested on October 8, 1973 and charged with transporting narcotics. She was arrested yet again in January of 1975, and charged with possession of marijuana, using a minor to violate the controlled substances act, possession for sale-heroin, and forgery. On January 19, 1977, Emma was arrested for forgery. On September 14, 1978, Emma was charged with possession of a hypo/syringe. She was arrested for possession for sale but charged with possession of a syringe. On September 6, 1980, Emma was arrested for possession of narcotics by the San Francisco Police Department. Id.

There was also no doubt at trial that Mr. Witter's father had spent a majority of his son's childhood in the penitentiary. See Exs. 5.5, 5.6, 5.7, and 5.8. These records supported the claim that criminal tendencies were expressed from both biological parents. Emma Witter used drugs and alcohol, was promiscuous, and was physically abusive and neglectful. These records would have supplemented the picture of Emma Witter by establishing her almost constant criminal behavior. This picture is hardly a case of simple neglect but a demonstration that Mr. Witter was trained in early childhood by two criminals. Had trial counsel established this, by introducing these records to the jury, there is a reasonable probability the jury would have mitigated, at the least, Mr. Witter's prior criminal history, and voted for a sentence of less than death.

Trial counsel knew Mr. Witter served more than two years in a California Youth Authority facility. Trial counsel was ineffective because he failed to collect and present CYA records documenting the neglectful and dysfunctional upbringing Mr. Witter suffered. Mr. Witter's CYA records show:

-[A psychiatric report said] - In discussing his feelings and relationships with the... significant people in his life, it was easy to see that his mother had to be the primary object of his angry feelings. He agreed that he must have deep emotional scars due to his mother's abandonment of him and the family,... the discussion about his mother revealed that he has felt deprived of her affection in addition to his more easily perceived anger toward her... He has not seen or had any contact with her since she abandoned the family about ten years ago. He has been informed that she is now under treatment at a Stanford Drug Treatment facility.

-[Mr. Witter] experienced considerable trauma and rejection in his life. Following the incarceration of his father, his mother became addicted to heroin and reached a point where she could no long effectively care for William or his siblings... William probably identified with his natural father and witnessed acts of destruction caused by Mr. Witter whenever he came home intoxicated.

-[Mr. Witter] was born in San Francisco, but moved to Hawaii with paternal grandparents after his mother deserted the family. His mother had become a heroin addict following the incarceration of his father who had a chronic felonious record.

-[Mr. Witter's] natural parents, Lewis Witter and Ema Witter, were married in 1958, in San Francisco. The were divorced in 1970. In 1972, Mrs. Ema Witter was arrested on several occasions for involvement in drugs. At this time, Lewis Witter's... whereabouts was unknown.

-Lewis Witter advises that [Mr. Witter] has had a life filled with separation and upheaval as a result of the natural mother's addiction to heroin and in his own lengthy juvenile and adult record. Mr. Witter states he does have frequent contact with his son and found Bill to be unstable from the age of six.

-The minor's natural father, Lewis Witter... reports that he has an extensive juvenile and adult record including strong arm robbery, possession of a weapon and rape. He served time at the California Youth Authority and Soledad State Prison.

-The natural mother, Emma Witter, is approximately 43 years of age and her exact whereabouts is unknown. In 1972, Mrs. Witter was arrested on several occasions for her involvement in drug-related offenses. She has served time in jail and is a heroin addict. Lewis and Emma Witter were married in 1958 in San Francisco and divorced in 1970.

-While [Mr. Witter] was in his early childhood his father was committed to a correctional institution. He and his sisters continued to reside with the mother who became a heroin addict. When [Mr. Witter] was about nine, the mother was picked up on several occasions for drug related offenses. The natural father has an extensive juvenile and adult record with previous arrests for strong armed robbery, possession of a weapon and rape. He served time in the California Youth Authority and at Soledad State Prison.

-According to William his father used to have a serious drinking problem and can recall instances when the man would come home drunk, smashing furniture and being physically abusive toward family members.

See Ex. 5.11.

In addition to giving evidence of violence, constant intoxication and abandonment in his

family and home, the CYA records contained various reports indicating Mr. Witter adapted well to the correctional institutions where he resided. The CYA records revealed:

> January 11, 1981 CYA probation report: Mr. Witter "has successfully completed the Rehabilitation program and the recommendation of the Court is to return the Ward to his... legal guardian."
>
> "On work crew William worked well and did a good job when he was able to control his head problem. He also has great athletic ability as a runner and puts forth a great effort when motivated to do so. William's overall behavior has shown progressive improvement during his stay at Smith Creek."
>
> "He has also developed positive work habits and has been showing a positive attitude. He earned school credits... ."
>
> "He learned and proved to himself that he can work and take on responsibilities."
>
> "William's overall experience at Smith Creek has helped him mature and become a more responsible person. The poor attitude and behavior experienced in his initial time at the Camp has improved considerably. His overall behavior and adjustment has been satisfactory."
>
> June 30, 1981 CYA Group Living Report:
>
> "Has no problem with staff"
>
> "He has made a good adjustment to institutional setting."
>
> "Gang Orientation-NONE"
>
> "Has visits every week. He has a good relationship with his family."
>
> "Independent"
>
> "Supervision Require–MINIMUM"
>
> "William since his arrival has maintained himself in a very positive manner. He has been above average in his overall performance while here. Can be anything he sets his mind to being."
>
> "Institutional Adjustment: William is a pleasant mannered young man who made a very good adaptation to routine during orientation. He required minimal supervision and seemed to relate easily with both staff and wards."

Mr. Witter was very damaged by his upbringing by the time he arrived at CYA but adjusted to a structured setting anyway. This was a powerful rebuttal to the state's argument that he posed a dangerous threat to other inmates and prison personnel.

Mr. Witter also served many months in California Department of Corrections in the years before the offense. Had trial counsel collected the complete CDC records, he could have

demonstrated Mr. Witter's good behavior while incarcerated. The CDC file contained a dozen reports detailing his lack of institutional violence and lack of gang affiliation. See Ex. 5.13.

Mr. Witter worked steadily after release from incarcerations. An effective capital defense attorney would have investigated his prior employment history and uncovered evidence indicating Mr. Witter had the ability to comply with authority and adapt well to structured work environments. The weekend before the penalty phase was scheduled to start, trial counsel received eight letters from former co-workers. Current counsel discovered letters in trial counsel's files during federal habeas discovery. The letters contained some of the following excerpts:

> "I always saw a smile on Willies face when he was here and could not say anything bad about him. He deserves a chance to live and be apart of society."
>
> "Willie was always a pleasure to work with, and, I always felt he could do jobs, which were with difficulty. Willie was always on time when he worked, and a asset to the jobs, he helped train men, when needed... He was always one of the best."
>
> "[Willie] worked on many of my important jobs without a single complaint, customers still request him on their jobs. I always found Willie to be a dependable worker, showed up for work on-time, and was well liked by his co-workers and customers alike... In all my observations of him, he always treated people fairly and he seemed to get along with everyone from the president of our company to anyone of the other helpers at our company."
>
> "William Witter was a hard worker and always got along well with the customers. When William showed up he came to work. He never horseplayed around or gave me any false representations of what took place on the job sites. He was never a problem whatsoever."
>
> "[William] was a quiet and easy man to work with. I never felt it was a problem to meet any of my customers."
>
> "[William's] performance as very professional while working. Many Mayflower drivers requested William as their helper,... I never had any problems with this man in the years I have known him."
>
> "[William] was a hard working person for me... He was always on time. [He] wanted to work anytime and any day, it didn't matter to him."
>
> "This is not the William we know... William was well liked by our employees and management. Our customers adored him and he was requested many times on subsequent moves.. I personally found William to be very courteous and helpful. He always had a friendly greeting and was genuinely nice to all the office staff."

Ex. 6.16.

Trial counsel was unaware of these letters until he received them in the mail. Donny Sanders,

Mr. Witter's brother-in-law, requested, collected, and mailed the letters to trial counsel. See Ex. 2.11. After receiving these humanizing letters, trial counsel neither requested a continuance nor attempted to introduce them at trial. None of the letter writers testified. None of the letters were shown to Dr. Etcoff. Trial counsel stated:

> I didn't ask William's former co-workers to write the letters they did. I believe it was Donny Sanders' idea. I was aware that the letters contained statements indicating William worked well in a structured environment and easily cooperated with his supervisors and co-workers. I never attempted to introduce the letters because I didn't think they'd be admissible. The letters were dated July 5, 1995, which was the Wednesday before the penalty hearing was scheduled to start. The penalty hearing was scheduled to and did start on July 10, 1995. I received the letters, I believe, late that week. I received them before the penalty hearing started. Once I received the letters I didn't attempt to call any of them to see if they would be willing to testify on William's behalf at the penalty phase. I had time to call them because the defense didn't present its case-in-chief until Tuesday afternoon, July 11, 1995. In retrospect, I should've asked for a brief continuance so I could interview and subpoena them if necessary. Considering what they had to say in their letters, these co-workers would have proved to be great rebuttal witnesses for the State's future dangerousness claim.

Ex. 2.26.

Mr. Witter was convicted of a stabbing a man to death while assaulting the man's wife. Trial counsel had the obligation to thoroughly investigate and prepare for a life or death punishment hearing. Effective representation in that hearing involved explaining why Mr. Witter had committed the offense and why he was still human even though he committed the offense. The first step in effective representation was collecting records that explained his client's life. Had trial counsel performed effectively, he would have collected records that showed Mr. Witter's mother as a criminal drug addict that neglected a 3 year old child to the point of starvation and physical retardation. Had trial counsel performed effectively, he would have collected records that showed Lewis Witter left him to his mother's abysmal care while the father was either incarcerated or running the streets using drugs and drinking. Had trial counsel performed effectively, he would have collected records that showed Mr. Witter was deeply emotionally scarred by his upbringing and showing those scars by early adolescence. Despite the torturous and treacherous upbringing, records trial counsel did not collect show that Mr. Witter adjusted well to structured environments as a juvenile and adult and that Mr. Witter functioned well as an employee. Had trial counsel collected these records, he could have interviewed family, experts and friends based on the records. The

interviews would have produced the data collected by undersigned counsel and presented in the declarations that are Petitioner's exhibits 2.1 through 2.25. The records, in addition, would have supported, verified, and expanded the mild testimony from Mr. Witter's sisters and father regarding the dysfunction of his early life. The records would have removed any doubt about the family witnesses biasing their testimony in favor of William Witter.

There were many other witnesses who could have described the neglect and chaos endured by Mr. Witter.

Mrs. Arlene Ritchison is William Witter's aunt. Trial counsel interviewed Mrs. Ritchison on June 9, 1995, but concluded that she provided nothing pertinent to the case in mitigation. Ex.3.32. That assessment was wrong:

> Emma and Lew met during the mid or late 1950s when they were 14 or 15 years old. Lew and Emma were both experimenting with pot during this period which was rare for 14 or 15 year olds during the 1950s. I'm not sure who introduced the pot to Lew and Emma. They used pot and other drugs while they were together.
>
> When Lew went to prison, Emma had the children all by herself. Emma wasn't around very much for the kids though.
>
> Emma would feed her children, but then she'd disappear for hours at a time, particularly at night. I took my kids to Martha's so they could visit with their grandmother. Later, I learned Martha would then take them over to Emma's. Michael, my son, has told me Aunt Emma would disappear and the kids would roam the streets of the Mission District at night. Michael later told me the kids would wander in and out of different apartment complexes in the Mission District. Will would ride his bike at all hours of the night through the Mission District.
>
> When my brother Lew was incarcerated, Emma rarely forced the children to attend school. She didn't take them to the doctors or dentist for their annual check-ups. Emma was very neglectful toward her children. Will and the other kids were generally dressed raggedly.
>
> Emma was very promiscuous. She had many boyfriends who were always into drugs. I remember one boyfriend in particular who was very mean to Emma and the kids. He'd make Emma lock the kids in the bedroom for long periods of time. The kids were hungry and scared, when they'd get locked in the room. The boyfriend would also whip the kids with a cane or belt. William always got the worst treatment.
>
> Emma once made a pass at Dennis [Affiant's husband] when she was drunk or high. My father once made a pass at Emma, but she turned him down. My mother never knew about my father making a pass at Emma.
>
> Most of what we know about Will's behavior in Hawaii came from word of mouth. What we heard, though, was my father was very hard on William. He'd regularly hit him if he misbehaved. We heard that William started getting in trouble with the law when he was in Hawaii. We really didn't know too many specific though. We heard

that Lew was very hard on everyone once he moved to Hawaii after getting out of prison. Lew was so hard on everyone because he was drinking and using drugs.

My mother never gave up on William, even when he was getting in trouble all the time. She was very protective and supportive of him. She was really the only true maternal figure Will learned to trust and love. I wasn't surprised when Will had Martha's name tattooed to his neck.

Lew's personality change was eerily similar to [our] father's personality change when he drank. Will Sr. like Lew could be a mean drunk. Lew and Will Sr. couldn't drink together because both of them had such volatile personalities once they were drunk. Emma's personality changed when she drank. Emma, like Lew, became very emotional and belligerent when she got drunk. Lew told me, a few different times, he was afraid of going to sleep around Emma when she was drunk. Lew was afraid Emma'd use a knife when he'd go to sleep. Emma had threatened to cut him up when he was sleeping.

Lew, like his father Will Sr., got physical with Emma when he drank. My husband saw Lew hit Emma while they were arguing. Dennis told Lew 'no woman ever gets hit in front of him'. Dennis and Lew had some few choice words for one another but it ended there.

Emma drank throughout her pregnancy with Will and the other kids. At that time people didn't know alcohol was bad for you. There weren't any warnings about drinking while you were pregnant back then.

Ex. 2.5.

Ms. Lisa Reyes is Mr. Witter's cousin. Trial counsel never interviewed Ms. Reyes. Had he done so, she could have sympathetically described Mr. Witter's dysfunctional upbringing:

My siblings and I used to spend time with Will, Lani, Tina, and Kim when they lived in San Francisco's Mission District. I have an older brother, Michael, and older sister, Valerie, and a younger brother, Tim. We lived in San Mateo. They lived in the Mission District.

. . . .

I remember another incident when we were at Emma's. Emma wasn't around again so we went roaming again. We went into another apartment building, not Emma's. It was somewhere in the Mission District. When we went in an apartment and there were people laying all around the floors and along the walls. I didn't know what they were doing at the time, but I know now they were all doing or smoking drugs. They all looked strung out.

Michael, my brother, told me Emma would have sex with the landlord instead of paying the rent.

My first memories of Lew are when he was over in Hawaii. I spent a couple summers visiting my grandparents and my cousins in Hawaii. When I'd go to Hawaii, grandma Martha would be the one caring for the kids. Lew was usually out drinking or getting high. When my grandparents would go out on the weekends, they'd have Lew watch the kids. When he watched the kids, Lew drank a lot and was mean to Will. Lew would beat Will for no reason sometimes. Lew would hit Will

with anything, an open hand, a belt, or fly swatter. One time we were playing outside and all of the sudden Lew calls us back to the house. Lew didn't yell at or hit any of us girls or Michael, as we walked by him and into the house. However, when Will walked by, Lew grabbed him and started spanking him with the metal end of a flyswatter. Will ran into the house and upstairs crying. I remembered Will having welts on his leg from the metal end of the flyswatter.

Lew was always drunk when he'd do things like this to Will. Grandma Martha would get upset with Lew for beating Will.

Ex.2.8.

Ms. Debbie Muela is Mr. Witter's maternal cousin. Trial counsel's investigator telephonically interviewed Ms. Muela on August 30, 1994. Ms. Muela vividly described Emma drinking, using heroin, abandoning and neglecting her children and physically abusing Mr. Witter. Ms. Muela agreed to testify. Trial counsel failed to produce Ms. Muela to testify. Had he done so, she would have provided the following humanizing evidence:

William Witter is my cousin. My mother, Estella Barrett, was his mother's sister. I spent a lot of time with William as a child.

William and Lani, Tina and Kim stayed with us frequently as kids. My mother Stella and Aunt Emma took turns staying with the kids. When Stella was gone, Emma was there. Then, Emma would leave and Stella stayed with us. They weren't always there though. Emma and Stella frequently left us alone. When we were left by ourselves, I was sort of the caretaker. I cooked and cleaned.

Aunt Emma and my mom had numerous affairs. There were strange men around the house seeing them all the time. I was too little to recognize it, but they might have been prostitutes.

Many of the men coming and going were Emma's boyfriends. I saw one boyfriend of Emma's who did not like William back William into the wall and raise him off the ground by his neck with his feet dangling in the air.

Aunt Emma and my mom drank every day from the time they got up in the mornings. I remember seeing bennies, black beauties and burnt and bent spoons around the house. Aunt Emma was a heroin addict.

Drugs were around the house all the time when I was a child. Later on, as we got older, me and most of my siblings had drug and alcohol problems. I started smoking pot when I was 11 years old. I quit using drugs and alcohol in 1994 but I relapsed in 1999. I am clean and sober now.

Emma had a child named Donald, when William was young. Emma had Donald while Uncle Lewis was in prison.Donald could not speak or walk. He was mentally retarded. Emma kept Donald in a room by himself with the curtains drawn and the door shut. The room smelled of urine because Emma would not change Donald's diapers.

I remember William got the shit beat out of him by Emma one day after he told

Emma that Donald had been crying. Emma would go after William with a belt or electrical cords. William often tried to give Donald food. I would change his diapers. Both of us were punished severely for trying to help Donald.

I remember one time Emma broke an egg on William's head as a joke. Everyone laughed. When William tried to do it to Emma, she beat him with an electrical cord.

I remember a psychologist had told William's grandmother that William needed therapy because he was like a time bomb. Neither Emma or William's grandmother did anything about getting William mental health help.

Ex. 2.32.

Ms. Valerie Sanseverino is also Mr. Witter's cousin. Trial counsel did not interview Ms. Sanseverino. Had he done so, she would have sympathetically described Mr. Witter's dysfunctional upbringing:

My brothers and sister and I used to go to the Mission District to visit Aunt Emma. I don't remember too much about Aunt Emma and the Mission District. I remember being able to run free and roam the streets when we went there. I remember because my parents didn't allow me and my siblings to do that at home. My parents were way more strict than Aunt Emma and Uncle Lew.

Will seemed to be locked in his room quite often. I'm not sure why he was locked in his room, but I'm guessing it was because he was always getting in trouble. I remember one time when Will crawled out his bedroom window when he was locked in his room. Lani, Michael, and I were outside playing and talking to him while he was on the window ledge.

I remember Emma having tape on her toes and feet. At first I didn't know the significance of the tape, but as I got older I learned Emma used to shoot heroin through the toes of her feet.

I have few, if any, memories of Lew when I was young. I remember seeing the news account of Lew's arrest for rape. I believe they arrested him at the house on Shotwell Street. Emma was nowhere to be found after Lew was arrested and convicted.

During my summer vacations, between 8th and 9th grade, I visited my grandparents in Hawaii. When I'd visit, Lew was always drinking. He did a lot of drinking. He also argued a lot with my grandparents. Lew would always end up screaming, yelling, and leaving if he didn't get his way. He usually blamed my grandparents for everything. Like him not having money, or something like that. Lew would get violent sometimes. I remember one time when he tore up my grandparents' kitchen and dining area by overturning and throwing the furniture. It didn't take much to get Lew upset when he was drinking. Once upset he could be pretty violent. No one liked to be around Lew when he drank.

Ex. 2.7.

Mrs. Louise Hemming is also Mr. Witter's maternal cousin and Emma Witter's niece. Trial

counsel never interviewed Mrs. Hemming:

Emma was an alcoholic and on drugs. My cousin Ernie Barrett one day went in the bathroom and saw her with a needle in her arm. That really affected him. He never forgot it. Later, he committed suicide.

Emma drank and used drugs during all her pregnancies.

My grandmother beat Emma quite a bit because she was an unruly child. Grandma went after Emma with anything she could get her hands on. Everyone was intimidated by her. Emma did the same thing. She went after Will with anything she could get her hands on and beat him severely. She would hit him hard, as hard as she could. She didn't hold back. He was so stubborn; they couldn't get along. He was young then, only 10 or so. Sometimes he would try not to cry because he was so angry, but she would end up hurting him enough to make him cry out.

William has always been a treasure for me. He was always very affectionate and sweet. I even changed his diapers. My aunt Emma wasn't very nurturing. She was sometimes. But sometimes she'd get angry at William because he was hard to control. His dad, Lew, wasn't around much. Emma was young and liked to have fun and party and sometimes wouldn't come back 'til the next day. Sometimes she wouldn't have food and Grandma Martha would bring food by. Other times, Emma would go out and give me a number and stay gone for days. I'd call the number and nobody knew where she was.

Will was close to Emma. She had a boyfriend that he really didn't like and would argue with him. Emma wanted to have fun and not be tied down with the kids. Grandma Martha started to intervene because Emma wasn't providing food for the children. She was often gone and running around with all kinds of people. Plus, they lived in a bad neighborhood and the children were starting to hang out with a bad crowd. Finally, Grandma Nellie and Grandma Martha talked Emma into giving up the kids. She had already given up Martin. She was about 18 when she had Martin and was still living at home. She was wearing warm clothes all the time and then one day complained of cramps and feeling sick, so they called an ambulance and she came home with Marty. But nobody knew she was pregnant. And she had no prenatal care and she had no idea of how to take care of him.

When I was babysitting, she'd stay out all night. I'd call the number and they'd say she can't come to the phone. Then she'd show up the next day or a few days later.

Both my Aunt Emma and Aunt Estella were alcoholics and drug users. Emma and Estella were like two peas in a pod. Emma and Estella were prostitutes. They would always have friends coming over. That's why Will and the kids were with the grandparents. That's just too much for the kids to be exposed to.

Estella was heavily into alcohol, drugs, and prostitution. She died of alcohol-related complications around 1980. She was 37 years old when she died and she looked like 60. Estella had eight children, seven to her first husband, Robert Barnett, and one to her second husband, Jerry Dean. There's Ricky Barrett, Debbie Muela, Bobby Barrett, Ronnie Barrett, Doris Barrett, Monine Barrett, Ernie Barrett, and Jerry Dean Jr. Estella and her first husband drank themselves to death. He died first of alcohol. Then Stella died of alcohol not long after that. Every one of the children is on alcohol and drugs. Three have committed suicide.

Debbie's [Mr. Witter's cousin] had a very difficult life. Estella started pimping out Debbie when she was probably 12-13 years old. Debbie's been in and out of drug and alcohol treatment centers. She had a husband and two kids and was doing well. Then, at 35, she got into drugs. She raised two girls, owned a home and had a solid marriage and then just flipped out. She had post-traumatic stress disorder. She said her mother used to prostitute her out at 13. She was the oldest and her mom would make her do everything.

Bobby Barrett committed suicide some years back by hanging himself. Bobby also had drug and alcohol problems. Bobby had three kids by two different wives.

Ronnie Barrett had a drug and alcohol problem. Ronnie died last year of an apparent drug overdose. He was found in the street with a needle in his arm. He OD'd. It was never determined whether the overdose was accidental or purposeful. Many of us think it was suicide.

Monine Barrett has a meth problem and just got arrested in Santa Rosa [for] bank robbery. They found the guy she was with and he copped to it, so she's out. Monine lives in Santa Rosa, but she was born in San Francisco. Monine has three daughters to two different men, one by the first man, who she was not married to, and two by the second man. Monine had an affair with Debbie's husband.

Ernie Barrett, like Bobby, and probably Ronnie, committed suicide. He shot himself at his grandma's house. He was a ring bearer at my wedding. He'd just finished boot camp, came home to grandma's, went into the basement and shot himself. He was very close to Estella and was very hurt by her death. He's the one who found my Aunt Emma in the bathroom shooting up and was traumatized by it. Ernie, like his siblings, had battled drug and alcohol addiction. Ernie had no children.

Neither Emma nor Estella were ever disciplined properly. They were the youngest and my grandma let them go out partying. Estella got pregnant at 15. That's why she married Robert Barrett.

Grandma Nellie [Mr. Witter's maternal grandmother] used to drink a lot. She drank Burgermeister. She'd drink so much she'd begin repeating herself. I remember her as being very strict. She would say mean things to the kids like "You're just going to grow up and get pregnant." She was very mean. Grandpa Tito died of alcoholism. We didn't see them that much, but when we did, there was alcohol involved. They'd have arguments but no brawls or anything like that. I think Tito had cirrhosis when he died. Estella died of cirrhosis, too. Tito used to hide bottles all over the place. When he died, we found them all over the house.

Will was very loving, very affectionate, but he did have a temper and he was stubborn. I think that's what bothered my aunt. They would lock horns and I don't think she could ever control him. He wanted her to be a mother, a mom, and she wasn't able to do that. She was too into herself. I know he loved her, but because of the way they were, it was kind of a standoff. William and his sisters lived in a bad neighborhood and roamed the streets with Aunt Estella's kids. They had little supervision.

Alcoholism was the biggest problem in the family. Whenever we partied, alcohol was always there. Everybody would want to start fights. My dad was one for causing a ruckus. We'd have quincieneras and baptisms and everybody would drink so much they'd get into fights. None of us could hold our liquor.

Ex. 2.9.

Mr. Witter was a severe alcoholic, from the time he was twelve years old; this was a disease which trial counsel never investigated. The jury heard Mr. Witter may have been intoxicated when he committed this offense and a prior offense, but had no idea of the grip and effect of alcohol in his life.

Mr. Witter's CYA records described the role of alcohol in his teenage life. Trial counsel did not collect or present these records.

> -[according to a report in the file from a psychiatric social worker...] William compared himself with his father with respect to having conflicts with the law, being incarcerated and experiencing a drinking problem. "His perception of violent behavior is to be that it is allowed under certain conditions, for example, when a male is drinking."
>
> -He admits his drinking may be, in part, determined by his need to avoid dealing with emotional conflicts. He agrees that he has turned to the bottle in times when he was upset emotionally. It was an easy way out. He feels that drinking is a problem to the extent each of his felonies occurred when he was in a very intoxicated condition.
>
> -This youth has a pattern of acting-out aggressively under the influence of alcohol, when situational conflicts reactivate feelings of ambivalence associated with the trauma of maternal abandonment
>
> -In his mid-teens [Mr. Witter] began to drink to excess and was involved in destructive acts relating to his being intoxicated. In this respect, he appears to have identified with his natural father who also has tended to be destructive whenever drunk. He will probably need help in his efforts to overcome his tendency to abuse alcohol. He has some awareness that drinking is a problem to him but it is uncertain as to whether he is ready at this stage to make necessary commitments to change.
>
> -Court review - The case of William Witter appears before the Court at this time for a Petition alleging one Count of felony vandalism and another of arson. Investigation by the San Jose Police Department reveals that on April 25, 1981 at approximately 12:25 a.m. San Jose Police Officers... responded to... [an] alarm sounding from Steinbeck Junior High School. ... Officers observed attempts to start continuous fires in four separate areas plus extensive damage to windows in the immediate area of the administration offices... Officer Newman found suspect Witter lying on the floor in the Media center library in a semi-conscious state. He was determined to be sleeping and appeared to be under the influence of alcohol. Witter was interviewed... at which time he admitted to forcibly entering the school, damaging property, setting fire and then falling asleep in the library. He further advised that he had left his residence between 7:30 and 8:30 pm and went to a friends house where he consumed approximately two quarts of alcohol.
>
> -[Mr. Witter] admits the allegations of the Petition. He indicated to this Officer that he had been with friends drinking and was walking back home when he went by Steinbeck and decided to go in. He admitted breaking in through a plate-glass

window while destroying other property and does not remember what happened because he "passed out." [Mr. Witter] stated that he does not understand why his behavior gets so out of control and that he has tried to stay away from alcohol for this very reason.

-[Mr. Witter's grandparents are] concern[ed] about the negative influence of Bill's peer associations. Further, they are concerned about his abuse of alcohol and the impact of the unstable childhood he experienced.

-[Lewis Witter] does believe that when intoxicated, Bill certainly does represent a threat to the property and possible safety of others.

-The Probation Officer concluded... that most of [Mr. Witter's] acting out has been directly related to abuse of alcohol.

-According to William his father used to have a serious drinking problem and can recall instances when the man would come home drunk, smashing furniture and being physically abusive toward family members.

-William agreed that alcohol has been a problem to him. He does not drink that often, usually once a week but whenever he starts drinking he usually drinks to excess. He agreed that most of his previous arrests have resulted from being intoxicated.

-The way to stay out of trouble in the future according to William, is not to drink. Earlier on the evening of the offense he had argued with his girlfriend. About a half-hour later he joined some of his friends and started drinking. He expressed a willingness to participate in AA or other alcohol rehabilitation programs.

-William doubts that he would have any serious adjustment problems if he did not drink.

-William... readily admitted to having a drinking problem and to the impact that it has on his behavior.... he tends to over-simply his problem by stating that if he could control his drinking, all his problems would be solved... he is unaware that his drinking is probably an attempt to cover up pain and hurt in his life. What ever program he attends for drinking, it will be important that he also learn to deal with whatever it is that needs to be numbed through alcohol.

-In September 1980, [Mr. Witter] broke into a junior high school... He was drunk on that occasion... His most recent offense occurred three months later. He was likewise drunk in the most recent offense... He broke into the same junior high... fell asleep on the floor and was found asleep by the people who responded to the fire.

-[Mr. Witter] has a serious problem with drinking. William indicates... whenever he gets started he usually drinks to excess. Much of his acting out has been directly related to alcohol intoxication.

-The focus of any treatment plan should be upon enabling William to overcome his drinking problem and to help him resolve any underlying emotional conflicts which contribute to this problem.

See Ex. 5.11.

Trial counsel did not review or present records from the California Youth Authority

nor did he have Dr. Etcoff evaluate or use these records. These records document the onset of Mr. Witter's alcoholism and concurrent violent acts, while Mr. Witter was still a teenager. The onset of such a disorder in such a young person implies either a biological basis for the disorder or a truly disturbed childhood. Either implication would have served Mr. Witter's case in mitigation. Had trial counsel collected and presented these records, or offered these records to Dr. Etcoff for interpretation and testimony, it is reasonable to believe that the jury would have weighed the mitigating evidence in Mr. Witter's case heavier than the aggravating elements, or determined that a sentence less than death was appropriate.

Mr. Witter was incarcerated in California Department of Corrections for more than thirty months. Trial counsel failed to present various CDC reports detailing his considerable alcohol problem. The following are some excerpts from Mr. Witter's CDC reports:

> -He was raised by his paternal grandmother. [Mother] lost paternal control and he became involved in alcohol and illegal street activities at an early age. The offenses rage from arson, rape, drunk driving to assaultive behavior. He claims he was always under the influence of alcohol at the time of each arrest.
>
> -The parolee is a 27 year old male who has a history of involvement with alcohol and drugs. His use of alcohol and controlled substances is on-going, and despite his participation in a the detox program, continues despite the knowledge he is subject to testing and monitoring by the Parole Division.
>
> -Continued supervision is warranted in Witter's cases, as he has yet to display a completely drug free lifestyle. Also due to the seriousness of Witter's commitment offense and the use of alcohol at the time of the committal, this agent requests and additional period of supervision to ensure Witter has abstained completely and is no longer a threat to the community due to his indulgence in drugs and alcohol.
>
> -Although the Parolee's behavior has improved dramatically following his involvement in the Alcoholic's Anonymous program, his history of violent and abusive behavior is such that as to warrant retaining him on parole for the additional two months until his controlled discharge date.
>
> -A review of Witter's file reveals that he caused serious bodily injury to another while under the influence of alcohol. He has abused drugs and alcohol since his release to parole. He has yet to do anything positive about this abuse. However, Witter now wishes to seek help concerning his alcohol use. As his agent, I have to weigh the sincerity for his request for help against his current custody status. Therefore, I recommend that Witter be returned to San Quentin State Prison for a detoxification program.
>
> -Witter admitted to consuming beer in violation of his special condition to abstain from alcoholic beverages.
>
> -A review of Witter's file indicates that he is a man capable of great violence. He is

> also an abuser of both drugs and alcohol. In the positive, Witter appeared to be sincere about conforming to his parole responsibilities. However, during the April/May time from of this year (1989), he began to experience problems with the abuse of meth which obviously clouded his judgment to the point where he chose not to deal with his parole responsibilities. Quite frankly, Witter's abuse or controlled substances and alcohol will not be tolerated by Parole and Community Services. Therefore, since he lacks the ability to deal with his problem, he is being returned to the institution for a time deemed appropriate by the Board of Prison Terms.

See Ex. 5.13.

Trial counsel was ineffective for not collecting these records. These records show that Mr. Witter continued to abuse alcohol even when he knew he was being monitored and knew he would be returned to the penitentiary as a consequence of abusing alcohol. These records show the depth of his problem with alcohol and his limited capability to be free of the problem. Had trial counsel collected these records and either presented them to the jury or gave them to Dr. Etcoff for testimony, it is reasonable to believe that the jury would have opted for a sentence less than death.[15]

Trial counsel failed to interview and present numerous witnesses who could have described Mr. Witter's and his family's battle with alcoholism.

Ms. Adele Chapple has known Mr. Witter since the early 1980s. Trial counsel never interviewed or requested Ms. Chapple to testify:

> I'm a very good friend of William Witter. I've known William and his family since the early 1980s. My son, Donny Sanders, is married to William's sister, Lani. William is on Nevada's death row. I know and love William like a son, he's not a terrible person. When William is sober he's a great person.
>
> When William didn't drink, he was a great person. When sober, he was great. Just fantastic. When he drank, though, he was a totally different person. He was a violent drunk. It was like a Dr. Jekyll and Mr. Hyde thing. If he was drinking and you looked at him wrong, you better watch out. It's amazing how he changed–just amazing. You could actually see him changing before your eyes. If Will's had too much watch out. If he was drinking, it was only a matter of time before he'd change

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[15]Dr. Etcoff testified that alcoholism is a disease and there appears to be a genetic component to when one becomes an alcoholic. 'There are people whose brains tell them to keep drinking. In this type of family, when they drink, they don't stop until they're quite inebriated. When they use drugs, they can't control their drug use. Children of parents and grandparents such as these have greater likelihood of abusing alcohol and drugs in uncontrollable fashion than children who came from family of social drinking not genetically wired to become alcohol and drug abusers.' ROA 2048. These records would have supported and verified that testimony, underlining the biological nature of Mr. Witter's compulsion to drink.

for the worse. When he drank, he did whatever he wanted. He'd try to intimidate people when he wanted something. He knew he was mean looking and he'd use this to his advantage when he drank.

I remember an incident where a Will threw a brick through my daughter's boyfriend's car window. Carina was going out with a guy named Dan. When he came to pick her up, Will came out of our house and threw a brick through Dan's car window. Will did it because he was very loyal to David and Donny. David didn't like Dan because he heard Dan had been fooling around with other girls while he was dating Carina. David told Will, so when Will saw Dan he felt he had to protect Carina. Will was very protective of my sons, Donny and David. If he cared about you, he'd definitely protect you.

I remember another incident when Will was hanging out with David and David's girlfriend, Tracy. They'd been drinking for a while. For some reason, Tracy slapped Will in the face. This instantly triggered Will, but instead of going after Tracy, Will went after David by choking him. I stepped in and had to physically separate Will from David. Will could have hurt me while I was prying him off of David, but he never touched me. He never threatened or touched me ever.

I know Will's dad well. Lew's personality would change as he continued to drink. I remember when Lew was drinking with Donny. Lew and Donny used to drink together, before they both got sober. The more Lew drank, the more he'd come on to me. He became a completely different person. It got to a point where he started pounding on the table and demanding I make out with him. After the incident, when Lew was sober, he apologized and was very remorseful.

. . . .

Lani acted like Will and Lew when she was drunk. She was a mean and violent drunk. She'd start off as a "crying" and "I love you" drunk, but she'd usually end up getting mean. When she drank she'd beat up Donny. She'd actually bite him, too. She'd became so physical with Donny, he'd have to started to fighting back just to defend himself. She'd antagonize him until they'd end up fighting physically.

Ex. 2.17.

Donny Sanders had known Mr. Witter since the early 1980s and was with Mr. Witter in Las Vegas when the offense occurred. Trial counsel did not interview Mr. Sanders. Had trial counsel interviewed and requested Mr. Sanders to testify, he would have testified to the following regarding Mr. Witter's alcohol abuse, his family's alcohol abuse, and how alcohol affected his good natured personality:

Will is "Dr. Jekyll and Mr. Hyde" when he drinks. Every time Will was arrested he was drunk or he was drunk and on meth. I first noticed Will's Jekyll and Hyde behavior after he got out of CYA, when he trashed our kitchen when he was drunk. I also remember an incident where he trashed grandma Martha's house. He was drunk one night when he got home. He started demanding money from Martha so he could buy more alcohol. When Martha refused to give him the money, Will tore up the kitchen and threw a chair through the sliding glass door and a window. Everything was upside down and turned over. By the time Lani and I got there Will

had calmed down, even though Martha didn't give him any money. Will never would've done this to grandma Martha, or anyone for that matter, if he were sober. I remember another drunken rampage where Will smashed grandpa's big screen T.V. and the patio windows. There was glass everywhere. Grandpa kicked him out of the house after that.

Every time he drank, he'd pass out. He'd basically drink until he passed out. The next day he wouldn't remember a thing. Will would sit on Grandma Martha's balcony and drink by himself a lot. He'd get his case of beer and smokes and he'd sit and smoke by himself. Will's first objective everyday was to find his beer money. He'd ask everyone for money until he'd have enough for his case of beer. He'd even do chores for Lani and I to get money.

Lani and Lew are also "Jekyll and Hyde" drinkers and blackout drinkers. Lani has been this way ever since we started dating. We started dating in the early 1980s. She'd drink, get all emotional and then turn into a mean, violent drunk. We've gotten into may physical fights when she was drunk. Lew is pretty much the same way. Very cool when he's sober, but when you add alcohol he's a mean SOB. None of them can socially drink, they all drink until they pass out. He's also a blackout drinker. The stories about Lew cooking sponges or other shit, thinking they're food or hamburgers, when he's drunk, are pretty well known.

Lew was not a father figure to Lani and Will. Lew acted like a friend rather than a parent to Will and his sisters. When he got drunk and belligerent, it felt like he was one of my kids sometimes.

Will could easily drink a case of beer a day. Drinking was an everyday thing for Will. If he didn't work, he'd drink all day. If he did work, he'd head to the bar after work and drink. He'd usually go to the Almaden Lounge after work. Will didn't make it into work some days because of his binge drinking. Will worked with me at Mayflower and Allstate Relocation. Many days Will would wake up hacking and coughing from drinking and smoking all night. Although Will missed some work because of his drinking, there were many days he got up early and went to work after drinking all night.

Ex. 2.11.

David Sanders had known Mr. Witter since the early 1980s and also was never interviewed by trial counsel.

When Will drank, he was more outgoing and more flirtatious around women. I've seen him get into it with his girlfriends, but I never saw him hit a woman. I've seen one throw an ashtray at him. I got in fights with Will as a kid, but my brother did, too.

Alcohol was his poison. It was his dad's poison. He had a big drinking problem, too. He used to drink with us. If Willie ever got into serious trouble, it was when he was drinking. Every time I saw him get arrested, or we all got arrested, we'd been drinking. I saw him black out a lot of times. He wouldn't remember anything a lot of the time. His sister, Lani, does the same thing. She gets drunk and doesn't remember anything. She was here one time and she was swinging at Donny and me. We had to hold her arms down, and she didn't have more than three margaritas. After 20 beers, Will would get there. When he drank hard liquor that would send him over the edge. Every time, when he got into a fight, he'd been drinking. We'd

drink whatever was on sale, Old English, whatever. If he started drinking, you'd see the change. That's why I said it was his poison. It would make him violent. It would do the same thing to Lani and to his father. Lewis was like the spitting image of Will. He and Will were exactly alike, same words, same expressions, everything. Lewis wouldn't remember half of what he did the night before. His own sister didn't remember what she did. She woke up the next day and didn't remember anything. She only had three margaritas and maybe a glass of wine and she didn't remember anything. I've seen Lewis like that, and he's the spitting image of Will. They even looked alike. I've seen Lewis disappearing for a month. They're identical. If you want to see what Will is like, try to get Lew drunk and you'll see. He's identical, to a T.

When Will got drunk, it was like Dr. Jekyll and Mr. Hyde. I've never seen him just walk up to someone and start trouble for no reason, but alcohol was his poison. It's his sister's poison and his dad's poison. His mother was alcoholic.

Lewis fell off the wagon and got drunk and he pulled a knife on my wife, and I called the cops. It was 10 years ago. I jumped in and said, "What are you doing, dude?" and he put it down. I still called the cops. I saw him a few weeks ago and we're still friends. He's that way on alcohol and so's Lani. I've seen Lani get drunk, flip out and not remember. I've seen Lew do that, too. All three of them are like that. They all three black out.

I've seen Lani several times not remember what she's done. I've seen her swing on my brother and then wake up the next morning and not remember anything, just as happy as can be. As long as Will's not drinking, he's fine. When he drinks, it's like Dr. Jekyll and Mr. Hyde. Normally, he'd get an 18-pack but take all day to drink it. It was mainly on the weekends, because we worked all the time. We always went to work. Will worked for Piedmont Moving with my brother Donny. He was a hard worker. He did not drink at work.

Ex. 2.21.

Carmen Kendrick aka Carmen Apodoca also had known Mr. Witter since the late 1980s and was dating Mr. Witter at the time of the offense. Mr. Witter informed trial counsel about Ms. Kendrick in June 1995. Trial counsel never interviewed or asked Ms. Kendrick to testify:

I married William Witter after dating him for a couple of years. William and I have divorced but he's still important to me.

Will was the nicest person when he was sober, but he'd snap once he drank too much. When he drank he, more often than not, became absolutely crazy. He never did anything violent when he was sober. If there was alcohol, then he snapped. He'd be really violent crazy and then he'd say he loved me and I'm the only one who ever cared about him. Then he'd call me back and he was a different person, saying he wanted to kill me and all that stuff. Then he'd be sober and want to kick back and have a family. But then he'd start drinking and, once he started, he couldn't stop.

There was like a feeling out process when you came across Will drunk. If you said the wrong thing, he'd snap and become very angry and violent. When Will started drinking, you couldn't stop it. It was like a snowball effect. You couldn't stop the rage. He was either going to pass out or he was going to end up in jail. You just

couldn't stop it. Will just had so much pain and so much anger and alcohol unleashed the pain and anger. There was no way to stop it.

His dad was a junkie and his mom was, too. She was a junkie when she was pregnant with him. All he'd say is that she was a junkie, that her boyfriends were abusive, that she was alcoholic and never around and that his grandmother took care of him. It was kind of weird because I thought that's why he had a lot of issues, because his mom was not around and she didn't want to have anything to do with him, and that must have hurt.

I remember another time when Will was drunk and I told him I didn't want to pursue our relationship anymore. Will called 5 million times that night. He'd start off being very mean and angry but he'd all the sudden he'd switch back to the sentimental Will. After being sentimental, he'd switch back to being angry and mean. He'd call over and over again and act differently each time he'd call. Will only acted like this when he was drunk.

When Will was drunk he was good at mental abuse. When Will was drunk he'd often make threatening statements like "If you leave me, I'll know your every move". Will actually tore up pictures of my daughters' fathers on a couple of occasions. One time Will was drunk and wanted to borrow my car. When I wouldn't give Will the keys he started throwing rocks at my apartment and then broke or demolished everything in the apartment.

When Will was violent when drunk, he often didn't or couldn't recall the previous night's events. Will often called and asked me to pick him up after he'd been on one of his drinking binges. He'd be drunk and disoriented and asking, "Can you come get me?" Many times he didn't know where the hell he was or how the hell he got there. One time it took me forever to find out where exactly he was.

Will was always very remorseful and sorry once he found out about his drunken outbursts.

Will wasn't always drunk. He would sober up for a couple days, but then he'd eventually turn back to the bottle. There were many times when Will would be gone for days at a time. Will would binge drink and do meth. The meth kept Will going for days. On meth, he could binge drink for days. When he'd disappear, he'd call every once in a while to check in on me. When he'd re-appear from his absence, he'd just sleep.

Ex. 2.14. Trial counsel contacted Ms. Kendrick pre-trial but there is no record of their conversation. While she was the complainant in the domestic violence case testified about by Shanta Franco, Ms. Kendrick could have supported the claim that the level of violence that alcohol stirred Mr. Witter to was abnormal, out of touch with any stimuli Mr. Witter experienced and that absent alcohol, Mr. Witter was a decent human being.

Ms.Elaine Retzer had known Mr. Witter since the early 1990s and briefly dated Mr. Witter during this period. Trial counsel neither interviewed nor requested Ms. Retzer to testify:

I'm a former girlfriend of William Witter. I dated him in the early 1990s. I know he

has a severe alcohol problem, but I also know he has a very sensitive side. He's not a monster.

I met William at Oakridge Bowling Alley in the late 1980s. I briefly dated him for roughly 4 or 5 months in early 1990. We were friends way before we started going out. We'd go out about once a week. At the time, I was working as a cocktail waitress at Oakridge Bowling Alley.

Will definitely had a "Jekyll and Hyde" personality. I saw the bad side of Will when he hung out at the bowling alley. He'd always get into arguments or fights when he got drunk. And he always seemed to get drunk. Will definitely had a tendency to get violent when he drank.

He was a good person when sober, but watch out when he's drunk. I really don't remember Will blacking out, he'd just drink until he passed out.

Will was a very sensitive individual who was very close to his family. He definitely had a sweet side and a lot of people would probably say that about him. He was liked by many people. He really tried to stay out of jail, but once he'd start drinking he'd end up in a fight and back in jail.

Ex. 2.15.

Gina Reyes aka Gina Martin had known Mr. Witter since the mid-1980s. In April 1994 Mr. Witter informed trial counsel he lived with Ms. Martin and her mother, Mary Byrd, after he was released from CYA. She was never interviewed:

William Witter has been a part of my life from 1984 on. I dated William throughout the 1980s. I continued to spend time with him after we broke up in 1989 until he was arrested for murder. William was always in the picture. I care about William a lot.

When William and I would go out, we would always drink. While I wouldn't drink that much, William always drank until he became very drunk. For the most part, William's alcohol of choice was beer, Budweiser in particular, although he'd occasionally drink stronger drinks like Mad Dog 20-20. Generally, William would purchase a suitcase, i.e. a 24-pack or 18-pack, of beer. William would generally start drinking beer in the morning for breakfast. It was his priority in the morning, to have a beer. Once he'd finished this suitcase of beer, William would go on another beer run and purchase another suitcase of beer. William could easily drink a case of beer a day. He was mostly drinking all the time. He'd stop for two or three days but he'd inevitably purchase another suitcase of beer and the cycle of drinking would start all over again. William's brief episodes of sobriety, where he'd stop drinking for a two to three day span, were normally brought on by the fact that William had done something wrong or had gotten into trouble with law enforcement.

Will really wasn't into meth until he started dating me. I was more into the drug scene than the drinking scene. My drug of choice was meth. I liked Will to do meth with me because it usually made him sober immediately because it would counteract the alcohol. Will's use of meth increased after he was released from prison for the Rumsey incident. Before he went to prison for the Rumsey incident, we'd smoke meth with Donny and Lani at their place. Will really wanted to get clean once he got out of prison. After two weeks of sobriety, however, he and I got back into the drug and alcohol scene. Will's decision to get back into the scene was partially my fault

and his fault.

Although William had an amazing personality when sober, his demeanor would drastically change, like Dr. Jekyll and Mr. Hyde, when he began drinking. When he got drunk, he'd get this evil look in his eyes like he was an entirely different person. The evil look showed the great anger William had somewhere. I think the anger had to do with his growing up. William and his sisters didn't really understand what was going on. William and his sisters never really confronted or dealt with their family issues. William's drinking was a way to cope with his childhood.

William would generally drink until he'd pass out. When he'd passed out, you couldn't wake him up for the life of him. For example, there was a woman named Lavone who wanted to date him while he and I were dating. One night, after William had passed out, she came by to see if William was home. Lavone was acting crazy. She was honking, and banging on the doors and windows trying to get William. I tried over and over again to wake him up. I shook him and yelled at him, but he never woke up–he was out like a light.

William had blackouts when he drank. He wouldn't remember anything he did the night before when he was drunk. William got so drunk one night that he crawled into a dumpster and fell asleep there. He peed all over my room one night. In the morning, William didn't remember waking up and peeing. He couldn't remember most of when he stole his grandfather's car and wrecked it. Will's behavior the night before was the morning coffee conversation the next morning.

Ex. 2.12.

Mary Byrd had known Mr. Witter since the mid-1980s. Trial counsel knew about Ms. Bryd in April 1994 but never talked with her:

I know William Witter well. He lived with me and my daughter Gina Reyes for a while in 1985. He dated my daughter for a few years before and after he lived with us. I saw him every day while he was dating my daughter. I cared a lot about Will back then and I still do.

William treated Gina OK and not OK, depending on whether he was drinking or not. Gina and William got in fights over kid's stuff, stupid stuff. She'd get mad because he was screwing around, and he'd get mad because she was mad. It'd go back and forth. I don't remember a lot of fights. Most fights were when he was drinking, or because of his drinking.

William would get so drunk he had no idea of what he was doing, and wouldn't remember when he was sober. He wouldn't remember at all. He was a blackout alcoholic. He'd call the next day and say, `Why am I in jail? What did I do?' For instance, in the David Rumsey incident, he thought he had hurt Gina. He had no idea he had hurt David Rumsey. He didn't remember walking miles to our house. He never knew what he did. You'd tell him the next day what he did the night before when he was drunk and he'd have no recollection of what happened or what he did.

When he lived with us, William started his day with a suitcase of beer in the morning. After his morning primping and after he ate his breakfast Will would go purchase his suitcase of beer. My daughter would give Will money for the beer if he asked. He'd buy Budweiser cans. He drank at least a case of beer at a time.

William would get so drunk he was completely out of it. I remember one night when a friend of William's name Lavone, who was about 7-feet tall, and William's cousin Valerie came by at 3 in the morning and started banging on the windows in the back yard. I looked out and saw who it was. I kneeled on Gina's bed and told them to go away, and it turned out I was kneeling on William. He was passed out on the bed. I didn't even know he was there. They were honking their horns and everything. He didn't move.

When William was drinking, there would be a point he'd reach when he would become someone else. It was exact. You could tell what beer it was. When he got like that, he'd go out usually. He'd have an angry look. His eyes would be glittery. He'd be sullen and angry instead of the friendly guy he was. He was a very personable guy. After drinking heavily, he would never know what he had done. He didn't know how he behaved or what he had done. He never talked about anything he'd done. When he got like that, you could see the rage coming out.

The rage must have come from his whole life, the way he had been raised, where he had been. I mean, I'd be angry, too, if I'd been raised like that. He was never given a chance.

When William lived with us he was not drunk every day. There would be periods when it was every day for days in a row, and then periods when it wasn't days in a row. He drank beer. He wouldn't have just one or two. It was drink until you dropped. If there was one beer, there were going to be a hundred beers. He never used drugs to kick alcohol. He'd combine the drugs with the alcohol. The drugs they used was mostly crank. That was the biggest thing back then.

Ex. 2.13.

Cary Jones had known Mr. Witter since the early 1980s. Trial counsel knew Mr. Witter lived with Mr. Jones immediately after his release from CYA but never talked to him.

I'm a good friend of Will Witter. I've known Will since the early 1980s. He's not a monster and he's certainly not a member of any gang.

On the outside, Will's thing was working or watching sports. Will's the nicest guy in the whole world. He'll give you the shirt off his back. When that happened in Las Vegas, it was alcohol or drugs. He'd never do that if he was sober. Will wasn't like that. I know he woke up and said, `Man, what did I do?' I got a couple of letters from him. He would tell me to straighten up, that he didn't have a chance, but I did. He was trying to warn me because when we got drunk, both of us were the same way.

When he's drunk, he's crazy. We've fought before when we were drunk. It was crazy, but we were drunk. Anybody who's really wasted, who's drunk, says stupid things. On a typical night of drinking, we'd start off at the park. I was Will's best friend. I'd have this biker thing because I was white and he was cholo because he was Mexican. We'd start out with a 12-pack. We were drinkers. We'd start drinking and then things would start happening. We'd go back to his house and he'd get into a fight with his old lady and then he'd break a window.

When he got off parole, he was working for Donny Sanders and Mayflower. He was doing good. He'd drink. He could drink a lot. I remember a couple of times he blacked out at Gina Martin's. One time, he thought he was in the bathroom and he started peeing on the wall. He didn't even know. I said, "Man, you're peeing on the

wall." He's an alcoholic and every time he'd drink he'd change. We're both alcoholics. We'd go to bars, drink at home, drink with chicks. There were always a lot of chicks around us. We'd get into a fight and I'd go over to apologize and he wouldn't even remember the fight. We never went looking for trouble, but it always seemed to find us.

At times, we'd get drunk and we'd talk. Sometimes I'd cry and sometimes he would. It was two young guys tripping on the world and thinking it wasn't fair.

I used to drink with his mom, Emma. Will didn't drink with her so much. She came over and was staying with Donny and Lani. She's a lot like Lani. She had her problems. We all knew that. Even Will's dad, Lew, had his problems drinking. He's like a dad to me.

Ex. 2.20.

Ivy Witter was Mr. Witter's step-mother and had been since the early 1980s. Trial counsel knew of Mrs. Witter because he interviewed Lewis Witter several times but never talked with her.

I'm William Witter's stepmother. I'm married to William's father, Lew Witter. We've been married for more than twenty years. I've known Will and his family for roughly 25 years. Will is on Nevada's death row, but he's not an evil person.

I did not know Will when the family was living in Hawaii. Lew got sober and was in Alcoholics Anonymous by 1984.

I remember Lew blacking out. He wouldn't know where the car was, who he was with, or what he did. I used to write things down so I could tell him the next morning what he did. At first, I used to think he was lying. I didn't know anything about alcoholism. But then I realized he was telling the truth, that he didn't remember anything. One time the bouncer at a bar called to tell me what had happened. Lew had gone to a bar, the Gold Rush, and he rode a mechanical bull. He was bruised all over his back. The bouncer was his nephew. Then he got into a fight and got kicked out. He had these huge bruises on his legs, and he remembered nothing. He told me that he would start blacking out after a few beers, that it took a lot less than it used to take. It used to scare me how he blacked out. One time he was in one and came home and said, "I'm gonna take a piss and then I'm gonna kill you." It scared me and I grabbed my purse and ran out. I was gone three days. One time I went to LA and I had just come home. I pulled up to the house and he ran out the door and he was completely naked with the music blasting behind him. He didn't remember that. He was in a blackout. I remember a lot of people used to compare Will and Lewis and that made me kind of sad. One time Lew got two DUI's in one day. One while at work and one after work and the police said he got pretty belligerent. That was before Matt was born.

Before we got married, he would get drunk and stay away for days. He'd stay with his family and party. We'd been out when he was drunk. We'd go to places and he'd start fights, he'd yell at people, "What the fuck are you looking at?" He would be the nicest guy and then he'd start drinking and then something would trigger him and he'd become outrageously evil. He'd get mean. One time he was drunk at a baseball game and he thought a guy was bothering his friend's wife. So he hit him and broke his jaw. He could be very violent when drinking. When he was sober, he wasn't like that at all. He never got violent. But he was violent when he was drinking. He'd get violent like I'd never seen. He had like a hair trigger. You'd just never know. So

people would say, "William's just like his father." I think it always made Lewis feel bad. It made him feel guilty. He was guilty because he wasn't a very good dad. And he felt bad because Will had to go through what he went through.

Ex. 2.4. Ivy Witter had great insight into the cyclical or generational nature of violence erupting when intoxicated. Ivy Witter could have presented solid evidence that both Mr. Witter and his father were predisposed to rage and anger on the slightest pre-text when intoxicated.

Lisa Reyes, noted above, would have addressed this issue as well had she simply been asked. She was never interviewed.

My first memories of Lew are when he was over in Hawaii. I spent a couple summers visiting my grandparents and my cousins in Hawaii. When I'd go to Hawaii, grandma Martha would be the one caring for the kids. Lew was usually out drinking or getting high. When my grandparents would go out on the weekends, they'd have Lew watch the kids. When he watched the kids, Lew drank a lot and was mean to Will. Lew would beat Will for no reason sometimes. Lew would hit Will with anything, an open hand, a belt, or fly swatter. One time we were playing outside and all of the sudden Lew calls us back to the house. Lew didn't yell at or hit any of us girls or Michael, as we walked by him and into the house. However, when Will walked by, Lew grabbed him and started spanking him with the metal end of a flyswatter. Will ran into the house and upstairs crying. I remembered Will having welts on his leg from the metal end of the flyswatter.

Lew was always drunk when he'd do things like this to Will. Grandma Martha would get upset with Lew for beating Will.

When my grandparents and Lew moved backed to San Jose, Lew would break all kinds of things when he was drunk. He'd even call Martha bad names. I remember one argument between Lew and Martha that escalated to the point where Lew overturned and threw the furniture and chairs in the dining room. Lew would go into a rage when he was drunk. He was a handful when drunk.

Will mimicked Lew when he drank. Lew changed when he drank, so did Will. They're both "Jekyll and Hyde" drinkers. You could see him change as he drank more and more alcohol. Will would drink too much and blackout. He'd never remember what he did. He'd drink hard liquor, go into a blackout stage, and get really violent. We'd always remind him the next day of what he had done. He'd apologize about what he had done when he found out about what he did. When Will broke something at my grandparents' house, Will would always say, "Don't worry, I'll pay for it.'" He usually didn't pay for it because he didn't have the money. As a result, my father would generally fix things.

Will would ask Martha for money, normally beer money; if she didn't give it to him he'd go crazy when he was drunk. He'd take grandpa Bill's car without permission. I believe he totaled two of grandpa Bill's cars.

Will never talked about his drinking problem. Will may have thought he really wasn't destructive because he couldn't remember. I don't recall Will ever attending AA classes. I know Donny Sanders, Lani's husband, and Lew were attending AA classes at one point, but I'm not sure if Will ever attended classes with Lew.

Ex. 2.8. She saw the duration of Mr. Witter's problem with alcohol and the violence against Mr. Witter and others caused by his father's alcoholism. This witness could have offered the jury insight into the violence Mr. Witterendured that later caused a psychiatric social worker to believe "His [Mr. Witter's] perception of violent behavior is to be that it is allowed under certain conditions, for example, when a male is drinking. William needs socialization rather than psychotherapuetic intervention." .

Mr. Witter was more than a simple alcoholic, drinking at every chance. Mr. Witter had positive personality traits. He was hard-working, generous, and loyal to family and friends alike. Trial counsel was provided with letters from employers and co-workers discussing some of these traits. Trial counsel did not follow up or try to develop any of these traits through available witnesses. Had trial counsel performed thorough investigation, including detailed interviews of family and friend, he would have discovered and presented evidence that related a complete picture of his client.

> Adele Chapple:
>
> When sober, Will was always a very kind and considerate individual. He was like a caretaker. He was a very loving person. He loved children, particularly my youngest daughter Rusty. Rusty and Will share the same birthday, July 19th. For Rusty's 8th birthday party, Will took her to Chucky Cheese. For Rusty's 12th birthday party, Will was the DJ. In fact, neither of Rusty's brothers were at her party, but Will was there. For Rusty's 16th birthday party, Will and David were there early on, but left and said they'd come back. They never came back. Will later called to apologize to Rusty for not coming back.
>
> When Will was sober, he always wanted to be involved and part of our family. When he was on a binge, he wouldn't show up at the house for a while. I'd ask Lani where Will had been and she'd say, "He's been drinking for two to three days straight."
>
> Will was able to hold down a job. He worked with Donny at Mayflower trucking. Will was a good worker. He was responsible. The people at Mayflower really like how he worked. Donny said he never went to work drunk. He'd miss some days because of hangovers, but he never showed up for work drunk.
>
> Will had the utmost respect for me and would always abide by the rules of my house. I didn't allow my sons and Will to drink at the house because my father and ex-husband were severe alcoholics. Will never swore around me. He never raised his voice at me. Will probably respected me so much because he saw me as a good mother, something he never really had. Will would always tell me, "I wish I had a mom like you. Donny and David are lucky to have a mom and dad like you and

Jack." When Donny or David complained about how mean or strict a mom I was, Will would tell them, "You should love and respect your mother because you have a mother who loves and cares for you." Will would sometimes call her "mom." He'd also tell the family that he loved them. He was always looking for a mother figure. Will would listen to me. They'd usually called me to calm Will down when he'd get drunk and start going ballistic. Ex. 2.17.

Lillian Reyes:

I was and still am very good friends with William Witter. I met William in 1989 or 1990, somewhere around Ross Circle in San Jose. I met him through my son, Aaron Reyes or through his sister, Lani.

William didn't have a mean bone in his body. He was a very giving and caring person. There were many times when my family and I needed money for groceries, school supplies, or school clothes. William would give me a hundred dollars and say, "Here homegirl, . . ." William frequently came by our house with many bags of groceries when he knew my family and I were running low on groceries. William did this even though he didn't make or have a lot of money. That was just William–he was just so nice and respectful to me and my family. He was a sweetheart. William also had a great sense of humor. He was always trying to make us laugh by playing pranks on each of us.

William must have truly loved his grandmother Martha Witter. He talked about her all the time. He talked about how wonderful a person she was to him and to others.

If William's jury had known the William Witter I knew, I'd be shocked if they came back with the death penalty. The William Witter I knew and loved does not deserve death.

Eric Reyes was a good friend of Mr. Witter:

I, like my mother, met William around 1989-1990. I met him when I was approximately 15 or 16 years old. I believe William was in his late 20s or early 30s when my family and I initially met William. I knew William those couple of years before he committed the Las Vegas offenses.

William was a great, good, nice guy. The thing I remember most about William was his giving nature. Back in the late 1980s and early 1990s my mother was having her fair share of financial troubles. During these times, my mother had difficulty scrounging up enough money for groceries. William, however, on many occasions would come over with as many groceries as he could carry and he say, "Here. You need these more than I." William did that many, many times. William was just real generous.

I remember another situation when I was 16 or 17 where Will saw my brother giving me a pile of "hand me down" (used) clothes that my brother used to wear. My brother was giving me his old clothes because neither my mother nor I could afford new school clothes at the time. Once William saw this, he came up to me, handed me a $120, and said, "Go get yourself some new clothes for school." Another time Will offered me some work with his brother-in-law Donny (Sanders). Although I ended up not taking the job, I felt as if Will was always watching out for my family's back. He really cared about my family and I.

Will was always working if he wasn't at home. It's kinda hard for him to terrorize

the streets when he was either at home drinking or at work working.

Ex. 2.19.

Mary Byrd:

> William treated me with absolute, total respect; with absolute, unwavering total respect. I liked William very much. He was a nice kid. He could talk to anyone about anything. He kept up on current events and sports. He was a fun person. He could always make you laugh. He could tell good stories and talk on any subject. He was just a great person. I really liked him sober. When he got drunk, he was totally different. He was completely insane.
>
> I know William could feel things deeply. One time, Cary had gone to jail and William went to the park a week or 10 days later. He couldn't relate to the people there. He came back crying and said he couldn't relate to anyone; that he had no friends since Cary was gone. He didn't know what to do. He had a knife in his hand and I was nervous about that. He gave me the knife, and left the house. He was crying when he left the house. The next day he was back, and he was fine. He was very subdued. He talked about how lonely he was and he didn't have any friends. He seemed depressed sometimes. He'd be quiet and not his usual outgoing self. It seemed like one long party, with everyone drunk all the time. It was all very ugly.
>
> I would have gladly told the jury that William was a lost soul. William was lost because he had no direction, ever. He had no job, no car, nothing. Nothing was going on in his life. He had no skills, no training, no property, nothing. He didn't know what to do. He was lost in life, and he didn't know what to do with his life. His grandmother loved him dearly, but she was an old Hawaiian lady. He had no one directing him or telling him what to do or what he could do. There was no one to help him from the beginning. His father was in prison. His mother was out of it. She locked the kids, William and Lani, in their room, sometimes for 24 hours. There was no kind of upbringing. He had a great personality. But there was no one there for him, that I know of, from when he was a little child. He had no parental guides or models at all. It's a tragedy. The people who know him love him. His feeling was always, 'What's wrong with me that my whole family doesn't want me?'

Ex. 2.13.

Gina Martin:

> When sober, you can't help but fall in love with the guy. He was truly remarkable. He had a magical personality, one that could win over anyone. Very charismatic. It was like instant love. He was a good-hearted, intelligent, and wonderful person. He was a truly wonderful and remarkable person. He was very charismatic. For instance, when William and I first started dating, he would buy a rose for me on those Fridays he received his pay check. Likewise, on one Valentine's Day he had his aunt go out and get some things. William was the most personable individual I knew when he was sober, in that he was able to get along with anybody, anywhere, and he could fit into any situation. When sober, William simply had an electric personality.

Ex. 2.12.

Carmen Kendrick:

> I married William because he is a wonderful person when sober. When he was sober, Will was a very compassionate and funny individual who loved children. Will was

absolutely wonderful with my daughter Stephanie. Will had a really, really good relationship with Stephanie. Will loved spending time with his family. He especially loved spending time with Donny and Lani's two daughters. Lani's two daughters adored Will. They always called him 'Flaco.' When Will spent time with his family you'd really get to see that he had an awesome compassionate side.

Will particularly loved his grandmother Martha and Lani. Will spoke about Martha everyday. Will loved her to death. When she was alive, Martha went to bat for Will time and time again. Martha seemed to be the only person who gave Will positive reinforcement. Growing up, Will never got positive reinforcement from anyone beside Martha.

I was with Will when Martha passed. Will was absolutely devastated. Will lost a lot because Martha was the only maternal figure Will ever loved and trusted. Besides Martha, Will never had anything good or anyone good in his childhood. Will was always told, especially by his father and grandfather, he's not worthy of anything. Will thought Martha was the only one who really cared about him besides Lani.

Will was good to people outside his family as well. Will would always give money to homeless people. One time Will gave his last $5 to a homeless person. Will said, "You need this more than I do." Will never deliberately hurt anyone when he's sober. He has a really loving heart.

There were many times when Will would buy bags and bags of groceries for me and my daughters. I'd send him to the store to buy three things, he'd come back with three bags. When Will did things you could see him get excited, like he was really contributing in a good way. When Will did things like this, you realized he had huge heart. Will was a great giver. Will, however, wasn't a great taker. He didn't know how to act when someone did something for him.

Besides his grandma, I don't think William had anything good in his life. They were both addicts and in and out of prison. They never gave him anything in his life. He grandmother, I think, is the only one who ever really gave him anything in his life, outside of Lani. Like dying in prison, he knew in his heart that was going to happen. I mean, he knew it.

He loved to work. He worked at Piedmont with line drivers and would go out on the road. When he was working, he'd go out and buy groceries. He'd buy new clothes and iron them with a perfect crease.

Ex. 2.14.

Donny Sanders:

Will was a great worker. He worked for me off and on for years. When we worked for Mayflower, other drivers, besides me, requested Will's help all the time because he was such a great and hard worker. Will started working with me when he first got out of CYA in 1984. At the time, I was working at Direct Delivery in Sunnydale, California unloading and loading trucks. I knew Will needed a job so I got him a job with Direct Delivery loading and unloading trucks. Will did a great, a wonderful job at Direct Delivery. We really got to know one another while working at Direct Delivery. Will worked approximately six months at Direct Delivery.

In 1985, I got my Class A trucking license and started working at Piedmont. Piedmont is an Agent of Mayflower. I worked at Piedmont for nearly 9 years, until the Las Vegas incident. Will started working with me at Piedmont in 1988 after he got out of prison for the Rumsey incident. Will worked off and on for Piedmont from mid-1988 up until the Las Vegas incident in November 1993. Will also worked with Allstate Relocation during this time. Allstate Relocation was located about a block or two away from Piedmont. Will would work for which ever company needed the help that day. If there wasn't much happening at Piedmont, he'd run over to Allstate Relocation to try to catch a job.

Will wouldn't go to work drunk. He'd miss work every now and then but he never showed up for work drunk. The people at Piedmont loved him because he was great with the customers and at his job.

When Will was sober, he was a fantastic, wonderful person. Will was great with children. Will would come home 'buzzed' sometimes and love to wrestle with DJ. Will rarely got into or started fights when he was sober.

Will respected my mother, Adele Chapple, so much. Adele was the mother figure Will never had. He idealized how my mother raised my family. Although she was strict, she was there for us and expressed her love for us. Will never had this. Adele represented everything a mom was supposed to be. Will used to tell me and my brother, "You're lucky to have a mother like Adele." My mom and step-dad gave Will and Lani structure. Something they didn't have growing up.

Ex. 2.11.

Cary Jones:

Will was old-fashioned as to courtesy and respect. He treated women with respect. If he'd been drinking and someone said something to the girl, he might fly off the handle and hit him. He was a gentleman, from the old school. He wasn't a wife-beater. He wasn't like that. I know him and Gina had some problems together, but I think she instigated it a lot. Like spitting on her window or calling her a whore or a bitch. They'd be arguing upstairs and he'd come down, throw a chair through the window and leave.

Ex. 2.20.

Lisa Reyes:

When Will was sober he was a good person who loved and protected his family very much. He was a good hearted and very respectful person when sober. Will would do anything for his family. He's a terrific person. Will was very family oriented when he was sober. He'd always watch football games on Sunday with the family. Will liked working. He liked making money. He worked with Donny. He was a very generous individual. He'd share whatever he had within anyone.

Will can be a good and warm hearted person. When sober, he's definitely not a danger to anyone. All he ever wanted was a mother figure.

Ex. 2.8.

Valerie Sanseverino:

Will cared deeply about Martha. He took Martha's death pretty hard. He couldn't even go to her funeral services. I don't even know if he visited her in the hospital those last couple weeks before she died. I didn't see Will that much after Martha's passing, when I did see him he seemed more withdrawn. He'd come to my parents' house for dinner and he'd leave right after he was done eating. There was very little interaction, which was uncharacteristic of him. Other family members even commented that Will's demeanor changed after Martha's death.

Will has a big heart. He loves children, especially Donny and Lani's kids. He cares for and loves his family, they mean a lot to him. He like to make people laugh. He was also very personable. He could start a conversation with anyone. He was just very likeable.

Ex. 2.7.

Bobby Seeger:

I worked with William Witter at Piedmont Moving Systems before he was sent to death row in Nevada. I still work for Piedmont Moving Systems.

Willie was a dedicated and hard working employee at Piedmont. Everyone liked him here because he was such a hard worker. I knew him at least two years.

I never saw him fly off the handle with customers. Customers are always very demanding in this business. Willie was a very hard worker and a very conscientious worker. I liked working with him. He took pride in his work. At work, the owner of Piedmont wanted Willie to wear long shirts to hide the tattoos.

We used to work a lot together. Willie respected me the most of anyone here. He liked working with me and I liked working with him. His brother-in-law, Donny Sanders, started taking him interstate because Donny always wanted someone with him.

I never experienced him drinking. The owner was a real stickler. He was against alcohol or drugs. He didn't want anyone around like that. I don't remember that ever happening with him. I never saw Willie acting strange or having to send him home. He was a very dedicated hard worker. . . .

I did several local jobs with him. We'd go out and do jobs. The customers loved us and would give us tips. I never had any problems with Willie. I liked working with him. He worked regularly. He had that goofy walk and would make everyone laugh. . . . .

A big key thing is that when Willie was here he had to serve the public. He had to be on his best behavior, and he was. We never got complaints on him, and those customers, if they have a problem, they'll call right away and say, `Hey, get rid of this guy. I don't want him in my house. Get him out of here. But Will wasn't like that. He worked hard and he respected the customers and they liked him. No one ever complained about him taking anything. I never heard anything like that. I probably dealt with Willie more than anyone here. He worked directly under my supervision.

Ex. 2.24.

Keith Miller:

I worked with William Witter when he worked for Piedmont Moving Systems back

in the late 1980s and early 1990s, before he was convicted and sent to Nevada's death row. I no longer work at Piedmont, I left in 1995.

What I said in my letter in 1995, I'd say today. Will was a hard worker. He never goofed around. He always showed up on time. If I needed him to go on a long trip, he'd go. He worked harder than anyone else. I'd rather put him on a job than any other worker. He'd call right when the job was done. Other guys would milk the clock. Not Will. He was a very hard worker.

He was smiling all the time. He was always happy, glad to live another day. He was a happy guy. He got along with everyone. If there was a hassle, he would be more inclined to walk away than confront. I would rather send Will on the road with Donny or Jack than a local. You want to send out the guys you trust the most on the long hauls. I talked to the driver most of the time. Will was the helper. Will never gave me any grief. It was always, `What do you want me to do? What do we need to do to get it done?' I don't think Will and I ever had a cross word. It would have been easy to do that because I sent him out on some crappy jobs. He was always, `OK, what do you want me to do?' He was liked by all the workers and drivers.

We never got complaints from customers about things missing. Never. We got no complaints from drivers or other workers. I'd trust Will to go into my own house and get whatever I wanted. If I was gonna move, I'd want him on the job because he knew what he was doing, and he did it well. He was always a very hard worker. I never got any complaints, ever, about Will.

I would often send him out on jobs. He came in every day I needed him. He would come in ready to work. The only people I really saw him around were his relatives, Donny and David Sanders. They were the two guys who got Will the job at Piedmont.

Will never came in drunk or high. He never brought his personal life to work.

Will was a respectable, dependable, friendly, happy guy who I would like to set down and talk to day or night. I'd like to hear what he had to say. He was a likable guy. I never knew him to use alcohol or drugs on the job. If he came to work drunk, we would have sent him home. But that never happened.

I'd have no problems testifying to this. I'd think you'd run into a lot of people who would speak well of him. I've heard a lot more good things he's done than anything bad.

Ex. 2.23.

Scott McElfresh:

I worked with Willie at Piedmont Moving Systems until all this happened. I've been with Piedmont since 1990.

Willie always had a good personality. He had a personality that all the customers liked. His tattoos put them off at first, but then they warmed up to him and liked him. Willie was a contract laborer. Some contract laborers like working on a casual basis so they can take off whenever they want. There's one worker here who's been here for 10 or 12 years and he doesn't want to be a full-time laborer. Casual laborers were making $10 an hour in cash when Willie was working. Will was pretty happy to do whatever he was doing at the time.

> Customers never had a problem with Willie. He did a great job. He hustled and he was good at it. I don't have anything bad to say about Willie.
>
> You could feel comfortable about having him in a situation or a home and nothing would happen. He never went back and ripped anybody off. None of the customers ever complained about him. I never doubted I could send Will into a customer's house and that everything wouldn't be fine.
>
> If you put Willie in a structured environment like here, he works real well.
>
> As far as being responsible and showing up and doing the tasks he was supposed to do, he was great. He never showed up drunk or anything. We saw each other when we worked 8 to 5 and might have a beer together, and he wasn't violent, not violent at all.
>
> Willie was a cool guy. I'm sure he feels remorse every day. He's probably trying to make the best of the worst situation he could ever be in. Willie takes responsibility for his actions. He wouldn't hide from it. He was always totally up front. He worked all the time. When you first came in, they put you as casual laborers, and they put you with interstate line drivers, but you didn't get benefits. So he'd do different jobs all the time. He always showed up on time. He had good rapport with the customers. He always showed up clear-eyed. He was always willing to do what was needed to be done. He was a good worker. He worked hard.

Ex. 2.25.

Trial counsel never interviewed most of these witnesses. The few trial counsel did speak to, Carmen Kendrick and Gena Martin, were not asked about any positive qualities Mr. Witter exercised even though trial counsel had knowledge of these qualities from the employment letters he received. Trial counsel did not retain a mitigation specialist and did not perform thorough mitigation interviews with anyone. A thorough mitigation interview, as well as a thorough mitigation investigation would have uncovered Mr. Witter's friendly and outgoing personality when sober, his generosity, his concern for his family members. The jury was presented with a defendant that sexually assaulted a woman, and stabbed her husband to death when he tried to stop the assault. The jury was not presented with a defendant that could, in sober circumstances, still care about other people and act pro-socially. The jury was not shown that some portion of Mr. Witter had survived his background and was worth saving. The jury was not shown that there was some caring, considerate, humanity left in him. Had trial counsel performed effectively, through proper investigation on his own or through the use of a mitigation specialist and provided the jury with this data, the jury would have insisted on a sentence less than death.

Trial counsel initially interviewed Mr. Witter in April of 1994. Mr. Witter informed trial counsel he served a "thirty-some" month sentence in Soledad State Prison for a 1986 Assault with a Deadly Weapon (hereinafter AWDW) conviction. Trial counsel drafted a memo to his file stating:

> William says he only has one adult felony charge. The AWDW occurred when he went to his girlfriend's house, Gina Martin, 916-863-5552, and another guy was there. He knocked on door and started to leave after no one answered. The guy then came out and was trying to tell William he didn't want trouble when William stabbed him. William says he was very drunk at the time of the stabbing.
>
> Gina Martin's mother, Mary, may be able to say some good things about William. William and a friend lived with Gina and Mary after they were released from prison. The women worked and supported them.

Ex 3.6.

The AWDW was the prior "felony involving the use of threat of violence to the person of another," Nev. Rev. Stat. §200.033(2), included in the State's Notice to Seek Death. A reasonable capital defense attorney would have thoroughly investigated the AWDW.

In August 1994, trial counsel and trial counsel's investigator were in Northern California interviewing Mr. Witter's family members. They interviewed a total of six people (five family members and Mr. Witter's parole officer, Linda Rose). Gina Martin and Mary Bird were living in the same general location as the witnesses interviewed in August 1994. Trial counsel had Gina Martin's telephone number. Trial counsel knew Ms. Martin and Ms. Bryd were key witnesses to the AWDW. Trial counsel knew the State had alleged the AWDW as a statutory aggravator. Neither trial counsel nor his investigator interviewed Ms. Martin or Ms. Bryd even though they lived less than 40 miles from the location where other witnesses were interviewed.

At some point prior to trial, trial counsel contacted Ms. Martin and Ms. Bryd. Ms. Martin told current counsel:

> I was called by someone from William's defense team. I'm not sure who called and when they called. I know Phil called my mother at work one day asking if she'd consider testifying on William's behalf. The person who called me sounded as if he wanted me to come out to Vegas to testify on William's behalf also. I believe they called back though and said they couldn't afford to fly my mother and I out to Las Vegas. We both told them we'd pay for our own tickets so we could testify on Will's behalf. They said they'd get back with me, but they never did. I never heard from anyone.

Ex. 2.12.

Ms. Byrd stated:

> I absolutely would have testified in his favor. Phil contacted me at work one day. I couldn't recall when exactly he called. It sounded like Phil wanted Gina and I to come to Las Vegas and testify on Will's behalf during sentencing. At the end, however, Phil said the Clark County Public Defenders Office didn't have enough money to pay for Gina and mine's travel expenses to Las Vegas. Gina and I both told Phil we'd pay our own way to Las Vegas. Phil said he'd contact me in the future, but neither he called Gina or I back.

Ex. 2.13. Trial counsel failed to record these phone conversations in the trial files.

A reasonable capital defense attorney would have made every possible effort to interview and present Ms. Martin and Ms. Bryd during the penalty phase. Trial counsel failed to interview or present them, even after Ms. Martin and Ms. Bryd informed trial counsel they would pay their own way to Las Vegas. Trial counsel told current counsel:

> Mr. Justice or I also contacted Mary Byrd and Gina Reyes. We contacted them because Gina was William's ex-girlfriend and because they both witnessed the David Rumsey incident. The Rumsey incident was listed as a statutory aggravator in the State's Notice to Seek Death. Gina and Mary both expressed a willingness to testify on William's behalf. Although both said they'd testify, but we just couldn't afford to fly both of them out to Las Vegas. Yes, they both indicated they'd pay their own way. I never called them back after they informed me of their willingness to pick up the tab. In retrospect, that was a mistake on my part, as they would have been great witnesses, in that their testimony could have really mitigated the circumstances surrounding the Rumsey incident. They also would have been great witnesses because both had many humanizing and great things to say about William.

Ex. 2.26.

Gina Martin:

> Although William had an amazing personality when sober, his demeanor would drastically change, like Dr. Jekyll and Mr. Hyde, when he began drinking. When he got drunk, he'd get this evil look in his eyes like he was an entirely different person. The evil look showed the great anger William had somewhere. I think the anger had to do with his growing up. William and his sisters didn't really understand what was going on. William and his sisters never really confronted or dealt with their family issues. William's drinking was a way to cope with his childhood.
>
> I distinctly remember the Scott Rumsey incident.[16] We had recently broken up before the Rumsey incident. On the day of the incident, I remember calling him and telling him I was going out with someone else. I told him to make him jealous. I know, it sounds crazy, but I was young and messed up at the time. That night, Scott Rumsey and I went and shot pool or something like that. When Scott and I returned to my mother's place, we planned on smoking a joint. My mother was upstairs talking on the phone with Cary Jones. All of the sudden, I heard some glass break in the carport–I think it was a lightbulb. Scott went out to see what the commotion was and the next thing I knew I saw Scott running back into the house and falling in front of my mom's door. My mom didn't know what to do. I saw William by the kitchen.

[16]The victim of the AWDW aggravator was Scott Rumsey.

> I threw pots and pans at him. He left and ran across a field by our house. William came back to our house while the police and paramedics were there. When he came back, he was arrested and taken to jail. When he was in jail, William called me and said, "What am I doing here? What happened?" William didn't have any memory of what happened. William pled guilty in that case. I think he took the deal so I wouldn't have to testify against him. He stabbed Scott but he didn't remember doing it.

Ex. 2.12.

Mary Bird:

> During the Rumsey incident, I was sleeping in my room. I had awoken after the phone rang, and was talking on the phone to Cary. Then I heard someone call for help, and David Rumsey was outside my room on the floor bleeding. Gina and I dragged him into the bedroom and locked the door. I had an iron and was going to smack William over the head. But he never came up. I heard smashing downstairs. There was glass broken in the house, and a chair broken on the patio. I don't think William came into the house. He had sliced Gina's tires, and left. He walked across the field by our house, and came back. He was screaming, `Yeah, I did it' and `If I had a gun, I would have shot him.' I think he was set off because Gina was going out with someone else. He'd been calling Gina at work all day and he called several times at night. He was drunk, really drunk. He pled guilty at trial and he apologized to David Rumsey for hurting him. He was very, very sorry, and stood up and apologized. He pled guilty because he didn't want Gina to have to testify.

Ex. 2.13.

Had trial counsel thoroughly interviewed and ensured Ms. Martin's and Ms. Byrd's appearance at Mr. Witter's penalty hearing, a reasonable probability exists the jury would have afforded more weight to the mitigating evidence than the State's evidence in aggravation. For instance, Ms. Martin's testimony could have demonstrated to the jury that she, in effect, instigated Mr. Witter's wrath when she purposely called Mr. Witter to inform him she was dating another individual. Ms. Martin purposely called Mr. Witter to hurt him and to make him jealous. Ms. Martin called Mr. Witter even though she was fully aware of his inability to effectively deal with rejection and abandonment and his inability to walked away from the bottle when confronted with issues such as rejection and abandonment. Ms. Martin's testimony does not absolve Mr. Witter's actions when he stabbed Mr. Rumsey, it explains, however, the interactions that set the offense in progress. [17]

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[17] This becomes especially important given that two of the remaining three aggravators are invalid under Bejarano. See Claim Four.

Had trial counsel thoroughly investigated the circumstances surrounding the AWDW, he would have presented testimony from Donny Sanders, Mr. Witter's brother-in-law. Mr. Sanders and Mr. Witter were drinking on the night of the AWDW. Mr. Sanders would have testified to the following regarding the Rumsey incident:

> Will was wasted when he stabbed David Rumsey. Lani, Will, and I were drinking at our place the night it happened. Will and Gina Martin had recently broken-up before the Rumsey incident. Gina called Will that day and told him she was going out with another guy, this David Rumsey guy, and that he should leave her alone. I think she just called to make him jealous. After she called him, Will got very upset. We had to calm him down because he was pissed and drunk. Lani and I eventually calmed him down and went to bed between 10 pm and 11 pm. I thought Will went to bed also because he was on the couch in the living room when Lani and I went to bed. At some point after we went to bed, though, he left the house and walked all the way to Gina's place, which isn't a short distance. He had to walk a good distance to get to Gina's, a couple miles at least.

Ex. 2.11.

Mr. Witter was prejudiced by trial counsel's failure to interview and present Mr. Sanders' testimony. Mr. Sanders' testimony could have been used to demonstrate Mr. Witter's intoxicated state of mind prior to and during the AWDW incident. While Mr. Sanders' testimony does not justify Mr. Witter's actions, it would have painted a clearer picture for the jury of why Mr. Witter was so enraged and just how intoxicated Mr. Witter was when he committed the instant offense.

Trial counsel's failure to interview and produce Ms. Martin, Ms. Bryd, and Mr. Sanders as explanatory or mitigating witnesses left Mr. Witter with little, to no, evidence to explain the circumstances surrounding the AWDW. Four different (State) witnesses testified about the AWDW incident with little or no cross-examination. See, e.g., ROA_at 1628-1640 (Ronald Ezell's testimony); ROA at 1641-1655 (David Rumsey's testimony); ROA_at 1655-1661 (Michael Pomeroy's testimony); ROA at 1668-1686 (Linda Rose's testimony). This testimony failed to thoroughly address the circumstances leading up to the incident, particularly Mr. Witter's alcohol intake that night. The two arresting officers (Ronald Ezell and Michael Pomeroy), testified they were unsure whether Mr. Witter was drunk that night. See, e.g., ROA at 1637-1640, 1660-1661. The only statements regarding intoxication came from Officer Pomeroy and Linda Rose. Officer Pomeroy tersely suggested Mr. Witter *may have* been intoxicated because Mr. Witter smelled of alcohol, slurred his speech, and had glassy eyes. See ROA at 1661. Linda Rose also tersely informed

the jury that Mr. Witter's blood alcohol content (hereinafter BAC) was .21, See ROA at 1679-1680, but trial counsel failed to explain what it meant to have a .21 BAC. Trial counsel failed to inform the jury Mr. Witter's BAC was nearly three times the legal BAC in California at the time. See ROA at 1679-1681. Even without an alcohol expert, trial counsel could have presented Mr. Sanders to equate Mr. Witter's .21 BAC to Mr. Witter being "pissed and drunk." Ex. 2.11.

The punishment phase began on Monday July 10th. Four days earlier, on July 6th, the State notified the defense of the intention to present evidence of gang affiliation by Mr. Witter. See Trial Counsel's Motion to Continue the Penalty Phase, ROA1790; Defendant's Opposition to the State's Motion to Permit Testimony Regarding Defendant's Gang Affiliation During Penalty Phase, ROA1801. The State argued that gang evidence should be presented, telling the trial court:

> His ties to the gang, his acts of violence, which is what that gang stands for, and his affiliation, shows his violence; it shows this is not an isolated incident and it shows why it [gang evidence] is relevant.

ROA 1577. The trial court ruled that the gang evidence was admissible "to show an individual's future dangerousness to society. . . . Dr. Etcoff will testify his gang affiliation does point to his future dangerousness to society." ROA 1582. During argument at the punishment phase, the State told the jury that Mr. Witterwas proud of his gang and threw gang signs for the camera in Exhibit 10 hours after the murder. The State begged the jury not to let Mr. Witter return to jail where he could revel in his crime because of his gang. ROA 2157. The State argued that Mr. Witter would not respond to any punishment less than death; he was in a gang and fighting against other gangs the last time he was being punished. ROA 2189.

Even were the allegations of Mr. Witter's supposed gang membership true, trial counsel could have taken steps to counter the prosecution's plea for death: that Mr. Witter would use his gang associations to inflict violence on prison guards and other inmates. Defense counsel, in a death penalty case, is obliged to investigate the prosecution's case for death and to develop and present arguments in rebuttal to that case. Here, defense counsel failed to do this because he never investigated the possibility. See Mr. Witter's Ex. 2.26 ¶34, Trial counsel's affidavit - Prior to receiving the State's notice of intent on the gang evidence "It never dawned on me the State would try to argue William was a gang member." See also Petitoner's ex. 4.2, p. 22, Trial counsel's

testimony at evidentiary hearing, ("this was a homicide committed on someone he didn't know. There was a sexual assault on someone that he didn't know. He wasn't here with any gang member. He was here with a brother-in-law. I had no reason in the world to believe that gang evidence would be relevant in this case.").[18]

The prosecution relied on Mr. Witter's past criminal conduct plus his alleged membership in a prison and street gang, known as the Nortenos. See Claim One. Despite ample available evidence, defense counsel failed to put on that evidence that would have demonstrated the weakness of these factors in predicting violence, even assuming the allegations were true. Department of Justice studies, published in 1992 established that past community violence was not either strongly or consistently associated with prison violence; the offense of conviction, prior convictions and even an escape history was only weakly associated with prison violence; and finally, the severity of the offense of conviction was not a good predictor for prison adjustment. See Alexander and Austin, Handbook for Evaluating objective prison conditions, National Council on Crime and Delinquency, 1992 (DOJ).

Violence is a product of the interaction of situational factors, interpersonal relationships, and other contributors, as well as individual proclivity. Shaw, Dangerousness: A paradigm for exploring

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[18] But he should have. In a November 15, 1993 report written by arresting Officer Bryon Candiano of the Las Vegas Metro Police Department, Officer Candiano reported that as he was attempting to arrest Mr. Witter, Mr. Witter said: "My reputation is higher now. All I have to do to complete it is to kill a cop." See Ex. 6.6. The state disclosed Officer Candino's report to trial counsel. Trial counsel was aware of Officer Candino's report. See Ex. 2.26. In a November 15, 1993 investigative report Detective Thomas Thowsen wrote: "[Mr. Witter] stated that he is a gang member in California and that in California he does not normally carry weapons... ." Ex. 6.8. In his "Declaration of Arrest" report, Detective Thowsen also wrote:"During the conversation with your affiant, Mr. Witter stated that he was a gang member from California and had served time in California penitentiaries for attempt [sic] murder." Ex. 6.7. The state disclosed Detective Thowsen's reports to trial counsel. Trial counsel was aware of Detective Thowsen's reports. See Ex. 2.26. From these reports, a reasonable capital trial attorney would have anticipated the State would present future dangerousness evidence based on gang affiliation. Trial counsel had an obligation to investigate and present any evidence undermining evidence of gang affiliation or future dangerousness when trial counsel knew such evidence was available to the State.

some issues in law in psychology, American Psychologist, Vol. 33, pp. 224-238 (1978). Prison, however, is a highly structured and intensively supervised setting quite unlike the free world. To assess an inmate's future dangerousness requires an intelligent assessment of the risk factors, those factors here are Mr. Witter's criminal history and his alleged gang status, in light of the various devices employed by prisons to control behavior and protect staff and other inmates.

The obvious conclusion of most observers is that prison works. The restrictions, structure, and supervision of prison are effective in controlling and limiting violence within the walls of any given prison unit. The most critical factor in containing the violence of any violent felon lies not with the inmate changing the attitudes he had in his community but on the security, structure, supervision, sanctions and prison incentives that keep serious violence at a low level - even among those felons that exhibited serious violence within their own community.

The reality of prison is that an inmate, especially one serving a very long sentence, who engages in bad behavior faces severe consequences for his conduct. It is not as if a long term prisoner has nothing to lose. There is always something to lose: time out of one's cell, recreation, work, programming, commissary privileges, visitation privileges, etc. The more time an inmate faces, the more important these small privileges become and the more important they become to the inmate to keep them. There, thus, exists a powerful incentive to coexist with other prisoners and guards, instead of confronting them. Flanagan, T.J., "Time served and institutional misconduct: patterns of involvement in disciplinary infractions among long-term and short-term inmates," **Journal of Criminal Justice**, 1980.

The assessment of risk, that is, the forecast of whether an inmate will pose a threat of future danger while incarcerated, has to involve consideration of the preventative steps a prison administrator can take to reduce the level of violence risked posed by a particular inmate. Serin and Amos, "Decision issues in risk assessment," **Forum on Corrections Research**, pp. 231-38 (1995). These sorts of prison interventions include medication or treatment for psychological disorders, application of disciplinary interventions, rehabilitation programming, isolation from co-defendants or fellow gang members, special management provisions, or modified confinement. What is most important, especially for circumstances like the instant case, where the jury is confronted with

someone who may be a gang member, is the availability of administrative segregation or super-maximum conditions of confinement. Under this level of security, available in Nevada, an inmate is single celled and locked down 23 hours a day, with solitary exercise and shackled movement under escort. Under these conditions, the opportunities for serious violence directed at other inmates or prison personnel are seriously limited. This level of supervision can be ordered preemptively - before an inmate exhibits violence. Thus, should prison officials determine that a particular inmate, such as one who may be a gang member, might assault someone, there are steps a prison can take to minimize violence and protect other inmates and personnel.

The failure of defense counsel here to investigate these issues allowed the state to argue, without evidentiary rebuttal, and to prey upon the fears of the jurors, that even prison could not contain the violent impulses of someone who was, again unrebutted, a member of a highly organized prison gang, like the Nortenos. This invited the jury to sentence Mr. Witter to death on a fear that was not supported by any real world data. Even if Mr. Witter were a member of Nortenos, when all the available evidence suggested that he wasn't, Nevada's Department of Corrections could have contained him. He would have posed a far less threat of future danger than the picture painted by the prosecution.

Mr. Witter spent more than two years in the custody of the California Youth Authority. Several of his friends [Donny Sanders, Cary Jones, Lillian Reyes] as well as his family knew that he felt CYA was a dangerous place where one had to protect oneself. Trial counsel knew that Mr. Witter had spent formative adolescent years in that environment. Trial counsel did not explore or investigate conditions of daily life for Mr. Witter as a teenager beyond listening to Mr. Witter say he was incarcerated there for years as a teenager. Trial counsel told undersigned counsel:

> I was aware of William's comments relating to his days in CYA and how he caught extra time for fighting and gang activity. I never considered investigating the conditions of the CYA facility where William was incarcerated. It never dawned on me that the CYA conditions could be used to mitigate or explain why William was perhaps involved in fights and gang activity.

Ex. 2.26.

Trial counsel did not investigate the adolescent incarceration or the impact of that

incarceration on his development. Competent experts regarding CYA's deplorable conditions and its effect on CYA wards were available. Undersigned counsel hired Dan Macallair, a criminal justice researcher from Northern California who has been studying CYA's abhorrent conditions since the 1980s. Had trial counsel hired Mr. Macallair or a similar expert, he could have explained why so many CYA wards engaged in violent behavior and gang activity during the time Mr. Witter was a CYA ward. The expert told undersigned counsel:

> CYA facilities are constructed and operated in ways that are considered antithetical to the task of imbuing troubled adolescents with prosocial habits and behavior. In fact, experts consider conditions in the CYA, and similar facilities around the Country, to be criminogenic. In other words the facilities are more likely to escalate criminal behavior through exposure to constant threat of violence, severe physical and emotional stress, racial segregation, and gang affiliation. This supposition is overwhelmingly supported by independent investigation, legal analysis, and empirical research on the CYA. One consistent criticism is leveled at the large congregate dormitory design that has dominated CYA architecture since its inception. The CYA dormitories at Preston in which Mr. Witter was housed, are 148 feet in length and designed for 50 to 70 youths. The Preston dormitories were set with two rows of beds on each side of the room. Each youth was assigned a triple bunk bed. There was virtually no privacy, a condition that creates constant and pervasive stress and tension. The CYA's own studies, conducted at the time of Mr. Witter's incarceration, have shown these environments to increase stress levels and distort reasoning capacities among wards due to extreme lack of privacy, the necessity for constant vigilance, and the absence of rehabilitative programming.[19]

> It was long noted that the design of CYA facilities was responsible for promoting the culture institutional violence and gang rivalries. Steve Lerner, researcher for the 1982 study, Conditions of Life at the California Youth Authority, found:

> > Many members of the Youth Authority staff who must work in these circumstances recount the disadvantage of large units. Again and again one hears that wards are constantly bumping into each other in the large units and that the result is often violence. In consequence, staff members must concentrate on security issues that require more rules and regimentation than would be necessary on smaller units. In addition, larger units frequently mix sophisticated delinquents with the less experienced; causing what is known in the correctional field as contamination and victimization. Finally, large living units spawn cliques and gangs, further escalating racial and ethnic tensions in the ward population. As one youth counselor observed, "it is simply impossible for anyone to relate sanely to fifty other people at one time day after day."

> Studies about the criminogenic effect of the CYA's institutional design was also noted in the CYA's own research. In 1980 and 1981, the CYA conducted two comprehensive studies to determine if reducing the ward population impacted levels of institutional tension. In a controlled study, CYA researchers found:

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[19]Lerner, Steve. 1982 The CYA Report: Conditions of Life at the California Youth Authority, Commonweal Research Institute.

> Examination of the descriptive reports suggests that with smaller living unit size there was a lessening of tension because: 1) wards were able to interact more closely and gain a better understanding of one another, thereby counteracting delinquent labels imposed by negative peer groups; 2) fewer delinquent factions were formed or they were of a smaller size; and 3) there was less militant gang activity involving well organized groups with ethnic affiliations... The studies generally show that with less crowded conditions inmates perceive more personal space, show more positive behavior and emotional responses, and exhibit fewer psychological/physiological stress symptoms.
>
> ... The major benefits include a sizable decrease in ward involvement in serous violent behavior, a decline in time adds, and increase in time cuts.

Mr. Witter was first committed to the CYA as a nonviolent offender from Santa Clara County following his second arrest for vandalism at Steinbeck Junior High School in San Jose.

Upon entry into the Northern Reception Center, Mr. Witter would have immediately encountered an initiation process from other wards. Most likely within the first two weeks of his arrival he would have been approached by other wards asking if he wanted to join their gang. Acceptance into a CYA gang required that you be of the same race and that you prove your ability and willingness to fight when challenged.

The emphasis on "proving yourself" by resorting to violence is endemic to CYA institutions. If wards were able to "prove themselves" through violence they gained acceptance and inclusion in one of the various race-based CYA gangs. Acceptance into an institution-based gang was considered essential to ensuring personal safety. Without the protection of a gang, wards could expect to be the targets of violence, exploitation, and sexual assault throughout their institutional stays. The necessity of group identity and affiliation served to legitimize gang involvement to impressionable wards such as Mr. Witter, who had not gang affiliation prior to his incarceration in the CYA.

Mr. Witter would have been well aware of what to expect at CYA by his conversations with other youths at the Santa Clara County Juvenile Hall prior to his commitment. The near universal understanding among youths facing CYA commitment was that they would have to fight to avoid being perceived as weak. In addition, they would also have to join a gang in order to avoid being victimized by other wards. In the second volume of their series of reports on conditions in the CYA entitled, Bodily Harm: The Pattern of Fear and Violence at the California Youth Authority *(1986)*, Commonwealth researchers noted:

> ...At the Youth Authority, many inmates join racially and geographically based gangs. New inmates are often forced to join these gangs for safety. If they balk, they may be beaten or intimidated into paying "rent" by buying off the bullies with candy, cigarettes, and groceries bought at the canteen.
>
> ...Those inmates who seek protection by joining a gang are often ordered by its leaders to assault someone as part of the price of admission - a proposition that is hard to refuse when they realize that their choice is beating someone up or becoming the target of a group attack. Either way they lose.

This initiation process into the CYA's gang subculture establishes the institutional pecking order and determines each youth's designated role. CYA gangs do not have an established formalized hierarchical structure like adult prison gangs. Instead CYA gangs are characterized as a fluid and frequently changing network of relationships that coalesce on racial, ethnic, and geographical identities. Unlike adult prisons where gangs are rigidly

> structured and engage in criminal enterprises, CYA gangs form primarily for protection and solidarity.
>
> Institutional riots typically resulted from rivalries or disputes between different racial and ethnic groups. These conflicts would erupt usually from minor disagreements or perceived disrespect. Mr. Witter would have been introduced to racial hatred and conflict upon entry into the CYA. It was an unwritten rule that you did not associate with people of other races. To do so meant exclusion from your group and the loss of protection from random attacks by rival groups, particularly at night in the dormitories.
>
> Wards considered weak and who had no gang affiliation where subject to random and frequent assault. In these situations weak wards were confronted with only three choices fight, submit to the victimization, or tell the staff. To accept a submissive role meant repeated physical, sexual, and emotional exploitation - a situation in which Mr. Witter would have endeavored to avoid. Reporting incidents to the staff ensured retaliation from the other wards, and staff could not adequately protect those labeled snitches. The general rule among CYA wards was if you saw something "go down" just walk away and pretend you didn't see anything. Even a willingness to fight and defend yourself brought no relief. As a ward you were expected to continually prove yourself even among your own group.
>
> Because of the gang subculture and rampant violence within CYA institutions, 75 percent of wards received time adds for rule infractions. These time adds extended the wards length of stay and caused a large number of wards to "max out" - completing their entire sentence within the institutions. The irony of this policy is that longer confinement periods served to further enmesh the youths in the prison subculture and left no opportunity for parole supervision. If wards "maxed out" they automatically received a dishonorable discharge- which appears to have occurred in Mr. Witter's case.

Ex. 2.28.

Mr. Witter was incarcerated within the CYA as a teenager. Mr. Witte rtold Dr. Etcoff that he was "catching time left and right for gang involvement. I didn't mind being there, you were young, you were on your own; there were all kinds of violence in there. A lot of different fighting, disrespecting counselors, attacking people with different things, all of our enemies from LA, jumping guys, stabbing them with pencils. I got jumped a few times, but I never stabbed." Dr. Etcoff repeated these words, verbatim, for the jury. ROA 2101. These words were also included in Dr. Etcoff's report, which trial counsel turned over to the State at the order of trial court. Trial counsel knew about his client's youthful incarceration. Trial counsel disclosed Mr. Witter's comments about 'catching time' at CYA to the State. Trial counsel made no effort to investigate CYA or minimize those comments. Trial counsel could have explained that many, many of those young prisoners at CYA were involved in 'all kinds of violence in there.' Trial counsel could have explained, through an expert or research himself, that the culture and environment of CYA forced the prisoners into fighting or suffering the consequences of refusing to fight. Trial counsel, and his expert, Dr. Etcoff,

left the jury with the impression that Mr. Witter was just a bad, violent, trouble causing kid at CYA. Mr. Witter, like many other youths at CYA, was backed into a corner, required to join a group and fight for safety, required to fight to keep from being victimized. Trial counsel was ineffective for not developing an accurate picture of CYA and presenting that picture to the jury. Had trial counsel investigated, uncovered, and presented the above-referenced documents and witnesses, a reasonable probability exits the jury would have voted for a sentence less than death.

In addition to failing to investigate and failing to present an accurate picture of William Witter, his upbringing, his alcoholism, the generational impact of alcohol and violence from both sides of the family, and the positive qualities that survived that upbringing, trial counsel failed to investigate the offense by interviewing Donny Sanders. Mr. Witter was traveling with, and working for Donny Sanders when the offense occurred. Donny Sanders described and explained the events leading up to murder. In particular, he vividly described Mr. Witter's battle with alcoholism and his fragile state of mind at the time of the offense. Mr. Sanders would have testified:

> I brought Will to Las Vegas when he did what he did in November 1993. I wanted to take my brother David on the trip. I didn't want to take Will for a couple reasons. My employer, Mayflower, didn't allow felons on their trucks, either as drivers or assistants. My job would've been in jeopardy if Mayflower discovered Will tagged along. Second, I felt David needed the money more than Will. Third, I didn't want Will to go with me because I didn't think he could handle the trip given his alcohol and drug use at the time and leading up to the trip. I was at the point with Will where I told Lani, "I'm done helping Will out." Will was doing a lot of drugs during the period leading up to the Vegas trip.
>
> Before we went on the road, William was drunk every day and he was smoking a lot of weed. When he was at home, William drank until he passed out. William was also doing a lot of speed. He was shooting meth with a guy named Larry Page, who had recently just got out of prison. He was also doing a lot of meth with my brother, David, and Cary Jones. They were doing meth almost on a daily basis. Will got into meth when he was dating Gina Martin. Her and Will were slamming dope throughout their relationship. William did speed after getting drunk to keep from passing out. He stayed awake three or four days at a time. At one point, he called Lani and said, "I think I'm having a heart attack." We took Will to Good Samaritan hospital. The doctors said he was suffering from a rapid heart beat because of the meth. The doctor gave William Valium to calm him down. This incident shook William up and he decided that he needed to get his act together. Before the heart attack scare, Will had been out binge drinking and shooting speed for a number of days with little sleep. Carmen was living with us and she was tired of him partying all the time also. We decided that he would go on the road with me to try to get himself together. I didn't really want Will to come with me. We left San Jose on October 31, 1993, Halloween night.
>
> We went to head to Texas first, then through Las Vegas, and back to Ontario,

California. Most of the stops and drop offs were in Texas. After we left San Jose our first stop was in San Antonio where we caught an NBA game between the San Antonio Spurs and Golden State Warriors. Will and I drank a couple beers at the game but didn't get completely wasted because we had to unload a shipment the next day.

After San Antonio, we went to Dallas. When we arrived in Dallas, we met up with my cousin, John Sanders. John was living in Euless, Texas at the time. Will and I hung with John for a while before I called it a night. John and Will went to the bowling alley to get some more drinks. They got drunk, especially Will. The police were called because Will was being rowdy. It was another one of his out of control, public drunkenness cases. The police came to my truck. I talked to them but William was shouting at them 'fuck you! I'm not coming out!' When William did come out, he allowed the police to handcuff him but then he started dragging his feet and stiffing up and refused to be put in the car. He was yelling at them 'fuck you! I'll beat your ass!' They finally got him in the car. Somehow, though, Will managed to get out of the police car. He tried to crawl away from the police. They eventually had to hog tie him to get him under control. The next morning, when I went to pick Will up at the police station, Will was sitting with the same police officers who arrested him. The officers were drinking coffee with him and having him help them move boxes. The officers told me they couldn't believe he was the same person they'd arrested the night before. They said he was a completely different person when he was sober.

The day before the murder, I discovered one of the helpers that had worked with us had left a knife on my truck. William was not carrying a knife before we found the knife on my truck.

We left Texas November 10, 1993 and arrived in Las Vegas during the afternoon on November 13, 1993. Once in Las Vegas, we drove up and down the strip a couple times because Will had never been to Las Vegas. After cruising the strip, we took the truck to the Wild, Wild West truck stop, which is right off Tropicana Avenue. During the early 1990s, this was the only truck stop. Once we got to the truck stop, I called Lani and Will called his girlfriend, Carmen Kendrick. While I was talking with Lani, I overheard Will's call with Carmen. We were using 2 payphones right beside one another. Will got more and more upset as the phone call went on. At one point I heard Will say, "Why Carmen, why are you doing this. I'm trying to get my act together." When Will got off the phone he said, "She's killing the baby." He also told me Carmen started doing black magic on him by placing a hex on him and telling him she's going to kill their child. She was going to get an abortion and kill their baby. Will, and some of the family, like Lani and I, thought Carmen was pregnant with Will's baby because she told Will she was pregnant with his baby. She'd even act like she was pregnant. She'd tell her friends and us to "feel my belly," "feel the baby." Will and her had a name picked out. They were supposed to use Lani's name somewhere in the name.

Will was a completely different person once he got off the phone. He was crying because Carmen wanted to kill their child. She wanted to abort the child. In all my years of knowing Will I'd never seen him cry. He was very, very upset because he really wanted to have a child. He really wanted to be a father. Will's ex-girlfriend, Gina Martin, also got an abortion when she and Will were dating. The pregnacy was the one thing that kept him sane during this period. He really looked forward to having a child and becoming a father.

I even spoke to Carmen that day. Will was so upset after the phone call I decided to

call her back. I called her and said, "What are you doing to Will?" She said, "I placed a hex on him. He's going to Hell." Lani even called Carmen because I called Lani and told her what Carmen said to Will. Lani said she called, but Carmen refused to answer her calls.

After the phone calls, Will and I showered and went across the street to Taco Bell to eat dinner. Will was still visibly upset. After dinner, we went back to the truck. Will started walking toward the strip. As he got out, I said, "Will, don't get drunk. We have to work tomorrow." After Will left, I eventually just fell asleep. I didn't drink that night.

When I woke up the next morning I didn't see Will in the truck. I figured he'd been arrested again for public drunkenness or something like that and spent the night in jail. I called Lani and told her to call all the local jails to see if she could find Will. Lani said she called the Clark County Detention Center and they told her Will was in custody for double murder. She then called me hysterical and told me where he was and what he was arrested for. I just couldn't believe it. I thought they got things mixed up at CCDC. I wanted to go to CCDC, but I had to make my deliveries. So I did my drop offs and then I went to CCDC to see if I could talk with Will or give him some money. Once I got to CCDC, they wouldn't let me see Will or give him any money, they said the best thing for me to do is to leave Las Vegas and finish my deliveries. I tried to tell them Will wasn't from Las Vegas and why he was in Las Vegas. They wouldn't listen, they basically just told me to leave.

I learned more about the incident in the morning paper. I just couldn't believe Will was responsible for this type of crime. The Las Vegas police never contacted me or interviewed me, even though I was with Will up until the time of the incident.

Will didn't shoot meth at all during the trip, he actually slept a lot on the trip because he'd been binge drinking and drugging so much leading up to the trip he needed to catch up on his sleep.

There's no way Will did this straight. Will had to be very drunk. A sober Will Witter would be incapable of doing such violence. Will is the greatest guy in the world when sober.

Ex. 2.11.

The murder of Mr. Cox and the assault of Ms. Cox was described by Ms. Cox, some security guards, police officers and detectives and crime scene personnel. Donny Sanders could have described what Mr. Witter was doing immediately and in the days before the offense. Donny Sanders could have described Mr. Witter's dashed belief that he was to be a father. Donny Sanders could have described Mr. Witter crying because Carmen wanted to kill their child. Donny Sanders could have given the context of Mr. Witter's continuing problems and how he transformed with alcohol from outgoing to angry and out of control even in the days before the incident. Even if Donny Sanders were not relevant to Mr. Witter's guilt, they were very relevant to the punishment phase. Had trial counsel investigated, uncovered, and presented the above-referenced Donny Sanders, a

reasonable probability exits the jury would have voted for a sentence less than death.

Cumulative Error Analysis

This Court is compelled by law to view the incidents of ineffective performance by trial counsel cumulatively in determining the impact of that error on the verdict. See, e.g., Cooper v. Fitzharris, 586 F.2d 1325, 1333 (9th Cir.1978) (en banc); Harris ex rel. Ramseyer v. Wood, 64 F.3d 1432, 1438-39 (9th Cir.1995), Daniels v. Woodford --- F.3d ----, 2005 WL 2861623, (C.A.9 (Cal.), Nov. 2, 2005). Viewed cumulatively, the multiple errors of failing to conduct a thorough investigation including interviewing available witnesses, thoroughly interviewing witnesses, collecting records, consulting the records to guide investigation, consulting with mitigation or mental health professionals regarding the records, failing to collect data about Mr. Witter's childhood home, the impact of alcohol on him, the impact of alcohol and drugs family wide, his positive qualities and the role of FAE in his life compel a new sentencing hearing. The sentencing hearing was fundamentally unfair. The jury sentenced Mr. Witter to death without being aware of all of the factors involved in the offense or in his life and development. The jury determined moral culpability at death for the facts of the offense without considering the factors beyond Mr. Witter's control that prompted the offense.

In sum, the assessment of prejudice is fairly simple. Though defense counsel presented a compelling case of family neglect and abuse, he was still confronted with a predictable and oft used prosecutorial rebuttal: that Mr. Witter's life was the result of his own voluntary choices, that he chose to drink, chose to fight, chose to join a gang and assault members of rival gangs, and that he chose to kill James Cox and sexually assault his wife, Kathryn Cox. To support this theory, the prosecution tried to establish that Mr. Witter was part of a gang and cross examined his witnesses with a view to establishing his own free will.

But Mr. Witter's life and the road to the tragic consequence of November 14, 1993 when James Cox was killed were not the result of Mr. Witter's voluntary choices. From before he was born, he was doomed to a life of failure, frustration, addiction and violence, because his mother poisoned him when she refused to stop drinking while she was pregnant. When he was of an age when positive interventions might have been effective, his parents were no where to be found, not

merely neglecting him and his brothers and sisters but abandoning him to his fate.[20] His father was in prison and, when not incarcerated, introducing his son to more drugs and alcohol. His mother's conduct has been well documented. When he reached puberty, at an age when few children are held legally accountable, he was an alcoholic. At the age of 18, the earliest when he could have been subjected to the death penalty for his "choices", he no longer had any.

The prosecution successfully rebutted Mr. Witter's mitigation claim by insisting that he posed a very serious risk of future danger. Their story of gangs and violence, however, was simply not true but built on a fabric of misrepresentation and lies. Mr. Witter was never a member of a gang, Norteno or otherwise. Despite his years of incarceration, no prison investigator ever validated his gang participation. No investigator ever linked him to any gang related offense. No one in the

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[20] Not only did the defense ignore mitigating evidence but it failed to offer any rebuttal to the state's implicit argument that William Witter was the only child to grow up and develop a murderous level of violence. The state, as has been stated several times, drew immediate distinctions between the siblings who testified and William Witter.

Lani Sanders, for example, was cross examined about her lack of violence. Unlike her brother, however, Ms. Sanders had someone who intervened in her life, making it possible for her to escape the fate that befell her brother. As a young teenager, living in Hawaii, Lani was "rescued" by Ivy Witter, her father's ultimately second wife. Ivy Witter took Lani to beaches, museums, parks, even Disney World. She became to Lani, the mother Lani never had. According to Lani, Ivy Witter became a positive role model, someone to look up to and an anchor for Lani. Ex. 2.1A. William Witter and Ivy did not have that close relationship.

Lani's life was not without problems but when she left home at 17 to live with Donny Sanders, Donny offered her the same level of "protection" that Ivy Witter had provided. Even though both were alcoholics and drug users, Donny reached a point where he realized he had to quit and told this then wife that she had to do so as well. Donny Sanders, in effect, rescued her by insisting on rehabilitation.

Tina Whitesell had a similar but by no means identical path. When she was in Hawaii, the families of her friends took her to church services, most often churches of the Mormon and Catholic faiths. She would attend church sponsored teen nights where teenagers could gather under the supervision of adults and the church. The Leeloi family went even further, by taking her into their home, encouraging her to stay overnight and get out of the disaster that was the Witter family household. These activities, in effect, "instilled" in her enough values to allow her to survive the chaos of her family's dysfunction. When she returned to the mainland US, she had "learned" enough to want desperately to leave her family, and so took a job and then joined the Coast Guard, an institution that provided her with structure, with discipline and a job. Ex. 2.2A.

None of these dynamics were available to William Witter.

San Jose police department ever concluded has associated with any gang. Linda Rose, his parole officer, never found any indication that he was a gang member. As noted by the CYA authorities and Mr. Witter's friends and Ms. Rose, the tattoos, emphasized so heavily by the prosecution, were simply a defensive measure, a step Mr. Witter took to protect himself in prison. Mr. Guymon's statements to the jury that he was committing assaults as part of the gang culture, Norteno v Soreno, were simply not true.

Further, Mr. Witter's life outside prison was not the violence filled life portrayed by the prosecution. Mr. Witter held jobs and was well liked by his coworkers and employers. He worked hard, showed up at work every day and never caused any trouble while sober. Even the victims of one of his offenses found him to be personally very likable when not under the influence of alcohol. This picture of Mr. Witter's life was not presented.

In short, what evidence defense counsel did present in mitigation was overwhelmed by evidence that could have been easily undermined, had defense counsel merely looked for it. Had defense counsel obtained records more quickly, he would have discovered the complete lack of evidence of gang affiliation. Had he simply asked Ms. Linda Rose, one of the State's witnesses, the same questions, he would have demonstrated how false the state's assertions were. Had he made a better effort to understand Fetal Alcohol Syndrome, he could have rebutted the prosecution's case for voluntary choice. Had he simply interviewed family members and friends, some of whom were in the courtroom and others who had volunteered to pay t heir own way to Las Vegas to testify, he could have established that Mr. Witter's life was not filled with violence and gang activity as the prosecution contended. The jury was left with a picture of a William Witter who, though coming from a bad family, was a thoroughly dangerous man, a false and incomplete picture. Mr. Witter has established both that his trial counsel rendered ineffective assistance of counsel and that he was prejudiced by this failure.

The above stated claim is of obvious merit. Competent appellate counsel would have raised and litigated this meritorious issue on direct appeal and in state post-conviction. There is no reasonable appellate strategy, reasonably designed to effectuate petitioner's best interest, that would justify appellate counsel's failure in this regard. Petitioner is entitled to relief in the form of a new

trial, a new sentencing hearing, and where appropriate, a new appeal.

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CLAIM THREE

Mr. Witter's sentence is invalid under the state and federal Constitutional guarantees of due process, equal protection, the right to trial by an impartial, representative jury, and a reliable sentence because the prosecutor used his peremptory challenges in an intentionally racially-discriminatory and intentionally gender-discriminatory manner by removing African-American women from his capital jury in violation of the state and federal constitutions. U.S. Const. Amends. V, VI, VIII & XIV. Nev. Const. Art. 1, §§ 3, 6, and 8; Art. 4, § 21.

SUPPORTING FACTS

The state violated well-established federal constitutional law when it struck panel member Elois Brown, an African-American woman. The prosecutor's removal of Ms. Brown was racially motivated in violation of Batson v. Kentucky, 476 U.S. 79 (1986) and its progeny.

Mr. Witter's Batson claim is premised on three arguments. First, the trial court failed to conduct an adequate inquiry because it misconstrued Batson's applicability in situations where the criminal defendant is not a minority. Second, the Nevada Supreme Court improperly found a race-neutral reason from an incomplete factual record and without giving due consideration to Batson's third step–whether the state's explanation was pretextual. Third, evidence from jury selection, a post-conviction deposition, and an affidavit from Ms. Brown, demonstrates that the prosecutor's alleged race-neutral reason was in fact pretextual.

Voir dire in Mr. Witter's capital trial was a two-phase process. First, the trial judge asked panel members a broad question regarding whether they could "equally consider" the three forms of punishment applicable under Nevada's capital punishment statute. Nev. Rev. Stat. §200.033. Second, if panel members were not removed for cause during the first stage, they were then questioned by the state and trial counsel.

During this initial phase of questioning, the trial judge asked Elois Brown the following questions:

> The Court: Miss Brown... as you know by now, this case could be, under certain circumstances, broken down into two distinct phases, the first being the evidentiary hearing phase and the second being the penalty phase.

If you sit upon the jury and you come back with a verdict of first degree murder, you would then sit in the penalty phase.

You understand that, don't you?

Ms. Brown: Yes, sir

The Court: Under the laws of the State of Nevada, you would have, in the penalty phase, three possible forms of punishment from among which you would select one. Those three forms are the imposition of the death penalty, life imprisonment without the possibility of parole and life imprisonment with the possibility of parole.

In your present state of mind, Miss Brown, if you're selected as a juror in this case, can you consider equally all three of these possible forms of punishment and select from among them the one you feel to be the most appropriate, under the facts and evidence of this case?

Ms. Brown: Yes, I could.

The Court: And will you do it?

Ms. Brown: I would do that.

ROA at 229-230.[21]

Ms. Brown did not hesitate in answering any questions, nor did she appear to be incapable of making a decision. If the trial court had detected any hesitation or ambivalence from Ms. Brown it would have further questioned her to uncover any impermissible biases or personal opinions that would have prevented or substantially impaired her ability to adhere to her duties as a juror.

The trial judge had no trouble questioning panel member Leroy Gammage when he detected hesitation. After the court asked Mr. Gammage the same questions as Ms. Brown, Mr. Gammage initially indicated he could "equally consider" all three forms of punishment. ROA at 248. The trial judge then asked "will you do that?" (implying will you "equally consider" all three punishments), whereupon Mr. Gammage, once again, answered "Yes." ROA at 249. At this point, even though Mr. Gammage gave affirmative answers to both questions the trial judge was not entirely sure whether Mr. Gammage's responses were completely forthcoming. As a result, the trial court said:

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[21] ROA citations are to the state record on direct appeal. Exhibit references are to the exhibits filed in conjunction with this petition.

"I detect just a slight hesitation on your part. I want to make sure: Can you consider equally all three of these forms of punishment?" ROA at 249. Whereupon Mr. Gammage responded: "Yes, I could, but—yes, I could." Id. The trial court followed up by asking, once again: "Will you consider–if you are in that position–consider equally all three of those forms of punishment and select the one you feel most appropriate?" Id. Mr. Gammage responded: "I'd rather not." Id. Through further questioning, the trial court discovered that Mr. Gammage does not believe in the death penalty. ROA at 249 (Mr. Gammage: "I just don't believe in the death penalty").

During the second phase of jury selection, Ms. Brown was initially questioned by the prosecutor. Throughout the prosecutor's questioning, Ms. Brown answered each question, particularly those concerning her ability and willingness to consider and impose death and to being fair to the state, with clarity and decisiveness. From her answers one could not reasonably infer that she would have a problem making a fair and impartial decision. When the prosecutor asked Ms. Brown about her "thoughts holding an individual responsible for his or her conduct," Ms. Brown answered, "I believe everybody is responsible for their actions. They have to understand there are reactions for every action, so everybody should know that." ROA at 452. When the prosecutor asked, "Do you feel as though you are good in making decisions?" ROA at 453, Ms. Brown unequivocally responded, "Yes, I do." Id. Ms. Brown straightforwardly answered in the negative as to whether there was anything that caused her any concern about passing judgment on another person. See ROA at 453.[22]

Ms. Brown admitted the decision would be "uncomfortable" but stressed she "would be open minded to look at both cases by the state and defense to know which decision I'm going to make." ROA at 454. Ms. Brown testified:

> I know it's one of the penalties imposed, but I gave it just as much thought as I gave the other two penalties that were given to us as a thought. After hearing evidence, that's when I can decide on which penalty suits the crime. So each one is just as equally important to me, in my opinion.

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[22] Ms. Brown was once again asked this question, "Is there any concerns that you have about serving as a juror in this case?" Again she straightforwardly answered, "No." ROA at 455.

Id.

The prosecutor asked: "And you see both the importance and perhaps the necessity of each one then?" ROA at 454-455. Ms. Brown answered, "Yes, I do." Id. Ms. Brown said she could tell Mr. Witter he deserved to die if she felt death was the appropriate punishment. See Id.

When the prosecutor tried to lead Ms. Brown into an uncomfortable corner by asking her, "Is it something that you look forward to with great reservation? Would that be accurate?" Ms. Brown unequivocally answered, "I wouldn't say any kind of reservation. I feel, as a citizen, it's my duty to serve on a jury if called. I have no reservations at all about it." ROA at 455. Ms. Brown stressed she could and would consider death, life with, and life without parole equally and fairly. See ROA at 455 (answering "yes" to the question "do you . . . have the capacity in your heart to consider each one."). Lastly, Ms. Brown testified, without hesitation, she could and would be fair to the state and Mr. Witter. See Id.

After questioning Ms. Brown, the prosecutor informed the trial court he was satisfied with Ms. Brown's answers and passed her for cause. See ROA at 456.

Once passed for cause by the prosecutor and trial counsel, the trial court simply said, "Thank you. Juror Number 7, Miss Brown, is passed for cause."[23] ROA at 459. The trial court asked no follow-up questions to determine potential biases or personal beliefs that would have prevented or substantially impaired Ms. Brown's ability to follow her duties as a juror. No one was unsure about her capacity to serve as a capital juror.

The trial court was also uncertain about the statements of prospective juror Linda Joyce Jones. See ROA at 340-349. While under questioning from the prosecutor, Ms. Jones expressed her apprehension regarding the death penalty, see ROA at 342 ("I couldn't do death"), whereupon the prosecutor promptly moved to challenge her for cause. See Id.. When questioned by trial counsel, Ms. Jones expressed a willingness to consider death even though she did not favor capital punishment. See ROA at 344 (Mr. Kohn: "[C]an you follow the law as the Court gives it to you,

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[23] Cause in Nevada includes "the existence of a state of mind in the juror evincing enmity against or bias to either party" and "having formed or expressed an unqualified opinion or belief as to the merits of the action. . . ." Nev. Rev. Stat. §16.050 (f)(g).

which means you must consider all three penalties?"; Ms. Jones: "If I had to, I would have to."). Trial counsel submitted and passed Ms. Jones for cause.

Not being one-hundred percent convinced Ms. Jones could consider death, the trial court questioned Ms. Jones. During its examination, Ms. Jones, on three separate occasions, indicated she could and would consider death, even though it would be a difficult task. See ROA at 346-348. Still not satisfied with Ms. Jones' responses, the trial court probed one last time by asking: "If, after the evidence is presented to you . . . when all of these circumstances are laid out before you . . . and you feel in your mind and your heart that it supports the death penalty and not the other two, can you come back with that penalty?" ROA at 349. Ms. Jones testified, "I don't think I could, sir." Id.

Likewise, when prospective juror Mark Clark testified he "would be leaning more towards the death penalty," ROA at 439, if the evidence presented conclusively established Mr. Witter was responsible for Mr. Cox's death, the trial court asked:

> What it seems like you told Mr. Kohn was if it was proved that the defendant murdered these people, that you would favor the death penalty. Do you understand that the question I asked you yesterday also said the same thing? It said if you come back with guilty of murder in the first degree,... could you consider all three forms of punishment, and you said yes, you could. But now you seem to say the opposite thing to Mr. Kohn: That if they proved he killed these people, you would favor the death penalty. I want to make sure what it is you think.

ROA at 443.

Lastly, when the prosecutor questioned Jimmy Earl King, Mr. King said he was a "little bit apprehens[ive]" about sitting as a juror on a murder case. Concerned that Mr. King's apprehension may impair or substantially affect his ability to be fair and impartial to the state, the prosecutor probed this issue in more detail with Mr. King to ensure he could be fair and impartial. See ROA at 335-336.

In short, nothing in Ms. Brown's demeanor or answers caused any apprehension with the trial officials that would justify her exclusion as a juror.

A. The Trial Court Failed to Conduct an Adequate Batson Inquiry Because it Misconstrued Batson's Applicability

The prosecution exercised the first peremptory to strike Ms. Elois Brown. See ROA at 812.

Trial counsel immediately made a Batson objection arguing, "Miss Brown was one of two African Americans . . . left on the panel." Id. Trial counsel added, "we had eight African Americans throughout the entire panel." Id. During the two-phase jury selection six out of eight (or 75%) African Americans were excused for cause. Trial counsel argued, "I believe [Mr. Witter's] right to trial under the Fourteenth, Sixth, and Seventh Amendments is violated by [the State] striking people of color. We are down to two black people; [Ms. Brown being] one of the two." ROA at 813. Trial counsel continued:

> The record has to know that there were eight African Americans on this panel. Six of them begged off because they could not impose the death penalty. I believe counsel is going to exclude black people because they cannot impose the death penalty. And I think that's what he's doing. They tend to be more liberal and–because they know who the death penalty is used against. I believe my client has a right to a cross-section of this community, which includes black Americans.

ROA at 815-816. In response, the trial court declared, "this isn't an African-American defendant... I should note the defendant isn't a person of color, so I think it's an unusual challenge . . ." ROA at 812 -813. The trial court believed Batson was inapposite under the circumstances because Mr. Witter was not an African-American defendant. Although skeptical of Batson's applicability, the trial court, without addressing Batson's prima facie requirement, went directly to Batson's second step (shifting the burden to the State) by asking the prosecutor to give his explanation for striking Ms. Brown. See ROA at 813 ("I'll let the State put on their reasons.").

The prosecutor claimed his strike was not racially motivated because his notes "did not reflect anything about [Ms. Brown's] race at all." ROA at 813; Id. at 816 (Mr. Guymon: "I can assure the Court it had nothing to do with race... When I looked at the juror, I did not note race."). The prosecutor claimed his notes reflect he "did not believe [Ms. Brown] was capable of making a decision." ROA at 813 (Mr. Guymon: "My notes–my statement as to 87 is absolutely blank, indifferent as to race other than the fact I put I did not believe she was capable of making a decision.").

The trial court overruled trial counsel's Batson objection. The trial court stated, "I overrule it in this matter, because I don't think it even applies in this instance." ROA at 813, 816 (emphasis

added), (The Court: "I don't know whether that falls under Batson."). The trial court further stated, "I didn't even think we had even a racial issue because I thought the defendant was a Caucasian." ROA at 815. The trial court's interpretation of Batson was that the defendant and the panel member had to be members of the same race.

The trial court's misapprehension of Batson's applicability prevented it from developing any factual findings relating to Mr. Witter's claim that the prosecutor's peremptory challenge of Ms. Brown was racially motivated. As a result, the trial court did not appropriately assess the persuasiveness, credibility, or plausibility of the prosecutor's professed race-neutral explanation, as mandated by Batson. Consequently, because the trial court did not address Batson's third step (i.e., whether the explanation is pretextual), the trial court's ruling (or based on its apparent misapprehension of law) violated clearly established federal due process rights.

B. Evidence from Jury Selection, a Post-Conviction Deposition, and a Declaration from Ms. Brown, Demonstrates that the Prosecutor's Alleged Race-Neutral Reason was in fact Pretextual

In March 2005, Ms. Brown stated:

> In early June 1995, I was summoned for jury duty in the capital trial, State v. William Witter. I was questioned by the judge and the attorneys on June 19 and 20, 1995, but I was not chosen to serve on the jury.
>
> During jury selection, I heard the prosecutor's recitation of the facts and the evidence that would be introduced at trial to show that Mr. Witter was guilty of first-degree murder with use of a deadly weapon, attempted murder with use of a deadly weapon, attempted sexual assault with use of a deadly weapon, and burglary.
>
> I recall having listened to potential jurors express that they could not impose the death penalty if Mr. Witter was found guilty of first-degree murder. I recall that the judge was combative with the individuals that expressed reservations about imposing the death penalty. The judge's demeanor toward those individuals did not impact my responses because I was not hesitant to impose the death penalty.
>
> I recall having observed Mr. Witter sitting at the defense table. He was a scary looking guy. He was a large, imposing, man who had tattoos visible on his face, neck and hands. He was very intimidating. Mr. Witter never reacted to what was going on in the courtroom. He had a blank expression on his face. He stared right through the jurors when they talked. He never showed any remorse.

At the time I was questioned by the judge and the attorneys to determine my eligibility to serve on the jury, I was of the belief that Mr. Witter's alleged actions, if proven to be true, constituted a horrible crime. It struck me that the blatant murder of a husband right in front of his wife was particularly horrendous. I did not think that such a murderer could be rehabilitated.

My belief was that, regardless of an individual's background, a person has the ability to control his or her actions; Mr. Witter could have changed his actions, but he failed to do so. My belief is that each and every action causes a reaction. Mr. Witter's alleged actions were inexcusable, and permanently altered the lives of his family, as well as the victim's family. My belief was that if Mr. Witter was responsible, he would have to pay. Therefore, I believed that, based on the things he had allegedly done, the death penalty was warranted.

I am an African-American female. I do not have light skin pigmentation or facial features that would lead someone to believe that I am not an African-American female.

I do not know whether I was removed from Mr. Witter's jury because of my race.

I do not know how the prosecutor could conclude that I was hesitant about imposing the death penalty.

I told the prosecutor that I believed in the criminal justice system, that I believed individuals should be held responsible for their actions, that I was good at making decisions, that I had twice served as a juror in the past, that I had made important decisions in my life, that I had no concerns about passing a final judgment, that I could consider each of the three possible penalties, that I could tell Mr. Witter to his face that he deserved to die, that I had no concerns about serving as a juror, that I believed it was my duty to serve as a juror, and that I could be fair to both sides.

I am not opposed to the death penalty as a form of punishment for offenders in egregious cases like this one. Nor would I hesitate to impose the death penalty in a case like this one. In fact, my belief at jury selection was that I would most likely vote for the death penalty in the penalty phase so long as the prosecution was able to establish that Mr. Witter was responsible for the crimes charged in the guilt phase.

See Ex 2.30. Ms. Brown was willing and able to consider death and possibly vote for death if the State established Mr. Witter was responsible for the crimes charged.

In attempting to rebut trial counsel's Batson objection, the prosecutor said he struck Ms. Brown because he "did not believe she was capable of making a decision." ROA at 813. The prosecutor told the trial court, on the record, he thought Ms. Brown was incapable of making a

decision because he made note of this fact in his juror notes. See Id.. ("My notes, I did not reflect anything about her race at all. My notes... as to 87 [Ms. Brown's designated juror number] is absolutely blank... other than the fact I put I did not believe she was capable of making a decision."). The prosecutor told the trial court, on the record, he wrote a brief comment on his juror notes referring to Ms. Brown's inability to make a decision. The state post-conviction trial court relied heavily on this assertion from the prosecutor when it denied Mr. Witter's Batson claim. See 6.5 at 9 ("the State offered a race-neutral reason for exercising its peremptory challenge. The prosecutor indicated to the trial court that he had nothing in his notes regarding the juror's race. The only notion the prosecutor had with regard to the juror was that he did not believe that she was capable of making a decision.") Id.. (emphasis added.)

Current counsel collected the prosecutor's juror notes through discovery in this Court. Counsel discovered no such comment or comments in Mr. Guymon's juror notes. See Ex. 4.6. There are no phrases, words, or comments of any kind on any of the prosecutor's juror notes indicating Ms. Brown was incapable of rendering a decision. The only thing written on Ms. Brown's juror information section is the letter "C," indicating she was perceived to be an average candidate using the A, B, C grading system. The prosecutor's representation to the trial court was a misrepresentation aimed at deflecting attention away from the real reason he struck Ms. Brown–she was an African-American woman. The prosecutor's response to the trial court is not a valid, race-neutral reason for exercising a strike.

Mr. Guymon made notes about countless other jurors who received low grades for their indecisiveness or anti-death penalty views. Mr. Guymon's juror information card reflect these comments:

Lenda Joyce Jones (initial voir dire, ROA at 226)

Individual voir dire, ROA at 340-349

Excused for cause during individual voir dire

Mr. Guymon's grade: None

Mr. Guymon's comments: "Couldn't sentence to death."

Karl J. Hanson (initial voir dire, ROA at 232)

Individual voir dire, ROA at 484-491

Excused for cause during individual voir dire

Mr. Guymon's grade: C-/D-

Mr. Guymon's comments: "This guy is weak; DUI prior; equally no in answer to can be open to death penalty; very hard find w/ giving death penalty"

Gerald F. Hon (initial voir dire, ROA at 245)

Excused for cause during initial voir dire

Mr. Guymon's grade: None

Mr. Guymon's comments: "Can't consider death."

Louise Collins (initial voir dire, ROA 248)

Excused during initial voir dire because she had a non-refundable ticket

Mr. Guymon's grade: C-

Mr. Guymon's comments: "This witness is weak; not sure if she can pass judge"

Tandy R. Yates (initial voir dire, ROA at 282)

Excused for cause during initial voir dire

Mr. Guymon's grade: None

Mr. Guymon's comments: "Doesn't want responsibility to hand down the verdict; can't handle a decision"

Evelyn Mitchell (initial voir dire, ROA at 295)

Individual voir dire, ROA 741-747

Peremptorily struck by Mr. Guymon

Mr. Guymon's grade: C+/B-

Mr. Guymon's comments: "Don't think so re: death penalty; don't want responsibility; woman w/cough drive me crazy"

Tita Ramos (initial voir dire, ROA at 383)

Individual voir dire, ROA at 543-549

Excused for cause during individual voir dire

Mr. Guymon's grade: none

Mr. Guymon's comments: "can't... judgment guilt"

Mary Phillips (initial voir dire, ROA at 376)

Individual voir dire, ROA at 549-560

Excused for cause during individual voir dire

Mr. Guymon's grade: D-

Mr. Guymon's comments: "passing judgment doesn't like to but understands need under the law; disinclined to choice (sic) death penalty; couldn't weigh them equal"

Donna Barber (initial voir dire, ROA at 383)

Excused for cause during initial voir dire

Mr. Guymon's grade: none

Mr. Guymon's comments: "could not consider death"

Donald McClaflin (initial voir dire, ROA at 387)

Excused for cause during initial voir dire

Mr. Guymon's grade: none

Mr. Guymon's comments: "Judge read panel 'the question' 143 shook head no; notice a bad attitude yesterday"

Fancy Winder (initial voir dire, ROA at 406)

Excused for cause during initial voir dire

Mr. Guymon's grade: none

Mr. Guymon's comments: "couldn't consider death"

Lynnedee Shay (initial voir dire, ROA at 409)

Excused for cause during initial voir dire

Mr. Guymon's grade: none

Mr. Guymon's comments: "couldn't consider death"

Dave Hickey (initial voir dire, ROA at 412)

Individual voir dire, ROA at 805-813

Peremptorily struck by Mr. Guymon

Mr. Guymon's grade: none

Mr. Guymon's comments: "has a bad attitude"

Heather York (initial voir dire, ROA at 418)

Excused for cause during initial voir dire

Mr. Guymon's grade: none

Mr. Guymon's comments: "couldn't consider death penalty; couldn't make decision."

See Ex. 4.6. In short, Mr. Guymon did not hesitate to note potential jurors who might have a problem returning a death verdict. The absence of such a note in Ms. Brown's case reinforces the argument that the strike was racially motivated and his explanation false.

Mr. Guymon allowed potential jurors to serve who expressed the same sort of reservation about the death penalty he mistakenly attributed to Ms. Brown:

> Mr. Guymon: Can you share with us some of your thoughts since Monday about the death penalty?
>
> Mr. Yale: Well, after leaving here, and listening to all the discussions that went on when I was in here before, I gave a considerable amount of thought to the death penalty. The other two didn't bother me as much as the death penalty. But as a citizen, I feel like it's my duty to do whatever I have to do.
>
> Mr. Guymon: Appreciate that. You say the thought of the death penalty bothered you. It bothered you because you didn't see the necessity of it or it bothered you because that was a heavy responsibility?
>
> Mr. Yale: I think it was a heavy responsibility, because I've never been confronted with anything like this before.

ROA at 655-656 (emphasis added).

At trial and during his deposition, Mr. Guymon characterized Ms. Brown as someone who could not make a decision because she admitted a level of discomfort that accompanies the awesome responsibility of deciding who lives and who dies. ROA 453-454 Using this explanation as a

baseline, other prospective jurors who expressed any level of discomfort, apprehension, or hesitation with passing judgment on Mr. Witter should have received similar grades to Ms. Brown (C), and have been peremptorily struck.

Jimmy Earl King expressed apprehension:

> Mr. Guymon: Are there any concerns you have, as this jury trial begins and as you assume the role of a juror in this case, any uneasiness?
>
> Mr. King: Yes, there is that little bit of apprehension. It's just an uneasy feeling, apprehensive feeling, that I would have in my mind about a murder trial, per se.
>
> Mr. Guymon: Is the apprehension caused from passing judgment on the conduct of a human being?
>
> Mr. King: No.
>
> Mr. Guymon: Can you articulate the apprehension for me?
>
> Mr. King: It would possibly be the evidence that I would be looking at.
>
> Mr. Guymon: I'll ask a little bit about that. This being a murder scene, obviously a murder scene will be depicted, and at times, the testimony may be very horrific. Is that the apprehension?
>
> Mr. King: Yes.
>
> Mr. Guymon: Does–that apprehension, does it over–will it overshadow your judgment in this case?
>
> Mr. King: It will not.

ROA at 335-336 (emphasis added). Mr. King also described the uneasiness of imposing the death penalty to Mr. Kohn.

> Mr. Kohn: Any thoughts about the death penalty?
>
> Mr. King: It's terrible to have to impose it on anyone, but I can see where it has its place, mainly in the fact that if

somebody does receive the death penalty, maybe it will cause somebody out there to think about their action before they commit something that would require it.

ROA at 496-497. Mr. King's apprehension did not affect Mr. Guymon's view of him. He received a higher grade than Ms. Brown (B+/B) and was selected as a juror for Mr. Witter's jury. See Ex. 4.6.

Edith Blankman acknowledged it would be "tough" to pass judgment on another individual's conduct.

Mr. Guymon: Your thoughts about passing judgment on another individual's conduct, do you have any thoughts about that?

Blankman: That's a tough one, but I do think everyone is responsible for their own actions.

ROA at 420 (emphasis added). Ms. Blankman's comment is very similar to Ms. Brown's testimony: "Is it uncomfortable? Yes, but I would be open mined to look at both cases by the State and defense to know which decision I'm going to make. I'm having evidence presented at me on both sides, so I have to look at the evidence before making that decision." ROA at 453-454. Ms. Blankman received a much higher grade (A-/B) than Ms. Brown (C) and served as one of Mr. Witter's jurors. Id..

Frank Delong was uneasy about passing judgment in a death penalty case:

Mr. Guymon: As a juror in this case, as the judge indicated, you'll sit in judgment of the conduct of another human being. What are your thoughts about that?

Mr. Delong: It's not easy, but it's one of the rights we have as a citizen and a juror, that you perform your duty.

Mr. Guymon: Have you formed any thoughts about giving a penalty in this case if we get to that point?

Mr. DeLong: It would have to be–the facts would have to be such that it would–whatever the penalty was, that it demanded that.

ROA at 477-478 (emphasis added). Mr. Delong's comment, is similar to Ms. Brown's testimony.

Mr. Delong, received a much higher grade (B+) than Ms. Brown (C) and served as a juror on Mr. Witter's trial. Id..

Sharon Vacelli testified about the heavy burden of passing judgment on someone:

> Mr. Guymon: Is there anything about passing judgment on another human being that causes you concern?
>
> Ms. Vacelli: I think it's quite a heavy responsibility, but I think it's a necessary thing that needs to be done.

ROA at 512 (emphasis added). Ms. Vacelli's comment is very reminiscent of Ms. Brown's comments. Ms. Vacelli received a much higher grade (B+) than Ms. Brown (C) and was selected to sit on Mr. Witter's jury. See Ex. 4.6.

Elizabeth Sera acknowledged the uncomfortableness that surfaces when one has to pass judgment on another individual, especially in a capital case.

> Mr. Guymon: As a juror, you'll be asked to first be a judge of the facts in this case during the evidentiary phase. Because this is an adversarial system, the State and the defense may not agree as to what the facts are and that's why we have jurors, and we'll ask you to judge the facts of this case and pass judgment on the defendant's conduct. Is that a role you are comfortable with?
>
> Ms. Sera: It's human nature to be a little uncomfortable, but I think I could do it.
>
> Mr. Guymon: Your thoughts about the responsibility that is placed on you as a juror in choosing a penalty, if you must?
>
> Ms. Sera: It's going to be a tough decision, but again, you can't make that decision until you hear it all. But if it warrants it, then that's what you have to–again, depending on the circumstances of the crime you have to just let everything fall into place. I can't say it's going to be easy, but–
>
> Ms. Guymon: And I don't suggest that it would be.
>
> Ms. Sera: - but if it has to be done, I can do it.

ROA at 613. Ms. Sera expressed her discomfort to Mr. Kohn.

> Mr. Kohn: Is there anything about the nature of the charge that would make you feel uncomfortable hearing this case?
>
> Ms. Sera: Well, the whole thing, again, it's an uncomfortable thing to do, but, I mean–no. Again, its that human nature thing; it's hard.

ROA at 621. Ms. Sera's responses are nearly identical to Ms. Brown's response. Ms. Sera received a much higher grade (A) than Ms. Brown (C) and was selected to sit on Mr. Witter's jury. See Ex. 4.6.

Robert Yale said the death decision bothered him to a certain extent.

> Mr. Guymon: Can you share with us some of your thoughts since Monday about the death penalty?
>
> Mr. Yale: Well, after leaving here, and listening to all the discussions that went on when I was in here before, I gave a considerable amount of thought to the death penalty. The other two didn't bother me as much as the death penalty. But as a citizen, I feel like it's my duty to do whatever I have to do.
>
> Mr. Guymon: Appreciate that. You say the thought of the death penalty bothered you. It bothered you because you didn't see the necessity of it or it bothered you because that was a heavy responsibility?
>
> Mr. Yale: I think it was a heavy responsibility, because I've never been confronted with anything like this before.

ROA at 655-656 (emphasis added). Despite the fact Mr. Yale's statements were "more affirmative" than Ms. Brown's, see 4.5 at 59, he received a higher mark (A-) from Mr. Guymon than Ms. Brown did (C) and actually sat on Mr. Witter's jury. See Ex. 4.6.

Robert Flemming expressed discomfort regarding the possibility of sentencing someone to death.

Mr. Guymon: Do you have the capacity, if it is proven that his is a first degree murder that is so aggravated that the death penalty is deemed appropriate, do you have the capacity to return that verdict and tell that man he is to die?

Flemming: Yes. It's not something I would want to do.

Mr. Guymon: I don't suggest anyone wants to do it.

ROA at 649-650 (emphasis added). Mr. Flemming's comment is identical to Ms. Brown's comment briefly acknowledging the discomfort associated with determining whether an individual ought to be sentenced to death. Mr. Yale received much higher grades (A+/B+) than Ms. Brown (C) and was selected to sit as an alternate on Mr. Witter's jury. See Ex. 4.6. Mr. Guymon's response to Mr. Flemming also flies in the face of the race-neutral explanation for striking Ms. Brown. Mr. Guymon acknowledged the discomfort surrounding the death penalty is real and legitimate. However, when Ms. Brown expressed this same (reasonable) discomfort, Mr. Guymon used this as a pretext to strike her from Mr. Witter's jury, arguing her discomfort demonstrated her inability to make tough decisions.

Marsha Clark also discussed the "heavy burden" associated with passing judgment on a capital defendant.

Mr. Owens: If we were to reach the penalty phase of trial, would you be able to carry that burden on your shoulders and deal with the seriousness of that decision?

Ms. Clark: It would be a burden, but, yes I would.

Mr. Owens: It wouldn't be an overwhelming burden, where you would collapse under the pressure or something?

Ms. Clark: I don't think I'd get that emotional, no. I've gotten emotional at times, but I don't think this–this is a controlled environment. I think I would be able to handle it.

ROA at 678-679 (emphasis added). Ms. Clark's comment is essentially identical to Ms. Brown's comments. Nonetheless, Ms. Clark received much higher grades (A+/B+) than Ms. Brown (C) and

was selected to sit on Mr. Witter's jury. See Ex. 4.6.

Jose Esteban expressed caution and discomfort regarding the prospect of having the final say as to whether a capital defendant should live or die.

> Mr. Guymon: Can you share with me some of your thoughts about the death penalty, as it relates to our criminal justice system?
>
> Mr. Esteban: I don't think anyone has the right to take another person's life, but if a person is convicted of a crime, I believe there should be some kind of penalty.

ROA at 590 (emphasis added). Mr. Esteban's comment display's a greater degree of caution or hesitation than Ms. Brown's comments. Mr. Esteban, nonetheless, received much higher marks from Mr. Guymon (A-/B) than Ms. Brown. See Ex. 4.6.

Lorelie McLellan described the uneasiness accompanied with passing judgment on an individual in a capital case.

> Mr. Owens: Reaching a decision that you're going to sentence someone to the death penalty is a very serious thing, as I'm sure we are all aware.
>
> McLellan: Yes.
>
> Mr. Owens: And you think that's a decision that you could make, under the appropriate circumstances?
>
> McLellan: Yes. It wouldn't be easy for anyone. I mean–if that is part of the penalty, then, no, I wouldn't have an problems with it.

ROA at 665-666 (emphasis added). Ms. McLellan's candidness, however, was not used against her, like Ms. Brown's was used against her. Instead, Ms. McLellan received a higher grade (B+) than Ms. Brown (C). See Ex. 4.6.

Meina Wong displayed indecisiveness and discomfort regarding the penalty phase.

> Mr. Owens: How do you think you would hold up in the penalty phase?
>
> Ms. Wong: I don't know, but I'd do the best I can.

ROA at 522 (emphasis added). Despite Ms. Wong's apparent indecisiveness, she still received a higher grade (B) than Ms. Brown (C). See Ex. 4.6.

Some of Mr. Guymon's questions to Ms. Brown were aimed at prompting an expression of hesitation (or discomfort) when it came to the death penalty and to elicit plausibly neutral grounds for a peremptory strike against her, if not a strike for cause.

Mr. Guymon phrased the uncomfortable/comfortable question to Ms. Brown in the following manner: "Is that an uncomfortable thought, passing judgment on an individual?" ROA at 453 (emphasis added). Ms. Brown replied: "Is it uncomfortable? Yes, but I would be open minded to look at both cases by the State and defense to know which decision I'm going to make. I'm having evidence presented at me on both sides, so I have to look at the evidence before making that decision." ROA at 453-454. Mr Guymon phrased this question quite differently for several non African-American prospective jurors who actually sat on Mr. Witter's jury.

Robert Hutchinson was presented with this line of questioning:

> Mr. Guymon: Do you have any reservations–those three options that you indicated you would give equal consideration to, would you agree that is a heavy responsibility?
>
> Hutchison: Yes.
>
> Mr. Guymon: It's a responsibility you are comfortable with?
>
> Hutchison: Yes.

ROA at 319 (emphasis added).

Mr. Guymon spoon-fed Ms. Brown the uncomfortable term, while he spoon-fed Mr. Hutchison the comfortable term. Mr. Hutchinson received a higher grade than Ms. Brown (B+/C+) and was selected to sit as a juror on Mr. Witter's jury. See Ex. 4.6.

Mr. Guymon engaged in spoon-feeding when he questioned Edith Blankman.

> Mr. Guymon: I don't suggest that it's easy. It's a responsibility you're comfortable with in representing the community—

Blankman: Yes.

Mr. Guymon: – on these choices?

Blankman: Yes.

Mr. Guymon: As you understand the Constitution and the necessity for laws in this state, I trust that you recognize the importance of the three punishments that we talked about associated with first degree murder. Are you comfortable with those three choices?

Blankman: Yes.

ROA at 423 (emphasis added). Mr. Guymon engaged in another spoon feeding incident with Ms. Blankman. Before turning to Ms. Blankman's testimony, Mr. Guymon tersely asked Ms. Brown whether she had "thought much about the death penalty since yesterday." ROA at 454. Ms. Brown replied, "Not really." Mr. Guymon claimed to have used Ms. Brown's non-introspective response against her:

> One of the things that I would have had concern about Miss Brown is the fact that we had taken a break and came back the next day and then when I said: Hey, by the way, did you think about the death penalty, and she says: No, I haven't thought about it.
>
> I mean, I have an expectation that this subject matter weighs heavily upon the jurors' minds. If it doesn't, then they really aren't fit people to be on the jury, in my opinion.
>
> And where Miss Brown told me no, I didn't really think about it overnight, to me, I have an expectation that the jurors go home and that they're troubled by this, they're burdened by it. Because they're going to be burdened in deliberations.

Ex. 4.5 at 60-61 (emphasis added).

When Mr. Guymon asked Ms. Blankman this same question, however, he phrased it quite differently:

Mr. Guymon: Yesterday, we–this particular panel, I think everyone began to get a feel of how difficult the responsibility is to sit in the seat you're sitting or in the capacity that we do. You've obviously thought an awful lot about your responsibility as a juror. Can you give me what some of your thoughts are as they have developed over a day-

and-half?

Blankman: I took the Constitution out, read it, read the Bill of Rights. It just reconfirms you're innocent until proven guilty.

ROA at 419-420. Mr. Guymon's question, in effect, assumed a critical fact that had yet to be proven (i.e. Ms. Blankman has thought long and hard about her responsibility); something he did not do when questioning Ms. Brown. Ms. Blankman received a higher grade (A-/B) than Ms. Brown (C) and served on Mr. Witter's jury. See Ex. 4.6.

Mr. Guymon employed the same semantics when he questioned Sharon Vacelli.

Mr. Guymon: Are you comfortable with [the] range [of possible punishments]?

Ms. Vacelli: Yes

Mr. Guymon: And as the defendant sits there, if we were to get to the penalty phase, are you comfortable with telling the defendant that he deserves to die for his conduct, if you believe it merits that?

Ms. Vacelli: If the evidence would show that, yes.

ROA at 513 (emphasis added). Ms. Vacelli received a higher grade (B+) than Ms. Brown (C) and served on Mr. Witter's jury. See Ex. 4.6.

Mr. Guymon did the same thing with Elizabeth Sera, one of Mr. Witter's jurors who received high marks from Mr. Guymon (A). Id..

Mr. Guymon: As a juror, you'll be asked to first be a judge of the facts in this case during the evidentiary phase. Because this is an adversarial system, the State and the defense may not agree as to what the facts are and that's why we have jurors, and we'll ask you to judge the facts of this case and pass judgment on the defendant's conduct. Is that a role you are comfortable with?

Ms. Sera: It's human nature to be a little uncomfortable, but I think I could do it.

ROA at 611 (emphasis added).

Mr. Guymon utilized the same semantics with Roque Lupuz, a prospective juror who received an A- from Mr. Guymon. See Ex. 4.6.

> Mr. Guymon: And if you believe that the strongest punishment needs to be applied in this case, are you comfortable with coming back in this courtroom, where a human being sits alive, as you and I are today, and telling him that he deserves to die?
>
> Mr. Lapuz: I would be comfortable, yes.

ROA at 431 (emphasis added).

Mr. Guymon also spoon-fed Larry King the comfortable term.

> Mr. Guymon: And I guess that's kind of where the buck stops, to use an expression: Twelve jurors in this case will tell us where the line is drawn?
>
> Mr. King: Yes, sir.
>
> Mr. Guymon: Are you comfortable with that responsibility?
>
> Mr. King: Yes, sir, I am.
>
> Mr. Guymon: And the State has alleged that the defendant did certain actions on the night of November 14, 1993. And as a juror, the State ultimately will ask you to hold him responsible for those actions, either his guilt, or his innocence. Is that a role you feel comfortable assuming?
>
> Mr. King: Yes, sir.
>
> Mr. Guymon: And in many ways, you'll also sit–or you'll also assume the role of a judge, in that you'll be issuing the penalty associated with the crimes if, in fact, they are proved beyond a reasonable doubt. Is that a role you're also comfortable with?
>
> Mr. King: Yes, I am.

ROA at 495-496 (emphasis added).

Mr. Guymon's failure to engage in any meaningful questioning with Ms. Brown on the

subject he alleged he was supposedly concerned about (i.e., an inability to make decisions) is further evidence that the race-neutral explanation was a sham and a pretext for discrimination. The following colloquy between Mr. Guymon and Ms. Brown establishes this point.

Mr. Guymon: And when we talk about making a decision that passes judgment on another individual, is there anything that causes you concern about that concept as a juror?

Ms. Brown: No.

Mr. Guymon: Is that an uncomfortable thought, passing judgment on an individual?

Ms. Brown: Is it uncomfortable? Yes, but I would be open minded to look at both cases by the State and defense to know which decision I'm going to make. I'm having evidence presented at me on both sides, so I have to look at the evidence before making that decision.

Mr. Guymon: You see the necessity–or would you agree there are first degree murder cases that necessitate, because of the egregiousness, the harshest penalty, that being the death penalty?

Ms. Brown: I don't think–

Mr. Kohn: Your Honor, I object, It's the same line of questioning I'm asking.

The Court: Sustained.

Mr. Guymon: Have you thought much about the death penalty since yesterday?

Ms. Brown: Not really.

Mr. Guymon: Can you share your thoughts about that penalty, as you thought about it, as you reflected upon it?

Ms. Brown: I know it's one of the penalties imposed, but I gave it as much thought as I gave the other two penalties that were given to us as a thought. After hearing evidence, that's when I can decide on which penalty suits the crime. So each one is just as equally important to me, in my opinion.

Mr. Guymon: And you see both the importance and perhaps the necessity of each one then?

Ms. Brown: Yes, I do.

Mr. Guymon: And seeing in your mind the necessity of each one, do you also have the capacity in your heart to consider each one?

Ms. Brown: Yes, I do.

Mr. Guymon: And to tell the defendant that he deserves to die if that's what you believe and feel?

Ms. Brown: If that's the case, yes.

Mr. Guymon: Likewise, to tell the defendant that he deserves life with the possibility of parole if the facts fit the punishment?

Ms. Brown: The same, yes.

Mr. Guymon: Is there any concerns that you have about serving as a juror in this case?

Ms. Brown: No.

Mr. Guymon: Is it something that you look forward to with great reservation? Would that be accurate?

Ms. Brown: I wouldn't say any kind of reservation. I feel, as a citizen, it's my duty to serve on a jury if called. I have no reservations at all about it.

Mr. Guymon: And do you feel you can be fair to all of us here?

Ms. Brown: Yes, I do.

ROA at 453-455 (emphasis added).

Mr. Guymon did not confront Ms. Brown about her inability to make a decision. In other instances either the state or the court further probed questionable jurors about certain perceived weaknesses or biases in their testimony. When Mary Phillips testified she "would be disinclined to choose the death penalty," Mr. Owens followed up with a series of questions to gauge whether she

could sincerely consider the death penalty as mandated by Nevada's death penalty statute. ROA at 551-555. Mr. Owens made these comments to Ms. Phillips clearly putting her and the trial court on notice that the State had an issue with her testimony:

> Mr. Owens: The trouble is, if you're selected as a juror and go through the whole process of hearing a trial–and it's only if we get to the penalty phase–after we've gone that far, if in the penalty phase it dawns on you, hey, now that I'm actually here, I can't do it, I can't impose the death penalty or I can't impose one of the three kinds of punishment. I thought I'd be able to consider them all equally, but when it comes right down to it, I can't return a punishment of the death penalty–so we are trying as much as possible, asking you to try to put yourself in that position now and think about it really happening and being back in the jury room.
>
> And all we are asking is that you consider all three equally, that you don't throw out the window automatically, that you'll listen to the evidence that will be presented, and only then consider all three and return a decision. So I'm not really comfortable with the answers I got from you.

ROA at 554.

Similarly, when Lenda Joyce Jones informed Mr. Owens she was not sure whether she could sentence someone to death, Mr. Owens followed up Mr. Jones' comments with a series of questions to ascertain whether she could fairly consider the death penalty. See ROA at 340-342. Likewise, when Karl Hanson testified he "would have a very hard time imposing a death penalty," Mr. Owens rattled off a series of questions to flesh out the exact extent of his discomfort. See ROA at 485-487. Furthermore, when Tita Ramos informed Mr. Guymon she did not "believe in the death penalty," Mr. Guymon peppered her with a slew of questions aimed at ascertaining whether she could fairly consider the death penalty. See ROA at 546-547. The state engaged in similar dialogues with other prospective jurors who piqued its curiosity as to whether they could be fair to either the state or Mr.

Witter. See Tandy Yates (ROA at 276-278); Donna Barber (ROA at 382-383); Tita Ramos (ROA at 545-547); Susan Hortizuela (ROA at 718-721); Lonnie Feazell (ROA at 722-723); Jennifer Boggs (ROA at 254-256); Neriza Martinez (ROA at 287-289); Edith Blankman (ROA at 422-423); Edward Miller (ROA at 727-729).

The state's inconsistent behavior with Ms. Brown, where it failed to ask a single follow-up question pertaining to her alleged indecisiveness, further undermines the credibility, plausibility, and persuasiveness of its claimed race-neutral explanation for peremptorily striking Ms. Brown.

The state also failed to physically make note of Ms. Brown's supposed indecisiveness by writing any comment(s) on its jury cards, even though the state did exactly this for numerous jurors it had concerns with. See, e.g., Lenda Jones' jury card ("Couldn't sentence to death"); Karl Hanson's jury card ("This guy is week; DUI prior; equally no in answer to can be open to death; very hard find w/ giving death penalty"); Gerald Hon's jury card ("Can't consider death"); Louise Collins' jury card ("This witness is weak; not sure if she can pass judge"); Tandy Yates' jury card ("Doesn't want responsibility to hand down the verdict; can't handle a decision"); Evelyn Mitchell's jury card ("Don't think so re: death penalty; don't want responsibility; woman w/ cough drive me crazy"); Tita Ramos' jury card ("can't... judgment guilt"); Mary Phillips' jury card ("passing judgment doesn't like to but understands need under the law; disinclined to choice death penalty; couldn't weigh them equal"); Donna Barber's jury card ("could not consider death"); Donald McClaflin's jury card ("Judge read panel 'the question' 143 shook head no; notice a bad attitude yesterday"); Fancy Winder jury card ("couldn't consider death"); Lynnedee Shay's jury card ("couldn't consider death"); Dave Hickey's jury card ("has a bad attitude"); Heather York's jury card ("couldn't consider death; couldn't make a decision."). See Ex. 4.6. The state's lack of documentation relating to Ms. Brown's alleged inability to make decisions further undermines the credibility, plausibility, and persuasiveness of the State's race-neutral reason for peremptorily striking Ms. Brown.

Trial counsel made a Batson challenge to the state's exercise of the first peremptory challenge on one of the two remaining minorities. The trial court rejected the application of Batson but allowed the state to make a record of a race-neutral reason for the exercise of the peremptory challenge. The state lied to the trial court, claiming that he wrote down in his notes that the venire

person was hesitant in making decisions. The state wrote no such thing in his notes and did not question the venire-person as if she had hesitated. The state offered a false race-neutral reason for the exercise of the peremptory challenge.

Mr. Witter has shown that the state's race-neutral reason was pretextual. The race-neutral reason did not and does not support the trial court's overruling the Batson objection. This Court is left with a valid prima facie Batson challenge and no legitimate excuse for the exercise of a peremptory against a minority person. Mr. Guymon's improper exclusion of jurors on the basis of race is structural error which is prejudicial per se, and the error necessarily did substantially and injuriously affect Mr. Witter's state and federal constitutional rights.

The above stated claim is of obvious merit. Competent appellate counsel would have raised and litigated this meritorious issue on direct appeal and in state post-conviction. There is no reasonable appellate strategy, reasonably designed to effectuate petitioner's best interest, that would justify appellate counsel's failure in this regard. Petitioner is entitled to relief in the form of a new trial, a new sentencing hearing, and where appropriate, a new appeal.

CLAIM FOUR

Mr. Witter's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, the prohibition against double jeopardy, the prohibition against arbitrary application of the death penalty, and a reliable sentence due to the state's use of the same felony acts to support both the conviction on a felony murder theory and to support the aggravating factors. U.S. Const. Amends. V, VI, VIII & XIV. Nev. Const. Art. 1, §§ 3, 6, and 8; Art. 4, § 21.

SUPPORTING FACTS

Mr. Witter was charged by way of information with one count of murder with use of a deadly weapon, one count of attempted murder with use of a deadly weapon, one count of attempted sexual assault with use of a deadly weapon, and one count of burglary. See ROA at 063-065, 1408-1409. The state proceeded to trial on a felony murder theory, charging in the information that the murders were committed with "malice aforethought and premeditation and/or while in the commission of a burglary and/or while in the commission of the attempt sexual assault of Kathryn Terry Cox." Id.. Mr. Witter was convicted of all charges. See ROA at 2250-2252. In its Amended Notice of Intent to Seek Death Penalty filed July 10, 1995, the state separately alleged the murder was committed in the course of burglary and sexual assault. See ROA at 068-069.

At the sentencing phase's conclusion, the jury found four aggravating factors with respect to Mr. Cox's murder. The jury found both that the "murder was committed while [Mr. Witter] was engaged in the commission of or an attempt to commit any Burglary and that the "murder was committed while [Mr. Witter] was engaged in the commission of or an attempt to commit any Sexual Assault." ROA at 2225-2226, based on the same burglary that was the basis for the first-degree felony murder theory.

The Nevada Supreme Court in Bejarano v. State, 146 P.3d 265, 272 (Nev. 2006), determined that the use of the same felony to produce conviction on a felony murder theory and aggravation or eligibility for death does not satisfy the requirements of the U.S. and Nevada Constitutions for narrowing the class of defendants eligible for death. Id.. at 272.

In Bejarano, the Nevada Supreme Court weighed the remaining aggravators, after the

erroneous felony aggravators were struck to determine the harm of this error. The only remaining aggravator is Mr. Witter's prior violent felony conviction.[24] The presentation of the evidence regarding the prior violent felony conviction was marred by ineffective assistance in not presenting both Gina Reye and Donny Sanders, witnesses to that offense. See Claim Two. This Court should not conclude that this McConnell error is harmless given the weak, marred, and incomplete nature of the evidence presented on the only remaining aggravator. This Court should find harm in this error and grant relief.

Trial counsel were ineffective for failing to object to this jury instruction. It was clearly established by 1995 that death sentences had to be rationally imposed and that any instructions likely to fail to narrow the class of potentially eligible defendants were prohibited. Direct appeal and state post-conviction attorneys were also ineffective for failing to raise this arguably meritorious issue on direct appeal and state post-conviction.

Had trial counsel objected to the jury instruction, either the trial court would have sustained the objection and withdrawn the instruction and the death sentence would not have been constitutionally possible or the trial court would have overruled the issue and preserved it for appeal. Had either direct appeal or state post-conviction counsel raised this meritorious issue, the reviewing court would have been compelled to grant relief.

The above stated claim is of obvious merit. Competent appellate counsel would have raised and litigated this meritorious issue on direct appeal and in state post-conviction. There is no reasonable appellate strategy, reasonably designed to effectuate petitioner's best interest, that would justify appellate counsel's failure in this regard. Petitioner is entitled to relief in the form of a new trial, a new sentencing hearing, and where appropriate, a new appeal.

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[24]The 'avoiding lawful arrest aggravator' was struck by the Nevada Supreme Court on direct appeal; "Clearly, the prosecution has not met its burden of proving this aggravator beyond a reasonable doubt. We therefore conclude that the jury could not have reasonably found that the murder was committed to avoid lawful arrest and that the district court erred when it denied Witter's motion to strike the aggravator." Witter v. State, 112 Nev. 908, 929 (Nev. 1996)

CLAIM FIVE

Mr. Witter's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, an impartial jury, and a reliable sentence due to the trial court's refusal to allow Mr. Witter's trial counsel to ascertain the partiality of potential jurors. U.S. Const. Amends. V, VI, VIII, & XIV. Nev. Const. Art. 1, §§ 3, 6, and 8; Art. 4, § 21.

SUPPORTING FACTS

Mr. Witter's federal constitutional rights to an impartial jury and a reliable sentence were violated on two separate occasions during jury selection: (1) the trial court improperly forced trial counsel to substantially narrow the scope of his voir dire questions regarding mitigation; and (2) the trial court improperly barred trial counsel from asking prospective jurors whether they could consider the two life sentence options under Nevada's death penalty statute once they were informed Mr. Witter had prior violent felonies. Trial court made these errors without reading or considering Morgan v. Illinios.[25]

A. The Trial Court Improperly Forced Trial Counsel to Substantially Narrow the Scope of his Voir Dire Question Regarding Mitigation

During jury selection, the state objected and argued that trial counsel was framing his questions to prospective jurors regarding mitigation evidence in violation of a rule against asking jurors about potential jury instructions. The state objected:[26]

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[25]An exchange during argument on this issue:

> Mr. Kohn: I guess my concern is: Looking at the Morgan case, Morgan versus Illinois, and I have the last year's edition, 119, 492, 504 US– I don't have the page number
>
> The Court: I haven't read the case.
>
> Mr. Kohn: May I give the Court a copy?
>
> The Court: Not right now counsel. I don't think it's appropriate to start bringing up cases with the Court when we have a jury out there waiting. ROA at 468 - 470.

[26] EDCR Rule 7.70 reads as follows:

Mr. Guymon: Your Honor, there's one point I wish to make. I haven't previously made an objection with regard to some of counsel's statements on mitigation and possible mitigating factors. I would cite Local Rule 7.70, which indicates questions touching upon anticipated instructions of law.

I know this Court is going to give this jury instructions on what mitigating circumstances are; and my objection would be when we anticipate what that law is, we give them instructions stating, at this juncture, that family upbringing is a mitigating circumstance. I would object to that.

The Court: Do you wish to put anything on the record?

Mr. Kohn: Certainly Your Honor.

... under the *Morgan [v. Illinois]* case and other, we need to know if the jury can consider this type of information, and I believe it's proper.

The Court: What I think Mr. Guymon is referring to–and I saw him stand to make an objection and didn't; he sat back down–is that–and this is one of the things I was referring to, counsel, on the questionnaire.

It's very difficult on the Court when counsel start to inquire in voir dire or in questionnaire about instructions that they deem the Court is going to give to the jury.

The judge must conduct the voir dire examination of the jurors.

Upon request of counsel, the trial judge may permit counsel to supplement the judge's examination by oral and direct questioning of any of the prospective jurors.

The scope of such additional questions or supplemental examination must be within reasonable limits prescribed by the trial judge in the judge's sound discretion.

The following areas of inquiry are not properly within the scope of voir dire examination by counsel:

. . . .

(b) Questioning touching on anticipated instructions of law.

(c) Questions touching on the verdict a juror would return when based upon **hypothetical facts**.

(Emphasis added.)

Because maybe the Court isn't going to give those instructions–we don't know at this junction–and to assume the Court is going to give any certain instructions, expect the ones that are basic stock instructions, like reasonable doubt or that sort of thing, I think it's dangerous ground to tread on.

Mr. Kohn: I think I have a right to know if they are going to consider things in mitigation.

The Court: I think you're right in principle, counsel, but I prefer you do it this way. You can get just as much information from a juror by saying if I present to you evidence in the hearing that mitigates in any way the situation, will you consider that? You don't have to tell them what that evidence is going to be.

Mr. Kohn: Your Honor, I think–we can brief this. I think this is critical to ask them. I'm not going to go any further than I have gone before, but I think it's critical that I know they are going to consider these type of things, upbringing–in no specifics, but just they will consider that as mitigation.

If not, what is mitigation? That's just a word they have never heard before.

The Court: Perhaps I don't mind you saying will they consider it, but when you say in mitigation, you don't know whether it's going to be mitigation or aggravation; you only know you're going to be presenting some evidence to them.

. . . I don't see anything wrong. . . in saying will you consider the evidence of his background? There's nothing wrong with that.

Mr. Kohn: And upbringing and things like that.

The Court: But when you say the word mitigation with it, you're asking them to conclude something now which they can't conclude.

Mr. Kohn: I don't mind striking the word 'mitigation.'

Mr. Guymon: That is what I was referring to. When we say this is a mitigating circumstance and it's the law, I don't know if that's been the law established in this.

The Court: You wouldn't want him saying would you consider this as an aggravating circumstance and saying what it was.

Mr. Kohn: We talked about this.

The Court: He doesn't want you using this as an example, childhood background, would you consider that in mitigation? Just ask him to consider it.

Mr. Kohn: In penalty phase?

The Court: Yes. You wouldn't want him to say something in aggravating circumstances. I don't know all the facts of this case either, and I think it's always dangerous for counsel to presume the Court is going to instruct on something the Court hasn't even heard yet.

Mr. Kohn: I agree, your Honor.

But when he talks to mitigation, .033, or what the statute is, specifically says: What is mitigation?

Mitigation can be anything else. We have mitigator number eight, which is a catchall. The State does not have aggravator number eight, which is a catchall.

The Court: What if I don't think that is a mitigating circumstance, so I don't instruct on that, after I hear the penalty phase and you've already told them? That's the danger.

The Court: That's the danger. You're talking about something I haven't heard yet and I don't know whether I'm going to instruct them on that or not. All counsel is saying is don't use the word 'mitigation.

ROA at 351-355 (emphasis added). The state made the same objection when trial counsel was questioning Mark Clark. See ROA at 449.

The trial court admonished trial counsel not to use the word 'mitigation' in his questions. The state was freely permitted to use the word 'mitigation,' see, e.g., ROA at 334, 592, 741, as did the trial court itself. See, e.g., ROA at 254, 264, 287-288, 346, 401, 444-445.

The trial court's ruling substantially and injuriously affected Mr. Witter's ability to identify jurors who could not be impartial and consider and give full effect to his mitigating evidence. This inability denigrated his Sixth Amendment right to an impartial jury, his right to effective assistance in exercising his peremptory challenges, and his Eighth and Fourteenth Amendment rights to a reliable death sentence.

The trial court was wrong to imply it had the authority to withdraw potential mitigating evidence, particularly evidence regarding Mr. Witter's chaotic, neglectful, and abusive childhood,

from the jury's consideration by not instructing on mitigation.. See ROA at 354 ("What if I don't think that is a mitigating circumstance, so I don't instruct on that, after I hear the penalty phase and you've already told them?"). This contravenes clearly established federal law, as jurors cannot be barred from considering any evidence that might support a sentence less than death as mitigation. The trial court equally prevented trial counsel from questioning a venireman about his ability to consider the mitigating nature of evidence. These wrongs prevented trial counsel from fully participating in voir dire and intelligently exercising his peremptory challenges.

The trial court was constitutionally obligated to inform prospective jurors of this fundamental principle and to ascertain whether they were capable of adhering to this principle. This is no different than the trial court informing prospective jurors about the presumption of innocence, see ROA at 315, or the state's burden of proving the defendant's guilt beyond a reasonable doubt, and questioning prospective jurors whether they would be able to adhere to the essential trial rights. Those questions were posed to every prospective juror.

Prospective jurors were required under the Eighth and Fourteenth Amendments to consider a capital defendant's proposed mitigating evidence. To divine a venire person's ability to consider mitigation (and not automatically render a death sentence on conviction for capital murder) the trial court was required to explain the concept of 'mitigating evidence' to the prospective jurors. Trial court categorically refused to explain mitigation during jury selection.

The trial court's ruling forced Mr. Kohn to ask the very narrow question, "Will you consider Mr. Witter's upbringing during the penalty phase, if we get to the penalty phase." ROA at 470 (The Court: "The questions which you asked are, 'will you consider upbringing and childhood as a circumstance?' and they answered that."). See,e.g., Edith Blankman (ROA at 425); Roque Lapuz (ROA at 434); Mark Clark (ROA at 449); Frank DeLong (ROA at 483); Larry King (ROA at 498-499); Meina Wong (ROA at 527-528); Clara Reilly (ROA at 535); Marlene Widnes (ROA at 571-572); Ian Archie (ROA at 583-884); Jose Estaban (ROA at 595-596); Elizabeth Sera (ROA at 619-620); Louise Collins (ROA at 632); John D. Kingery (ROA at 639); Regina L. Connell (ROA at 646); Robert Flemming (ROA at 651-652); Robert A. Yale (ROA at 661); Barbara McArthur (ROA at 676); William Purdy (ROA at 710); Edward Miller (ROA at 733-734); Rudy Dudley (ROA at 761-

762); Hedy Orchard (ROA at 771); Norman Becker (ROA at 799-800). This question did not allow trial counsel to determine whether prospective jurors could give effect to any mitigating circumstance. A potential venireperson could certainly consider anything presented and still feel ethically or morally bound to give a death sentence regardless of what was presented during the punishment phase. The limited question does not fulfill the mandate of *Morgan*, a venireperson that could consider physical abuse, dysfunctional household and problems with alcohol dependence without potentially giving that evidence any effect is not a competent or fair juror.

The error is illustrated when trial counsel questioned prospective juror Edward Miller. Mr. Miller testified he would not consider Mr. Witter's upbringing during the penalty phase. See ROA at 734. Trial counsel moved to strike Mr. Miller for cause. See Id.. The trial court denied Mr. Kohn's "for cause" request after questioning Mr. Miller and determining he could be fair and impartial. See ROA at 734-738. After the trial court's first denial, trial counsel wished to ask more fact-specific questions pertaining to Mr. Witter's upbringing to determine whether Mr. Miller could honestly consider this evidence during the penalty phase. The trial court barred trial counsel from asking more fact-intensive, case-specific questions. See ROA at 738 ("You can't ask him if he's skeptical of the evidence because we don't know what the evidence is. You can ask him if he questions this area of evidence or something like that.").

Although barred from asking case-specific questions, trial counsel renewed his request to strike Mr. Miller for cause because his views prevented and substantially impaired his ability to consider and give full effect to Mr. Witter's mitigating evidence. See ROA at 740 ("Your Honor, I renew my motion for cause."). The trial court overruled this request, reasoning Mr. Miller "could at least consider life without the possibility of parole." Id..

Trial counsel renewed his motion to strike Mr. Miller for cause. See ROA at 749. Trial counsel expressed great concern that he was unable to flesh out, more clearly, Mr. Miller's inability to consider critical mitigating evidence, namely, Mr. Witter's abusive and neglectful upbringing:

> Mr. Kohn: I believe when taken as a whole, Mr. Miller cannot be fair to the defense; not just the fact he's a security guard and his son is a Metro Officer; that wasn't it.

He brought up the fact he was a victim. I do not believe–and I could be wrong–I don't believe counsel asked were you the victim of a crime. He just said it happened to me. At first, the more counsel asked him, it became no, I could be fair.

But more importantly is the questions about mitigation. He doesn't buy it. I know he answered the Court, but that was my concern when the Court and I talked a week ago.

I do believe jurors show more deference to the Court, as should everyone, than they show to counsel. His answer to me is he's not buying that stuff. I'm concerned I wasn't allowed to ask him about abuse and things like that, but the Court instructed me not to ask those questions and I did not.

But when taken as a whole, I'm convinced Mr. Miller cannot give the defense a fair trial.

ROA at 749 (emphasis added).

The state disagreed with trial counsel's argument and responded with the prohibition against hypothetical questions:

Mr. Guymon: Your Honor, we had a thorough questioning of that individual. And whether counsel likes the answer or not that he got from him is not the issue.

He answered the key question, and that was: He said he was certain that he could be fair. He doesn't have to buy the defendant's childhood as a mitigating factor. The law does not require him to do that. . . . .

Mr. Kohn: Your Honor, I don't mean to argue with the Court. I wanted to respond to what counsel said, so I'm not responding to the Court.

Counsel brought up Rule 7.70 and I

bring up the case of Dirk Morgan v. Illinois, 119 Lawyers Edition.

My concern is . . . is on our right under the Constitution, Fourteenth, Sixth, and Seventh amendments, right to a fair trial, and that's what I'm concerned about.

ROA at 750-752 (emphasis added).

Mr. Kohn was unable to establish Mr. Miller's potential bias against mitigating evidence because of the unreasonable and unconstitutional ruling severely limiting the questions he could ask prospective jurors.

Mr. Witter was not afforded his constitutional rights to a fair and impartial jury selection process, an impartial jury, and a fair and a reliable sentence, as he was not allowed effective assistance to adequately inspect prospective jurors to determine whether they could and would consider his upbringing and other mitigating evidence.

Mr. Witter's direct appeal and state post-conviction attorneys were ineffective for failing to raise this arguably meritorious issue on direct appeal and state post-conviction.

B. The Trial Court Improperly Barred Trial Counsel From Asking Prospective Jurors Whether They Were Able to Consider the Two Life Sentence Options If They Knew Mr. Witter Had Prior Violent Felonies

Mr. Witter's federal constitutional rights to an impartial jury and a reliable sentence were violated when the trial court refused to permit Mr. Witter's trial counsel to question prospective jurors whether they could and would consider all three potential penalties identified in Nevada's death penalty statute if they were informed Mr. Witter had prior violent felonies. During jury selection, trial counsel made the following request:

The Court: Anything else that needs to go on the record?

Mr. Kohn: Yes. We just had a discussion in chambers. I advised the Court that it was my intention to ask potential jurors–inquire in the area of aggravating circumstances. A statutory aggravator that is alleged in

this case is that which sets forth a prior crime of violence. And I suspect that will be an integral part of the State's penalty phase if we get to that point.

I would care to ask potential jurors if they would automatically vote for a certain penalty, or the converse, that they would still consider all three penalties, as the Court has indicated in death qualifying these jurors, if they knew one of the aggravating circumstances was a prior crime of violence.

By doing that, I'm not waiving the right of the District Attorney being allowed to put that on in the evidentiary phase of this trial, unless of course, my client testifies and they use that to impeach him.

But in terms of using his prior conduct, they have not noticed me they intend to do that, so I assume they are not going to, and I would not waive it by asking questions of the jury.

We had discussion in chambers and the Court is going to prohibit me from asking those questions. I feel that area is critical to my client's right to have a fair trial under the Sixth, Seventh, and Eighth Amendment to the Constitution, and we should be allowed to inquire if they could still impose all--consider all three penalties, knowing there may be proof of a prior crime

ROA at 363-364.

The state objected to trial counsel's proposed line of questioning. The state premised the objection on a rule against asking hypothetical questions.

Mr. Guymon: What counsel would be doing, in effect, would be giving these jurors a hypothetical, and that would be: If you find my client's committed a violent crime, will you still consider all three? That is a hypothetical and its virtually

precluded under the rules.

I think the Court hit the nail on the head when they say these rules establish rules of fairness for both parties. And just as the State cannot tell a jury of a defendant's prior conviction, I don't know that you can have it both ways, Your Honor, and from the defense's side, be able to presuppose or predict, if you will, with this jury, based upon hypothetical facts or anticipating instructions in the law. That's the basis of the State's objection.

Mr. Kohn: Your Honor, my concern is, Mr. Owens, at the beginning of this case, stood up before the panel and, among other things, read to the panel the Information that's on file.

Also on file is a Notice of Intent to Seek Death, and he referred to it, but did not read it. So my concern is we are not talking about hypothetical facts; we are talking about a notice that's been filed, a statutory aggravator that is not hypothetical, that is going to be part of this case; and that maybe that's the problem with the statutory scheme, as we talked about in chambers.

I know the Court doesn't agree with me, but my concern is we are death qualifying these people and giving them some information so they have some idea of the facts they might hear, even though the Court has told them even though it's in this Information doesn't make it true.

Since this is an aggravator that I'm on notice for, I think I should be allowed to inquire.

ROA at 364-366.

The trial court denied trial counsel's request by adhering to the state's interpretation of the rule against hypothetical questions.

The Court: I also think it's improper for either side to ask a juror something to elicit and answer that would favor them, either in the trial or disproportionally favor them in either the trial or penalty phase, should we come to that point.

For instance, Mr. Kohn, you would not like Mr. Guymon to ask the question of a juror: Would you still consider all three of those forms of punishment even if you knew the defendant had some psychological imbalance or the defendant had some alcohol syndrome or this or that, touching upon every one of the things–and you could take it to the point where you could touch upon all five or six things that are going to be presented in the penalty phase–and I wouldn't allow it because it wouldn't be fair.

You're gaining an advantage by doing that. And you can't have it your way, either by asking the very things that are going to be the subject of the penalty phase itself and getting a juror's response, to see if they would go one way or another or consider it this way or that way.

ROA at 366-368.

Trial counsel followed up the trial court's ruling by emphasizing the need to ensure capital jurors are willing and able to consider all three penalties identified in Nevada's capital punishment statute.

Mr. Kohn: Your Honor, as I said in chambers, I think it's critical to know, if jurors find out he has a prior, they can still be fair and consider all three, because I'm afraid some people turn off–

The Court: I'm going to give instructions to them for the penalty phase, the same as the guilt phase, and they are going to follow those instructions. I don't know what those instructions are yet, so I can't allow you to comment on them.

Mr. Kohn: Your Honor, there's a reason why the State requires a Notice of Intent.

The Court: They don't have to use those. They can give two or three notices and not use any of them. I've seen the State waive everything at penalty hearing. They have aggravating circumstances noted and they just submit it.

You don't know what's going to happen at a penalty hearing. He's given you notice because, just like his witnesses, he says this is what I'm entitled to do at penalty hearing. Give you notice so you would be entitled to use it if you wish to. He may or may not.

But I think that's too speculative to allow you to ask that type of question, because then you're getting inside a juror's head and saying this is what I anticipate is going to happen, and if this happens, will you act in a certain way? And I don't think that's proper on voir dire.

Mr. Kohn: All I'm asking is they will consider all three penalties, which the Court has been doing.

The Court: You can say that about everything that's going to happen in trial. Every evidence brought up, you could ask the same question on, and I just don't think its appropriate.

ROA at 368-369 (emphasis added).

Mr. Kohn broached the same issue with the trial court the following day after having read a scathing editorial (in the Las Vegas Review Journal) by an Nevada Deputy Attorney General disparaging the notion of mitigation in criminal law, particularly in capital cases. See Ex. 6.3.

Mr. Kohn: We talked about this yesterday, and I don't mean to show disrespect to the Court by bringing it up again, but in today's Las Vegas Review, editorial page, there's a letter from the deputy Attorney General and it talks about criminal not taking blame for criminal actions. It basically belittles the idea of mitigation.

I don't know if the proper inquiry is to ask the jury if they have read it of not. I'm afraid to draw attention to it if they haven't. My concern is counsel's objections and the Court's rulings on voir dire in asking the jury about abuse.

But in not being allowed to ask jurors whether evidence of a prior act of violence, which I believe is going to come out in penalty phase, and whether there's actual abuse, and asking the words about abuse, what I want to hear–I want to hear if some juror feels because of this article or because of the Menendez trial–

The Court: Counsel, no, I'm not going to get involved in it. I'm not going to be a California court here. I'm not doing that.

Mr. Kohn: Your Honor, I'm not asking the Court to do that.

The Court: You're asking me to respond to something in the press today and I'll not do that; nor will I allow you to put that before the jury.

Mr. Kohn: Your Honor, I'm not going to ask to put this before the jury. I'm just asking this Court to make this part of the record.

What I'm saying is: By not being able to ask them would you consider abuse as something to consider–

The Court: I think the questions which I have allowed are appropriate.

Mr. Kohn: I just wanted to cite–

The Court: The question which you asked are will you consider upbringing and childhood as a circumstance and they answered that.

Mr. Kohn: And I want to use the word abuse, because my concern is someone is going to say I've heard this abuse excuse and I'm not buying. I think abuse will trigger of–

The Court: Counsel, you may, and you may hear just the opposite. Jurors go both ways. I don't thinks its appropriate.

I'll state it again: I don't think it's appropriate for counsel to ask those specific questions that will ask a juror what they are going to rule on and which way they are going to rule when the issue comes before them. That's isn't appropriate. It goes both ways.

Mr. Kohn: What I'm asking–maybe I'm not wording it right–would you automatically vote a certain way?

The Court: No, you're not saying that in those specific terms, but by bringing out specific examples of certain types of things, you're saying: Will you consider this specific thing? And then the State will want to say: Then you will consider this specific thing?

ROA at 468-470.

Mr. Kohn: I guess my concern is: Looking at the Morgan case, Morgan versus Illinois, and I have the last year's edition, 119, 492, 504 US– I don't have the page number

The Court: I haven't read the case.

Mr. Kohn: May I give the Court a copy?

The Court: Not right now counsel. I don't think it's appropriate to start bringing up cases with the Court when we have a jury out there waiting.

Mr. Kohn: What counsel brings up, the Court rules, and I feel Morgan versus Illinois almost overrides this Court's rules.

My concern is will they automatically take one penalty because they hear of prior violence and about the abuse.

The Court: I don't know why you would think that. I don't know how you rationally reasonably can think that. You have all different types of jurors on this panel. By our questioning, you see that. Some somewhat favor the death

penalty; some won't even look at the death penalty; some somewhat favor no parole possibility; others won't even look at that.

What you have is a jury up there who are part of this community. Now, what your protection is is that it takes a unanimous verdict to come back to say any one of these things. That's your protection.

You don't need those protections of asking the jurors to favor one side or another. Our protection in this system is that if you just convince one of them–and presumably half of them will be on your side, as you're talking about what they are thinking–and that's your protection. It isn't getting into trying to get a jury to favor your side by asking a question which you wish to ask that isn't appropriate.

Mr. Kohn: But my point is, nothing is more damaging than prior evidence. When people hear he did it before, he did it again, I believe that's the most critical evidence in any case. I don't have a survey to back it up.

The Court: You also know, in no trial in this jurisdiction do we ever allow that to be brought up on voir dire.

Mr. Kohn: I understand, because we haven't done it before.

The Court: And I'm not going to do it now. I don't think it's appropriate. I don't think it's just because of the rule. I don't think it's appropriate for fairness.

You're asking to get one leg up on the other side. If you do, then I have to let them do it and then we get into the push and pull of the California court, and I'm not going to do that. I'm not going to bend the rules.

Mr. Kohn: I just want to make sure I can get a fair Witherspoon jury.

The Court: That's what I'm giving you.

Mr. Kohn: I'm looking if someone is going to automatically disregard a penalty because of evidence–

The Court: We've gone through this before and I'll tell you the same thing again. I've told you what you can ask. I think it's fair. It's not as specific as you would like, but I think it's fair.

ROA at 468-473 (emphasis added).

The trial court's ruling was objectively unreasonable. First, the trial court refused to read Morgan v. Illinois, 503 U.S. 419 (1992); the court did not know the applicable federal constitutional law governing voir dire in capital cases. Before a trial court can reasonably apply or interpret a federal constitutional issue it has to know what it is applying or interpreting. A state trial court cannot make an objectively reasonable judicial determination on a federal constitutional issue if it is unaware of the how the Supreme Court has ruled on the issue.

Second, the trial court mischaracterized trial counsel's intention so as to make it appear as if he was trying to "stake out" a specific conclusion from prospective jurors based on alleged hypothetical facts and refused to consider the Constitutional dimension of the issue.

Unlike trial counsel, the state was repeatedly permitted to ask case-specific questions involving aggravating factors to ascertain whether prospective jurors could be fair to the state and Mr. Witter. See, e.g., Jimmy Earl King (ROA at 331-332); Edith 3 (ROA at 424); Roque Lapuz (ROA at 430-431); Beth Ann Wiechowski (ROA at 504); Marlene Widnes (ROA at 563); Jennifer Correlli (ROA at 604); Robert Flemming (ROA at 649); Marsha Clark (ROA at 678); Ruby Dudley (ROA at 757-758); Hedy Orchard (ROA at 766).

Trial counsel was barred from probing prospective jurors on their views of prior felons, particularly violent ones. Mr. Witter was not given an adequate opportunity to expose venire member that were biased against the sentencing law on which he was entitled to rely. He was prevented from determining which jurors were unfairly biased against life sentences. The federal constitutional right to due process was violated. The death sentence is inherently unreliable and unconstitutional.

The error was per se prejudicial, and no showing of specific prejudice is required. In the

alternative, the trial judge's unreasonable interpretation and application of the federal constitutional issue substantially and injuriously affected the juror's impartiality to such an extent as to render Mr. Witter's death sentence fundamentally unfair, unreliable, and unconstitutional.

The above stated claim is of obvious merit. Competent appellate counsel would have raised and litigated this meritorious issue on direct appeal and in state post-conviction. There is no reasonable appellate strategy, reasonably designed to effectuate petitioner's best interest, that would justify appellate counsel's failure in this regard. Petitioner is entitled to relief in the form of a new trial, a new sentencing hearing, and where appropriate, a new appeal.

CLAIM SIX

Mr. Witter's sentence is invalid under the state and federal constitutional guarantees of due process, self-incrimination, a reliable sentence, and effective assistance of counsel because the state obtained and used Mr. Witter's mental health expert's report, interview notes, and raw data to prepare for trial, to have other extraneous evidence admitted, and to cross-examine lay witnesses other than Mr. Witter's expert. U.S. Const. Amends. V, VI, VIII & XIV. Nev. Const. Art. 1, §§ 3, 6, and 8; Art. 4, § 21.

SUPPORTING FACTS

The Fifth Amendment was violated when Dr. Lewis Etcoff disclosed his report, interview notes, and raw test data to the state prior to trial. The state used the data to prepare for trial and cross-examine witnesses both before and during Dr. Etcoff's testimony. Trial counsel failed to make a timely Fifth Amendment objection to the state obtaining and using data from the trial expert's interview with Mr. Witter to cross-examine defense witnesses, other than the expert. Trial counsel failed to make a timely Fifth Amendment objection to the state having access to Mr. Witter's pre-trial interview with a defense expert and the state investigating and preparing their case based on that access. Appellate and state post-conviction counsel failed to raise this meritorious Fifth Amendment claim on direct appeal and in state post-conviction.

Individually, both the Fifth and Sixth Amendment violations render Mr. Witter's death sentence unreliable and fundamentally unfair. In the alternative, the Fifth and Sixth Amendment errors collectively rendered Mr. Witter's death sentence unreliable and fundamentally unfair.

A. Dr. Lewis Etcoff

On December 1, 1993, trial counsel retained Lewis Etcoff, Ph.D. to conduct an examination of Mr. Witter to determine whether he was competent to stand trial and to determine if there were any "psychiatric defenses" to the offense. See Ex. 3.3. On August 10, 1994, Dr. Etcoff evaluated Mr. Witter. See Ex. 3.2. In connection with an evaluation, competent trial counsel would have advised both his client and the expert of the Fifth Amendment ramifications, i.e., that the state could use Mr. Witter's statements during the evaluation only after trial counsel made some issue of psychological data.

Trial counsel did not advise Mr. Witter that his statements might eventually be disclosed to the state. Trial counsel did not warn Dr. Etcoff about the Fifth Amendment ramifications relating to his evaluation. Trial counsel told current counsel:

> I did not attend Dr. Etcoff's evaluation of William. I did not warn William prior to his evaluation that his statements to Dr. Etcoff might eventually be turned over to the state. I did not instruct Dr. Etcoff to warn William that his statements might be used against him by the state.

Ex. 2.26

Prior to his evaluation, Dr. Etcoff gave Mr. Witter a "Consent to Evaluate Form." The consent form states: "[M]uch of what you tell me about yourself will be told to your attorney; and so your conversations with me are not completely confidential. Yet, I won't discuss any part of your conversation or evaluation results with anyone else besides your attorney, unless of course I must testify in court at which time your evaluation will become part of the court proceedings and public record." Id. Ex. 3.2.

During his evaluation, Dr. Etcoff conducted various psychological testing, including the Millon Clinical Multitiaxial Inventory (hereinafter MCMI-II) and the Minnesota Multiphasic Personalty Inventory (hereinafter MMPP-2). See Exs. 3.2, 3.4. Dr. Etcoff interviewed Mr. Witter, asking general and specific questions about his social history, correctional history, and substance abuse history. Mr. Witter made several incriminating comments during the interview, including comments about his time in CYA. Mr. Witter told Dr. Etcoff he was supposed to have had a much shorter CYA sentence, but, "I was catching time left and right for gang involvement. I didn't mind being there. You were young, you were on your own. There was all kind of violence in there, a lot of fighting, disrespecting counselors, attacking people with different things, all of our enemies from L.A., jumping guys, stabbing them with pencils. I got jumped a few times, but never stabbed." Ex. 3.2. None of this information was in Mr. Witter's CYA records.

Dr. Etcoff drafted his report on August 12, 1994 and forwarded it to trial counsel. Id. In March 1995, trial counsel chose to employ Dr. Etcoff as his penalty phase expert to present "the big picture of mitigation." Ex. 3.33; see also Ex. 3.3.

The trial court scheduled a penalty phase discovery hearing for July 6, 1995. See ROA at 1553-1560. Prior to the hearing, trial counsel had not disclosed Dr. Etcoff's reports to the state or the trial court. Trial counsel stated: "I planned on waiting until the state presented its case in aggravation before deciding whether I wanted to turn over Dr. Etcoff's report." Ex. 2.26. The trial court forced trial counsel to disclose Dr. Etcoff's report if he wished to have Dr. Etcoff testify. If trial counsel refused to disclose Dr. Etcoff's report, the trial court would bar Dr. Etcoff from testifying. See ROA at 1555-1556. Trial counsel unwillingly abided by the trial court's order and turned over Dr. Etcoff's report. See ROA at 1556-1557. Trial counsel told current counsel he had not yet decided about using Dr. Etcoff when the trial court issued the order:

> This plan was foiled when the trial judge forced me to turn over Dr. Etcoff's report prior to the penalty phase. If I did not turn over Dr. Etcoff's report on July 6, 1995, the trial judge said he'd bar me from calling Dr. Etcoff during the penalty phase. Given this ultimatum, I reluctantly turned over Dr. Etcoff's report to the State. I was not sure at that point that I wanted to put on Dr. Etcoff.

Ex. 2.26.

The state immediately subpoenaed all of the raw data generated from Dr. Etcoff's evaluation. Ex. 3.33. It requested the MCMI-2 and MMPI-2 individual questions, Mr. Witter's answers to these questions, and Dr. Etcoff's interview notes. See Exs. 6.19; 2.26.

A competent capital defense attorney would have filed a motion to quash the state's request to obtain the highly personal and potentially incriminating raw data from Dr. Etcoff. Trial counsel failed to file a motion to quash the state's subpoena. Trial counsel told current counsel:

> I can't remember exactly when I discovered the State had subpoenaed Dr. Etcoff's raw data. Dr. Etcoff didn't immediately contact me once he received the State's subpoena. I did not file a motion to quash the State's subpoena. Dr. Etcoff handed over the material. My failure to attempt to quash the subpoena was clearly unacceptable. When the prosecutor used the raw data, the questions from the MMPI, both to cross-examine Dr. Etcoff and to argue, I didn't object. I didn't know that I should've objected to this improper use of the raw data. I didn't know that this was an improper use of the raw data, according to the test. If I were to do it all over again, I would definitely file a motion to prevent the State from obtaining William's highly confidential material. I had no tactical or strategic reasons for not filing a motion to quash the State's subpoena.

Ex. 2.26.

Mr. Witter was protected by the Fifth Amendment from being compelled to offer testimony

against himself. This protection was violated when the state gained access to Dr. Etcoff's interview notes and other raw data while both sides were preparing for the penalty phase. Mr. Witter had been asked highly personal and ambiguously worded questions by Dr. Etcoff that could easily be used against him at trial. Mr. Witter answered these questions honestly and sincerely, yet in doing so he provided the state with incriminating evidence it would not have discovered in Mr. Witter's records. The state had access to these incriminating responses while deciding whom to present at the penalty phase, what questions to ask, and where else to investigate.

The trial court held a hearing to determine if gang testimony would be admitted during the penalty phase. In this hearing, the state argued the gang evidence was relevant because Mr. Witter admitted to Dr. Etcoff he was in a gang in CYA and he was involved in stabbings and other gang violence. The state argued that Mr. Witter admitted to Dr. Etcoff that his time at CYA was increased because he engaged in these activities. See ROA at 1576-1577. The state prosecutor admitted that he "began to consider" the gang material admissible when he received Dr. Etcoff's data. The state began to consider the gang material admissible because Mr. Witter told Dr. Etcoff that "there was a number of stabbings," in the gang activity in CYA. ROA 1576. The trial court ruled that the gang evidence was relevant and admissible. The trial court premised its ruling on Mr. Witter's incriminating statements to Dr. Etcoff. The trial court reasoned that Mr. Witter's gang comments to Dr. Etcoff were relevant to establishing Mr. Witter's future dangerousness. See ROA at 1581.

The state's access to Mr. Witter's statements violated the Fifth Amendment. The state used, and the trial court relied upon, this violation to admit prejudicial gang testimony from San Jose Police Officers Ford and Jackson. This error substantially undermined the penalty phase's fundamental fairness. Had trial counsel made a proper Fifth Amendment objection, the trial court would not have admitted the gang evidence on the basis declared in the record. Trial counsel's conduct was unreasonable and prejudicial.

Mr. Witter's penalty hearing began on July 11, 1995. Prior to Dr. Etcoff testifying, the state used Dr. Etcoff's report and raw data while cross-examining Mr. Witter's mitigation witnesses. See, e.g., ROA at 1931-1932 (state's cross-examination of Lani Sanders); ROA at 2006 (state's cross-

examination of Tina Whitesell). At the close of testimony on July 11, 1995, trial counsel ineffectively objected to the state's usage of Dr. Etcoff's report during cross-examination when he failed to identify how, why, and what Constitutional Amendment was violated:

> Mr. Kohn: Your honor, one other matter:
>
> I was watching the District Attorney during his cross-examination of [Lewis] Witter, and it appeared to me he was using the report that I gave him from Dr. Etcoff as cross-examination material.
>
> He had it in his hand; he's referring to it. I believe at this point in the proceeding, it was wrong.

ROA at 1973.

The trial court sided with the state and held that it was permissible for the state to use Dr. Etcoff's report to cross-examine witnesses before Dr. Etcoff even testified.

> Mr. Guymon: No, it is true that I took a quote from the defendant in that material, absolutely, Your Honor. I don't know I'm precluded from doing that.
>
> The Court: I don't think you are.
>
> I don't think it's wrong counsel. You keep making your record on it, but I'm still making my ruling on it. I don't think it's wrong.

ROA at 1973-1974.

Mr. Witter was protected by the Fifth Amendment from giving statements to assist the state in seeking the death penalty. Mr. Witter was interviewed by his trial expert and made comments that were later used against him by the state both in examining witnesses and in preparing the case for trial. Mr. Witter was not warned of his Fifth Amendment rights or of the possibility the state may use these comments against him in preparation for their case or in cross-examination of anyone besides the expert. The state gained access to Mr. Witter's statements and effectively used them against him as it sought the death penalty. The Fifth Amendment was violated.

Trial counsel knew an objection was appropriate but failed to make a specific Fifth Amendment objection. If trial counsel had made such an objection, he would have either preserved the issue for appellate review or barred the state from gaining access to this data prior to Dr. Etcoff's testimony. Either scenario would have caused a more favorable result for Mr. Witter; either by limiting the state's cross-examination of lay witnesses and limiting the admissibility of the gang evidence and expert testimony, or by Mr. Witter gaining relief on appeal. Trial counsel rendered ineffective assistance. Trial counsel's ineffectiveness prejudiced Mr. Witter, as it allowed the state to turn Mr. Witter's own expert, Dr. Etcoff, into a key prosecution witness supporting the state's future dangerousness argument. The state also improperly used the raw data by using individual answers on standardized tests as substantive evidence and to cross-examine Dr. Etcoff. The state's conduct violated legal and ethical cannons by using psychological data in a manner that psychology believes invalid and unreliable. The state's manner of using this data was unfair and prejudicial. It is reasonably probable that a more favorable result would have been obtained if counsel had properly moved to quash the state's subpoena, to exclude this evidence entirely, or to object to its improper use.

Appellate counsel were ineffective for failing to raise this meritorious Fifth Amendment claim on direct appeal or state post-conviction. Had appellate counsel raised such a meritable issue, the reviewing court would have been compelled to vacate Mr. Witter's sentence.

The Fifth Amendment protects Mr. Witter from giving statements to the state that will be used to seek his conviction or sentence. The Fifth Amendment commands the state only receive statements from Mr. Witter that were made while he was aware of and intelligently waived the protection. Neither trial counsel nor Dr. Etcoff warned Mr. Witter that his admissions could be used by the state in preparation for the penalty phase or to cross examine anyone other than Dr. Etcoff. Trial counsel had an obligation to make sure Mr. Witter was aware of his Fifth Amendment rights and protections and that he knowingly waived such protections. Trial counsel gave Mr. Witter no such warnings. Trial counsel failed to make certain that Dr. Etcoff provided Mr. Witter with such a warning prior to his evaluation. Mr. Witter lost the opportunity to exercise his Fifth Amendment rights because of trial counsel's ineffectiveness. Trial counsel's ineffectiveness rendered the

resulting penalty phase fundamentally unfair because of the use of Mr. Witter's statements by the state.

Appellate and state post-conviction counsel were ineffective for failing to raise this meritorious Fifth Amendment claim on direct appeal or state post-conviction. Had appellate counsel raised such a meritorious issue, the reviewing court would have been compelled to vacate Mr. Witter's sentence.

B. Trial Counsel Was Ineffective For Failing to Make Timely Objections to the State's Offering Invalid and Unreliable Testimony

The penalty hearing began on July 11, 1995. Dr. Etcoff testified on July 12, 1995. During cross-examination, the state relied heavily on Mr. Witter's responses to the MCMI-II and MMPI-2 questions. The state, in effect, re-read these questions to Dr. Etcoff to disclose Mr. Witter's answers:

Mr. Guymon: And the first test was the MCMI-2?

Dr. Etcoff: Yes.

.....

Mr. Guymon: I just want to run through a couple test questions. Do you have the test with you?

Dr. Etcoff: Yes.

Mr. Guymon: Because I want the jury to feel for the test, the kind of things he was able to answer and his truthfulness.

As a teenager, I got into lots of trouble because of bad behavior.

Dr. Etcoff: True.

Mr. Guymon: Question 12: Sometimes I can be pretty rough and mean in relations with my family.

Dr. Etcoff: True.

Mr. Guymon: Question 17: I have drinking a problem that I've tried unsuccessfully to end.

Dr. Etcoff: True.

Mr. Guymon: Question 23: I often feel I should be punished for the things I have done.

Dr. Etcoff: True.

Mr. Guymon: Question 26: I tend to burst out in tears or anger for unknown reasons.

Dr. Etcoff: True.

ROA at 2082-2083.

This improper and highly prejudicial dialogue between Dr. Etcoff and the prosecutor continued for another fifteen questions. See ROA at 2083-2084. After covering the MCMI-II questions, the state turned to the MMPI-2. The state re-read these questions and once again improperly forced Dr. Etcoff to disclose Mr. Witter's answers:

Mr. Guymon: I'd like to share just some of the questions and answers with the jury if I could. I'm referring to page 7 on the MMPI-2, question number 92, if you have that?

Dr. Etcoff: I do.

Mr. Guymon: I don't seem to care what happens to me.

Dr. Etcoff: True.

Mr. Guymon: The future seems hopeless to me.

Dr. Etcoff: True.

Mr. Guymon: I have made lots of bad mistakes in my life.

Dr. Etcoff: True

.....

Mr. Guymon: I have enjoyed using marijuana.

Dr. Etcoff: True.

.....

Mr. Guymon: I have never been in trouble with the law.

Dr. Etcoff: False.

Mr. Guymon: I have never been in trouble because of my sex behavior?

Dr. Etcoff: False.

ROA at 2090-2091.

The state also improperly used Dr. Etcoff's report and Mr. Witter's MMPI-2 and MCMI-II data during its closing arguments.

> Mr. Guymon: What do we know about his character?... We know he enjoys fighting. We know, using his words, he was the hard ass around the campus. He was the playboy, the first one to have sex; he always had women; he was a show off.
>
> . . . He used drugs repeatedly and he told us something about himself in a couple exams. The defense witness, Dr. Etcoff, gave these exams.
>
> What did Mr. Witter tell us about himself? He answers to the question I have never been in trouble because of my sexual behavior, false.
>
> The future seems hopeless to me; true
>
> I have to agree with that.
>
> For Mr. Witter, his future is hopeless because his punishment is going to be secure; it's going to be irrevocable.
>
> He tells us a little more about his character and about himself. In answer to the question I often feel I should be punished for the things I've done, he puts true. This is that this man has, knowing that he should be punished for his crimes, yet he does it anyway.
>
> I am ready to fight to the death before I let anybody take away my self-determination.
>
> Did Kathryn Cox take away his self-determination when he told her no? Was that what his fight was about, he was going to fight to his death?
>
> .....
>
> He tells us punishment never stopped him from doing what I wanted. Punishment is going to slow this man down. He answered true to that

question.

I think highly of rules because they are a good guide to follow. He says false. He's going to break the rules. On the streets, he'd going to break them; in school, he's going to break them; in prison he's going to break them. The evidence shows that very, very clearly.

Do we give him the chance to break more rules?

There's a penalty that doesn't give him that chance.

Lastly, in answer to the question I deserve the suffering I've gone through in life; answer, true.

If history repeats itself, we begin to look at his life and we find when he was in the California Youth Authority, he was fighting all the time, involved in gang violence, fighting his enemies from L.A., Nortenos and Sorenos, northern and Souther; that he witnessed stabbings, jumpings, was involved in those fights, got extra time, got extra punishment. He knew he would be punished additionally for that involvement, yet he did it anyway.

There's not a punishment that slows this man down. There's not a punishment that stops him, with the exception of the harshest punishment.

ROA at 2187-2189; see also ROA at 2158-2159 (state comments on Mr. Witter's disclosure to Dr. Etcoff that he felt comfortable in prison).

The state utilized Mr. Witter's MMPI-2 and MCMI-II results to bolster the argument that Mr. Witter represented a future threat to prison officials and inmates. See ROA at 2098-2110.

The instructions that are published with the MMPI-2 and control its proper use explain that some questions are included to test the subject's veracity, some to compare responses on questions, and some are designed to receive the truth of the matter asserted. The questions have no validity independent of the test and are not meant to be independently interpreted. The questions like 'the

future seems hopeless,' and 'I don't care what happens to me' or 'I have been in trouble for my sex behavior' require too many interpretations and qualifiers to be valid independent statements. The questions were never intended to be used as independent declarative statements of truth.

A competent capital defense attorney, who was aware of the test's proper usage, would have objected once the state made clear it intention to use MMPI-2 and MCMI-II questions to cross-examine Dr. Etcoff. Trial counsel failed to make a preemptive objection or any contemporaneous objections. Trial counsel also failed to make an after-the-fact objection or to request a mistrial. Had trial counsel made a proper objection, he either would have preserved this issue for appellate review or prevented the state from presenting invalid and unreliable testimony and argument. Should trial counsel have successfully objected, the state would have not been able to bolster the future dangerousness argument or present damning admissions of psychologically malevolent attitudes. In the absence of such testimony, there is a reasonable probability that the jury would have rendered a more favorable sentence.

The above stated claim is of obvious merit. Competent appellate counsel would have raised and litigated this meritorious issue on direct appeal and in state post-conviction. There is no reasonable appellate strategy, reasonably designed to effectuate petitioner's best interest, that would justify appellate counsel's failure in this regard. Petitioner is entitled to relief in the form of a new trial, a new sentencing hearing, and where appropriate, a new appeal.

CLAIM SEVEN

Mr. Witter's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, trial by jury, trial before an impartial jury, and a reliable sentence because of the trial court's failure to properly instruct the jury at trial and during the penalty phase. U.S. Const. Amends. V, VI, VIII, & XIV. Nev. Const. Art. 1, §§ 3, 6, and 8; Art. 4, § 21.

SUPPORTING FACTS

Mr. Witter's death sentence is unconstitutional because it is premised on four faulty penalty phase jury instructions that rendered it unreliable and fundamentally unfair. First, the reasonable doubt instruction impermissibly raised the standard of doubt. Second, Instruction 8, failed to adequately apprise the jurors they were not required to unanimously find mitigating circumstances. Third, Instruction 8 failed to adequately inform the jurors they were required to unanimously find any aggravating factor. Fourth, Instruction 15 failed to identify the underlying elements of the aggravating circumstances and to inform the jury they were required to find each element beyond a reasonable.

A. Reasonable Doubt Instruction

At the time of Mr. Witter's trial and sentencing hearing Nev. Rev. Stat. § 175.211 provided the following definition of reasonable doubt:

> A reasonable doubt is one based on reason. It is not a mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

The trial court recited this instruction to the jury during Mr. Witter's penalty hearing. See ROA at 2138, 2215 (Instruction 9). This definition inflates the constitutional standard of doubt necessary for acquittal, and the use of this definition improperly infected Mr. Witter's trial and sentencing hearing.

The Constitutional problem begins with the second sentence: 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." This language is a characterization of the degree of certainty found in proof that contains no reasonable doubt, rather than an explanation of reasonable doubt itself. This language is also an historical anomaly; as far as can be discerned, no other state currently uses this language in its reasonable doubt instruction, and the few states that previously used it have since disapproved it.

The final sentence of the instruction is also constitutionally infirm. That sentence states "[d]oubt to be reasonable must be actual, not mere possibility or speculation." This language is similar to language condemned by the United States Supreme Court, see, e.g., Francis v. Franklin, 471 U.S. 307 (1985); Sandstrom v. Montana, 442 U.S. 510 (1979); Yates v. Aiken, 484 U.S. 211 (1988), and when read in combination with the "govern or control" language, creates a reasonable likelihood that the jury would convict and sentence based on a lesser standard of proof than the Constitution requires. This sentence elevates the threshold of reasonable doubt, making reasonable doubt unconstitutionally difficult to recognize while making lack of reasonable doubt more attainable.

The characterization of the proof standard as an "abiding conviction of the truth of the charge" does not cure the defects. That term is not linked to any language suggesting a proper definition of the proof standard, and the immediately preceding reference to the unconstitutional "govern or control" standard in fact links the "abiding conviction" language to a standard of proof that is impermissibly low. In short, the instruction does nothing to dispel the false notion that the jurors could have an "abiding conviction" as to an aggravator if the reasonable doubts they harbored were not sufficient to "govern or control" their actions.

The statutorily mandated reasonable doubt definition prejudiced Mr. Witter. Constitutional defects of this instruction substantially and injuriously affected Mr. Witter's clearly established federal constitutional rights by lowering the threshold for conviction. The state cannot show, beyond a reasonable doubt, that this error did not affect the conviction and sentence.

Mr. Witter's trial counsel were ineffective for failing to object to this jury instruction, as it was clearly established by the time of trial that this definition of reasonable doubt arguably could not pass constitutional scrutiny.

Mr. Witter's direct appeal and state post-conviction attorneys were also ineffective for failing

to raise this arguably meritorious issue on direct appeal and state post-conviction.

B. Failure to Instruct that Mitigating Factors Do Not Have to be Unanimously Found

During Mr. Witter's sentencing hearing, the trial court gave the following instruction to the jury on how it was to determine whether an aggravator or mitigator existed:

> The Court: Instruction Number 8: The state has alleged that aggravating circumstances are present in this case. The defendants have alleged that certain mitigating factors are present in this case.
>
> It shall be your duty to determine: A, whether an aggravating circumstance or circumstances are found to exist; and B, whether a mitigating circumstance or circumstances are found to exist; and C, based upon these findings, whether the defendant should be sentenced to life imprisonment.
>
> The jury may impose a sentence of death only if it finds at least one aggravating circumstance has been established beyond a reasonable doubt, and further finds there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.
>
> Otherwise, the punishment imposed shall be imprisonment in the state prison for life with or without the possibility of parole.
>
> You are instructed that it is not necessary for the defendant to present any mitigating circumstances. Even if the State establishes one or more aggravating circumstances beyond a reasonable doubt and the defendant presents no evidence in mitigation, you should not automatically sentence the defendant to death.
>
> The law never specifies that a sentence of death is appropriate. The jury, however, may consider the option of sentencing the defendant to death where the State has established beyond

> a reasonable doubt that an aggravating circumstance or circumstances exist and the mitigating evidence is not sufficient to outweigh the aggravating circumstance.

ROA at 2137-2138 (Instruction 8).

The instruction failed to advise the jury that any mitigating circumstance could be considered by an individual juror in making his or her own determination as to the appropriate penalty, regardless of what the other jurors thought about the existence of that circumstance. The instruction failed to convey the message that each juror is individually permitted to consider and give effect to mitigating evidence when deciding whether to sentence a capital defendant to life or death. This fundamental defect was exacerbated by the state's closing argument claim that "the jury must... find there are not mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." ROA at 2145 (emphasis added).

This instruction violates clearly established constitutional law, see e.g., Mills v. Maryland, 486 U.S. 367 (1988); McKoy v. North Carolina, 494 U.S. 433 (1990), as a reasonable juror would have understood the instructions as requiring the jury as a whole make unanimous findings as to mitigating factors. Reasonable jurors would have believed they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a mitigating circumstance. The jury would have reasonably thought itself required to reject one or more mitigating circumstances, even if 11 jurors found that particular circumstance to exist. Thus, one holdout juror could prohibit a finding of any mitigating circumstances, and guarantee a death sentence if the jurors agreed to even one aggravating factor.

By failing to convey the lack of unanimity requirement on mitigating circumstances, and the absence of a state law requirement of meeting a burden of proof as to their existence, the instructions, taken as a whole, impermissibly limited the jurors' consideration of mitigating circumstances, in violation of due process and clearly established federal law.

Permitting the possibility that a single juror could block consideration of a mitigating factor and consequently require the jury to impose death permitted this unique penalty to be wantonly and

freakishly imposed. This process denied Mr. Witter a fair and impartial trial. Such a "freakish" scheme violated Mr. Witter's constitutional right to a reliable sentencing determination and fundamental fairness.

The failure to guide the jury's sentencing determination through instruction as to the lack of unanimity requirement for mitigating circumstances substantially and injuriously affected the process to such an extent as to render Mr. Witter's death sentence fundamentally unfair and unconstitutional.

Mr. Witter's trial counsel were ineffective for failing to object to this jury instruction, as it was clearly established by 1995 that mitigating factors need not be unanimously found by the jury.

Mr. Witter's direct appeal and state post-conviction attorneys were also ineffective for failing to raise this arguably meritorious issue on direct appeal and state post-conviction.

C. Failure to Instruct that Aggravating Factors Had to Be Unanimously Found

Nevada's death penalty statute requires unanimity for the finding of an aggravating factor. See Nev. Rev. Stat. § 175.554 (2). Should this Court determine jury instruction 8 allowed the jurors to independently determine mitigation, the instruction allowed the jurors to independently determine aggravators, in violation of due process and state statute.

The instruction given to the jury failed to specify that the jury was obligated to unanimously agree as to the existence of aggravating circumstances. The instructions merely stated that the "jury may impose a sentence of death only if it finds at least one aggravating circumstance has been established beyond a reasonable doubt, and further finds there are no mitigating circumstances sufficient to outweigh the aggravating circumstances or circumstances found." ROA at 2137 (Instruction 8). Similarly, the "Special Verdict" form for aggravating circumstances failed to incorporate a unanimity instruction. The form simply reads: "We, the Jury . . . designate that the aggravating circumstance or circumstances which have been checked have been established beyond a reasonable doubt." ROA at 2225. The only unanimity requirement mentioned by the trial court pertained to the jury's verdict. See ROA at 2141 (Instruction 15) ("Your verdict must be unanimous.").

The jury lacked the requisite information as to how to properly find the existence of an aggravating factor. The jury's discretion was not properly channeled or limited. Affording the jury

unlimited discretion to determine whether an aggravating factor existed, violates the Eighth Amendment because the class of persons eligible for the death penalty are not narrowed by a process that does not direct the jury in how to find eligibility. Mr. Witter's death sentence was inflicted in an arbitrary and capricious manner because the jury was not instructed in how to legitimately narrow the class of persons eligible for death.

The failure to guide the sentencing determination through the giving of an express instruction as to the unanimity requirement regarding aggravating circumstances substantially and injuriously affected the jury's sentencing deliberation to such an extent as to render Mr. Witter's death sentence fundamentally unfair and unconstitutional. Accordingly, the state cannot demonstrate, beyond a reasonable doubt, that the lack of a unanimity instruction as to aggravating circumstances did not affect Mr. Witter's death sentence.

Mr. Witter's trial counsel were ineffective for failing to object to this jury instruction, as it was clearly established by 1995 that a capital jury's discretion had to be adequately guided and channeled when it came to determining whether an aggravator existed or not. Mr. Witter's direct appeal and state post-conviction attorneys were also ineffective for failing to raise this arguably meritorious issue on direct appeal and state post-conviction.

Had trial counsel objected to the jury instruction, either the trial court would have sustained the objection and withdrawn the instruction or overruled the issue and preserved it for appeal. Had either direct appeal or state post-conviction counsel raised this meritorious issue, the reviewing court would have been compelled to grant relief.

D. Failure to Instruct on Elements of Felony Offenses Used as Aggravating Factors

During Mr. Witter's sentencing hearing, the trial court instructed the jury on the aggravating factors alleged by the prosecution. Two of the four aggravating factors alleged by the state were (1) "the murder was committed while a person was engaged in the commission of or attempt to commit burglary," and (2) "the murder was committed while the person was engaged in the commission of or attempt to commit a sexual assault." ROA at 2139 (Instruction 10). The trial court, though, did not instruct the jury on the elements of the felony offenses of burglary, attempted burglary, sexual assault, or attempted sexual assault.

The trial court's failure to instruct on any elements of the felony-based aggravating factors resulted in no adequate finding by the jury of those factors and amounted to a directed verdict of guilt by the court on the elements of these aggravating factors, based on the guilt phase convictions as to the underlying felonies, without requiring any finding as to the nexus between the commission of the felony and the commission of the homicide, and without any finding of the personal commission of the homicide or other mental state required by Nev. Rev. Stat. § 200.033(4)(a, b). The prosecutor exacerbated the court's failure to instruct on these necessary elements by arguing to the jury that, by their guilt phase verdicts, they had already found these aggravating factors. See ROA at 2148-2049.

The failure of the trial court to instruct the jury on the elements of the felony aggravating circumstances is prejudicial per se. Nevada is a weighing state, in which each aggravating factor adds a separate weight in the jury's calculus leading to a determination of death eligibility and to the ultimate sentence. This Court should find that the consideration, after improper instruction, of the felony aggravating factors affected the sentencing verdict. The constitutional error had a substantial and injurious effect on the verdict.

Trial counsel were ineffective for failing to object to this jury instruction. It was clearly established by 1995 that there had to be an adequate finding of the aggravating circumstances' underlying elements before a capital defendant could be death-eligible. Direct appeal and state post-conviction attorneys were also ineffective for failing to raise this arguably meritorious issue on direct appeal and state post-conviction.

Had trial counsel objected to the jury instruction, either the trial court would have sustained the objection and withdrawn the instruction or overruled the issue and preserved it for appeal. Had either direct appeal or state post-conviction counsel raised this meritorious issue, the reviewing court would have been compelled to grant relief.

The above stated claims are of obvious merit. Competent appellate counsel would have raised and litigated these meritorious issues on direct appeal and in state post-conviction. There is no reasonable appellate strategy, reasonably designed to effectuate petitioner's best interest, that would justify appellate counsel's failure in this regard. Petitioner is entitled to relief in the form of a new trial, a new sentencing hearing, and where appropriate, a new appeal.

CLAIM EIGHT

Mr. Witter's death sentence is invalid under the state and federal constitutional guarantee of due process, equal protection, to not be subjected to cruel and unusual punishment, and a reliable death sentence due to the state's use of Mr. Witter's juvenile convictions as a non-statutory aggravating factor during the penalty phase. U.S. Const. Amends. V, VI, VII, & XIV. Nev. Const. Art. 1, §§ 3, 6, and 8; Art. 4, § 21.

SUPPORTING FACTS

During Mr. Witter's sentencing hearing, the state had Mr. Witter's former parole officer, Linda Rose, testify about his prior record, including his juvenile arrests and commitments. She mentioned Mr. Witter's arrest for rape, from an incident occurring when he was 15 years old and vandalism and arson arrests, from an single incident when he was 17 years old. See ROA at 1679. The state honed in on these incidents and Mr. Witter's subsequent institutionalization within CYA when cross-examining Dr. Etcoff, in an attempt to bolster the future dangerousness argument.

Mr. Guymon: A history that includes arson?

Dr. Etcoff: That's an indicator [of future dangerousness].

Mr. Guymon: A dangerous incident, arson?

Dr. Etcoff: Sure.

Mr. Guymon: A history of sexual assault or rape, violence?

Dr. Etcoff: Violence?

Mr. Guymon: History?

Dr. Etcoff: That's history, yes.

Mr. Guymon: Incarcerated in California Youth Authority, a history of jumping people?

Dr. Etcoff: Yes.

Mr. Guymon: Getting extra time, violating prison rules for that?

ROA at 2103-2104.

The state not only used Mr. Witter's juvenile convictions as a general non-statutory aggravator, it also incorporated them into its future dangerousness argument.

The use of Mr. Witter's prior juvenile commitments as non-statutory aggravating circumstances violated his Eight and Fourteenth Amendment rights both because of lack of due process in a juvenile adjudication and because evidence from juvenile offenses is not reliable predicated upon the unstable nature of a juvenile's development. In Roper v. Simmons, 125 S.Ct. 1183 (2005), the Supreme Court recognized that based on impulsiveness and susceptibility, juveniles are more likely to engage in reckless behavior without fully understanding the consequences of that behavior. This rationale applies to incidents which occur prior to the age of eighteen. Due to their continuing intellectual development, it is very likely that minors completely disregard the negative repercussions of their actions not only for the immediate offense but its future impact on their lives. This level of development decreases a minor's culpability. The use of prior convictions that occurred before a capital defendant reached eighteen violates the heightened reliability required of death sentences. If their age and development prohibits a capital sentence directly, other crimes committed while at that same age are not reliable evidence for a death sentence when they are older.

Due to the fact that Nevada is a weighing state, Mr. Witter is entitled to a new penalty phase because of the unconstitutional prior conviction aggravating circumstance presented against him. At the very least, he is entitled to a reweighing of this aggravating and mitigating circumstances where he has been permitted to present his reduced culpability in the prior conviction.

Mr. Witter's trial counsel were ineffective for failing to exclude this evidence during the penalty phase, particularly in light of the fact that the Supreme Court, on numerous occasions prior to its decision in Roper, held that a capital defendant's youthfulness was a mitigating factor.

Ms. Rose, in effect, read into the record Mr. Witter's previous misdeeds and felony convictions from a California Department of Corrections ("CDC") report. A reasonable capital defense attorney would have obtained a copy of this report and reviewed its contents before Ms. Rose testified to ensure nothing improper or prejudicial was introduced to the jury.

Trial counsel failed to investigate and uncover this CDC report. See Ex. 2.26. Trial counsel

were ineffective for failing to obtain this document and to review its contents before Ms. Rose testified. Had trial counsel investigated and discovered this report, they would have noted that it included the juvenile convictions and offered proper objections, at the very least, preserving this issue for appellate review.

Mr. Witter's direct appeal and state post-conviction attorneys were ineffective for failing to raise this arguably meritorious issue on direct appeal and state post-conviction. Had either direct appeal or state post-conviction counsel raised this meritorious issue, the reviewing court would have been compelled to grant relief.

CLAIM NINE

Mr. Witter's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, an impartial jury, and a reliable sentence because the trial court's death qualification question removed prospective jurors whose views on capital punishment prevented or substantially impaired their ability to follow Nevada law but not federal constitutional law. U.S. Const. Amend. V, VI, VIII, & XIV. Nev. Const. Art. 1, §§ 3, 6, and 8; Art. 4, § 21.

SUPPORTING FACTS

Before each prospective juror was individually questioned by the trial court, the trial judge gave them the following instructions.

> The Court: In the State of Nevada, we have three possible forms of punishment from among which the jury must select one of these possible forms of punishment. Those three forms of punishment among which you'll select one are these:
>
> The imposition of the death penalty, life imprisonment without the possibility of parole, and life imprisonment with the possibility of parole.
>
> This is the question I'll ask each of you individually. In your present state of mind, if you are selected as a juror in this case, can you equally consider all three of these forms of punishment and select the one that you feel, under the evidence and facts of this case, to be the most appropriate?

ROA at 224; see also ROA at 240, 265, 374.

The trial judge then proceeded to ask every prospective juror the "equally consider" question. To be death qualified prospective jurors had to be willing and able to "equally consider" all three penalty sanctioned by Nevada's death penalty statute. The trial court's "equally consider" violates clearly established federal constitutional law. Under Witherspoon v. Illinois, 391 U.S. 510, 522 n.21 (1968), a juror can not be removed because he or she has qualms about selecting someone for death

when he pledges to follow the law and consider death. Removing jurors because they are uneasy about giving a death sentence denies Mr. Witter a fair cross-section of section of society on the jury and tilts any jury towards death.

The trial court relied on the "equally consider" phrase to remove four prospective jurors who testified they could consider death, but not equally when compared with the two life sentence alternatives because of their personal, moral, or religious views regarding the death penalty. See Lenda Jones (ROA 340-349); Karl Johnson (ROA at 484-491); Donna Barber (382-383); Donald McClaflin (ROA 385-387).

The trial court recognized this error when questioning prospective juror Mary Phillips:

> The Court: Miss Phillips, sometimes we sit here year after year and go through these kind of things and think we know it all, and a situation comes up and I realize sometimes we have something to learn here too. And I've learned something from your answers; and that is, the word equally really isn't a good word, because, as you say, these things aren't equal.
>
> So how do you consider them equal? I realize maybe that isn't a good word that we are using. Appellate courts struggle over these words for hundreds of years and finally they come up with one we all use, and I can see that probably isn't a good connotation for what we are asking.
>
> So I think what we are trying to say, Miss Phillips, in the context of what we would be trying to do in the penalty phase, that is, select the proper punishment for whatever it is the evidence shows has been done, can you consider each of them–even though not equally, can you consider each and select the one that you feel, under the facts that you hear, to be most appropriate?
>
> Miss Phillips: I believe so. That's why I answered yesterday yes.

ROA at 555-556.

By the time the trial judge realized the error, four potential jurors had been removed for cause because they could not 'equally consider' life and death.

The questioning of the removed jurors does not reveal views that would have prevented or substantially impaired their ability to conscientiously adhere to and apply the law. Removing these prospective jurors prejudiced Mr. Witter. The presence of any one of these four prospective jurors would have likely prevented the jury from unanimously agreeing to sentence Mr. Witter to death. When the trial court removed these four jurors it violated Mr. Witter's clearly established right to due process, an impartial jury, and a reliable death sentence.

The unsupported removal of a qualified trial juror is prejudicial per se. In the alternative, the removal of these four prospective jurors substantially and injuriously affected Mr. Witter's federal constitutional rights to due process, an impartial juror, and a reliable death sentence.

Mr. Witter's trial counsel were ineffective for failing to raise timely objections to the trial court's death qualification standard and its subsequent dismissals under this standard.

Mr. Witter's direct appeal and state post-conviction attorneys were also ineffective for failing to raise this arguably meritorious issue on direct appeal and state post-conviction.

Had trial counsel objected to the trial court's improper questioning, either the trial court would have sustained the objection and not improperly removed the venire persons or overruled the issue and preserved it for appeal. Had either direct appeal or state post-conviction counsel raised this meritorious issue, the reviewing court would have been compelled grant relief.

The above stated claim is of obvious merit. Competent appellate counsel would have raised and litigated this meritorious issue on direct appeal and in state post-conviction. There is no reasonable appellate strategy, reasonably designed to effectuate petitioner's best interest, that would justify appellate counsel's failure in this regard. Petitioner is entitled to relief in the form of a new trial, a new sentencing hearing, and where appropriate, a new appeal.

CLAIM TEN

Mr. Witter's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, and a reliable sentence due to the admission of impermissible and unduly prejudicial victim impact evidence. U.S. Const. Amends. V, VI, VIII, & XIV. Nev. Const. Art. 1, §§ 3, 6, and 8; Art. 4, § 21.

SUPPORTING FACTS

The State improperly introduced substantial evidence from the complainant's surviving family. Three members of Mr. Cox's family provided irrelevant and prejudicial testimony outside the scope of admissible victim-impact testimony as determined by the United States Supreme Court.

A. James R. Cox's Testimony

During Mr. Cox's testimony, he testified as to how his son (Mr. Cox's grandson) reacted to and felt about his grandfather's death.

> Mr. Cox: Initially, he was angry and wanted to hurt the men that caused this... he's not so much interested in hurting the individual that hurt Grandpa, but he wants to make sure–and he voiced this to my ex-wife–that this never happens again, that this man never hurts anybody else.

ROA at 1830 (emphasis added).

This testimony is highly prejudicial because it asks the jury to hand down a death sentence by relaying that the complainant's grandson desires a death sentence. Mr. Cox also made the following comments about the crime:

> Something that bothered me... during the trial, when I first listened to the coroner give his account of his findings, I found it very odd when he mentioned upon examining my father that there were no defensive wounds on his body.
>
> I knew my father very well, I worked beside him... and I realized my father was a strong man; not excessively strong.
>
> Myself, based on my training, both inside and outside the military, I realized one of the first things we were taught in self defense . . . you have to be taught how

> to block and not to block. It's a natural instinct to throw your hands up to defend yourself. You don't even think about it. A child will just throw their hands up.
>
> So to think my father . . . did not show any signs of throwing his hands up made me question. I thought about a lot of the situations I've been trained in and trained to deal with and it makes me think, whatever happened on that scene is something I would probably never have an opportunity to know.
>
> My father was either caught off guard or was stunned within the first few moments of the fight, and was probably not in a position where he could defend himself... to throw his hands up to defend himself.
>
> That took me by surprise and shocked me because... that's something I would assume . . . it really shocked me and made me realize, based on the evidence and based on my understanding of my father and hand to hand combat, that whatever happened initially, he had no chance.

ROA at 1831-1833.

Mr. Cox's crime reconstruction comments interjected essentially expert testimony, without any qualification as an expert, and they are highly prejudicial characterizations about the crime there were made simply to inflame the jury.

B. Phil Cox's Testimony

When Mr. Cox testified, he made the following statement mocking jurors who show compassion for criminal defendants by not sentencing them to the harshest penalty under the law:

> [O]ur biblical upbringing instructs us when somebody does something wrong, a penalty has to be paid, whether it's a great or small act that has been committed. . . . We don't feel that we are trying to get back at Mr. Witter. It's not an eye for an eye type thing. We are not trying to avenge ourselves. We believe the word of God in heaven will take care of that for us. . . . we believe the Bible has instructed us that governments are set up to oversee the land; they set up a structure that sets boundaries of human behavior, and the government is an instrument to restrain the evil that is in the land. As Bible believing people, we are commanded to respect the authority of the government and support its efforts to promote peace and order in our society. I really feel, as Americans, we are the laughing stock of the world

> because of our light sentences that we give to people who commit crime; and we parole them early for those things when they should not be. I really feel this is an opportunity for the State to inflict as strong a penalty that fits a sentence, and I ask as a brother of Jim for my other brothers, for my sister and my parents, that you issue a penalty that fits this crime.

ROA at 1860-1861 (emphasis added).

Mr. Cox's statements are constitutionally impermissible because they invoked non-legal bases for imposing the death penalty, that is, biblical authority and a desire to avoid having the state be a "laughing stock" by not imposing death. Mr. Cox asked the jurors to sentence Mr. Witter to death on an impermissible basis. The absence of the objection at the trial level rendered the punishment verdict unreliable.

Mr. Witter's trial counsel were ineffective for failing to object to Phil and James Cox's testimony. Mr. Witter's direct appeal and state post-conviction counsel are ineffective for failing to raise this arguably meritorious issue on direct appeal and state post-conviction.

C. Kathryn Cox's Testimony

Kathryn Cox, the victim's wife and the survivor of the sexual assault testified. During Ms. Cox's testimony, she said "the events of November 14, 1993 demand that you show this defendant no mercy." ROA at 1866 (emphasis added). She added, "William Witter viscously and brutally murdered my husband James Cox. William Witter perpetrated unconscionable acts of violence directed at me and then my husband. My greatest fear is that William Witter would inflict the same violent acts of destruction on some other unsuspecting victim." ROA at 1867. She concluded her testimony by saying, "I have waited and worked very hard so that I could be here and face the murderer of my husband. I'm here today to do everything in my power to see that William Witter receives no mercy." ROA at 1867-68.

After Ms. Cox testified, trial counsel objected to her testimony and asked for a mistrial.

> Mr. Kohn: My other concern, we have just gone through some very emotional victim impact just prior to this. I'm concerned about the statement of Ms. Kathryn Cox . . . in it she asked twice

> that the jury not give my client mercy. That's about as close as you can come to asking the death penalty without saying kill him... But when you say give no mercy, that certainly is not in the purview of how it affects the family.. For me to object at the time would have been inappropriate. I'm objecting right after. I ask for a mistrial. There's no way to strike what was said. I think it was misconduct on [the State's] part to let her say it and to ask her to say it and I'll submit it on that basis.

ROA 1878-1879.

The trial court denied trial counsel's motion for a mistrial by declaring that Mrs. Cox's testimony did not fall outside the purview of Payne v. Tennessee, 501 U.S. 808 (1991). ROA at 1881.

While trial counsel made an after-the-fact objection to Ms. Cox's highly inflammatory statements, he was still ineffective for not ascertaining, ahead of time, whether the state intended to use victim impact evidence, and if so, evaluating "all available strategies for contesting the admissibility of such evidence and minimizing its effect on the sentencer." Commentary, 2003 ABA Guidelines, 10.11 (reprinted in 31 Hofstra L. Rev. 913, 1067 (2003)). Competent trial counsel could have filed pre-trial motions to exclude such testimony.

The Nevada Supreme Court rejected Mr. Witter's claim that Ms. Cox's testimony was so unduly prejudicial it rendered his penalty hearing fundamentally unfair. According to the Nevada Supreme Court:

> We conclude that in asking the jury to 'show no mercy,' Kathryn was not expressing her opinion as to what sentence Witter should receive. Rather, we believe that Kathryn was only asking that the jury return the most severe verdict that it deemed appropriate under the facts and circumstances of this case. Kathryn's statements also emphasize the devastating effect this crime has had on her and her family's life. Such sentiments are admissible victim-

> impact statements NRS 175.552(3).[27] We therefore conclude that Witter was not deprived of a fair trial and that the district court properly denied Witter's motion for mistrial.

Ex. 6.5 at 14.

The Nevada Supreme Court opinion is an unreasonable application of clearly established federal constitutional law.

Requests to show no mercy or to sentence a capital defendant to the harshest punishment are irrelevant to a capital sentencing decision, and their admission create a constitutionally unacceptable risk the jury may impose the death penalty in an arbitrary and capricious manner by diverting the jury's attention away from the defendant's background and record, and the circumstances of the crime.

The Nevada Supreme Court has held that when an invalid aggravator is considered, at the very least he reviewing court must reweigh the remaining aggravators to determine the harm of the error. The jury's death sentence was based upon an invalid and unreliable aggravating evidence–the impact of the repeated requests to sentence Mr. Witter to death and to show him no mercy. This Court should determine the harm from that resulting error, especially in relation to the other McConnell sentencing error in this case.

The admission of this testimony substantially and injuriously affected Mr. Witter's federal constitutional rights. The jury could not have heard the heart rending plea from a woman who was raped and whose husband was murdered in front of her and not be impacted during the deliberations in a serious manner. This error was prejudicial.

The above stated claim is of obvious merit. Competent appellate counsel would have raised and litigated this meritorious issue on direct appeal and in state post-conviction. There is no

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[27] NRS 175.552(3) states, in part:

> that in the [penalty] hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible.

reasonable appellate strategy, reasonably designed to effectuate petitioner's best interest, that would justify appellate counsel's failure in this regard. Petitioner is entitled to relief in the form of a new trial, a new sentencing hearing, and where appropriate, a new appeal.

CLAIM ELEVEN

Mr. Witter's death sentence is invalid under the state and federal constitutional guarantees of due process, an impartial jury, and a reliable death sentence due to comments made by the trial court to the jury venire which contaminated the conviction and the capital sentencing process. U.S. Const. Amends. V, VI, VIII, XIV. Nev. Const. Art. 1, §§ 3, 6, and 8; Art. 4, § 21.

SUPPORTING FACTS

Mr. Witter's federal constitutional rights to an impartial jury and a reliable sentence were violated on two separate occasions during jury selection: (1) the trial court berated potential jurors who expressed qualms about imposing the death penalty by informing them death was the prescribed penalty for murder as set forth in the Christian Bible; and (2) the trial court improperly instructed prospective jurors they had no individual role in the sentencing process. The trial court's comments during voir dire were highly prejudicial and invalidate Mr. Witter's death sentence.

A. Biblical Comments

The trial court repeatedly injected improper and prejudicial comments when confronted with prospective jurors whose religious views caused them to pause before considering the death penalty. When asked whether she could equally consider all three punishments authorized by Nevada's death penalty statute, Lynndee Shay said she would have difficulty equally considering the death penalty because of her "religious conviction." ROA at 407-408. The trial court engaged in the following with Ms. Shay:

The Court:	What religion is against the death penalty?
Ms. Shay:	I'm Lutheran.
The Court:	They are against the death penalty?
Ms. Shay:	I'm against the death penalty.
The Court:	They are not against it; your religion is not against it?
Ms. Shay:	Not specifically.
The Court:	The Bible isn't against the death penalty.

Ms. Shay: I think the Bible is against vengeance.

The Court: We are not talking about vengeance.

Ms. Shay: I am.

The Court: The Lord gives vengeance. But you don't feel you can?

Ms. Shay: No.

The Court: You realize the laws of this state say someone will consider this punishment?

Ms. Shay: Yes.

The Court: And I take it your religion says you should follow the laws of the State as well?

Ms. Shay: Yes, sir.

The Court: I'm working you into a box, aren't I?

Ms. Shay: Yes, you are.

The Court: Do you wish not to follow the laws of this state?

Ms. Shay: Yes, as it pertains to the death penalty.

The Court: Do you feel then no matter what the facts of this case are, no matter how strong the evidence is, no matter how gross the circumstances are, you can consider no facts where you feel it fair to consider the death penalty?

Ms. Shay: I don't think so.

The Court: Then it wouldn't be fair for you to sit on a jury where that must be the standard?

ROA at 408-409.

A more highly prejudicial colloquy took place between the trial court and Heather York after Ms. York informed the trial court she would have difficulty considering the death penalty because she felt it was "God's job" and not her's to decide. See ROA at 415.

The Court: I could go around the horn and trap you on that one.

Ms. York: Okay.

The Court: Do you want me to try to do that?

Ms. York: If you wish. It's just a–

The Court: We are told by our maker to live here and follow the laws that we live under, right?

Ms. York: Uh-huh.

The Court: And the Bible, which tells of that, has many instances where death is meted out by tribunals, one, the Savior himself, and sometimes whole cities have been destroyed for wrongdoing. So it's hard to say out of religious beliefs you don't believe in doing justice by using a penalty such as this if we are told to do it.

Number two, you're not doing it; the legislature of this state is. You're acting as one of 12 people to determine whether it should be applied or not.

I'm sure you like to follow the laws of the State.

Ms. York: Uh-huh.

The Court: But you don't want to follow this one?

Ms. York: You know, people, I think, have to make decisions they can live with, and this is a decision that I couldn't live with. I would have a hard time dealing with myself if I had to make that decision. Therefore, I couldn't be fair considering that because I would hold back. I don't want it on my–

The Court: So you want others to do it, not you?

Ms. York: Whatever they want to do is what they do and that's their business. What's my decision–

The Court: I guess you wouldn't fight in a war either?

Ms. York: You're right, I would not.

I couldn't make a decision if it meant a cat was going to get killed. I wouldn't do it in a person's life.

The Court: I wouldn't want to kill a cat either unless that cat was killing something else, which is what happens sometimes.

All I'm saying is this: We each have a responsibility to live in the community we live in. We enjoy the benefits of the laws and protection of the laws, and each of us have an obligation to honor them and uphold them unless we have some moral reason why we couldn't do that, which generally we say is this country would be reason enough to not apply that law to us, unless we do something unusual, and I would respect that.

What I don't respect is when someone tells me I believe in the law and I'd like to uphold it, but I'd like someone else to do it, but not me, because then you're accepting the benefit without accepting the responsibility.

ROA at 416-418 (emphasis added).

The trial court made the offending comments in front of at least 14 potential jurors. ROA 217 - 220.

The trial court's comments violated the fundamental due process right that affords criminal defendants the right to a verdict based solely on the evidence and the relevant law. The jury which sentenced Mr. Witter had a duty to apply Nevada state law as instructed by the trial judge in determining whether to sentence Mr. Witter to death, not the trial judge's interpretation or its own interpretation of biblical precepts regarding capital punishment. The trial court, by telling jurors that the Bible tells them to follow state law and the law of the state involves a death penalty, instructed jurors to follow the Bible in their role as a juror.

The trial court's comments violated the Sixth Amendment's clearly established principle that a state may not entrust the determination of whether a man should live or die to a tribunal

predisposed to return a verdict of death. The trial court's comments thwarted the entire purpose of voir dire in capital cases. It impermissibly interjected Biblical support for a death sentence into the proceedings, predisposing prospective jurors to return a death sentence if ultimately selected as a juror. The trial court's comments were made in such a way to misleadingly imply that the Bible, and Jesus Christ himself, endorse the death penalty for a large majority of murders. See ROA at 416 ("And the Bible, which tells of that, has many instances where death is meted out by tribunals, one, the Savior himself, and sometimes whole cities have been destroyed for wrongdoing.").

B. Individual Responsibility Comments

The trial court improperly told potential jurors that they had no individual responsibility when issuing a verdict in the penalty phase. See ROA at 416 (The Court: "you're not doing it; the legislature of this state is. You're acting as one of 12 people to determine whether it should be applied or not."); ROA at 490 (The Court: "In your case, it would be diluted by 12. You would have your say, along with 11 others, on the punishment to be given. And if you decided, the 12 of you–and once again, it must be unanimous–if you decided, the 12 of you, it should be death, then it's diluted by 12 ways."). These comments are contrary to clearly established state and federal law which require individual jurors to render a decision. See Caldwell v. Mississippi, 472 U.S. 320, 330-34 (1985). These comments minimize the jury's sense of individual responsibility when imposing a death sentence. The judge's comments also violated Mills v. Maryland, 486 U.S. 367(1988), by instructing implied that the findings of the jury must be unanimous on the issue of death or life.

The trial court's comments were patently improper and require the reversal of Mr. Witter's conviction and death sentence. The statements at issue in this case are even more prejudicial because they came from the trial judge.

The trial court's comments to the jury were per se prejudicial and no specific showing of prejudice is required. Under clearly established federal law, there is a presumption of prejudice from contamination of the jury with extraneous information. In the alternative, the trial court's comments caused a substantial and injurious effect on the verdict.

Mr. Witter's trial counsel were ineffective for failing to object to the trial court's comments. Mr. Witter's direct appeal and state post-conviction attorneys were also ineffective for failing to raise

this arguably meritorious issue on direct appeal and state post-conviction.

Had trial counsel objected to the trial court's comments, either the trial court would have sustained the objection and made corrective remarks to the panel or overruled the issue and preserved it for appeal. Had either direct appeal or state post-conviction counsel raised this meritorious issue, the reviewing court would have been compelled grant relief.

The above stated claim is of obvious merit. Competent appellate counsel would have raised and litigated this meritorious issue on direct appeal and in state post-conviction. There is no reasonable appellate strategy, reasonably designed to effectuate petitioner's best interest, that would justify appellate counsel's failure in this regard. Petitioner is entitled to relief in the form of a new trial, a new sentencing hearing, and where appropriate, a new appeal.

CLAIM TWELVE

Mr. Witter's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, and a reliable sentence because execution by lethal injection violates the constitutional prohibition against cruel and unusual punishments. U.S. Const. Amends. V, VI, VIII, & XIV; International Covenant on Civil and Political Rights, Art. 7. Nev. Const. Art. 1, §§ 3, 6, and 8; Art. 4, § 21.

SUPPORTING FACTS

A. Lethal Injection Constitutes Cruel and Unusual Punishment

Nevada law requires that execution be inflicted by an injection of a lethal drug. Nev. Rev. Stat. § 176.355 (1).

The Nevada Department of Corrections did not release a redacted copy of its "Confidential Execution Manual," last revised February 2004, until April, 2006. See Pet. Ex. 7.3. The execution manual specifies that execution by lethal injection will be carried out using 5 grams of sodium thiopental, a barbiturate typically used by anesthesiologists to induce temporary anesthesia; 20 milligrams of Pavulon, a paralytic agent; and 160 milliequivalents of potassium chloride, a salt solution that induces cardiac arrest. Id.; See Pet. Ex. 7.2 at ¶ 10; See also Pet. Ex. 7.1. Sodium Pentothal is a brand name for the generic drug sodium thiopental . Pavulon is a brand name for the generic drug pancuronium bromide.

Competent physicians cannot administer the lethal injection because the ethical standards of the American Medical Association prohibit physicians from participating in an execution other than to certify that a death has occurred. American Medical Association, House of Delegates, Resolution 5 (1992); American Medical Association, Judicial Counsel, Current Opinion 2.06 (1980). Thus, the lethal injection is not administered by competent medical personnel.

Lethal injection conducted by untrained personnel using the three drugs specified by Nevada's protocol creates an unnecessary risk of undue pain and suffering because Nevada's procedures for inducing and maintaining anesthesia fall below the medical standard of care for the use of anesthesia prior to conducting painful procedures. See Pet. Ex. 7.2 at ¶14-15, 18. The humaneness of execution by lethal injection is dependent upon the proper administration of the

anesthetic agent, sodium thiopental. In the surgical arena, general anesthesia can be administered only by physicians trained in anesthesiology or nurses who have completed the necessary training to be Certified Registered Nurse Anesthetists (CRNAs). Id. at ¶ 23. Nevada's execution manual does not specify what, if any, training in anesthesiology the person(s) administering the lethal injection may have. If the untrained executioner fails to successfully deliver a quantity of sodium thiopental sufficient to achieve adequate anesthetic depth, the inmate will feel the excruciating pain of the subsequent injections of pancuronium bromide and potassium chloride. Id. at ¶ 17; Leonidas G. Koniaris et al., Inadequate anaesthesia in lethal injection for execution, The Lancet, Vol. 365, April 16, 2005, at 1412-14, See Pet. Ex. 7.1. According to Dr. Mark Heath, a board-certified anaesthesiologist who has reviewed NDOC's redacted Execution Manual,

> [i]f an inmate does not receive the full dose of sodium thiopental because of errors or problems in administering the drug, the inmate might not be rendered unconscious and unable to feel pain, or alternatively might, because of the short-acting nature of sodium thiopental, regain consciousness during the execution.

See Pet. Ex. 7.2. Moreover, according to Dr. Heath,

> [i]f sodium thiopental is not properly administered in a dose sufficient to cause the loss of consciousness for the duration of the execution procedure, then it is my opinion held to a reasonable degree of medical certainty that the use of pancuronium places the condemned inmate at risk for consciously experiencing paralysis, suffocation and the excruciating pain of the intravenous injection of high dose potassium chloride.

Id.

Nevada's lethal injection procedure is vulnerable to many potential errors in administration that would result in a failure to administer a quantity of sodium thiopental sufficient to induce the necessary anesthetic depth. The risk of error is compounded by Nevada's use of inadequately trained personnel. Id. at ¶ 21-22. The potential errors include: errors in preparing the sodium thiopental solution (because sodium thiopental has a relatively short shelf-life in liquid. form, it is distributed as a powder and must be mixed into a liquid. solution prior to the execution, Id. at ¶ 19), errors in labeling the syringes, errors in selecting the syringes during the execution, errors in correctly injecting the drugs into the IV, leaks in the IV line, incorrect insertion of the catheter, migration of the catheter, perforation, rupture, or leakage of the vein, excessive pressure on the syringe plunger, errors in securing the catheter, and failure to properly flush the IV line

between drugs. Id. at ¶ 22.

Nevada's lethal injection protocol further falls below the standard of care for administering anesthesia because it prevents any type of effective monitoring of the inmate's condition or whether he is anesthetized or unconscious. Id. at ¶ 26. In Nevada, during the injection of the three drugs, the executioner is in a room separate from the inmate and has no visual surveillance of the inmate.

> Accepted medical practice dictates that trained personnel monitor the IV lines and the flow of anesthesia into the veins through visual and tactile observation and examination. The lack of any qualified personnel present in the chamber during the execution thwarts the execution personnel from taking the standard and necessary measures to reasonably ensure that the sodium thiopental is properly flowing in to the inmate and that he is properly anesthetized prior to the administration of the pancuronium and potassium.

Id.. at ¶ 26. The American Society of Anesthesiologists requires that "[q]ualified anesthesia personnel . . . be present in the room throughout the conduct of all general anesthetics" due to the "rapid. changes in patient status during anesthesia." Id.. at Attachment D [American Society of Anesthesiologists, Standards for Basic Anesthetic Monitoring].

Nevada's lethal injection protocol fails to account for the foreseeable circumstance that the executioner(s) will be unable to obtain intravenous access by a needle piercing the skin and entering a superficial vein suitable for the reliable delivery of drugs. See Pet. Ex. 7.2 at ¶ 33. Inability to access a suitable vein is often associated with past intravenous drug use by the inmate. However, medical conditions such as diabetes or obesity, individual characteristics such as heavily pigmented skin or muscularity, and the nervousness caused by impending death can impede peripheral IV access. See Deborah W. Denno, When Legislatures Delegate Death: the Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What it Says About Us, 63 Ohio St. L.J. 63, 109-10 (2002). Typically, when the executioner is unable to find a suitable vein, the executioner resorts to a "cut down," a surgical procedure used to gain access to a functioning vein. When performed by a non-physician, the risks are great. When deep incisions are made there is a risk of rupturing large blood vessels causing a hemorrhage, and if the procedure is performed on the neck, there is a risk of cardiac dysrhythmia (irregular electrical activity in the heart) and pneumothorax (which induces the sensation of suffocation). In addition, a cut-down causes severe

physical pain and obvious emotional stress. This procedure should take place only in a hospital or other appropriate medical setting and should be performed only by a qualified physician with specialized training in that area. See Pet. Ex. 7.5 (Amicus Brief of Drs. Dill, Gogan, Kalkut, Mitchell, Mobley, and Winternitz on Writ of Certiorari to the United States Supreme Court, Nelson v. Campbell, No. 03-6821, dated Feb. 4, 2004). Nevada's execution manual recognizes that a "sterile cut-down tray" may be required equipment "if necessary," see Pet. Ex. 7.3 at 7, but does not specify who determines when a cut down is necessary, how that determination is made, or the training or qualifications of the personnel who would perform such a cut down.

If the inmate is not adequately anesthetized by the successful administration of sodium thiopental, he will suffer the pain of the remaining two injections. The choice of "potassium chloride to cause cardiac arrest needlessly increases the risk that a prisoner will experience excruciating pain prior to execution" because the "[i]ntravenous injection of concentrated potassium chloride solution causes excruciating pain." See Pet. Ex. 7.2 at ¶ 12. The inmate would be consciously aware and feel the pain of the potassium-induced fatal heart attack. Id.

Pancuronium bromide, the second drug in the lethal injection process, is a paralytic agent that paralyzes all voluntary muscles. This includes paralysis of the diaphragm and other respiratory muscles, which causes the inmate to cease breathing. Pancuronium "does not affect sensation, consciousness, cognition, or the ability to feel pain or suffocation." Id., at ¶ 37 (emphasis added). If the inmate is not adequately anesthetized prior to the pancuronium injection, the pancuronium will cause the inmate to consciously experience a "torturous suffocation" lasting "at least several minutes." Id., at ¶ 39-40.

Pancuronium is "unnecessary" and "serves no legitimate purpose" in the execution process because both sodium thiopental and potassium chloride, if properly administered in the doses specified in the execution manual, are adequate to cause death. Id., at ¶ 37, 44. Pancuronium "compounds the risk that an inmate may suffer excruciating pain during his execution" because it masks any physical manifestations of pain that an inadequately anesthetized inmate would feel during pancuronium-induced suffocation and potassium-induced cardiac arrest. Id., at ¶ 37, 42. "[U]sing barbiturates [such as sodium thiopental] and paralytics [such as pancuronium] to execute

human beings poses a serious risk of cruel, protracted death" because "[e]ven a slight error in dosage or administration can leave a prisoner conscious but paralyzed while dying, a sentient witness of his or her own slow, lingering asphyxiation." Chaney v. Heckler, 718 F.2d 1174, 1191 (D.C. Cir. 1984), reversed on other grounds, 470 U.S. 84 (1985) (citing Royal Commission on Capital on Capital Punishment, 1949-1953 Report (1953)). By paralyzing the inmate and preventing physical manifestations of pain, pancuronium places a "chemical veil" on the lethal injection process that precludes observers from knowing whether the prisoner is experiencing great pain. See Pet. Ex. 7.2 at ¶ 44; Adam Liptak, "Critics Say Execution Drug May Hide Suffering," N.Y. Times (October 7, 2003).

Nevada's lethal injection protocol falls below the standard of care for euthanizing animals. The American Veterinary Medical Association (AVMA) allows euthanasia by potassium chloride, but mandates that animals be under a surgical plane of anesthesia prior to the administration of potassium. See Pet. Ex. 7.2, Attachment B [American Veterinary Medical Association, 2000 Report of the American Veterinary Medical Association Panel on Euthanasia] at 680-81. "It is of utmost importance that personnel performing this technique are trained and knowledgeable in anesthetic techniques, and are competent in assessing anesthetic depth appropriate for administration of potassium chloride intravenously." Id. at 681. "A combination of pentobarbital [a barbiturate similar to, but longer acting than, sodium thiopental] with a neuromuscular blocking agent is not an acceptable euthanasia agent." Id.. at 680. Nevada is one of at least 30 states that prohibit the use of neuromuscular blocking agents in euthanizing animals, either expressly or by mandating the use of a specific euthanasia agent such as pentobarbital. See Ala. Code § 34-29-131; Alaska Stat. § 08.02.050; Ariz. Rev. Stat. Ann. § 11-1021; Cal. Bus. & Prof. Code § 4827; Colo. Rev. Stat. § 18-9-201; Conn. Gen. Stat. § 22-344a; Del. Code Ann. tit. 3, § 8001; Fla. Stat. § 828.058; Ga. Code Ann. § 4-11-5.1; 510 Ill. Comp. Stat. 70/2.09; Kan. Stat. Ann. § 47-1718(a); La. Rev. Stat. Ann. § 3:2465; Me. Rev. Stat. Ann. tit. 17, § 1044; Md. Code Ann., Crim. Law, § 10-611; Mass. Gen. Laws ch. 140, § 151A; Mich. Comp. laws § 333.7333; Mo. Rev. Stat. § 578.005(7); Neb. Rev. Stat. § 54-2503; Nev. Rev. Stat. Ann. § 638.005; N.J. Stat. Ann. § 4:22-19.3; N.Y. Agric. & Mkts. Law § 374; Ohio Rev. Code Ann. § 4729.532; Okla. Stat. tit. 4, § 501; Ore. Rev. Stat. §

686.040(6); R.I. Gen. Laws § 4-1-34; S.C. Code Ann. § 47-3-420; Tenn. Code Ann. § 44-17-303; Tex. Health & Safety Code Ann. § 821.052(a); W. Va. Code § 30-10A-8; Wyo. Stat. Ann. § 33-30-216. Nevada's lethal injection statute would violate state law if applied to a dog. The consistent trend in professional norms and statutory regulation of animal euthanasia, places the method currently practiced by Nevada is outside the bounds of evolving standards of decency.

There have been numerous documented cases of botched lethal injection executions that have produced prolonged and unnecessary pain, including:

Charles Brooks, Jr. (December 7, 1982, Texas): The executioner had a difficult time finding a suitable vein. The injection took seven minutes to kill. Witnesses stated that Brooks "had not died easily." See Deborah W. Denno, Getting to Death: Are Executions Unconstitutional?, 82 Iowa L. Rev. 319, 428-29 (1997) ("Denno-1"); Deborah W. Denno, When Legislatures Delegate Death: the Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What it Says About Us, 63 Ohio St. L.J. 63, 139 (2002) ("Denno-2").

James Autry (March 14, 1984, Texas): Autry took ten minutes to die, complaining of pain throughout. Officials suggested that faulty equipment or inexperienced personnel were to blame. See Denno-1 at 429; Denno-2 at 139.

Thomas Barefoot (October 30, 1984, Texas): A witness stated that after emitting a "terrible gasp," Barefoot's heart was still beating after the prison medical examiner had declared him dead. See Denno-1 at 430; Denno-2 at 139.

Stephen Morin (March 13, 1985, Texas): It took almost 45 minutes for technicians to find a suitable vein, while they punctured him repeatedly, and another eleven minutes for him to die. See Denno-1 at 430; Denno-2 at 139; Michael L. Radelet, Post-Furman Botched Executions, Death Penalty Information Center, available at http://www.deathpenaltyinfo.org ("Radelet").

Randy Woolls (August 20, 1986, Texas): Woolls had to assist execution technicians in finding an adequate vein for insertion. He died seventeen minutes after technicians inserted the needle. See Denno-1 at 431; Denno-2 at 139; Radelet; "Killer Lends A Hand to Find A

Vein for Execution," L.A. Times, Aug. 20, 1986, at 2.

Elliot Johnson (June 24, 1987, Texas): Johnson's execution was plagued by repetitive needle punctures and took executioners thirty-five minutes to find a vein. See Denno-1 at 431; Denno-2 at 139; Radelet; "Addict Is Executed in Texas For Slaying of 2 in Robbery," N.Y. Times, June 25, 1987, at A24.

Raymond Landry (December 13, 1988, Texas): Executioners "repeatedly probed" his veins with syringes for forty minutes. Then, two minutes after the injection process began, the syringe came out of Landry's vein, "spewing deadly chemicals toward startled witnesses." A plastic curtain was pulled so that witnesses could not see the execution team reinsert the catheter into Landry's vein. "After 14 minutes, and after witnesses heard the sound of doors opening and closing, murmurs and at least one groan, the curtain was opened and Landry appeared motionless and unconscious." Landry was pronounced dead twenty-four minutes after the drugs were initially injected. See Denno-1 at 431-32; Denno-2 at 139; Radelet.

Stephen McCoy (May 24, 1989, Texas): In a violent reaction to the drugs, McCoy "choked and heaved" during his execution. A reporter witnessing the scene fainted. See Denno-1 at 432; Denno-2 at 139; Radelet.

George Mercer (January 6, 1990, Missouri): A medical doctor was required to perform a surgical "cutdown" procedure on Mercer's groin. See Denno-1 at 432; Denno-2 at 139.

George Gilmore (August 31, 1990, Missouri): Force was used to stick the needle into Gilmore's arm. See Denno-1 at 433; Denno-2 at 139.

Charles Coleman (September 10, 1990, Oklahoma): Technicians had difficulty finding a vein, delaying the execution for ten minutes. See Denno- 1 at 433; Denno-2 at 139.

Charles Walker (September 12, 1990, Illinois): There was a kink in the IV line, and the needle was inserted improperly so that the chemicals flowed toward his fingertips instead of his heart. As a result, Walker's execution took eleven minutes rather than the three or four contemplated by the state's protocols, and the sedative chemical may have worn off too quickly, causing excruciating pain. When these problems arose, prison officials closed the blinds so that witnesses could not observe the process. See Denno-1 at 433- 34; Denno-2 at

139; Radelet; Niles Group Questions Execution Procedure, United Press International, Nov. 8,1992 (Lexis/Nexis file).

Maurice Byrd (August 23, 1991, Missouri): The machine used to inject the lethal dosage malfunctioned. See Denno-1 at 434; Denno-2 at 140.

Rickey Rector (January 24, 1992, Arkansas): It took almost an hour for a team of eight to find a suitable vein. Witnesses were separated from the injection team by a curtain, but could hear repeated, loud moans from Rector. See Denno-1 at 434-35; Denno-2 at 140; Radelet; Joe Farmer, "Rector's Time Came, Painfully Late," Arkansas Democrat Gazette, Jan. 26, 1992, at 1B; Marshall Frady, "Death in Arkansas," The New Yorker, Feb. 22, 1993, at 105.

Robyn Parks (March 10, 1992, Oklahoma): Parks violently gagged, jerked, spasmed and bucked in his chair after the drugs were administered. A news reporter witness said his death looked "painful and inhumane." See Denno-1 at 435; Denno-2 at 140; Radelet.

Billy White (April 23, 1992, Texas): White's death required forty- seven minutes because executioners had difficulty finding a vein that was not severely damaged from years of heroin abuse. See Denno-1 at 435-36; Denno-2 at 140; Radelet.

Justin May (May 7, 1992, Texas): May groaned, gasped and reared against his restraints during his nine-minute death. See Denno-1 at 436; Denno-2 at 140; Radelet; Robert Wernsman, "Convicted Killer May Dies," Item (Huntsville, Tex.), May 7, 1992, at 1; Michael Graczyk, "Convicted Killer Gets Lethal Injection," Herald (Denison, Tex.), May 8, 1992.

John Gacy (May 10, 1994, Illinois): The lethal injection chemicals solidified, blocking the IV tube. The blinds were closed for ten minutes, preventing witnesses from watching, while the execution team replaced the tubing. See Denno-1 at 435; Denno-2 at 140; Radelet; Scott Fornek & Alex Rodriguez, "Gacy Lawyers Blast Method: Lethal Injections Under Fire After Equipment Malfunction," Chicago Sun-times, May 11, 1994, at 5; Rich Chapman, "Witnesses Describe Killer's 'Macabre' Final Few Minutes," Chicago Sun-times, May 11,1994, at 5; Rob Karwath & Susan Kuczka, "Gacy Execution Delay Blamed on Clogged IV Tube," Chicago Trib., May 11, 1994, at 1 (Metro Lake Section).

Emmitt Foster (May 3, 1995, Missouri): Seven minutes after the lethal chemicals began to flow into Foster's arm, the execution was halted when the chemicals stopped circulating. With Foster gasping and convulsing, blinds were drawn so witnesses could not view the scene. Death was pronounced thirty minutes after the execution began, and three minutes later the blinds were reopened so the witnesses could view the corpse. According to the coroner, the problem was caused by the tightness of the leather straps that bound Foster to the execution gurney. Foster did not die until several minutes after a prison worker finally loosened the straps. See Denno-1 at 437; Denno-2 at 140; Radelet; "Witnesses to a Botched Execution," St. Louis Post- Dispatch, May 8, 1995, at 6B; Tim O'Neil, "Too-Tight Strap Hampered Execution," St. Louis Post-dispatch, May 5,1995, at B1; Jim Slater, "Execution Procedure Questioned," Kansas City Star, May 4, 1995, at C8.

Ronald Allridge (June 8, 1995, Texas): Allridge's execution was conducted with only one needle, rather than the two required by the protocol, because a suitable vein could not be found in his left arm. See Denno-1 at 437; Denno- 2 at 140.

Richard Townes (January 23, 1996, Virginia): It took twenty-two minutes for medical personnel to find a vein. After repeated unsuccessful attempts to insert the needle through the arms, the needle was finally inserted through the top of Townes' right foot. See Denno-1 at 437; Denno-2 at 140; Radelet.

Tommie Smith (July 18, 1996, Indiana): It took one hour and nine minutes for Smith to be pronounced dead after the execution team began sticking needles into his body. For sixteen minutes, the team failed to find adequate veins, and then a physician was called. Smith was given a local anesthetic and the physician twice attempted to insert the tube in Smith's neck. When that failed, an angio-catheter was inserted in Smith's foot. Only then were witnesses permitted to view the process. The lethal drugs were finally injected into Smith 49 minutes after the first attempts, and it took another 20 minutes before death was pronounced. See Denno-1 at 438; Denno-2 at 140; Radelet.

Luis Mata (August 22, 1996, Arizona): Mata remained strapped to a gurney with the needle in his arm for one hour and ten minutes while his attorneys argued his case. When injected,

his head jerked, his face contorted, and his chest and stomach sharply heaved. See Denno-1 at 438; Denno-2 at 140.

Scott Carpenter (May 8, 1997, Oklahoma): Carpenter gasped, made guttural sounds, and shook for three minutes following the injection. He was pronounced dead eight minutes later. See Denno-2 at 140; Radelet; Michael Overall & Michael Smith, "22-Year-Old Killer Gets Early Execution," Tulsa World, May 8, 1997, at A1.

Michael Elkins (June 13, 1997, South Carolina): Liver and spleen problems had caused Elkins's body to swell, requiring executioners to search almost an hour – and seek assistance from Elkins – to find a suitable vein. See Denno-2 at 140; Radelet; "Killer Helps Officials Find A Vein At His Execution," Chattanooga Free Press, June 13, 1997, at A7.

Joseph Cannon (April 23, 1998, Texas): It took two attempts to complete the execution. Cannon's vein collapsed and the needle popped out after the first injection. He then made a second final statement and was injected a second time behind a closed curtain. See Denno-2 at 141; Radelet; "1st Try Fails to Execute Texas Death Row Inmate," Orlando Sent., Apr. 23, 1998, at A16; Michael Graczyk, "Texas Executes Man Who Killed San Antonio Attorney at Age 17," Austin American-statesman, Apr. 23, 1998, at B5.

Genaro Camacho (August 26, 1998, Texas): Camacho's execution was delayed approximately two hours when executioners could not find a suitable veins in his arms. See Denno-2 at 141; Radelet.

Roderick Abeyta (October 5, 1998, Nevada): The execution team took twenty- five minutes to find a vein suitable for the lethal injection. See Denno-2 at 141; Radelet; Sean Whaley, "Nevada Executes Killer," Las Vegas Review-Journal, Oct. 5, 1998, at 1A.

Christina Riggs (May 3, 2000. Arkansas): The execution was delayed for 18 minutes when prison staff could not find a vein. Radelet.

Bennie Demps (June 8, 2000, Florida): It took the execution team thirty- three (33) minutes to find suitable veins for the execution. "They butchered me back there," said. Demps in his final statement. "I was in a lot of pain. They cut me in the groin; they cut me in the leg. I was bleeding profusely. This is not an execution, it is murder." The executioners had no unusual

problems finding one vein, but because the Florida protocol requires a second alternate intravenous drip, they continued to work to insert another needle, finally abandoning the effort after their prolonged failures. See Denno-2 at 141; Radelet; Rick Bragg, "Florida Inmate Claims Abuse in Execution," N.Y. Times, June 9, 2000, at A14; Phil Long & Steve Brousquet, "Execution of Slayer Goes Wrong; Delay, Bitter Tirade Precede His Death," Miami Herald, June 8, 2000.

Bert Hunter (June 28, 2000, Missouri): In a violent reaction to the drugs, Hunter's body convulsed against his restraints during what one witness called "a violent and agonizing death." See Denno-2 at 141; Radelet; David. Scott, "Convicted Killer Who Once Asked to Die is Executed," Associated Press, June 28, 2000.

Claude Jones (December 7, 2000, Texas): His execution was delayed 30 minutes while the execution team struggled to insert an IV. One member of the execution team commented, "They had to stick him about five times. They finally put it in his leg." Radelet.

Joseph High (November 7, 2001, Georgia): For twenty minutes, technicians tried unsuccessfully to locate a vein in High's arms. Eventually, they inserted a needle in his chest, after a doctor cut an incision there, while they inserted the other needle in one of his hands. High was pronounced dead one hour and nine minutes after the procedure began. See Denno-2 at 141; Radelet.

Sebastian Bridges (April 21, 2001, Nevada): Mr. Bridges spent between twenty and twenty-five minutes on the execution bed, with the intravenous line inserted, continuously agitated, asserting his innocence, the injustice of executing him, and the injustice of requiring him to sign a habeas corpus petition, and to suffer prolonged delay, in order to have the unconstitutionality of his conviction recognized by the court system. He remained agitated after the execution process began, so the sedative drugs appeared not to take effect and he died while apparently still conscious and shouting about the injustice of his execution.

Joeseph L. Clark (May 2, 2006, Ohio): It initially took executioners 22 minutes to find a suitable vein in Mr. Clark's left arm for insertion of the catheter. As the injection began, the vein collapsed. After an additional 30 minutes, the execution team succeeded in placing a

catheter in Mr. Clark's right arm. However, the team again tried to inject the drugs into the left arm, where the vein had already collapsed. These difficulties prompted Mr. Clark to sit up, tell the executioners that "It don't work," and to ask "Can you just give me something by mouth to end this?" Mr. Clark was finally pronounced dead 90 minutes after the execution began. Radelet; Andrew Walsh-Huggins, "IV Fiasco Led Killer to Ask for Plan B," AP (May 12, 2006).

Nevada's execution protocol is similar to the lethal injection protocol employed in California prior to the recent litigation in Morales v. Hickman, 415 F. Supp. 2d 1037 (N.D. Cal. February 14, 2006), aff'd, 438 F.3d 926 (9th Cir. 2006), cert denied, ___ U.S. ___, 126 S.Ct. 1314 (2006). See Pet. Ex. 7.2 at ¶ 7. The use of sodium thiopental, pancuronium bromide, and potassium chloride without the protections imposed in Morales to ensure adequate administration of anesthesia poses an unreasonable risk of inflicting unnecessary suffering.

This Court must prevent the infliction of unnecessary suffering in Mr. Witter's execution by vacating the sentence or by requiring the execution to be conducted under conditions that eliminate the unnecessary risk of infliction of pain.

B. Ineffective Assistance and Preservation

The refusal of the NDOC to release information on the process of execution prevented Mr. Witter from raising this issue in previous proceedings. See, e.g., Banks v. Dretke, 540 U.S. 668, 695-698 (2004). Moreover, the scientific evidence showing that the chemicals used in the execution process are likely to cause unnecessary pain was not published until last year. See Pet. Ex. 7.1 [Leonidas G. Koniaris et al., Inadequate anaesthesia in lethal injection for execution, The Lancet, Vol. 365, April 16, 2005, at 1412-14]. That this issue is a serious and potentially meritorious one is shown by the fact that the United States Supreme Court is currently addressing a case in which it has entered a stay of execution to determine how challenges to lethal injection can be made. Hill v. McDonough, No. 05-8794 (argued April 26, 2006).

In the alternative, trial counsel was ineffective under the Sixth Amendment to the United States Constitution for failing to object to and/or properly litigate and argue the claims, issues and errors raised herein. Relief is therefore appropriate under the Fifth, Sixth, Eighth and Fourteenth

Amendments.

In addition, direct appeal counsel was ineffective under the Sixth Amendment to the United States Constitution for failing to object to and/or properly litigate and argue these claims, issues and errors. Relief is therefore appropriate under the Fifth, Sixth, Eighth and Fourteenth Amendments.

C. Conclusion

Mr. Witter's averments demonstrate at least the risk that Nevada's methods and protocols in conducting lethal injections violates the Eighth and Fourteenth Amendments. Similarly, the DOC's policy of withholding its manual and materials regarding the implementation of the death penalty violate Mr. Witter's state and federal constitutional rights as defined by the First, Sixth, Eighth and Fourteenth Amendments. For the reasons described above, Mr. Witter is entitled to relief.

CLAIM THIRTEEN

Mr. Witter's conviction and sentence violate the state and federal constitutional guarantees of due process of law, equal protection of the laws, a reliable sentence, and international law because Mr. Witter's capital trial and sentencing and review on direct appeal were conducted before state judicial officers whose tenure in office was not during good behavior but whose tenure was dependent on popular election. U.S. Const. Art. VI, Amends. VIII & XIV. Nev. Const. Art. 1, §§ 3, 6, and 8; Art. 4, § 21.

SUPPORTING FACTS

The tenure of judges of the Nevada state district courts and of the Justices of the Nevada Supreme Court is dependent upon popular contested elections. See Nev. Const. Art. 6 §§ 3, 5.

Mr. Witter's capital trial and sentencing and review on direct appeal were conducted before elected judges.

The justices of the Nevada Supreme Court perform mandatory review of capital sentences, which includes the exercise of unfettered discretion to determine whether a death sentence is excessive or disproportionate, without any legislative prescription as to the standards to be applied in that evaluation. See Nev. Rev. Stat. § 177.055(2). Mr. Witter incorporates the allegations of Claim Thirty-One.

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, have tenure during good behavior. All of the judges who performed the appellate function of deciding legal issues reserved for review at trial had tenure during good behavior. This mechanism was intended to, and did, preserve judicial independence by insulating judicial officers from the influence of the sovereign that would otherwise have improperly affected their impartiality.

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. Witter's death sentence be vacated. Mr. Witter is entitled to relief in the form of a new trial and new sentencing proceeding.

The above stated claim is of obvious merit. Competent appellate counsel would have raised and litigated this meritorious issue on direct appeal and in state post-conviction. There is no reasonable appellate strategy, reasonably designed to effectuate petitioner's best interest, that would justify appellate counsel's failure in this regard. Petitioner is entitled to relief in the form of a new trial and sentencing hearing.

CLAIM FOURTEEN

Mr. Witter's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, and punishment which is not cruel or unusual due to the restrictive conditions on Nevada's death row. U.S. Const. Amends. VIII & XIV. Nev. Const. Art. 1, §§ 3, 6, and 8; Art. 4, § 21.

SUPPORTING FACTS

Mr. Witter has been incarcerated in single-occupancy confinement on the Nevada Department of Corrections' death row since 1981. During those 25 years, he has been allowed only two hours of recreation and social contact for every 36 hour period.

The principal social purposes of retribution and deterrence sought through the death penalty have lost their compelling purpose by the passage of time. The acceptable state interest of retribution has been satisfied by the severe punishment already inflicted by forcing Mr. Witter to live in spartan circumstances, cut off from normal social interaction. The United States Supreme Court has recognized the "painful character" of holding a prisoner in solitary confinement for only four weeks while awaiting execution. In re Medley, 134 U.S. 160, 171-72 (1890). This is due, not only to the isolating nature of solitary confinement, but also to the "horrible feeling" the prisoner must feel due to the knowledge he is to be executed and the "uncertainty" as to when. Id.. Mr. Witter has suffered those four weeks' agony 325 times over.

The deterrent value of any punishment is directly related to the promptness with which it is inflicted. The deterrent value of carrying out an execution 16 years after conviction is minimal, at best. See Jeffrey Fagan, Columbia Law School, "Deterrence and the Death Penalty: A Critical Review of New Evidence;" Death Penalty Information Center, "National Murder Rates, 1995-2004," Pet. Ex. 7.6. Carrying out an execution at such a removed date may have no deterrent value over and above the deterrent value of simply incarcerating the defendant for the years between conviction and execution.

The delay from Mr. Witter's conviction to present is attributable to the ineffective assistance of Mr. Witter's trial, appellate, and post-conviction counsel. Trial, appellate, and post-conviction counsel have failed to investigate and present many legitimate claims to the state court and to this

Court. Mr. Witter cannot be held responsible for delays caused by his prior counsels' ineffectiveness. Inflicting the punishment of death upon Mr. Witter, after the State has inflicted the torturous punishment of holding him in near-solitary confinement for 25 years, would push his total punishment beyond what evolving standards of decency can tolerate. Accordingly, Mr. Witter's death sentence must be vacated.

CLAIM FIFTEEN

Mr. Witter's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, and a reliable sentence, as well as under international law, because of the risk that the irreparable punishment of execution will be applied to innocent persons. U.S. Const. Amends. VI, VIII & XIV; International Covenant on Civil and Political Rights, Art. VII. Nev. Const. Art. 1, §§ 3, 6, and 8; Art. 4, § 21.

SUPPORTING FACTS

Both the United States and Nevada Constitutions bar the execution of innocent persons. Under the due process clause of the Fourteenth Amendment, the execution of the innocent is "contrary to contemporary standards of decency," Ford v. Wainwright, 477 U.S. 399 (1986), "shocking to the conscience," Rochin v. California, 342 U.S. 165 (1952), and offensive to "a principle so rooted in the traditions and conscience of our people as to be ranked as fundamental." Medina v. California, 505 U.S. 537 (1992). Under the Eighth Amendment, the execution of the innocent is cruel and unusual since it is arbitrary, Furman v. Georgia, 408 U.S. 238 (1972), and excessive. Coker v. Georgia, 433 U.S. 917 (1977).

The Nevada Constitution is violated by the irreparable mistaken application of the death penalty. Nev. Const. Art. 1., Sect. 6 (prohibiting cruel and unusual punishment); Art. 1 Sect. 7, (prohibiting deprivation of life, liberty or property without due process of law.) In Nevada and elsewhere across the United States, numerous innocent persons who were once condemned to die have been exonerated. In January, 2000, Illinois Governor George Ryan declared a moratorium on capital punishment after the number of men who were wrongly convicted and released from Illinois's death row -- 13 -- exceeded the numbers of persons executed for their crimes since the reinstatement of capital punishment. In April 2002, a commission studying the administration of capital punishment in Illinois recommended extensive reforms if capital punishment is to be utilized in the future. The governor of Maryland declared a moratorium on May 9, 2002 to determine whether death sentences should continue to be carried out there.

Since the reinstatement of capital punishment in 1976, 123 inmates have been freed from death row due to serious flaws in the legal process, including recantation of witness testimony,

incompetent or negligent counsel, withholding of exculpatory evidence by prosecutors or the police, and exoneration through DNA testing. Since 1982, more than 100 inmates, including twelve on death row, have been exonerated by DNA evidence alone.

A comprehensive study recently conducted by the Columbia University School of Law, Ex. 7.8, revealed that the error rate in death penalty cases in America is indicative of a system that is "collapsing under the weight of its own mistakes." Id., at 112. The death penalty system in the United States is "persistently and systematically fraught with serious error. Indeed, capital trials produce so many mistakes that it takes three judicial inspections to catch them, leaving grave doubt whether we catch them all." Id. at i.

These serious legal errors are no less common in Nevada, which has the highest death penalty rate in the country. The same Columbia University study concluded that seven out of ten Nevada death penalty cases fully reviewed by the state and federal courts are overturned for egregious errors such as those noted above. Id. at App. A-43, A-44.

Because of the inability of the State of Nevada to prevent execution of innocent persons, the Nevada capital sentencing scheme is invalid and it cannot be applied to uphold the sentence imposed in this case.

Mr. Witter is entitled to relief in the form of a new trial and new sentencing proceeding.

The above stated claim is of obvious merit. Competent appellate counsel would have raised and litigated this meritorious issue on direct appeal and in state post-conviction. There is no reasonable appellate strategy, reasonably designed to effectuate petitioner's best interest, that would justify appellate counsel's failure in this regard. Petitioner is entitled to relief in the form of a new trial and sentencing hearing.

CLAIM SIXTEEN

Mr. Witter's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, and a reliable sentence because the Nevada capital punishment system operates in an arbitrary and capricious manner. U.S. Const. Art. VI, Amends. VI, VIII, & XIV. Nev. Const. Art. 1, §§ 3, 6, and 8; Art. 4, § 21.

SUPPORTING FACTS

Mr. Witter incorporates each and every allegation contained in this petition as if fully set forth herein.

The Nevada capital sentencing process permits the imposition of the death penalty for any first degree murder that is accompanied by an aggravating circumstance. Nev. Rev. Stat. 200.030(4)(a). The statutory aggravating circumstances are so numerous and so vague that they arguably exist in every first degree murder case. See Nev. Rev. Stat. 200.033. Nevada permits the imposition of the death penalty for all first degree murders that are "at random and without apparent motive." Nev. Rev. Stat. 200.033(9). Nevada statutes also appear to permit the death penalty for murders involving virtually every conceivable kind of motive: robbery, sexual assault, arson, burglary, kidnaping, torture, escape, to receive money, and to prevent lawful arrest and escape. See Nev. Rev. Stat. § 200.033. The scope of the Nevada death penalty statute makes the death penalty an option for all first degree murders that involve a motive, and death is also an option if the first degree murder involves no motive at all. See id.

The death penalty is accordingly permitted in Nevada for all first degree murders, and first degree murders, in turn, are not restricted in Nevada within traditional bounds of premeditated and deliberate murder. As the result of the Nevada courts' use of unconstitutional definitions of reasonable doubt, express malice, and premeditation and deliberation, first degree murder convictions occur in the absence of proof beyond a reasonable doubt, in the absence of any rational showing of premeditation and deliberation, and as a result of the presumption of malice aforethought. Consequently, a death sentence is permissible under Nevada law in every case where the prosecution can present evidence, not even beyond a reasonable doubt, that an accused committed an intentional killing. It is well-settled that, in order to pass constitutional muster, a

capital sentencing scheme must 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.

As a result of plea bargaining practices and imposition of sentences by juries and three-judge panels, sentences less than death have been imposed for offenses that are more aggravated than the one for which Mr. Witter stands convicted and in situations where the amount of mitigating evidence was less than the mitigation evidence that existed here. The untrammeled power of the sentencer under Nevada law to decline to impose the death penalty, even when no mitigating evidence exists at all, or when the aggravating factors far outweigh the mitigating evidence, means that the imposition of the death penalty is necessarily arbitrary and capricious.

Nevada law fails to provide sentencing bodies with any rational method for separating those few cases that warrant the imposition of the ultimate punishment from the many that do not. The narrowing function required by the Eighth Amendment is accordingly non-existent under Nevada's sentencing scheme, and the process is contaminated even further by Nevada Supreme Court decisions permitting the prosecution to present unreliable and prejudicial evidence during sentencing, regarding uncharged criminal activities of the accused. Consideration of such evidence necessarily diverts the sentencer's attention from the statutory aggravating circumstances, whose appropriate application is already virtually impossible to discern.

Because the Nevada capital punishment system provides no rational method for distinguishing between who lives and who dies, such determinations are made on the basis of illegitimate considerations. In Nevada, capital punishment is imposed disproportionately on racial minorities: Nevada's death row population is approximately 50% minority even though Nevada's general minority population is less approximately 17%. The disparity is even greater for African-American defendants: One 1993 study found that African-Americans are overrepresented on death row by a comparative disparity of 439.4% in Nevada in general and 351.6% in Clark County. Ex. 248. It is virtually impossible that this disparity would have occurred by chance alone. The same study estimated that the odds against this result occurring at random are less than 1 in 100,000. Id. All the people on Nevada's death row are indigent and have had to defend with the meager resources

afforded to indigent defendants and their counsel. As this case illustrates, the lack of resources provided to capital defendants virtually ensures that compelling mitigating evidence will not be presented to, or considered by, the sentencing body. Nevada sentencers are accordingly unable to, and do not, provide the individualized, reliable sentencing determination that the constitution requires.

The defects in the Nevada system are aggravated by the inadequacy of the appellate review process. Mr. Witter hereby incorporates each and every factual allegation made in support of claim thirty-one, as if fully set forth herein.

The Nevada capital punishment system suffers from the problems of under-funding of defense counsel, the lack of a fair and adequate appellate review process, and the pervasive effects of race. The problems with Nevada's process, moreover, are exacerbated by open-ended definitions of both first degree murder and the accompanying aggravating circumstances, which permit the imposition of a death sentence for virtually every intentional killing. This arbitrary, capricious, and irrational scheme violates the Constitution and is prejudicial per se and violates Mr. Witter's rights under international law, which prohibits the arbitrary deprivation of life.

Mr. Witter is entitled to relief in the form of a new trial and new sentencing proceeding.

The above stated claim is of obvious merit. Competent appellate counsel would have raised and litigated this meritorious issue on direct appeal and in state post-conviction. There is no reasonable appellate strategy, reasonably designed to effectuate petitioner's best interest, that would justify appellate counsel's failure in this regard. Petitioner is entitled to relief in the form of a new trial and sentencing hearing.

CLAIM SEVENTEEN

Mr. Witter's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, and a reliable sentence, as well as his rights under international law, because the death penalty is cruel and unusual punishment. U.S. Const. Art. VI, Amends. VIII & XIV; International Covenant on Civil and Political Rights. Nev. Const. Art. 1, §§ 3, 6, and 8; Art. 4, § 21.

SUPPORTING FACTS

The Eighth Amendment guarantee against cruel and unusual punishment prohibits punishment which is inconsistent with the evolving standards of decency that mark the progress of a maturing society.

The worldwide trend is toward the abolition of capital punishment and most civilized nations no longer conduct executions. Portugal outlawed capital punishment in 1867; Sweden and Spain abolished the death penalty during the 1970's; and France abolished capital punishment in 1981. In 1990, the United Nations called on all member nations to take steps toward the abolition of capital punishment. Since this call by the United Nations, Canada, Mexico, Germany, Haiti and South Africa, pursuant to international law provisions that outlaw "cruel, unusual and degrading punishment," have abolished capital punishment. The death penalty has recently been abolished in Azerbaijan and Lithuania. Many of the "third world" nations have rejected capital punishment on moral grounds. As demonstrated by the world-wide trend toward abolition of the death penalty, state-sanctioned killing is inconsistent with the evolving standards of decency that mark the progress of a maturing society.

The death penalty is unnecessary to the achievement of any legitimate societal or penalogical interests in Mr. Witter's case.

The death penalty constitutes cruel and unusual punishment under any and all circumstances, and constitutes cruel and unusual punishment under the circumstances of this case. Petitioner's death sentence also violates international law, which prohibits the arbitrary deprivation of life, and cruel, inhuman or degrading treatment or punishment.

Mr. Witter is entitled to relief in the form of a new trial and new sentencing proceeding.

The above stated claim is of obvious merit. Competent appellate counsel would have raised and litigated this meritorious issue on direct appeal and in state post-conviction. There is no reasonable appellate strategy, reasonably designed to effectuate petitioner's best interest, that would justify appellate counsel's failure in this regard. Petitioner is entitled to relief in the form of a new trial and sentencing hearing.

CLAIM EIGHTEEN

Mr. Witter's conviction and death sentence are invalid under the state and federal constitutional guarantees of due process, equal protection, effective assistance of counsel, a fair tribunal, an impartial jury, and a reliable sentence due to the cumulative errors in the admission of evidence and instructions, gross misconduct by state officials and witnesses, the systematic deprivation of Mr. Witter's right to the effective assistance of counsel, the atmosphere of intimidation at trial, and issues of juror bias. U.S. Const. Amends. V, VI, VIII, & XIV. Nev. Const. Art. 1, §§ 3, 6, and 8; Art. 4, § 21.

SUPPORTING FACTS

Each of the claims specified in this petition requires vacation of the conviction or sentence. Mr. Witter incorporates each and every factual allegation contained in this petition as if fully set forth herein.

The cumulative effect of the errors demonstrated in this petition deprived Mr. Witter of proceedings that were fundamentally fair and resulted in a constitutionally unreliable sentence. Whether or not any individual error requires the vacation of the judgment or sentence, the totality of these multiple errors and omissions resulted in substantial prejudice to Mr. Witter.

The State cannot show, beyond a reasonable doubt, that the cumulative effect of these numerous constitutional errors was harmless beyond a reasonable doubt; in the alternative, the totality of these constitutional violations substantially and injuriously affected the fairness of the proceedings and prejudiced Mr. Witter.

Mr. Witter is entitled to a new trial and a new sentencing proceeding.

Mr. Witter is entitled to relief in the form of a new trial and new sentencing proceeding.

The above stated claim is of obvious merit. Competent appellate counsel would have raised and litigated this meritorious issue on direct appeal and in state post-conviction. There is no reasonable appellate strategy, reasonably designed to effectuate petitioner's best interest, that would justify appellate counsel's failure in this regard. Petitioner is entitled to relief in the form of a new trial and sentencing hearing.

PRAYER FOR RELIEF

For the reasons stated above, this Court should issue a Writ of Habeas Corpus and vacate petitioner's conviction and sentence.

DATED this 14 day of February, 2007.

Respectfully submitted,

David S. Anthony
Assistant Federal Public Defender
Attorney for Petitioner

VERIFICATION

Under penalty of perjury, the undersigned declares that he is counsel for the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge except as to those matters stated on information and belief and as to such matters he believes them to be true. Petitioner personally authorized the filing of the petition for writ of habeas corpus that was filed on February 14, 2007.

By submitting this verification on petitioner's behalf, and submitting the accompanying verification of petitioner, counsel does not represent, concede or imply that petitioner is in fact competent to assist in the litigation of this matter.

DATED this 14th day of February, 2007.

David S. Anthony

CERTIFICATE OF MAILING

In accordance with the Nevada Rules of Civil Procedure, the undersigned hereby certifies that on this 14th day of February 2007, she deposited for mailing in the United States mail, first-class postage prepaid, a true and correct copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)** addressed to the parties as follows:

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