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 3

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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

SUPPLEMENTAL CLAIM TO PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

(Death Penalty Habeas Corpus Case)

Petitioner hereby supplements his state post-conviction petition filed on February 14, 2007 (counsel appointed on February 27, 2007) pursuant to NRS 34.750(3) by adding Claim Nineteen.

CLAIM NINETEEN

Mr. Witter's death sentence violates the Eighth Amendment to the Constitution and its Nevada state counterpart because he suffers from Fetal Alcohol Spectrum Disorder. U.S. Const. Amend. VIII. Nev. Const. Art. 1, §§ 3, 6, and 8; Art. 4, § 21.

SUPPORTING FACTS

Mr. Witter has already pleaded the facts supporting his claim of FASD and they are

incorporated in support of this claim as well. See Claim Two.

In Atkins v. Virginia, 536 U.S. 304 (2002), the United States Supreme Court held that executing a mentally retarded individual is a violation of the Eighth and Fourteenth Amendments to the United States Constitution. In Atkins, the Supreme Court explained why execution of the mentally retarded was unconstitutional:

> Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants.

Atkins, supra, 536 U.S. at 307. The Court also recognized that deterrence was not a consideration with the mentally retarded because of their "diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses." Id. at 320.

There are other people who have similar or worse disabilities and who, under Atkins, ought not to be sentenced to death or executed. Courts are recognizing that the Atkins rationale applies to such people. See Bryan v. Mullin (10th Cir. 2003) (dissenting, "Supreme Court's logic applies to those with severe mental deficiencies"); Corcoran v. State, 774 N.E. 2d 495 (Ind. 2002) (Rucker J., dissenting) (Atkins rationale is "just as compelling" for prohibiting the execution of the "seriously mentally ill"); State v. Nelson, 803 A.2d 1 (N.J. 2002) (Zappala, J. concurring) ("lesser culpability" of seriously mentally ill defendant is indistinguishable from mentally retarded defendant).[1]

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[1] See also, People v. Danks, 32 Cal. 4th 268 (Cal. 2004)(Kennard, J., concurring and dissenting):

> If defendant's doctors are right, defendant's mental deficiencies are comparable in severity to mental retardation. In Atkins, the Court held that to execute the mentally retarded is cruel and unusual punishment, reasoning that retarded persons 'have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.' Id. at 318. The same mental capacities are impaired in a

People who suffer from fetal alcohol syndrome have significant disabilities. In fact, they are more disabled than people who have lower IQs but who do not suffer from FAS. In other words, persons who are simply below average in IQ but who have FAS may have greater disabilities than a mentally retarded person. And these disabilities are the same sorts of disabilities that mentally retarded people have, as identified in Atkins. Specifically, people who suffer from FAS have

difficulty with abstract thinking

problems with sequencing, processing, organizing information

difficulty generalizing information from one setting to another

inability to change behavior depending on situation

poor short term memory

difficulty understanding cause and effect relationships

difficulty in predicting outcomes

chronic poor judgment

hyperactivity

impulsivity

attention deficits

learning and memory deficits

poor spatial and motor coordination

impaired social ability

deficits in executive function.

Said another way, people with FAS have "disabilities in areas of reasoning, judgment, and control of their impulses" and "they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." Atkins, supra. Since FAS sufferers are just like, or more disabled than, people who suffer from mental retardation, and in the same areas of

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person suffering from paranoid schizophrenia, and the impairment may be equally grave.

cognitive functioning, their execution would violate the Eighth Amendment. It would also violate the evolved standard of decency in this country.

Respectfully submitted this 29th day of March 2007.

FRANNY A. FORSMAN
Federal Public Defender

DAVID ANTHONY
Assistant Federal Public Defender

Attorneys for Petitioner

CERTIFICATE OF SERVICE

In accordance with Rule 5(b) of the Nevada Rules of Civil Procedure, the undersigned hereby certifies that on the 29th day of March 2007, a true and correct copy of the foregoing **SUPPLEMENTAL CLAIM TO PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)** was deposited in the United States mail, first class postage prepaid, addressed to counsel as follows:

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM WITTER,
1204227

Defendant.

CASE NO: C117513

DEPT NO: II

STATE'S OPPOSITION TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND MOTION TO DISMISS

DATE OF HEARING: July 12, 2007
TIME OF HEARING: 10:30 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through STEVEN S. OWENS, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Petition For Writ Of Habeas Corpus (Post-Conviction).

This opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

A. Facts of the Case[1]

On November 14, 1993, Kathryn Cox was working as a retail clerk at the Park Avenue Gift Shop in the Luxor Hotel in Las Vegas, Clark County, Nevada. On that date, Kathryn was forty-four (44) years old and had been married to her husband, James Cox, for approximately twelve (12) years. James Cox was a fifty-three (53) year-old taxi cab driver for the Yellow Checker Star cab company. On November 14, 1993, William Witter (hereinafter "Defendant"), sexually assaulted Kathryn Cox, stabbed her, and then brutally killed her husband. The details of this crime are as follows:

On the evening of November 14, 1993, Kathryn finished her shift at 10:00 p.m. and boarded the shuttle bus that would take her to the parking lot where Kathryn's Mercury Tracer was parked. Kathryn unlocked the driver's door, got inside, and tried to start the car. Kathryn tried several times to start the car, but was unsuccessful. Kathryn called her husband, James. Kathryn told James that the car would not start and asked if James could pick her up and give her a ride home. James told Kathryn that he was on his way to pick up a passenger and that it would be about 25 to 30 minutes before he could come and pick her up. Kathryn then returned to her car on the shuttle bus in order to wait for James to arrive.

When Kathryn arrived at her car, she got inside, locked the driver's door and started to read a book. After about five (5) to ten (10) minutes, the passenger door suddenly opened and the defendant quickly got inside Kathryn's car. The defendant immediately stated to Kathryn in a loud voice, "Don't look at me." Defendant then instructed Kathryn, "Drive this car out of the parking lot." Kathryn responded that she could not drive the car because it would not start. Defendant then angrily stated, "You will drive this out of here, you bitch." Following this statement, the defendant swung his right hand around and stabbed Kathryn with a knife just above the left breast. The defendant again instructed Kathryn, "You will

[1] Facts taken from State's Response to Defendant's Direct Appeal. (citations omitted).

drive this car out of here right now." Kathryn again told the defendant that she could not drive the car because the car would not start. Defendant then grabbed Kathryn by her hair and pulled her towards him, leaving Kathryn's hair over her face so she could not see. Defendant told Kathryn, "I'm going to kill you, you bitch", and then with his right hand stabbed Kathryn six (6) more times in the left side of her body, between Kathryn's arm pit and left breast, and one (1) time in the back, near her shoulder blade.

Kathryn began screaming and Defendant repeatedly told her, "Shut up. I'm going to kill you, you bitch." Defendant then asked Kathryn if she knew the defendant was going to kill her and Kathryn responded that she was aware the Defendant would kill her. The defendant also asked if Kathryn was aware that Defendant was going to rape her and Kathryn again responded that she was aware that the defendant would rape her. Following these questions, the defendant unzipped his pants and exposed his penis and told Kathryn to "suck his cock like [she] would for [her] old man and make him feel better or good." While the defendant was making this statement to Kathryn, he placed Kathryn's hand on his flaccid penis and pushed her head down towards his lap. Kathryn was unable to meet the defendant's demands because she kept passing out as a result of a collapsed lung that was caused by the stab wounds inflicted by the defendant. When the defendant realized Kathryn was not able to comply with his demands, the defendant lifted Kathryn's head back up and again told her that he was going to rape her and kill her. At that point, Kathryn could feel the blood exuding from her multiple stab wounds. Kathryn tried not to breathe very often or very deep in order to decrease her blood loss. Kathryn also tried to keep the defendant calm so that he would not rage again and inflict more stab wounds.

At one point, the defendant turned his head away from Kathryn and she quickly jumped out of her car and ran away screaming. Kathryn only ran about 10 to 15 feet when the defendant caught her, grabbing her by the back of the neck and hair. Defendant dragged Kathryn back to the car and pushed her into the driver's seat again. After the defendant got back inside the car he kissed Kathryn at least one (1) time.

Defendant then tried to remove Kathryn's Levi pants by unbuttoning them, but was unable to because the pants fit tightly. The defendant became frustrated and slashed Kathryn's pants with his knife, leaving four (4) or five (5) knife wounds on Kathryn's right hip. After the defendant cut Kathryn's pants, he pulled the clothing open, exposing Kathryn's vaginal area. The defendant reached over with his hand and began rubbing Kathryn's vaginal area with his hand and fingers. While the defendant was rubbing Kathryn's vaginal area, he began kissing her again and reached underneath Kathryn's shirt, undid her bra and began squeezing Kathryn's breast.

While the defendant was attacking her, Kathryn saw in the side-view mirror James's taxi cab pull up along side the car. Kathryn also noticed that the knife, which has a six-inch blade and four-inch handle, was lying on the dashboard of the car. Defendant, not knowing that the taxi driver was Kathryn's husband, instructed Kathryn to be quiet so he could tell the taxi driver that Kathryn was having a bad cocaine trip and the defendant was just trying to help. James opened the driver's door and asked, "What's going on here?" The defendant told James that Kathryn was having a bad cocaine trip and the defendant was just trying to help James responded, "I don't think so. This is my wife and this is my car and get the hell out." Defendant got out of the car through the passenger's door and confronted James. Kathryn noticed that the knife was no longer lying on the dashboard.

After the defendant got out of the car, Kathryn could hear James and the defendant yelling and scuffling. Kathryn got out of the car and attempted to get inside the taxi cab in order to call for help. When Kathryn was unable to get inside the taxi, she turned and saw the defendant stabbing James in the left shoulder area. James screamed in pain and the defendant continued to stab him repeatedly. James eventually fell into Kathryn and they both fell to the ground. Kathryn began screaming and kicking and the defendant stabbed her in the calf area of her left leg, the knife blade passing completely through Kathryn's leg. James lay motionless in Kathryn's arms.

Kathryn told James she loved him and she was going to get help and then got up and ran towards the bus stop. Kathryn lost one shoe while she was running and then the

defendant caught her again. Defendant grabbed Kathryn by the hair and picked her up from the ground. Defendant took Kathryn back to the car and stuffed her into the back seat area on the passenger's side floor. The defendant then completely removed Kathryn's pantyhose and Levi's. The defendant left Kathryn in the back seat and Kathryn could hear the defendant attempting to move James's body. Defendant returned and began touching Kathryn's legs. Shortly thereafter, Kathryn heard the voices of the hotel security and the defendant left her in the back seat of her car.

Security Officer Thomas Pummil was patrolling the Luxor/Excalibur employee parking lot on the evening of November 14, 1993. After being informed of the attack, Officer Pummil immediately went to the location of Kathryn's car and saw the defendant standing between Kathryn's car and James's taxi cab (RA 77). It appeared to Officer Pummil that the defendant was trying to stuff something in the back seat of Kathryn's car. Officer Pummil got out of his truck and asked the defendant, "What is the problem?" The defendant responded, "Nothing." Defendant then turned and came towards Officer Pummil from between Kathryn's car and James's taxi cab. Officer Pummil instructed the defendant to stop. The defendant ignored the instructions and stated, "Fuck you", and took several steps towards Pummil. Officer Pummil retreated several steps to keep a safe distance and again instructed the defendant to stop. Defendant again ignored the instructions and advanced towards Officer Pummil stating, "Kill me. Go ahead, shoot me. Kill me, mother fucker." Defendant repeated these same words several times as he approached Officer Pummil. After Officer Pummil stepped back a second time, he drew his weapon and ordered the defendant to lie on the ground. Officer Pummil also called for backup assistance at this time. (RA 96). Approximately a minute and-a-half after Officer Pummil arrived, Officer Schroeder arrived, walked up behind the defendant and placed him in handcuffs.

After the defendant was handcuffed, Officer Schroeder went over near James's taxi cab and noticed James's body lying on the ground partially underneath the taxi cab. James's face and upper torso were covered with a coat. Officer Schroeder removed the coat and

determined that James was not breathing and did not have a noticeable pulse. Officer Schroeder then heard Kathryn's moans coming from the back seat of the car.

Kathryn was found lying in the back seat with no clothes on from the waist down and several visible stab wounds Kathryn told the officers that the defendant had stabbed her and tried to rape her. Paramedics soon arrived and Kathryn was transported to the hospital, where she remained for eight (8) days, only leaving to attend James's funeral.

Officer Candiano of the Las Vegas Metropolitan Police Department (LVMPD) was one of the first police officers to arrive at the crime scene. Officer Candiano took control of the defendant from the security officers. While Officer Candiano was taking the defendant to his patrol car, the defendant stated several times that he hated all cops and was going "to kill all the fucking cops he could." Officer Candiano twice read the defendant his Miranda rights, once before placing him inside the patrol car and once after the defendant was inside the car. The defendant acknowledged that he understood his constitutional rights (RA 187). Officer Candiano noticed that the defendant's pants, shoes and hands were all covered in blood. The defendant was taken to the police station and during questioning the defendant stated, "I can't believe I did it. I just can't believe I did it." (RA 195-197).

The defendant was interviewed at the police station by Detective Thowsen. Detective Thowsen showed the defendant a *Miranda* card which the defendant read out loud and signed. Subsequently, the defendant admitted being in the Luxor parking lot, approaching Kathryn and becoming aggressive with her, stabbing James with the hunting knife, and using his jacket to cover James after the stabbing.

Alan Galaspy, a criminalist with the Las Vegas Metropolitan Police Department (LVMPD), conducted a scientific analysis of the defendant's blood that was drawn on the early morning of November 15, 1993. The results of this analysis demonstrated that the defendant had a .07 blood alcohol level. Criminalist Mino Aoki signed an affidavit indicating that he found no controlled substances in the defendant's blood when it was tested.

On November 15, 1993, Dr. Robert Jordan, a Clark County medical examiner, performed an autopsy on the body of James Cox. The autopsy revealed a total of sixteen

(16) stab wounds: one (1) wound in front of the left ear; three (3) wounds through the left ear; one (1) wound behind the left ear; and eleven (11) wounds to the left neck, shoulder and upper left arm. The autopsy also revealed that one of the stab wounds extended through the shoulder muscles and lacerated James's axillary artery, from which James most likely bled to death. The autopsy also revealed that one of the stab wounds penetrated James's skull and extended a half inch into his brain. Dr. Jordan concluded that this injury would have caused fatal hemorrhaging, however, the stab wound which lacerated James's axillary artery caused his death first. Dr. Jordan concluded that James's injuries were inflicted by a knife and his death was the result of the injuries to his neck and head. Dr. Jordan also concluded that James's death was the result of a homicide.

B. Procedural History

On June 28, 1995 a jury found William Witter (hereinafter "Defendant")guilty of Murder with Use of a Deadly Weapon, Attempted Sexual Assault with Use of a Deadly Weapon, and Burglary. A penalty hearing was held on July 10, 1995 through July 13, 1995, after which, by way of special verdict, the jury sentenced Witter to death by lethal injection. The penalty phase of the trial commenced on July 10, 1995 (AA 147). Prior to trial the State filed a Notice of Intent to Seek the Death Penalty alleging six (6) aggravating circumstances, including the following:

1. The murder was committed by a person under sentence of imprisonment. NRS 200.033(1).

2. The murder was committed by a person who was previously convicted of a felony involving the use or threat of violence to the person of another. NRS 200.033(2).

3. The murder was committed while the person was engaged in the commission of or an attempt to commit Burglary. NRS 200.033(4).

4. The murder was committed while the person was engaged in the commission of or an attempt to commit a Sexual Assault. NRS 200.033(4).

5. The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody. NRS 200.033(5). (This aggravator was struck down in the

direct appeal by the Supreme Court of Nevada in Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996)).

6. The murder involved torture, depravity of mind or the mutilation of the victim. NRS 200.033(8)

Following the conclusion of the presentation of evidence in the penalty phase, the jury returned a special verdict indicating that the following aggravating circumstances had been proven beyond a reasonable doubt: (1) the murder was committed by a person who was previously convicted of a felony involving the use or threat of violence to the person of another; (2) the murder was committed while the person was engaged in the commission of or an attempt to commit burglary; (3) the murder was committed while the person was engaged in the commission of or an attempt to commit sexual assault; (4) the murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody.[2] The jury also found that the aggravating circumstances outweighed any mitigating circumstances.

The district court entered an amended judgment of conviction on August 2, 1995, based on the jury's sentence of death for the first-degree murder charge and imposing a twenty-year sentence for attempted murder (plus a twenty-year sentence enhancement for use of a deadly weapon), a twenty-year sentence for attempted sexual assault (plus a twenty-year sentence enhancement for use of a deadly weapon), and a ten-year sentence for burglary. All sentences are to run consecutively.

On July 22, 1996, the Nevada Supreme Court affirmed Defendant's conviction and sentence in a published opinion. Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996), *cert. denied,* 520 U.S. 1217 (1997).

On October 27, 1997, Defendant filed his first Petition for Writ of Habeas Corpus (Post-Conviction). Counsel was appointed to represent Defendant. On August 11, 1998, Defendant's post-conviction counsel filed a supplemental brief in support of the petition. Following an evidentiary hearing at which Defendant's trial and appellate counsel testified, the district court denied relief on September 25, 2000. The Nevada Supreme Court affirmed

[2] The fourth aggravator was struck down on appeal. *See* Witter, *infra*.

the district court's denial of relief on August 10, 2001.

On September 4, 2001, Defendant filed a petition for habeas corpus under the federal habeas corpus statute. The Federal Public Defender was appointed to represent Defendant on September 17, 2001. The Federal Public Defender continues to represent Defendant.

Defendant failed to file any other petition in Nevada State courts until his current petition on February 14, 2007. The State responds as follows.

ARGUMENT

II. DEFENDANT'S DEATH SENTENCE IS APPROPRIATE BECAUSE THE AGGRAVATING CIRCUMSTANCES OUTWEIGH THE MITIGATING CIRCUMSTANCES

As fully set forth below, the only cognizable claim presented in Defendant's petition is Claim 4. Based on the Nevada Supreme Court's recent holdings, the State must concede that Defendant is entitled to have his death sentence re-weighed. However, because Defendant's petition includes arguments and exhibits which may improperly influence and contaminate the re-weighing process, the State submits that the Court should consider re-weighing the death sentence based on the facts presented at trial before addressing any other claim presented by Defendant.

A. McConnell is Retroactive

Defendant is seeking to vacate his sentence of death. In support of his argument Defendant is relying on the Nevada Supreme Court's rule as espoused in the Court's recent decision in McConnell v. State, 102 P.3d 606 (Nev. 2004), *rehearing denied* McConnell v. State, 107 P.3d 1287 (Nev. 2005), and asks this court to apply this rule retroactively to his case. The Nevada Supreme Court only recently reached this issue and likewise concluded that McConnell is to be applied retroactively. Bejarano v. State, 122 Nev.Adv.Op. 92, 146 P.3d 265 (2006); Rippo v. State, 122 Nev. Adv. Op. 93, 146 P.3d 279 (2006). Now that McConnell has been made retroactive, the State must concede that two of the three[3]

[3] The Nevada Supreme Court made a clerical error when it referred to four remaining aggravators. See Witter, at 930, 921 P.2d at 900. See also, Decision and Order, C117513, September 25, 2000 (holding that clerical errors in the courts opinion was not of a material consequence and noting that there remained three aggravators and only one was sufficient to invoke the death penalty. NRS 200.030(4)(a)).

remaining aggravators in the instant case (namely the commission of a burglary and attempted sexual assault) are invalid because they were also used as a theory of guilt to obtain convictions for first degree murder.

The McConnell decision stands for the proposition that the enumerated felonies in Nevada's Felony Murder statute as per NRS 200.030(1)(b) cannot be used both to establish first-degree murder and to aggravate the murder to capital status. Id. at 623. The purpose behind such a stance is to sufficiently narrow the death eligibility of defendants who commit felony murder in full satisfaction of the constitutional requirements as set forth in the Constitutions of the United States and of the State of Nevada. The exception to this new rule espoused by the Court is when the jury makes a specific determination during the guilt phase of the trial that there was ample evidence of premeditation and deliberation. Id. at 624. Under this circumstance, the Court in McConnell deemed it permissible for the State to use the underlying felonies, which were the basis for the conviction for first-degree murder, in the guilt phase as aggravators warranting a sentence of death during the penalty phase. In McConnell, the Court specifically advised the State that "if it charges alternative theories of first-degree murder intending to seek a death sentence, jurors in the guilt phase should receive a special verdict form that allows them to indicate whether they find first-degree murder based on deliberation and premeditation, felony murder, or both." Id.

NRS 200.033 lists the aggravators which elevate first-degree murder to capital status. And over the years the Nevada Supreme Court has specifically held that NRS 200.033 was constitutional and that the statutory aggravators it lists, even "in combination," properly narrow the class of persons eligible for the death penalty. Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985); Gallego v. State, 117 Nev. 348, 370, 23 P.3d 227, 242 (2001); *see* also, Bennett v. State, 106 Nev. 135, 787 P.2d 797 (1990); (overruled on other grounds by Leslie v. Warden, 118 Nev. 773, 59 P.3d 440 (2002)) (NRS 200.033 subdivision 4 is not constitutionally overbroad or arbitrary); Smith v. State, 114 Nev. 33, 953 P.2d 264 (1998) (subdivision 8 is not constitutionally vague and ambiguous); Cambro v. State, 114 Nev. 106, 952 P.2d 946 (1998) and Geary v. State, 112 Nev. 1434 (1996)(subdivision 9 is not

constitutionally vague); Leslie v. Warden, 118 Nev. 773, 59 P.3d 440 (2002)(Defense counsel was not deficient in failing to argue that "at random and without apparent motive" aggravator was not supported by evidence in penalty phase of defendant's murder trial, where Supreme Court had consistently upheld that aggravator when, as in defendant's case, killing was unnecessary to complete robbery, and defense counsel, knowing that Supreme Court was required to independently review all aggravating circumstances, may have chosen to focus on issues more likely to yield results). This issue was again addressed, and the Court sanctioned the practice of using an underlying felony as an aggravator in Miranda v. State, 101 Nev. 562, 707 P.2d 1121 (1985) and Atkins v. State, 112 Nev. 1122, 923 P.2d 1119 (1996). In Atkins, the Nevada Supreme Court specifically rejected the argument that the felony aggravator statute did not sufficiently narrow the class of eligible persons for the death penalty. Now the Court has determined that the State may no longer use a felony aggravator if a defendant is convicted of first-degree murder on the theory of felony murder. The Nevada Supreme Court determined that McConnell overruled precedent and enunciated a new substantive rule. Bejarano, *supra*.

Where the conviction is sufficiently supported by evidence of premeditation and deliberation as opposed to felony murder, use of the felony-aggravator is permissible. *See* McConnell, *supra*. The Court can be assured that such narrowing has occurred where a defendant pleads guilty or is tried solely under a theory of premeditation and deliberation, or if a special verdict form is used when alternative theories are alleged. Id. Because no such special verdict form was previously required under pre-McConnell law, the Nevada Supreme Court held that McConnell applied "whenever it is possible that any juror could have relied on a theory of felony murder in finding the defendant guilty of first-degree murder." Bejarano, *supra*; *see also* Rippo, *supra* (explaining that McConnell's rationale is not concerned with the adequacy of the evidence of deliberation and premeditation). Therefore, in cases such as the instant case, Bejarano requires that a court re-weigh the aggravating and mitigating circumstances, notwithstanding the felony aggravator, to determine whether the Death Penalty is appropriate.

A. Other Aggravators Support Imposition of the Death Penalty

Because this Court cannot weigh the substantial evidence of premeditation and deliberation present in this case, this Court can look only to the other valid aggravating circumstances found by the jury which are not called into question by McConnell to determine whether the accuracy of the death verdict is seriously diminished.

Essentially, McConnell "does not 'alter our understanding of what constitutes basic due process,'" but merely removes a specific type of aggravator (one identical to the underlying charge) from consideration in imposing the death penalty. *See*, Bockting v. Bayer, 399 F.3d 1010, 1020 (9th Cir. 2005) (quoting Brown v. Uphoff, 381 F.3d 1219, 1226-27 (10th Cir. 2004)). McConnell does not disturb the conviction of a defendant, but only addresses the severity of the punishment imposed. If it is to be Death, then McConnell narrows those eligible, but it in no way affects a defendant's culpability. The importance of this distinction cannot be overstated.

1. Re-weighing does not involve the receipt of evidence that was not presented at trial.

As the Nevada Supreme Court has reasoned in the past, the re-weighing of the evidence is permissible under the Nevada Constitution and does not entail impermissible fact-finding. Bejarano, *supra.*, Leslie v. Warden, 118 Nev. 773, 782, 59 P.3d 440, 447 (2002) (*citing* Canape v. State, 109 Nev. 864, 859 P.2d 1023 (1993)). This is especially true when the Court has invalidated a heretofore valid aggravating circumstance. Id; *accord* Browning v. State, 120 Nev. 347, 91 P.3d 39, 51 (2004) ("Once an aggravator is stricken, the court either re-weighs the aggravating and mitigating circumstances or applies a harmless error analysis."). In State v. Haberstroh, 119 Nev. 173, 69 P.3d 676 (2003) the Court stated:

> The Supreme Court has held that "the Federal Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by re-weighing of the aggravating and mitigating evidence or by harmless-error review. It appears that either analysis is essentially the same and that either should achieve the same result. Harmless-error review requires this court to actually

> perform a new sentencing calculus to determine whether the error involving the invalid aggravator was harmless beyond a reasonable doubt. Reweighing involves disregarding the invalid aggravating circumstances and reweighing the remaining permissible aggravating and mitigating circumstances. In any case, we must provide close appellate scrutiny of the import and effect of invalid aggravating factors to implement the well-established Eighth Amendment requirement of individualized sentencing determinations in death penalty cases.

Haberstroh, at 682. (Internal quotation marks and citations omitted).

> We recognize that many of our duties require us to make factual determination. For example, this court is often called upon to determine whether the jury's verdict is supported by sufficient evidence. With respect to capital cases, we are required to consider whether the sentence was imposed under the influence of passion, prejudice, or any arbitrary factor and whether the sentence is excessive, considering the crime and the defendant. We concluded that reweighing after invalidating an aggravating circumstance is similar to these permissible duties. Therefore, we hold that reweighing is proper under the Nevada Constitution and statutes. We are of the same opinion today.

Leslie, *supra,* at 782-83. (Emphasis added). The State submits that this court should re-weigh the aggravating and mitigating circumstances based upon an independent review of the trial record. Bridges v. State, 116 Nev. 752, 6 P.3d 1000 (2000). The Nevada Supreme Court and the United States Supreme Court have held that the re-weighing of aggravating and mitigating circumstances is a function of an appellate court which does not involve the receipt of facts or evidence not found in the trial record. *See* Clemons v. Mississippi, 494 U.S. 738 (1990); s*ee also* Canape v. State, 109 Nev. 864, 859 P.2d 1023 (1993). Therefore, Defendant should be barred from introducing evidence or litigating issues that should have been, could have been, or actually were disposed of in previous proceedings. Because all of the claims raised in Defendant's petition were previously litigated or are procedurally barred, the Court should not consider any exhibits presented by Defendant in arguing those claims when considering whether the record supports the imposition of the death penalty.

2. The Previous Violent Felony Aggravator outweighs the mitigation evidence

In the present case, the Nevada Supreme Court has already re-weighed the aggravating and mitigating circumstance in this case. In 1996, the Court struck down the "prevention of lawful arrest" aggravator. Witter, at 930, 921 P.2d at 900-901. After that aggravator was struck, the court concluded that the remaining aggravators outweighed the mitigating evidence offered by the defendant. Notwithstanding the felony-murder aggravators, Defendant's death sentence should be upheld.

David S. Rumsey testified that on January 11, 1986, the defendant stabbed DAVID in the stomach with a seven-inch butcher knife (Appellant's Appendix (hereinafter "AA") 148).[4] Rumsey explained that on the evening of January 11, 1986, the defendant confronted Rumsey and Gina Martin[5], the defendant's former girlfriend (AA 148). The defendant was enraged because Rumsey had gone on a date with Martin. (AA 148). Rumsey attempted to resolve the matter by extending his hand to shake the defendant's hand and the defendant responded by plunging this seven-inch butcher knife into Rumsey's stomach (AA 148). Rumsey fled into Martin's house, leaving a trail of blood behind him (AA 148). The defendant followed, but not before slashing Rumsey's tires, breaking out light bulbs, destroying several flower pots and ripping down the window drapes (AA 148). Ultimately, the defendant fled the scene, but was later apprehended and charged with attempt murder with use of a deadly weapon and assault with a deadly weapon (AA 148-149). Rumsey was hospitalized for approximately four (4) weeks recovering from Defendant's stabbing which severed Rumsey's large and small intestines, cut ten (10) holes in Rumsey's bowels, and extended into Rumsey's rectum (AA 149). The defendant eventually pled guilty, pursuant to negotiations, to one (1) count of assault with a deadly weapon and was sentenced to five (5) years in the California State Prison (AA 149).

Linda Rose, a parole officer for the California Department of Corrections, testified that she supervised the defendant while he was on parole from the assault conviction (AA 149). Officer Rose indicated that the defendant served two (2) years and eight (8) months in

[4] Appellant's Appendix on Direct Appeal.
[5] Defendant asserts that Ms. Martin would have testified positively for him. (Petition, p. 95)

prison and then was placed on parole (AA 149). The defendant violated the conditions of his parole on three (3) separate occasions and was returned to prison following each violation (AA 149). The defendant was discharged from parole on February 9, 1993 (AA 149).

James Ford, a patrol officer with the San Jose, California Police Department, testified that on July 20, 1993 he responded to a call that the defendant was throwing rocks through the windows in Shanta Franco's home (AA 149). Officer Ford found the defendant outside the house screaming and carrying a six-inch dagger in the back of his pants (AA 149). Ms. Franco told Officer Ford that the defendant came to her home looking for his ex-girlfriend, Carmen Kendrick (AA 149). Ms. Kendrick, who was present at the home, told Officer Ford that she was pregnant with the defendant's child, but did not want to speak with him (AA 149). The defendant was arrested and charged with possession of an illegal weapon, vandalism of a residence, and public intoxication (AA 149). Officer Ford also testified that he was familiar with the signs of gang affiliation in California and that the defendant wore several tattoos and clothing that suggested the defendant's gang affiliation and that in several photographs taken after the defendant was arrested in the present case, the defendant was exhibiting "gang signs" (AA 149). See Exhibit 1.

Officer Timothy Jackson, a police officer with the San Jose, California Police Department testified that he responded to a call on October 9, 1993 where the defendant had beaten his girlfriend, Carmen Kendrick. (AA 149). Ms. Kendrick[6] told Officer Jackson that she was pregnant with the defendant's child and that the defendant had beaten her (AA 149-150). Officer Jackson also observed that the defendant had vandalized Ms. Kendrick's house and car (AA 150). A bench warrant was issued for the defendant's arrest following this incident (AA 150). Officer Jackson also testified that he was familiar with the signs of gang affiliation in California (AA 150). Officer Jackson testified that the defendant wore several tattoos that indicated he was a member of a northern California gang called the "Nortenos" (AA 150).

[6] Despite being beaten, Defendant asserts that Ms. Kendrick would have testified positively for him. (Petition, p. 94).

Thomas Pipitone, a Corrections Officer with the Las Vegas Metropolitan Police Department (LVMPD), testified that on August 4, 1994, he searched the defendant's cell at the Clark County Detention Center (AA 150). During this search, Officer Pipitone found a sharpened metal item that had been fashioned from a piece of a clipboard (AA 150).

James R. Cox, the oldest son of the victim, James Cox, testified about the impact that his father's death had on the Cox family (AA 150). Mr. Cox described his father as an honorable, caring, honest father, husband, and member of the Las Vegas community (AA 150). Mr. Cox told how his father's death had impacted his father's other children (AA 150). Finally, Mr. Cox read a letter written by his brother, Matthew Cox, describing Matthew's sentiments regarding his father's death (AA 150).

Phillip Cox, a brother of James Cox, also described James's positive qualities and characteristics. (AA 150). Phillip Cox described James's relationship with his parents, his relationship with his children, and his employment history. (AA 150). Phillip Cox also described the loss that had been experienced by himself and the other members of James Cox's family. (AA 150).

The State's final witness during the penalty phase was Kathryn Cox. (AA 150). Kathryn told of her memories of her husband, James. (AA 150). Kathryn read a statement she had previously prepared describing her feelings and emotions regarding the defendant's brutal attack and James's murder. (AA 150).

The first witness called by the defense was Ruth Fabela, the defendant's maternal aunt. (AA 150). Ms. Fabela testified that the defendant's mother had problems with alcohol and drugs. (AA 150-151). On cross-examination, Ms. Fabela testified that the defendant was essentially raised by his paternal grandparents, William and Martha Witter. (AA 151).

Tina Whitesell, the defendant's sister, testified that her mother was constantly involved in drugs, alcohol, and men. (AA 151). Ms. Whitesell testified that her parents frequently fought with each other, sometimes hitting each other and chasing each other with a knife. (AA 151). Ms. Whitesell also related how she and the defendant were raised by grandparents and that both the grandparents drank heavily. (AA 151). Ms. Whitesell also

testified that neither she nor her two sisters had not been involved in criminal activity during their lives (AA 151). Ms. Whitesell related how the defendant began drinking alcohol regularly and smoking marijuana in junior high school. (AA 151).

The defense also called Louis Witter, the defendant's father. (AA 151). He testified that he had three prior felony convictions and had trouble with alcohol and drugs. (AA 151). Louis Witter also testified that the defendant's mother had trouble with alcohol and drugs. (AA 151). Finally, Louis Witter described how he and the defendant's mother constantly fought after drinking excessively. (AA 151).

Elisa Sanders, the defendant's sister, testified about the abusive environment in which the defendant and his siblings were raised. (AA 151). Ms. Sanders also testified about the abuse that occurred while the defendant and his siblings were being raised by their paternal grandparents. (AA 151). Ms. Sanders related how this upbringing had negatively impacted her own life. (AA 151).

Michael L. Ritchison, the defendant's cousin, testified about the drug, alcohol, and physical abuse that was present in the defendant's home while he was growing up. (AA 151). Mr. Ritchison also testified about the alcohol and physical abuse that was present in his grandparent's home while the defendant was living there. (AA 151).

The final witness called by the defense was Dr. Louis Etcoff, a licensed psychologist in the state of Nevada. (AA 151). Dr. Etcoff testified that he had previously interviewed the defendant and conducted various psychological tests on the defendant. (AA 151). Dr. Etcoff related the results of these tests and described how the results directly correlated with the information he had acquired regarding the defendant's life. (AA 152). Dr. Etcoff concluded that the defendant may have had attention deficit hyperactivity disorder, antisocial personality disorder, and developmental arithmetic disorder. (AA 152).

At the conclusion of the penalty hearing, the jury recommended death. Because the jury had found, beyond a reasonable doubt, that Defendant was guilty of attempted sexual assault with use of a deadly weapon, and burglary, very little evidence regarding these convictions was presented in the penalty phase.

It is clear in this case that, even without the felony aggravator, the aggravating circumstances outweigh any evidence of mitigation. Defendant has a long history of violence using a knife. In the present case, the jury could have concluded that the killing of James Cox, a man who lost his life when he came to his wife's aid, was brutal and senseless. Given the brutality Defendant exhibited in this crime, the Defendant's history of violent crimes involving a knife, and the fact that he continued to rely upon knives and "shanks" to commit crimes while incarcerated, each demonstrate the jury's verdict was proper in this case. Therefore, Defendant should be denied relief.

II. DEFENDANT'S PETITION SHOULD BE SUMMARILY DISMISSED AS UNTIMELY AND SUCCESSIVE

A. NRS 34.726 bars Defendant's petition as untimely

Defendant's conviction and sentence were affirmed on July 22, 1996. Defendant filed the instant petition on February 14, 2007. This is a delay of ten (10) years; well beyond the statutory deadline of one year delineated in NRS 34.726. Defendant argues that the failure to raise claims was also the result of ineffective assistance of counsel throughout the past 10 years. This argument is both absurd and without merit. Likewise, it fails to account for Defendant's failure to file a petition since 2001.[7]

Prior to the changes in 1993, a defendant, after his appeal was denied, could file a Petition for Post-Conviction Relief in the district court where he was convicted. *See* NRS 177.325, *repealed* 1993. In the first petition, he could raise any ground which could not have been raised on appeal. *See* NRS 177.375, *repealed* 1993. If the first petition was denied, a defendant could then file a Petition For Writ of Habeas Corpus in the county where he was incarcerated, essentially raising any grounds he could not raise in the trial court. After reviewing this duplicitous scheme, the Nevada Legislature combined the two forms of

[7] Defendant's pursuit of habeas corpus relief in federal court does not constitute "good cause" for his failure to file petition for post-conviction relief within one year after resolution of appeal, as required by statute. Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989); See also Shumway v. Payne, 223 F.3d 982 (9th Cir. 2000)(finding that upon remand from federal court, Defendant would be barred from presenting claims under Washington Post-Conviction Relief statute.) Current counsel has represented Defendant since 2001. Counsel may not raise his own ineffectiveness.

relief into one legal vehicle, a Petition for Writ of Habeas Corpus (Post-Conviction). A Petition must now be filed in the county of conviction. NRS 34.738. In addition, the Legislature combined the procedural bars of both chapters into one comprehensive statutory scheme. *See* NRS 34.720 to 34.830 et. seq.

The statutory scheme now in place creates a variety of procedural bars which a defendant must be in compliance with or his petition is not cognizable. The first limitation is contained in NRS 34.726. That statute states in pertinent part:

> 1. Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the supreme court issues its remittitur.

Contrary to Defendant's assertions, the plain language of the statute applies to any petition that challenges the validity of a judgment or sentence. *See* Dickerson v. State, 114 Nev. 1084, 967 P.2d 1132 (1998). Nevada Revised Statute 34.726 was enacted, in the words of the Nevada Supreme Court, to create limitations on post-conviction remedies because:

> Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. **In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions.** A showing of prejudice is thus essential to prevent the filing of successive and meritless petitions for post-conviction relief.

Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994) (emphasis added). Therefore, Defendant's failure to file this successive petition within one year procedurally bars a review of the petition by the district court. Successive petitions are only heard in extraordinary cases where a defendant can show both cause for the delay and actual prejudice. NRS 34.810; Bejarano v. Warden, 112 Nev. 1466, 929 P.2d 922 (1996).

B. The State Pleads Laches per NRS 34.800(2)

In addition, subsection 2 of NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period of five years [elapses] between the filing of a judgment of conviction, an order imposing sentence of imprisonment or a decision on direct appeal of a

judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction ... ." *See* NRS 34.800. The statute also requires that the State plead laches in its motion to dismiss the petition. Defendant's direct appeal was dismissed by the Nevada Supreme Court on July 22, 1996. Defendant filed the instant petition for writ of habeas corpus on February 14, 2007. Since over ten years elapsed between the affirmance of Defendant's conviction and the filing of this petition, subsection 2 of NRS 34.800 directly applies in this case.

Many of Defendant's claims were mixed questions of law and fact that would have required the State to prove facts that were over a decade old. Nevada Revised Statute 34.800 was enacted to protect the State from having to go back years later to reprove matters that have become ancient history. There is a rebuttable presumption of prejudice for this very reason and the doctrine of laches must be applied.

Since the remedy Defendant seeks is a new trial, the determination of the issues on the merits would not be based on a purely legal analysis. If courts were to require an evidentiary hearing on long delayed petitions such as in this case, the State would have to call and find long lost witnesses whose once vivid recollections have faded and re-gather evidence that, in many cases, has been lost or destroyed because of the lengthy passage of time. Therefore, not only is this case barred by the one year rule, it is also barred by the doctrine of laches. *See* Groesbeck v. Warden, 100 Nev. 259, 679 P.2d 268 (1984).

C. The Petition is Successive

As noted previously, the Nevada Legislature added a section severely limiting successive petitions. Defendant's petition is not only barred because it was untimely filed, it is barred because it is successive. Nevada Revised Statute 34.810, entitled "**Additional reasons for dismissal of petition**", creates a statutory scheme which prevents a successive petition from being heard.

Pertinent portions of NRS 34.810 state:

> 2. A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds

are alleged, the judge or justice finds that the failure of the Defendant to assert those grounds in a prior petition constituted an abuse of the writ.

3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving specific facts that demonstrate:
   (a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and
   (b) Actual prejudice to the petitioner.

In order to show good cause, Defendant has the burden of demonstrating that there was an impediment external to the defense which prevented him from complying with the state procedural default rules. Lozada v. State , 110 Nev. 349, 353, 871 P.2d 944, 946 (1994). Good cause for the delay is defined as "a substantial reason; one that affords a legal excuse." Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989). Defendant's pursuit of habeas corpus relief in federal court does not constitute "good cause" for his failure to file petition for post-conviction relief within one year after resolution of appeal, as required by statute. Id. In order to establish prejudice, a petitioner must demonstrate that the alleged errors worked to his actual and substantial disadvantage. Hogan v. Warden , 109 Nev. 952, 959, 860 P.2d 710, 716 (1993).

In addition, dismissal of the instant petition will not prejudice the defendant. The defendant has no legal basis to challenge his conviction, as he has raised many of the issues before, either on direct appeal or in his prior petitions. Thus, the district court's dismissal of this petition as time barred was proper and does not prejudice the defendant. A finding of prejudice is required to avoid the time bar of NRS 34.726. In regard to this requirement, the Nevada Supreme Court has held that "requiring prejudice to excuse the filing of untimely petitions helps to ensure that claims are raised before evidence is lost or memories fade. Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies." Lozada, 110 Nev. at 358, 871 P.2d at 950. Because Defendant was unable to provide either good cause or prejudice so as to avoid application of the statute, the petition should be dismissed.

Nevada Revised Statute 34.726, along with the legislative history regarding the

restructuring of post-conviction relief avenues, clearly indicate that the one year rule is to apply to all petitions for writ of habeas corpus. Defendant had an opportunity to address the issues he raises in this petition in his first petition in 1997. As the speakers to the legislature pointed out during the consideration of the changes to post-conviction relief, the combination of statutes merely streamlined the process. It does not take away any habeas remedy. There was no denial of due process or equal protection.

D. Nevada Courts Consistently Apply Procedural Defaults.

Defendant asserts that the Nevada Supreme Court as well as the district courts do not have to follow the procedural rules contained in NRS 34.720 to 34.830 et. seq. because those rules are not consistently applied. In essence, Defendant argues that this Court should ignore the law because it has been ignored in the past.

The Ninth Circuit Court of Appeals has put to rest any allegation that Nevada has been inconsistent, finding:

> [Defendant] argues, however, that the Nevada Supreme Court's procedural bar rules are not adequate because that court does not consistently apply them. To be adequate, a state's procedural rule must be consistently applied. Wells v. Maass, 28 F.3d 1005, 1010 (9th Cir.1994).
>
> We reject [Defendant]'s argument. The Nevada Supreme Court has consistently applied the state rule which prohibits review of the merits of an untimely claim unless the petitioner demonstrates cause. See, e.g., Birges v. State, 107 Nev. 809, 820 P.2d 764, 765-66 (1991); Glauner v. State, 107 Nev. 482, 813 P.2d 1001, 1003 (1991); Colley v. State, 105 Nev. 235, 773 P.2d 1229, 1230 (1989). Even before the Nevada State Legislature adopted the procedural rules which bar [Defendant]'s claims in state court, the Nevada Supreme Court dismissed petitions without reviewing the merits if the delay was unreasonable and prejudicial. Groesbeck v. State, 100 Nev. 259, 679 P.2d 1268, 1269 (1984).
>
> . . .
>
> We conclude that the Nevada Supreme Court consistently applies its procedural rules to bar review of the merits of an untimely claim in the absence of a showing of cause and lack of prejudice to the State. Our review of the merits of [Defendant]'s

> claims, therefore, is precluded unless [Defendant] can establish cause and prejudice or that a miscarriage of justice would result in the absence of our review.

Moran v. E.K. McDaniel, 80 F.3d 1261, 1269-70 (1996) (citations omitted); *see* Bargas v. Burns, 179 F.3d 1207, 1211-13 (9th Cir. 1999) (the court concluded that the Nevada Supreme Court "firmly established and regularly followed" Nevada law in finding claims procedurally barred when raised in a subsequent petition and not raised on appeal); Valerio, 112 Nev. at 389-90, 915 P.2d at 878. Also, the Nevada Supreme Court had repeatedly upheld Nevada's procedural bars against attacks that they are unconstitutional or are applied in an arbitrary and capricious manner. *See* Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001). The latest word in this line of cases came just last year when the Court again held that the bars are mandatory and have been consistently applied. State v. Dist. Ct. (Riker), 121 Nev.Adv.Op. 25, 112 P.3d 1070 (2005). Thus, Defendant's assertion in this regard has been soundly and repeatedly rejected by the Nevada Supreme Court.

Defendant's reliance on Rippo is misplaced. Contrary to Defendant's assertion, the Nevada Supreme Court did not disregard the procedural bars. Instead, the Court in Bejarano v. State, 122 Nev.Adv.Op. 92, 146 P.3d 265 (2006) and Rippo v. State, 122 Nev. Adv. Op. 93, 146 P.3d 279 (2006) held that the **petitioners established good cause to overcome** the procedural bars. Good cause for failing to file a timely petition or raise a claim in a previous proceeding may be established where the factual or legal basis for the claim was not reasonably available. Bejarano, at 270. In the present case, based on the precedent established in Rippo and Bejarano, the State concedes that a challenge under McConnell establishes good cause to overcome procedural bars as they relate to **that single issue of whether Defendant's death sentence may be upheld** in the absence of the aggravators based upon the convictions for burglary and attempted sexual assault. Defendant raised that issue in Ground 4. Based on the forgoing, Defendant's claim that the procedural bars are not consistently applied is without merit in regard to Claims 1-3 and 5-18.

E. Defendant Failed to Establish Good Cause for Failing to File his Successive Petition in a Timely Manner and the Issues Raised or that Could Have Been Raised are Procedurally Barred

With the limited exception of Ground 4, Defendant failed to establish good cause for failing to file his successive petition in a timely manner and the issues raised or that could have been raised are procedurally barred. Defendant acknowledged in his successive petition writ of for habeas corpus that some of the issues raised in the petition had been previously raised in prior proceedings. It has long been the rule in Nevada that "[t]he law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969); *see also* Bejarano v. State, 106 Nev. 840, 801 P.2d 1388 (1990). Nevada Revised Statute 34.810(2) states that "[a] second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different ground for relief and that the prior determination was on the merits ... ." Nevada Revised Statute 34.810(1)(b) states that the district court should dismiss a petition for habeas corpus if the defendant's conviction was based on a trial and the grounds could have been raised in a direct appeal or a prior petition for writ of habeas corpus unless the Court finds both good cause for failure to bring such issues previously and actual prejudice to the defendant. Good cause is "an impediment external to the defense which prevented [the petitioner] from complying with the state procedural rules." Crump v. Warden, 113 Nev. 293, 302, 934 P.2d 247, 252 (1997).

The only hint of a "good cause" argument put forth by Defendant, as to the reason for his failure to include these issues in either his previous appeal or petition for post-conviction relief, is Defendant's blanket assertion that all the issues raised in the instant petition could not be raised previously due to ineffective assistance of counsel through all stages of the proceedings.[8] In Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984), the Court

[8] The State concedes that Defendant's McConnell Argument satisfies good cause if Defendant can show that he was prejudiced but all others should be dismissed. *See* Bejarano v. State, 122 Nev.Adv.Op. 92, 146 P.3d 265 (2006); Rippo v. State, 122 Nev. Adv. Op. 93, 146 P.3d 279 (2006).

held that claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Defendant fails to provide any evidence to support the blanket claim of ineffective assistance of counsel. As such the allegations made by Defendant are merely naked and are insufficient to provide any post-conviction relief.

III. DEFENDANT'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL ARE SUCCESSIVE BECAUSE THE EIGHTH JUDICIAL DISTRICT HAS ALREADY HELD THAT BOTH TRIAL AND APPELLATE COUNSEL WERE NOT INEFFECTIVE.

As noted previously, Defendant's petition is successive. Nevada Revised Statute 34.810, entitled "**Additional reasons for dismissal of petition,**" creates a statutory scheme which prevents a successive petition from being heard.

Pertinent portions of NRS 34.810 state:

> 2. A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the Defendant to assert those grounds in a prior petition constituted an abuse of the writ.
>
> 3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving specific facts that demonstrate:
>
> (a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and
>
> (b) Actual prejudice to the petitioner.

In order to show good cause, Defendant has the burden of demonstrating that there was an impediment external to the defense which prevented him from complying with the state procedural default rules. Lozada v. State , 110 Nev. 349, 353, 871 P.2d 944, 946 (1994). Good cause for the delay is defined as "a substantial reason; one that affords a legal excuse." Colley v. State , 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989). Defendant's pursuit of habeas corpus relief in federal court does not constitute "good cause" for his failure to file petition for post-conviction relief within one year after resolution of appeal, as required by statute. Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989). In order to establish prejudice, a petitioner must demonstrate that the alleged errors worked to his actual

and substantial disadvantage. Hogan v. Warden, 109 Nev. 952, 959, 860 P.2d 710, 716 (1993). The following claims of ineffective assistance of counsel are successive and must be dismissed.

A. Grounds 1& 2: Ineffective Assistance of Trial Counsel

This issue was raised in a previous Petition for Post-Conviction Relief. The District Court denied relief on the merits. Decision and Order, C117513, September 25, 2000. The Nevada Supreme Court affirmed the district court's denial of relief on August 10, 2001. The District Court's Findings of Fact and Conclusions of Law accompany its order. They are presented as Exhibit 6.4 in Volume 6 of Defendant's Appendix.

1. Fetal Alcohol Syndrome

The following Conclusions are relevant to the matter of Fetal Alcohol Syndrome.[9]

5) Counsel was not ineffective for choosing not to present evidence at the trial portion of defendant's case. At the evidentiary hearing, counsel explained that he knew if defendant was convicted there would be a penalty phase. Because of the overwhelming evidence of defendant's guilt, counsel felt it was prudent to not present a defense during the guilt phase so as not to impair his credibility at the penalty phase.

6) Trial counsel was effective because he did investigate a FAS defense. Counsel flew to San Jose, California where he researched Defendant's family background and spent one week interviewing witnesses...At the time counsel was preparing for trial, little was known about FAS,[10] yet counsel conducted extensive investigation into this possible defense. Counsel's efforts to investigate FAS were reasonable.

7) Trial counsel was effective because he did attempt to obtain an FAS expert. Counsel learned that he would need a geneticist to support a claim of FAS. To locate a geneticist, counsel contacted three university medical facilities and eventually located a local geneticist, Colene Morris. Counsel contacted Dr. Morris on at least ten occasions, but each time, she refused to speak to him...Counsel eventually contacted FAS experts who resided in Seattle, but they refused to meet with defendant until he was first examined by a geneticist.... Based on counsel's conduct, there is no merit to defendant's claim.

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[9] For the purpose of consistency, the Conclusions listed throughout are numbered as they are in the district court's order.

[10] In his current petition, Defendant cites A Manual on Adolescents with Fetal Alcohol Syndrome with Special Reference to American Indians. (Exhibit 4.4). This manual pertains to the special socioeconomic conditions which exist in the Native American populations/reservations which had led to the abuse of alcohol and the resulting effects on Native American Children. Defendant in this case is a Hispanic from San Jose, California. Counsel cannot reasonably be expected to investigate every publication, and in particular a publication whose relevance is tenuous at best.

8) Defendant cannot show that counsel was deficient for failing to retain a FAS expert because defendant failed to present any evidence that FAS would have been a valid defense in this case.

9) Defendant was unable to show that the outcome of his case would have been different... because FAS is a mitigator, not an affirmative defense. A diagnosis of FAS, "would place nothing more than a label on [defendant's] lower intelligence and behavioral problems, evidence which was already before the jury. With or without the diagnosis or label, the defense could argue that such evidence mitigated in favor of the lesser sentence." State v. Brett, 892 P.2d 29, 64 (Wash. 1995).

2. Gang Experts

The following Conclusions are relevant to the issue of Gang Experts:

10) Counsel was not deficient for failing to present a gang expert during his penalty hearing because he believed that gang evidence was only admissible if defendant had been a gang member at some point in his life. Defendant did not tell counsel of his previous gang affiliation, therefore, counsel could not have anticipated the need to retain a gang expert.

11) Counsel's failure to retain a gang expert was not deficient because an expert was not necessary to refute many of the claims made by the State's gang experts.

12) Defendant was not prejudiced by counsel's failure to call a gang expert. The Nevada Supreme Court, upon considering whether defendant was prejudiced by the district court's refusal of a continuance that rendered it impossible for defendant to obtain a gain expert, concluded that even if the defendant had been able to secure an expert to testify as to violence in prisons and the need for a shank, "such testimony would have done little to mitigate his involvement." Witter v. State, 112 Nev. 908, 920, 921 P.2d 886, 894 (1996).

3. Prejudice

As to prejudice, the following Conclusion is relevant:

20) Defendant cannot meet the second prong of Strickland because even if counsel were ineffective, defendant was not prejudiced by trial counsel's performance...because no matter what counsel did at trial, no reasonable probability existed that Defendant would not be convicted. There was so much overwhelming evidence of guilt by way of the identification of the defendant by one of the victim (Kathryn Cox), three security guards, and the bus driver; physical evidence of the deceased victim's blood found all over the defendant; and a confession by the defendant that he committed the killing, that defendant cannot show that he was prejudiced by counsel's performance.

4. Failure to Investigate Witnesses

Defendant devotes a substantial portion of his petition to the allegation that he was "a nice guy" when he was not intoxicated. Defendant asserts that trial counsel failed to investigate and interview witnesses who would have testified that if Defendant was sober, he was "a great person." Even if the court were to consider this argument, Defendant cannot establish that the result would have been more favorable. A defendant who contends that his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 87 P.3d 533 (2004). In the present case, Defendant's blood alcohol content was .07. Thus, he was not legally intoxicated. Moreover, any claims of Defendant being "the nicest guy in the whole world" or a "gentleman who treated a woman with respect" (Petition, p. 104), "caring and sensitive" (Petition, p. 31), "didn't have a mean bone in his body" (Petition, p. 31), and "he never got angry" (Petition, p. 32) are belied by the following facts elicited at trial.

Kathryn began screaming and Defendant repeatedly told her, "Shut up. I'm going to kill you, you bitch." .... the defendant unzipped his pants and exposed his penis and told Kathryn to "suck his cock like [she] would for [her] old man and make him feel better or good."....Kathryn was unable to meet the defendant's demands, however, because she kept passing out as a result of a collapsed lung that was caused by the stab wounds inflicted by the defendant. When the defendant realized Kathryn was not able to comply with his demands, the defendant lifted Kathryn's head back up and again told her that he was going to rape her and kill her.....Defendant dragged Kathryn back to the car and pushed her into the driver's seat again..... The defendant became frustrated and slashed Kathryn's pants with his knife, leaving four (4) or five (5) knife wounds on Kathryn's right hip. After the defendant cut Kathryn's pants, he pulled the clothing open, exposing Kathryn's vaginal area. The defendant reached over with his hand and began rubbing Kathryn's vaginal area with his hand and fingers. While the defendant was rubbing Kathryn's vaginal area, he began kissing

her again and reached underneath Kathryn's shirt, undid her bra and began squeezing Kathryn's breast.

Under the circumstances, any evidence which emphasized defendant's positive qualities and respect for women would have been belied by the record of nearly a dozen wounds on the body of Kathryn Cox, his intended rape victim, and sixteen (16) stab wounds on the body of James Cox, who came to his wife's aid and paid with his life. Thus, Defendant cannot establish that the presentation of this evidence would have rendered a more favorable outcome.

5. Ground 2(d): Other Mitigating Evidence:

The State begins by noting that the allegations raised Ground 2(d) should be considered only for the limited purpose of determining whether counsel was effective. The State submits that this evidence should not be considered by this Court in re-weighing the aggravating and mitigating circumstances because the use of these mitigating circumstances involves the improper findings of facts that were not presented to a jury and not tested by the adversarial process. Clearly, if any of these facts would have been presented at trial, they would have been subject to examination and impeachment by the State. For example, on page, 102, Defendant asserts that Gina Martin and Carmen Kendrick would have testified positively for him. However, the State could have, and would have, demonstrated that these women were victims of Defendant's violence. Gina Martin was present at, and the catalyst for, the stabbing of David Rumsey. Defendant fails to explain how, given the striking similarities between the two cases, (the stabbing of a man who stood between Defendant and his intended female victim) would have rendered a more positive outcome. Nonetheless, because this evidence was not submitted to the jury, it cannot be properly considered by this Court in re-weighing the evidence presented at trial.

Even if the court were to consider this claim for the limited purpose of demonstrating the conduct of counsel. Defendant would not be entitled to relief. Defendant presented mitigating evidence at the penalty phase. This evidence included, "the testimony of several members of his family and the testimony of a clinical psychologist who testified that Witter

grew up in a very abusive and dysfunctional family."[11] Witter, at 930, 921 P.2d at 901. Thus, Defense counsel presented evidence of the same mitigating circumstances now raised. The jury and the Nevada Supreme Court have considered this evidence and held that it did not outweigh the aggravators presented by the State.

Defendant's current counsel has had over five (5) years to gather and collect the evidence he presents in Ground 2(d). Obviously, the fact that trial counsel did not spend five (5) years investigating and collecting data on an individual defendant does not fall "below the objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2063-64 (1984)

B. Ineffective Assistance of Appellate Counsel

Although, Defendant does not assert the ineffective assistance of appellate counsel as a separate ground, in Defendant's petition, he asserts, "[t]he failure to raise any claims 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." (Petition, p. 3). This matter has already been litigated and decided on its merits. Decision and Order, C117513, September 25, 2000. The Nevada Supreme Court affirmed the district court's denial of relief on August 10, 2001. The District Court's Findings of Fact and Conclusions of Law accompany its order. They are presented as Exhibit 6.4 in Volume 6 of Defendant's Appendix.

C. Ground 3: *Batson*

The following Conclusions are relevant to Appellate Counsel's failure to raise a Batson[12] issue.

> 21) Appellate Counsel was not ineffective for not raising a Batson challenge because the defendant failed to show that the juror in question was a member of a cognizable racial group. At the time of the peremptory challenges, the jurors were not present. Neither the prosecutor nor the Court had noted that the juror was African-American because they were not aware that race was an issue in the case and the defendant appeared to be Caucasian... Due to the uncertainty of the juror's race, appellate

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[11] This evidence is presented in Section VII, and incorporated here by reference. As is evidence, defense counsel presented evidence of Louis Witter's arrests (Petition, p. 76), the children's care by grandparents (Petition, p. 73), the mother's alcoholism. (Petition, p. 73) and the testimony of Louis Witter and Lani Sanders (Petition, p. 75).

[12] Batson v. Kentucky, 476 U.S. 79 (1986).

counsel chose not to raise this issue on appeal. Appellate was not ineffective because he clearly chose to exclude this weak argument.

22) Appellate counsel was effective for not raising a Batson challenge because the State offered a race-neutral reason for exercising its peremptory challenge.... Defendant was unable to show that State's reason was not facially valid, therefore, this issue would not have been successful on appeal.

Inasmuch as Defendant presents the Batson issue as a separate claim in Ground 3, this issue has been litigated and decided on its merits during post-conviction proceedings. Therefore, Ground 3 is successive and should be dismissed.

D. Ground 5(a): Voir Dire of Edward Miller:

This issue was raised and litigated in Defendant's first petition for post-conviction relief. The Court held:

28) Appellate counsel was correct in not raising the issue of denial of trial counsel's challenge for cause of juror Miller, who indicated that he would not consider the childhood of Defendant as a mitigating circumstance. The issue would have lost on appeal unless defendant could prove that the trial court abused its discretion.

Therefore, Ground 5(a) is successive and must be dismissed.

IV. GROUNDS BARRED BY LAW OF THE CASE

It has long been the rule in Nevada that "[t]he law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969); *see also* Bejarano v. State, 106 Nev. 840, 801 P.2d 1388 (1990). The Nevada Supreme Court has decided a number of the issues Defendant raises in the instant petition. *See* Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996).

A. Ground 1: Gang Violence Evidence

As stated, previously, the issue of Gang Violence Evidence is successive. In addition, the issue has been presented to the Nevada Supreme Court and is barred by the law of the case. Hall, *supra*. The Nevada Supreme Court held that the district court did not abuse its

discretion in denying Defendant's motion for continuance to obtain an expert to testify about gang violence. Witter, at 919-920, 921 P.2d at 894. The court noted:

> on June 20, 1995, almost a full year before the penalty hearing, the State notified Witter's counsel that it was investigating a discipline problem (possession of a shank) involving Witter. In addition, Witter's body displays a number of tattoos that are consistent with those worn by members of street gangs in San Jose, California, Witter's hometown. From these facts, we conclude that Witter's counsel had actual notice of Witter's possession of a shank while incarcerated, and his involvement with street gangs."[13]

The court continued:

> We also conclude that even if Witter were able to secure expert testimony regarding gang violence in prisons, such evidence would have done little to mitigate his involvement. Therefore, we conclude that Witter was not prejudiced by the district court's decision to allow only four days between discovery and the penalty hearing.

Id. In addition, Defendant admitted that he was "catching time left and right for gang involvement." (Petition, p. 118). This involvement included attacking "all our enemies from LA." (Petition, p. 118). Defendant's own statements demonstrate that he was a gang member from Northern California. Moreover, on direct appeal, the Nevada Supreme Court held that gang evidence was properly admitted to show future dangerousness.

> In this case, the State presented testimony from the arresting officers indicating that Witter told them that he could heighten his reputation if he were to kill police officers, and from a second officer who stated that from the clothing Witter was wearing and from the tattoos on his arm, he believed that Witter was a member of a violent California gang knows as the "Nortenos." We conclude that this evidence tends to show that Witter posed a threat of future violence to the community...Accordingly, we conclude that the district court properly admitted evidence of Witter's affiliation with a street gang.

Witter, *supra*. Any attempt to deny his involvement in the "Nortenos" is without merit.

B. Ground 1: Prosecutorial Misconduct during Closing Argument

The Nevada Supreme Court held that the State did not commit prosecutorial misconduct so unfair as to deprive Defendant of due process. Witter, at 924-928, 921 P.2d at 897-900. In particular, the court concluded that the any comments regarding "community

[13] Photographs of Defendant's tattoos and gang sign are attached hereto as Exhibit "1."

standards" were an attempt to educate the jury about some of the theories supporting the criminal justice system, and why the death penalty is an available option. Since these are proper areas for prosecutorial misconduct, the court concluded that the prosecutor did not engage in misconduct. Witter, at 924, 921 P.2d at 897.

The court also concluded that any statements regarding a "duty to society at large" were proper comments that focused on the appropriate punishment under the facts and circumstances of the case. Witter, at 925, 921 P.2d at 898.

The court concluded that Witter's argument in regards to the prosecutor's reference to matters outside the record was without merit. Witter, at 926. 921 P.2d at 898. The court stated that the prosecutor did not refer to matters outside of the record or disparage a legitimate defense tactic. Id. Rather, the court concluded, the statements "merely attempted to keep the jury's focus on the actual victim's in Witter's crime." Id.

The Nevada Supreme Court held that the prosecutor's comments regarding future dangerousness were proper. Witter, at 927-928, 921 P.2d at 899. The prosecutor is allowed to argue future dangerousness based solely on the killing of the victim in the present case. Id.; see *also* Redmen v. State, 108 Nev. 227, 828 P.2d 395 (1992). Moreover, it was not improper to comment on Defendant's possession of a shank in jail. Id.; *see also*, Haberstroh v. State, 105 Nev. 739, 782 P.2d 1343 (1989).

In concluding that the prosecutor's statements did not violate the "golden rule" doctrine, the Nevada Supreme Court stated:

> in commenting that anything less than the death sentence would be disrespectful to the dead, we conclude that the prosecutor was merely pointing our to the jury that our society values human life, one who takes a human life in the matter that Witter did should pay for his crime with his own life. Furthermore, the prosecutor's statement painted a vivid picture for the jury, and any reference to 'you' appears to be merely rhetorical.

Witter, at 928, 921 P.2d at 899-900.

C. Grounds 5 & 9: Limiting Voir Dire & Death Qualification of the Jury

The Nevada Supreme Court held that the trial court did not abuse its discretion when it precluded Defendant's counsel from asking prospective jurors "If there was evidence that

Defendant had a prior felony conviction involving the use or threat of violence, would you still consider all three sentencing alternatives in your deliberations." Witter, at 915-16, 921 P.2d at 891-892.

In addition, the Court held, "we do not read Morgan[14] or the Witherspoon[15] decisions to allow for one side to gain such an unfair advantage. Moreover, the record shows that other questions properly death qualified the jury." Witter, at 915, 921 P.2d at 892. Thus, Defendant's assertion that the trial court erred in not considering Morgan v. Illinois (Petition, p. 155)is barred by the law of the case. Hall, *supra.* In addition, Ground 9 is barred by the law of the case. Hall, supra.

Likewise, any argument that the district court erred based on the refusal to allow trial counsel to question jurors about an article in the newspaper is barred by the law of the case. The Nevada Supreme Court held that the "district court would have run a greater risk of contamination if it were to have allowed Witter's counsel to question the jurors about the article. Under the circumstances, we conclude that Witter was not prejudiced by the district court's refusal to allow his counsel to question the jury about Schulze's article." Witter, at 916, 921 P.2d at 892.

D. Ground 7: Jury Instructions

The Nevada Supreme Court held that the jury instructions submitted to the jury were proper, and that the district court did not err when it refused Witter's instruction defining deliberation. Witter, at 918, 921 P.2d at 893. In regards to SCR 250, the Nevada Supreme Court stated. "[w]e conclude that the procedures followed by the district court were sufficient to guarantee that any legitimate objections Witter may have had about the jury instructions were considered by the district court and preserved in the record. Accordingly, we conclude that the procedures used by the district court satisfy SCR 250." Witter, at 918-919, 921 P.2d at 894.

[14] Morgan v. Illinois, 504 U.S. 719 (1992)
[15] Witherspoon v. Illinois, 391 U.S. 510 (1968).

Defendant alleges that the statutorily mandated reasonable doubt instruction unconstitutionally minimizes the State's burden of proof. This issue was thoroughly explored by the Ninth Circuit when it declared that the statutory definition of reasonable doubt in place at the time of Defendant's conviction was constitutional. *See* Ramirez v. Hatcher, 136 F.3d 1209 (9th Cir. 1998) cert. denied, 525 U.S. 967, 119 S.Ct. 415 (1998). Defendant states, "No other state currently uses this language in its reasonable doubt instruction and the few states that have previously used it have since disapproved it." (Petition, p. 184). Defendant does not cite a single state that has disapproved this language. Bare and naked assertions will not support relief. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

Defendant states that the jury could have concluded that there need be unanimity to find mitigating and aggravating circumstances. Clearly, this is mere speculation unsupported by any legal or factual authority. Judge Learned Hand once wrote that the consideration of possible reasons for a jury's decision is to "consider too curiously, unless all verdicts are to be upset on speculation." Steckler v. United States, 7 F.2d 59, 60 (2nd Cir. 1925) (L. Hand, J.). Clearly, this cautionary advice is to be heeded in this case.

The State submits that, because the same jury was empanelled for the guilt phase and the penalty phase, it was unnecessary to review the elements of the underlying felony offenses in a specific jury instruction. Clearly, the jury knew and understood the elements because they rendered a guilty verdict during the guilt phase.

E. Ground 10: Victim Impact Testimony

The Nevada Supreme Court concluded that Defendant's motion for a mistrial was properly denied because Witter was not denied a fair trial based on the testimony of Kathryn Cox. Witter, at 922, 921 P.2d at 896. The court stated:

> 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 conclude that Kathryn was asking that the jury return the most sever verdict that it deemed appropriate under the facts and circumstances of this case. **Kathryn's statements also emphasis the devastating effect this crime had**

on her and her family's life. Such sentiments are admissible victim-impact statements. NRS 175.552(3).

Id. (emphasis added).

In addition, all of Defendant's other claims are without merit. NRS 175.552(3) provides that "[i]n 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." Thus, James R. Cox's testimony and Phil Cox's testimony are proper commentary on the circumstances of the offense and the impact on the victim's family.

V. GROUNDS BARRED BECAUSE THEY COULD HAVE BEEN RAISED ON DIRECT APPEAL

Nevada Revised Statute 34.810, entitled "**Additional reasons for dismissal of petition,**" creates a statutory scheme which prevents a successive petition from being heard. Pertinent portions of NRS 34.810 state that if new and different grounds are alleged, the judge or justice finds that the failure of the Defendant to assert those grounds in a prior petition constituted an abuse of the writ. The following issues could have been raised in Defendant's first direct appeal. Defendant has failed to demonstrate good cause for failing to raise the issues.

A. Ground 3: *Batson* Challenge

> In denying Defendant's previous petition, Judge Sally Loehrer concluded:
> Appellate Counsel was held to not be ineffective because Appellate Counsel was not ineffective for not raising a Batson challenge because the defendant failed to show that the juror in question was a member of a cognizable racial group. At the time of the peremptory challenges, the jurors were not present. Neither the prosecutor nor the Court had noted that the juror was African-American because they were not aware that race was an issue in the case and the defendant appeared to be Caucasian.

Decision and Order, C117513, September 25, 2000. Appellate counsel was effective for not raising a Batson challenge because the State offered a race-neutral reason for exercising its peremptory challenge.... Defendant was unable to show that State's reason was not facially valid; therefore, this issue would not have been successful on appeal. Id.

Moreover, Judge Lochrer concluded:

> Appellate counsel was correct in not raising the issue of denial of trial counsel's challenge for cause of juror Miller, who indicated that he would not consider the childhood of Defendant as a mitigating circumstance. The issue would have lost on appeal unless defendant could prove that the trial court abused its discretion.

Decision and Order, C117513, September 25, 2000. Thus, not only is this claim barred because it could have been raised first on direct appeal, it is barred because it is successive.

B. Issues not objected to at trial which would require Defendant's appellate counsel to establish plain error

Generally, the failure to object at trial precludes review by the Nevada Supreme Court; however, the court may address plain error *sua sponte*. Sterling v. State, 108 Nev. 391, 834 P.2d 400 (1992). An error is plain only if the error is so unmistakable that it reveals itself by a casual inspection of the record. Patterson v. State, 111 Nev. 1525, 907 P.2d 984 (1995). Plain error exists only in exceptional circumstances when a substantial right of a defendant is affected. United States v. Olano, 507 U.S. 725, 733-35 (1993). The defendant must show that an error was prejudicial in order to establish that it affected substantial rights. Gallego v. State, 117 Nev. 348, 23 P.3d 227, 239 (2001).

The United States Supreme Court has analyzed the plain error doctrine as it relates to Federal Rule of Criminal Procedure 52(b)[16] and held that the plain error doctrine should only correct:

> particularly egregious errors,' those errors that 'seriously affect the fairness, integrity, or public reputation of judicial proceedings. In other words, the plain-error exception to the contemporaneous-objection rule is to be used sparingly, solely in those circumstances in which a miscarriage of justice would result. Any unwarranted extension of this exacting definition of plain error would skew the Rule's careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed. Reviewing courts are not to use the plain-error doctrine to consider trial court errors not meriting appellate review absent timely objection – a practice which has been criticized as extravagant protection.

[16] Rule 52(b) provides: "Plain errors or defects affecting substantial rights bay be noticed although they were not brought to the attention of the court."

United States v. Young, 470 U.S. 1, 15, 105 S.Ct. 1038, 1046 (1985)(internal citations and quotations omitted). The Court continued:

> In reviewing criminal cases, it is particularly important for appellate courts to relive the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure. To turn a criminal trial into a quest for error no more promotes the ends of justice than to acquiesce in low standards of criminal prosecution.

Id. at 16, 105 S.Ct. at 1047; *citing* Johnson v. United States, 318 U.S. 189, 202, 63 S.Ct. 549, 555 (1943)(Frankfurter, J., concurring). In the present case, a review of the record does not lead to the conclusion that the use of a testifying expert's report amounts to plain error. Defendant cannot demonstrate that he was denied a substantial right. Even if this court were to determine that an error occurred, Defendant cannot establish that he was prejudiced.

Therefore, this issue would not have had any reasonable likelihood of success on appeal. The failure to raise this issue was not ineffective. Therefore, Defendant has failed to establish good cause for failing to raise these issues in a prior appeal or petition.

1. Ground 6: Mental Health Evaluation

Any claim that Defendant was "forced" to turn over the report of Dr. Etcoff is without merit. NRS 174.234(2) clearly states:

> 2. If the defendant will be tried for one or more offenses that are punishable as a gross misdemeanor or felony and a witness that a party intends to call during the case in chief of the State or during the case in chief of the defendant is expected to offer testimony as an expert witness, the party who intends to call that witness **shall** file and serve upon the opposing party, not less than 21 days before trial or at such other time as the court directs, a written notice containing:
>
> (a) A brief statement regarding the subject matter on which the expert witness is expected to testify and the substance of his testimony;
>
> (b) A copy of the curriculum vitae of the expert witness; and
>
> (c) A copy of all reports made by or at the direction of the expert witness.

(emphasis added). NRS 174.245(1)(b) provides in part that the defendant **must** allow the prosecutor to inspect and copy any "[r]esults or reports of physical or mental examinations, scientific tests or scientific experiments that the defendant intends to introduce in evidence

during the case in chief of the defendant. The penalty phase of a capital trial is a "case in chief" for the purpose of these rules. Floyd v. State, 118 Nev. 156, 42 P.3d 249 (2003).

Although Defendant fails to cite any legal authority for his claim that the Fifth Amendment was violated, a review of relevant precedent demonstrates that Defendant's claim of error is unfounded. Thus, even if this issue was appealed, it would have been unsuccessful.

The Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. In Estelle v. Smith, 451 U.S. 454 (1981), the United States Supreme Court addressed whether the admission of a psychiatrist's testimony about statements made by a defendant violated the defendant's Fifth Amendment privilege against compelled self-incrimination. The Supreme Court held that a state's attempt to establish a defendant's future dangerousness at the penalty phase of a capital trial by relying on the statements made by him during a pretrial psychiatric evaluation violated his Fifth Amendment right against self-incrimination. Id. at 468. The High Court concluded the defendant's statements were inadmissible because he was not advised before the psychiatric examination that he had a right to remain silent or that any statement he made could be used against him at a sentencing proceeding. Finally, the Supreme Court noted that the defendant did not voluntarily consent to the interview and was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what extent the psychiatrist's findings would be used as a result. Id. at 470-471.

Later, the United States Supreme Court spoke to this very issue in Buchanan v. Kentucky, 483 U.S. 402 (1987) with the following analysis:

> A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. This statement logically leads to another proposition: **if a defendant requests such an evaluation or presents psychiatric**

> **evidence**, then, at the very least, **the prosecution may rebut this presentation** with evidence from the reports of the examination that the defendant requested. The defendant would have **no Fifth Amendment privilege** against the introduction of this psychiatric testimony by the prosecution.

Buchanan, 483 U.S. at 422-23 (emphasis added).

In the present case, Defendant was not compelled to make statements. Instead, he volunteered the statements as part of a defense strategy. Dr. Etcoff was retained by Defendant, not, as in Estelle, by the court. See Sechrest v. State, 108 Nev. 158, 826 P.2d 564 (1992). Thus, Defendant consented to the interview and, unlike Estelle, received the assistance of counsel in determining whether to submit to the examinations and to what extent the findings would be used. Therefore, the use of the report did not violate Defendant's Fifth Amendment privilege against self-incrimination.

Therefore, because Defendant has failed to state any facts which, if true, would demonstrate that he was denied a substantial right, an appeal would have been denied. Therefore, Defendant has failed to establish good cause for not raising this issue on direct appeal. Moreover, trial counsel is not ineffective for failing to raise an objection because Defendant's Fifth Amendment privilege was not violated.

As to the issue of the use of the MMPI questions, an objection would have been overruled because the use of the questions is relevant to a determination of Defendant's mental status. Moreover, defense counsel had the opportunity to use these same reports and cross-examine Dr. Etcoff about any question which was answered in a manner which would reflect positively. Defendant fails to state any legal authority which would demonstrate that the State's questions were improper or that an objection at trial would have been successful. Therefore, Defendant has failed to demonstrate that counsel's performance fell below "reasonably objective."

Thus, Defendant has failed to establish that a substantial right was violated sufficient to support a finding of "plain error" by the Nevada Supreme Court. As such, this issue would not have been successful on appeal.

2. Ground 8: Prior Juvenile Conviction

Defendant fails to cite even one case which would support his argument that a defendant's juvenile crimes may not be used to aggravate a death sentence. Moreover, the jury was only required to find that Defendant had been convicted of "A felony involving the use or threat of violence to the person of another." NRS 200.033(2)(b). Given the substantial evidence that was convicted after he stabbed a man who stood between him and a woman, there is no evidence of the weight the jury placed on the juvenile conviction.

This issue is also successive. In denying Defendant's first petition, the Court concluded:

> Appellate counsel was not ineffective in deciding not to address the reference to defendant's acts of juvenile rape as this was reliable evidence that was admissible. Defendant claimed that this evidence was tenuous and specious. However, this evidence was reliable, as it was introduced through a certified copy of a criminal report which stated that in "1978, [subject] was arrested at the age of 15 for rape while residing in Hawaii. He served in juvenile hall." It was part of a certified copy of the record of the Department of Corrections that was read verbatim to the jury by a parole officer.

Decision and Order, C117513, September 25, 2000.

3. Ground 11: Biblical Comments

A review of the trial court's statements demonstrate that the purpose of his comments was to thoroughly evaluate the prospective jurors' apprehension towards the imposition of the death penalty based on the juror's professed statements that they could not impose the death penalty. Defendant states, "[t]he trial court, by telling jurors that the Bible tells them to follow state law and the law of the state involves the death penalty, instructed jurors to follow the Bible in their role as a juror." The court did not tell the jurors to impose death. Rather, the court asked if the jurors could follow the law of the state which allows for the imposition of death as a permissible penalty for first degree murder.

Defendant has failed to state any facts which, if true, would demonstrate that he was denied a substantial right. Therefore, even if counsel would have presented this issue on appeal, the claim would have been denied. Therefore, Defendant has failed to establish good

cause for not raising this issue on direct appeal.

VI. GROUNDS BARRED BECAUSE THEY ARE NOT SUPPORTED BY ANY FACTUAL ALLEGATION THAT WOULD ENTITLE DEFENDANT TO RELIEF

The following issues lack any factual support which would support the allegations.

A. Ground 13: Elected Judges

Defendant argues his sentence violates the constitutional guarantees of due process of law, equal protection of the laws, and a reliable sentence because the trial and review were conducted by popularly elected judges. However, the Nevada Supreme Court has found that a defendant in a capital murder prosecution is not prejudiced by having a popularly elected trial judge. Haberstroh v. Warden, Nevada State Prison, 119 Nev. 173, 182, 69 P.3d 676, 685 (2003). Just because judges are elected does not make them hostile to the defense. Id. In addition, a judge is presumed not to be biased and the burden is on the party making the challenge to show that a judge will not be fair in carrying out their duties. Goldman v. Bryan, 104 Nev. 644, 764 P.2d 1296 (1988). The mere general allegation that judges are impartial based on the fact that they are elected does not overcome the presumption that judges are unbiased.

Further, all judges, federal and state, are bound by the same oath to support the Constitution of the United States. Neither the United States Constitution nor the Nevada Constitution requires that only non-elected judges participate in the sentencing process in any criminal case, including capital cases.

Defendant's conviction was not determined by the presiding trial judge but, rather, by a jury. Further, Defendant has failed to show bias on the part of the presiding judge in any of his evidentiary rulings at trial. Defendant's sentence of death was constitutionally imposed by the jury in finding that the aggravating circumstances outweighed any mitigating circumstances. Defendant has failed to show any bias on the part of the presiding judge during the penalty phase. Defendant's conviction was affirmed by the Nevada Supreme Court. Defendant has failed to show bias on the part of the justices of the Supreme Court.

Defendant's theoretical flaw in Nevada's capital sentencing scheme is insufficient to overturn Defendant's conviction. Further, Defendant could have raised this issue on direct appeal, but did not. Absent a showing of actual prejudice, Defendant's claim must be denied. *See* NRS 34.810(1)(b).

B. Ground 14: Restrictive Conditions on Death Row

Clearly, the State does not wish to delay the execution of Defendant or keep him incarcerated in the restrictive conditions of death row. To the contrary, the State favors the imposition of sentence without undue delay. Defendant's incarceration in the restrictive conditions of Death Row is for the reasonable purpose of confining a member of society who has exhibited a willingness to kill others. Moreover, because Defendant is under a sentence of death in the current case, there are no provisions of the law which would impose greater punishment for misconduct and crimes against the general prison population. An example of Defendant's dangerousness is the fact that he possessed a shank while incarcerated pending trial and the fact that Defendant admitted that he had previously been involved in attacks on other prisoners he identified as "our enemies from L.A." Thus, the imposition of restrictive conditions is appropriate to prevent Defendant from committing violence against other inmates without fear of repercussion.

Defendant cannot demonstrate any legal or factual support for his argument that the conditions of death row are such that they violate Defendant's civil liberties or constitute cruel and unusual punishment. Thus, the mere fact that the Nevada Department of Corrections has determined that Defendant should be confined in a restrictive environment based on his status as a prisoner awaiting imposition of the death sentence does not entitle Defendant to relief.

The State recognizes that a fundamental element of due process is, within the limits of practicability, a State must afford all individuals a meaningful opportunity to be heard in its courts. *See* Tennessee v. Lane, 541 U.S. 509, 124 S.Ct. 1978 (2004). Therefore, the State has responded to appeals, petitions for post-conviction relief, and petitions for habeas corpus which have been **filed by Defendant** for the past ten years. Clearly, the State and the courts

are obligated to review each appeal and petition to ensure that any legally cognizable claim is not dismissed arbitrarily.

In the present case , the State has thoroughly reviewed Defendant's 234-page petition which asserts time barred, successive, and redundant claims. The State has responded to those claims which could have some arguable merit and has presented alternative arguments clearly founded in the current law of the State of Nevada and the United States.

With the limited exception of Ground 4, further consideration of this matter is not justified on the issues the defendant advances for review. Neither the trial court's denial of defendant's pre-trial and post-trial motions nor the Nevada Supreme Court's affirmance of the trial court's judgment of sentence conflicts with or is inconsistent with any previous decision of this Court or any other appellate decision. With the exception of Ground 4, the defendant cannot point to any controlling or directly relevant authority relied upon by any court that has been expressly reversed, modified, overruled or otherwise materially affected the outcome of this matter. Furthermore, no court overlooked or misinterpreted any controlling or directly relevant authority. Therefore, the continued presentations of grounds, by the Defendant, which have been addressed by previous courts only prolongs Defendant's time on death row.

C. Ground 16: Arbitrary & Capricious Sentencing Scheme

Defendant's argument is a bare and naked allegation completely unsupported by the record. Moreover, the studies,[17] broad assertions, and references to international law are irrelevant to the case before the bar. Moreover, in Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984), the Court held that claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Therefore, Ground 16 must be dismissed.

D. Ground 19: Fetal Alcohol Syndrome and *Atkins*

Defendant asserts that Fetal Alcohol Syndrome (FAS) is equivalent to mental

[17] Defendant is a Hispanic male. Studies reflecting the disparity in race regarding African-Americans on death row are absolutely irrelevant to this case. Nothing in Defendant's boilerplate statement refers to any disparity in Hispanic males.

retardation and therefore, the United States Supreme Court's decision in Atkins v. Virginia, 536 U.S. 304 (2002) should be extended in this case. Defendant fails to cite any legal authority which would support such an extension. Defendant fails to cite any facts which support his contention that persons who suffer from FAS are like or more disabled than persons who suffer from mental retardation. Finally, and most importantly, Defendant fails to provide any support for his contention that he meets the Atkins standard.

> Mental Retardation is defined as:
> The American Association on Mental Retardation (AAMR) defines mental retardation as follows: " Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed.1992).
>
> The American Psychiatric Association's definition is similar: "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed.2000). "Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70.

Atkins, at 309. Defendant cites two IQ tests where he score an 83 and a 78 respectively. (Petition, p. 58).

> In Atkins, the United States Supreme Court reasoned:
> clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments,

> however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Atkins, at 318. Here, Defendant has failed to establish that Fetal Alcohol Syndrome is equivalent to mental retardation. First and foremost, according the United States Department of Health and Human Services in conjunction with the National Center on Birth Defects and Developmental Disabilities, there are no specific or uniformly accepted diagnostic criteria available for determining whether a person has Fetal Alcohol syndrome. Fetal Alcohol Syndrome: Guidelines for Referral and Diagnosis U.S. Department of Health and Human Services (2004), (hereinafter "Guidelines"), p. 2. The four broad areas of clinical features that constitute a diagnosis of FAS have remained unchanged since 1973.[18] Id. The Guidelines clearly state, "these broad areas of diagnostic **criteria are not sufficiently specific to ensure diagnostic accuracy, consistency, or reliability**." Id. The Guidelines further state, "it is easy for a clinician to misdiagnose FAS." Id. at 3. Moreover, the Guidelines demonstrate that there are no diagnostic criteria to distinguish FAS from other alcohol-related conditions. Id. at 3.

Diagnostic characteristics for FAS vary by provider. This has led to a determination that the lack of specificity can result in inconsistent diagnostic methodology and the inconsistent application of the FAS diagnosis. For example, one particular method which is widely in use has been criticized because it will result in a number false-positive findings. Id. at 11. Nine additional syndromes have overlapping features with FAS. Id. at 12. Thus, determining whether a particular defendant does suffer from FAS is subjective, rather than

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[18] Documentation of ALL THREE facial abnormalities (smooth philtrum, thin vermillion border, and small palpabral fissures); documentation of growth deficits; and documentation of CNS abnormalities. (structural, neurological or functional, or combination thereof. Defendant **does not** assert that he has **any** facial abnormalities and does not assert that he has **any growth deficits.** In fact, he is over 6'0 tall and weighs 158 lbs. (Exhibit 5.13).

objective. Therefore, a court cannot say, with any confidence whether a particular defendant has FAS.

Even if this Court were to apply the Atkins standard in this case, Defendant cannot demonstrate that the standard applies to him. Defendant fails to present any evidence that he suffers from significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. To the contrary, the affidavits presented by Defendant reflect a person who cared for himself and, in fact, purchased food for others. The affidavits appear to demonstrate that he was able to be accountable to his employer and his customers. When tested in ninth grade, Defendant's reading and mathematic skills were at or slightly below grade level. (Exhibit 5.12: CTBS Scores). His language skills were at grade level. (Exhibit 5:12: CTBS Scores). Thus, it is clear that Defendant is not mentally retarded, nor is there any reliable evidence that he suffers from FAS. Therefore, Defendant is not entitled to relief.

VII. GROUNDS THAT ARE NOT REVIEWABLE BY THIS COURT

A. Ground 15: Innocent Persons Argument

Defendant does not assert his own innocence. To do so would be contrary to the overwhelming evidence against him, including his own confession to police, the fact that he was identified by a victim, the fact that he was covered in the victim's blood when a security officer intervened to stop the second murder.

Instead, Defendant asserts that if he is executed, there is a "risk that the irreparable punishment of execution will be applied to innocent persons." (Petition, 226). The State agrees that the execution of an innocent person would be unconstitutional. In the present case, Defendant is not innocent. There is overwhelming evidence of Defendant's guilt. This issue has been presented to a jury and to the Nevada Supreme Court. Each has found that there is overwhelming evidence against Defendant. Therefore, Defendant should be denied relief.

The State notes Defendant's statement that Nevada has the "highest death penalty rate in the country." **This statement is patently false.**[19] The bare and naked assertions which permeate Defendant's petition are not supported by any facts which, if true, would entitle Defendant to relief. *See* Hargrove, *supra.*

B. Ground 17: Nevada's Death Penalty System is not Cruel and Unusual Punishment

Ground 38 is a bare legal conclusion belied by current United States law. Therefore, this claim must be dismissed.

C. Ground 18: Cumulative Error

The Nevada Supreme Court has held that under the doctrine of cumulative error, "although individual errors may be harmless, the cumulative effect of multiple errors may deprive a defendant of the constitutional right to a fair trial." Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994), *citing* Sipsas v. State, 102 Nev. 119, 716 P.2d 231 (1986); *see also* Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). The relevant factors to consider in determining "whether error is harmless or prejudicial include whether 'the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.'" Big Pond, 101 Nev. at 3, 692 P.2d at 1289. The doctrine of cumulative error "requires that numerous errors be committed, not merely alleged." People v. Rivers, 727 P.2d 394, 401 (Colo.App. 1986); *see also* People v. Jones, 665 P.2d 127, 131 (Colo.App. 1982). Evidence against the defendant must therefore be "substantial enough to convict him in an otherwise fair trial" and it must be said "without reservation that the verdict would have been the same in the absence of the error." Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1156 (1988).

Insofar as Defendant failed to establish any error which would have entitled him to relief, there is and can be no cumulative error worthy of reversal. Chief Justice E.M.

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[19] Executions by State @ Deathpenaltyinfo.org. Nevada is 18th in the total number of executions and 10 in the number of executions per 10,000 population. Thus, this statement is, like a number of other claims in Defendant's petition, belied by actual facts.

Gunderson observed in his dissenting opinion in LaPena v. State, 92 Nev. 1, 14, 544 P.2d 1187, 1195 (1976), "nothing plus nothing plus nothing is nothing." In the instant case, all of Defendant's claims of error amount to "nothing," therefore, cumulative error does not apply.

Furthermore, it is of note that a defendant "is not entitled to a perfect trial, but only a fair trial..." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975), *citing* Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974). In the case at bar, Defendant received a fair trial. The issue of Defendant's guilt or innocence was never a close question. All the errors alleged here are without merit. Therefore, this claim must be dismissed.

VIII. DEFENDANT'S CLAIM THAT LETHAL INJECTION METHOD IS CRUEL AND UNUSUAL PUNISHMENT IS WITHOUT MERIT

In Ground 12, Defendant asserts that his death sentence is invalid due to the execution protocol.

A. Lethal Injection As a Form of Execution is Constitutional

NRS 176.355(1) provides that a sentence of death in Nevada "must be inflicted by an injection of a lethal drug." NRS 176.355(2)(b) requires the Director of the Department of Corrections to "[s]elect the drug or combination of drugs to be used for the execution after consulting with the State Health Officer." *See also* NRS 453.377(6)(providing that otherwise controlled substances may be legally released by a pharmacy to the Director of the Department of Corrections for use in an execution); NRS 454.221(2)(f).

In State v. Jon, 46 Nev. 418, 211 P. 676 (1923), the Nevada Supreme Court stated:

> We must presume that the officials intrusted (sic) with the infliction of the death penalty by the use of gas will administer a gas which will produce no such results, and will carefully avoid inflicting cruel punishment. That they may not do so is no argument against the law.
> ...The legislature has determined that the infliction of the death penalty by the administration of lethal gas is human, and it would indeed by not only presumptuous, but boldness on our part, to substitute our judgment for theirs.
> ...The present statute provides that the judgment of death shall be inflicted by the administration of lethal gas, and that a suitable and efficient inclosure and proper means of the administration of such gas for the purpose shall be provided. We cannot see that any useful purpose would be served by requiring

greater detail.

In State v. McConnell, 120 Nev. ____, 102 P.3d 606, 616 (2004), the Nevada Supreme Court, found the Jon Court's reasoning to remain sound when concluding that the current method of lethal injection was not cruel and unusual punishment. Since then, a number of defendants have challenged the three drug succession commonly used in carrying out the execution. To date, no court has found either lethal injection in general or the specific lethal injection protocol to be unconstitutional. See Bieghler v. State, 839 N.E. 691 (Ind. 2005); Abdur'Rahman v. Bredesen, 181 S.W.3d 292 (Tenn. 2005); Aldrich v. Johnson, 388 F.3d 159 (5th Cir. 2004)(lethal injection in Texas); Reid v. Johnson, 333 F.Supp.2d 543 (E.D.Va. 2004); Harris v. Johnson, 376 F.3d 414 (5th Cir. 2004); People v. Snow, 65 P.3d 749, 800-01 (Cal. 2003). Sims v. State, 754 So.2d 657 (Fla. 2000); State v. Webb, 750 A.2d 448 (Conn. 2000); LaGrand v. Stewart, 133 F.3d 1253, 1265 (9th Cir. 1998)

B. Procedural Bars

Defendant's challenge to the lethal injection protocol is procedurally barred. Lethal injection has been the method of execution in Nevada since 1983. Defendant was first sentenced to death in 1996. In challenging the execution protocol, Defendant relies on several documents which appear to support his position that inadequate anesthesia can cause pain and suffering during the execution. Without addressing the relative merits of each exhibit proffered by Defendant, it is clear that each has been known[20] and available for a considerable time prior to the date of this petition. Defendant fails to offer any indication why he has failed to raise this issue in a timely petition.

C. Post Conviction Writ of Habeas Corpus is not the proper vehicle to challenge the execution protocol.

NRS 34.720 provides that the provisions of NRS 34.720 to NRS 34.830 inclusive, apply only to petitions for writs of habeas corpus in which the petitioner:

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[20] Each of the alleged "botched executions" is over 10 years old. Only two of the executions took place in Nevada. In neither case, did the Defendant state that the condemned were in pain. Bridges complained of "the injustice of signing a petition." Defendant fails to explain how the statutory requirement of signing a petition to protect due process rights equates to "cruel and unusual punishment."

1. Request relief from a judgment of conviction or sentence in a criminal case; or

2. Challenges the computation of time he has served pursuant to a judgment of conviction.

There is nothing in the statutory language or the legislative history that permits Defendant to challenge the execution protocol. To succeed in a post-conviction claim, Defendant must prove his claim that the conviction was obtained, or that the sentence was imposed, in violation of the Constitution of the United States or the constitution or laws of this state. NRS 34.724. Defendant was sentenced to death by lethal injection. The specific protocol under which Defendant's execution is to be carried out is within the discretion of the Department of Corrections. NRS 176.355. Even if Defendant was successful in challenging the specific **protocol** used by the Department of Corrections, Defendant's **sentence** would remain unchanged. See also State v. Moore, 272 Neb. 71, 718 N.W.2d 537 (2006).

Two recent United States Supreme Court cases have addressed a similar issue. In Nelson v. Campbell, 541 U.S. 637, 124 S.Ct. 2117 (2004), the Court concluded that the appropriate vehicle for a prisoner to challenge a particular lethal injection procedure was an action under 42 U.S.C. §1983, stating **"a particular means of effectuating a sentence of death does not directly call into question the 'fact' or 'validity' of the sentence itself"** because by altering the procedure, the state could go forward with the execution.

In June 2006, the Court again addressed the proper vehicle for challenging an execution protocol in Hill v. McDonough, ____ U.S. ____, 126 S.Ct. 2096 (2006). The Court observed that, as in Nevada, the implementation of Florida's lethal injection protocol was left to the Department of Corrections. The Hill court also noted that a prior habeas corpus petition filed by the prisoner did not preclude this §1983 action and that the injunction sought by him enjoining the specific procedure would not foreclose the State of Florida from implementing lethal injection by another procedure and, thus, **it could not be said that the prisoner's suit sought to establish "'unlawfulness [that] would render a conviction or sentence invalid.' "** 126 S.Ct. at 2099, *quoting* Heck v. Humphrey, 512 U.S.

477, 114 S.Ct. 2364 (1994).

D. Ripeness

This issue is not ripe. Nevada has a long history of requiring an actual justiciable controversy as a predicate to judicial relief. Doe v. Bryan, 102 Nev. 553, 728 P.2d 443 (1986). It is well-settled in federal and state criminal litigation that a controversy must be ripe for judicial consideration. See Kress v. Corey, 65 Nev. 1, 26, 189 P.2d 352, 364 (1948). The purpose of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Poland v. Stewart, 117 F.3d 1094, 1104 (9th Cir. 1997) quoting, Clinton v. Acequia, Inc. 94 F.3d 568, 572 (9th Cir. 1996).

> An issue is not ripe for review, 'where the existence of the dispute itself hangs on future contingencies that may or may not occur.' Where there is no danger of imminent and certain injury to the party, an issue has not 'matured sufficiently to warrant judicial intervention.' The United States Supreme Court has stated a two prong test for determining the ripeness of a claim: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'

Poland, 117 F.3d at 1104 (internal citations omitted.). Here, as in Poland, Defendant has failed to meet either part of the ripeness test.

The lethal injection protocol is not fit for a judicial decision at this juncture. The Death Penalty in the United States and in Nevada has evolved. Until 1911, executions in Nevada were carried out by hanging the condemned. In 1911, the legislature provided that a death row inmate could choose to die by shooting. On May 14, 1913, a three-gun execution machine was used to put the condemned to death. In 1921, the legislature eliminated hanging and shooting as a method of execution, and provided for execution by lethal gas. The gas chamber was used to carry out executions from 1924 until 1979. In 1983, the Legislature changed the authorized method of execution to lethal injection. *See* 1983 Nev. Stat., ch. 601, § 1, at 1937. In State v. McConnell, 120 Nev. ____, 102 P.3d 606, 616 (2004), the Nevada Supreme Court, concluded that the current method of lethal injection was not cruel and unusual punishment.

In 2006, a death row inmate in California brought an action under 42 U.S.C. §1983 seeking to enjoin the state from executing him by lethal injection alleging that, due to a combination of circumstances, executing him by lethal injection pursuant to the prison's protocol would constitute cruel and unusual punishment. Morales v. Hickman, 438 F.3d 926 (9th Cir., Feb 19, 2006). On February 14, 2006, seven days prior to a scheduled execution, the United States District Court for the Northern District of California conditionally denied a death row inmate's preliminary injunction if the State of California complied with certain criteria in carrying out the execution. Id. However, the District Court required that, for the execution to proceed, the State of California was required to (1) certify, in writing, that they would use only sodium thiopental or another barbiturate or combination of barbiturates in [Morales's] execution; OR (2) agree to independent verification, through direct observation and examination by a qualified individual or individuals, in a manner comparable to that normally used in medical settings where a combination of sedative and paralytic medications is administered, that [Morales] in fact is unconscious before either the pancurium bromide or potassium chloride is injected...the presence of such person shall be continuous until Plaintiff is pronounced dead. Morales v. Hickman, 415 F.Supp.2d 1037, 1047 (N.D. Cal. 2006). The state of California accepted the anesthesiologist option, agreeing to have two anesthesiologists on hand, one inside the execution chamber and one in reserve. Morales, 438 F.3d at 929. In all other respects, the California execution protocol remained unchanged.[21]

Since then, several states have either stayed executions or identified new protocols

[21] The execution did not take place due to an unwillingness of medical personnel to participate. On April 21, 2006, Willie Brown was executed in North Carolina under a revised protocol that uses a bispectral index (BIS) monitor, a device that, according to the State, can monitor Brown's level of consciousness during the execution procedure. [The State] will not administer lethal drugs until *after* total unconsciousness of the plaintiff has been verified through use of the BIS monitor. Thus, [Brown's] concerns about human error are greatly mitigated by the use of this independent check on [his] level of consciousness before the potentially pain-inducing injections ··· begin. Whatever concerns might be raised about this "machine" or about the propriety of using it in executions, it is apparent to this court that the BIS monitor has been used reliably for a decade and is used in many anesthesia procedures across the country to determine an individual's level of consciousness. *See* Brown v. Beck, 445 F.3d 752 (4th Cir. April 20, 2006).

under which the death sentence is to be carried out.[22] Unlike the defendants who sought stays or revised procedures, Defendant is not in imminent danger of execution. Defendant has not yet exhausted his state[23] or federal remedies. (Petition, p. 5). It would be premature for this court to consider Nevada's execution protocol which may be altered by the time Defendant's sentence is carried out. Thus, there is no hardship to Defendant in withholding consideration. *See* Poland, 117 F.3d at 1104. Therefore, any challenge to the method of lethal injection is not ripe for review and must be dismissed.

CONCLUSION

For all the foregoing reasons, Defendant's Petition for Writ of Habeas Corpus (Post-Conviction) should be dismissed.

DATED this 15th day of May, 2007.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY _____
STEVEN S. OWENS
Deputy District Attorney
Nevada Bar #004352

[22] The governor of South Dakota stayed the execution of Elijah Page on the day it was to be carried out because of concerns about the state's lethal injection process. (Sioux Falls Argus Leader, Aug. 29, 2006). Oklahoma now doubles the dose of sodium pentothal initially administered to the inmate. (Associated Press, Aug. 21, 2006).

[23] Clearly, Defendant may appeal this court's order denying relief, then return to federal habeas corpus litigation on this and his other First Degree Murder conviction (District Court #C79346). Moreover, Defendant may also bring an action under 42 U.S.C. §1983. See Hill v. McDonough, 126 S.Ct. 2096 (June 12, 2006).

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing, was made this 1st day of May, 2007, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

David Anthony
Assistant Federal Public Defender
411 E.Bonneville, Suite 250
Las Vegas, Nevada 89101

Eileen Davis

Employee for the District Attorney's Office

DeanMorgan/SSO/ed

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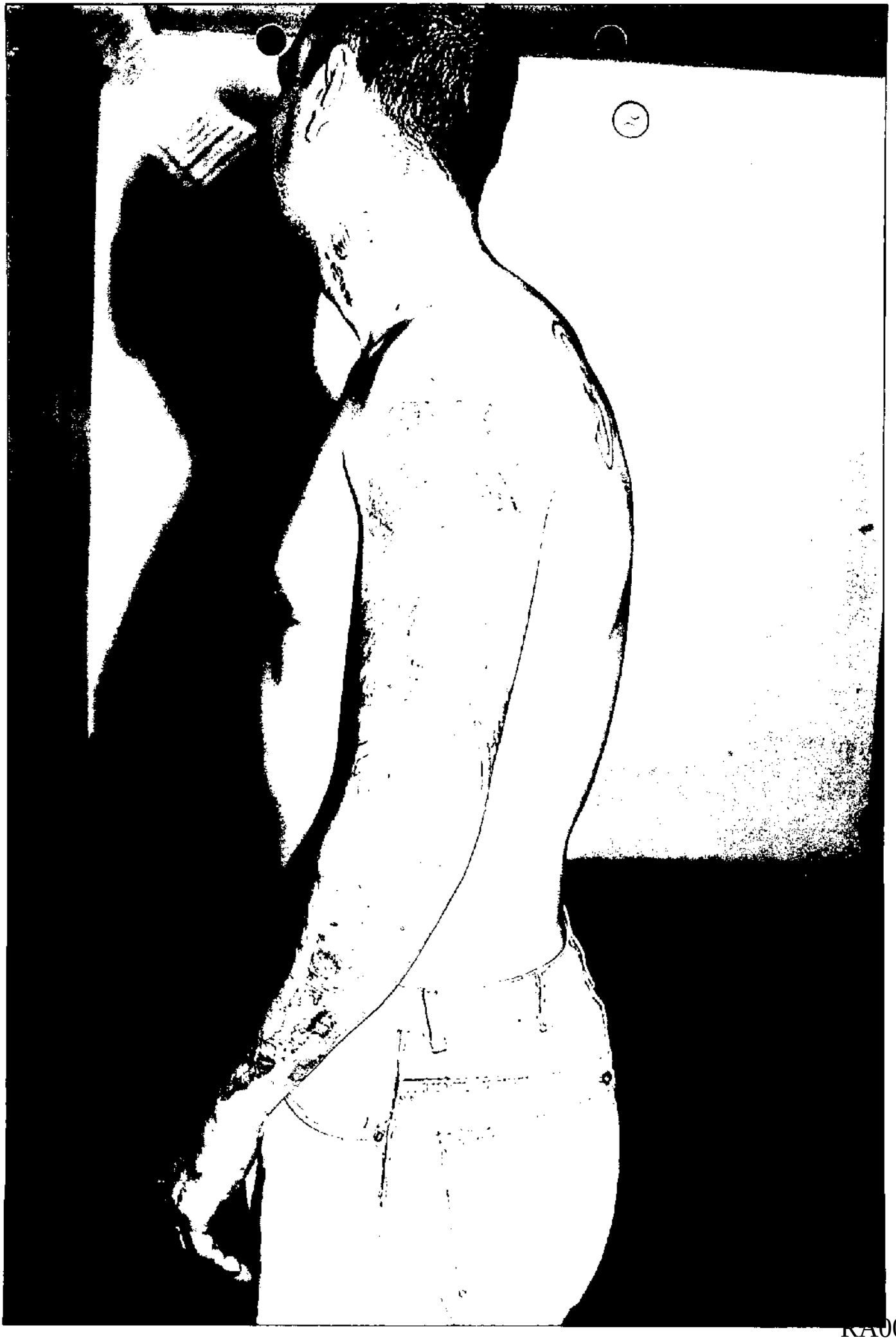
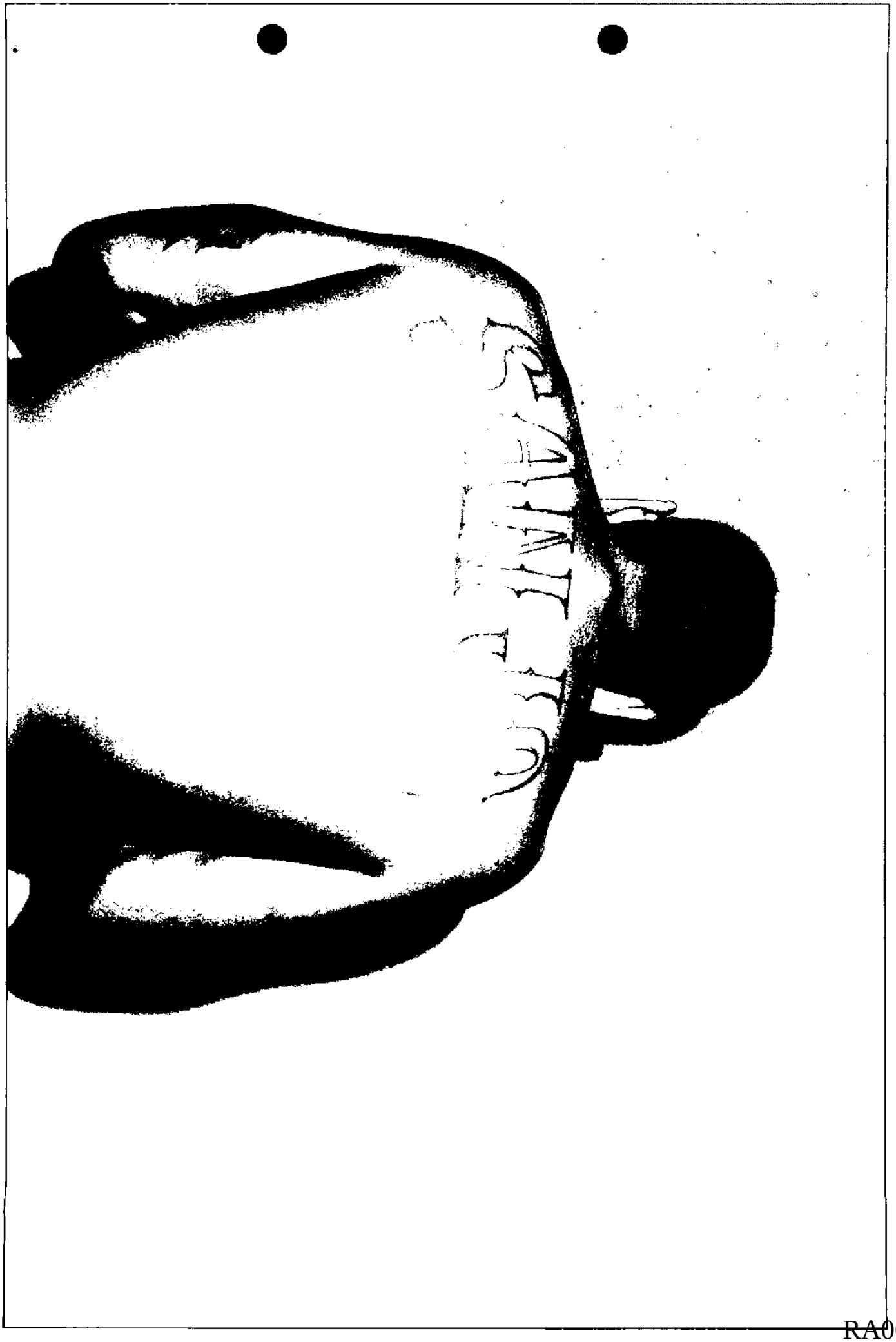
Exhibit 1

Exhibit 1





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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 Date of Hearing: 07/12/07 Time of Hearing: 10:30 a.m. (Death Penalty Habeas Corpus Case)

OPPOSITION TO MOTION TO DISMISS

Petitioner, William Witter, hereby files his Opposition to the State's Motion to Dismiss his Petition for Writ of Habeas Corpus. This Opposition is based upon the attached memorandum of points and authorities and exhibits and the entire file in this matter.

Respectfully submitted this 28th day of June, 2007.

FRANNY A. FORSMAN
Federal Public Defender

Gerald Bierbaum
Assistant Federal Public Defender

Gary Taylor
Assistant Federal Public Defender

Attorneys for Petitioner

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION.

Petitioner, William Witter, was convicted of capital murder. At the punishment phase, the State improperly presented false testimony of gang affiliation. Mr. Witter's trial counsel ineffectively failed to thoroughly investigate his background and to investigate, develop, and present expert testimony regarding Fetal Alcohol Effect. Mr. Witter was sentenced to death. Mr. Witter has challenged his conviction and sentence on these and other issues through a Petition for Writ of Habeas Corpus which is presently before the Court. The State moved to dismiss all of Mr. Witter's claims, except those regarding the duplication of convicting and eligibility factors as described in McConnell v. State 102 P.3d 606 (Nev. 2004). Mr. Witter submits this Opposition to the State's Motion to Dismiss.

II.

STANDARD OF REVIEW

MOTION TO DISMISS

The State failed to address the applicable standards of review in its motion to dismiss. This Court is required to liberally construe Mr. Witter's petition and accept his factual allegations as true. Vacation Village, Inc. v. Hitachi America, Ltd., 110 Nev. 481, 484, 874 P.2d 744, 746 (1994); Doleman v. Meiji Mutual Life Ins. Co., 727 F.2d 1480, 1482 (9th Cir. 1984) ("[f]or purposes of the motion, the allegations of the non-moving party must be accepted as true while the allegations of the moving party which have been denied are assumed to be false."). The Court may dismiss only if "it appears beyond a doubt that the [petitioner] could prove no set of facts which, if accepted by the trier of fact, would entitle him [or her] to relief," Vacation Village, 110 Nev. at 484, 872 P.2d at 746 (citations omitted). Therefore, the Court must accept the allegations within Mr. Witter's petition to be true and is precluded from granting the State's motion to dismiss

because the State has not affirmatively demonstrated that Mr. Witter is not entitled to relief under any factual circumstances.

EVIDENTIARY HEARING.

The Court must grant an evidentiary hearing whenever "... the petitioner asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief." Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002). The Nevada Supreme Court has held that a habeas petitioner need only plead "something more than a naked allegation" in order to be entitled to an evidentiary hearing. Id. at 1230; see Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 226 (1984). A claim is "belied by the record" only if it is affirmatively shown to be false and may never involve a factual dispute. See Mann, 46 P.3d at 1230. Whenever resolution of the State's claim of procedural default requires a factual inquiry, the petitioner is entitled to an adequate hearing under federal due process principles. See Crump v. Warden, 113 Nev. 293, 305, 934 P.2d 247, 254 (1997).[1] Therefore, because Mr. Witter has alleged specific factual issues which the State failed to demonstrate were entirely false, Mr. Witter is entitled to an evidentiary hearing.

---

[1] At a minimum, petitioner is entitled to an evidentiary hearing, consistent with due process, to present evidence of his post-conviction counsel's failure to provide effective assistance at this critical stage of the proceedings. Mr. Witter holds a constitutional right to due process in this habeas proceedings, see, e.g. Mata v. Johnson, 210 F.3d 324, 332 (5th Cir. 2000) (district court violated due process by failing to conduct adequate evaluation of petitioner's competence); Miller v. Dugger, 820 F.2d 1135, 1137 (11th Cir. 1987) (due process required district court to review grand jury testimony for materiality before dismissing petition); Chaney v. Lewis, 801 F.2d 1191, 1195 (9th Cir. 1986) (petitioner entitled to due process in habeas corpus proceedings). An adequate hearing is necessary to allow Mr. Witter to establish cause to overcome any default alleged by the state, or to demonstrate such rules are inapplicable. Crump v. Warden, 113 Nev. at 305 (remanding for evidentiary hearing on issue of cause arising from post-conviction counsel's alleged ineffectiveness); see also Jenkins v. Anderson, 447 U.S. 231, 234-235 n.1 (1980); Buffalo v. Sunn, 854 F.2d 1158, 1165-1166 (9th Cir. 1988).

III.

McCONNELL ERROR

A. A JURY, AND NOT THE TRIAL COURT, SHOULD RE-WEIGH THE AGGRAVATING EVIDENCE IN THIS CASE

The State has determined, and informed the Court, that Mr. Witter "is entitled to have his death sentence re-weighed." Motion to Dismiss, p. 9. The State agreed that McConnell v. State 102 P.3d 606 (Nev. 2004), retroactively applied to Mr. Witter's petition. Finally, the State agreed that, by application of McConnell, "two of the three remaining aggravators in [Mr. Witter's] case are invalid. . . ." Motion to Dismiss, p. 10.

Mr. Witter submits his case must be distinguished from those past cases in which the Court re-weighed aggravating factors. The jurors in the instant case were never asked to "find" what mitigating evidence they determined to be raised by the evidence. The jury verdict in Mr. Witter's case did not allow the jury to designate any mitigators. See Lane v. State, 114 Nev. 299, 305, 956 P.2d 88, 92 (1998); see also McKenna v. McDaniel, 65 F.3d 1483, 1490 (9th Cir. 1995), (the jury's verdict jury stated only that "there were no mitigating circumstances sufficient to outweigh the aggravating factors." The circuit court has held such a verdict was "insufficient to conclude that the jury found no mitigating circumstances.").

The jurors were instructed:

> 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 that there are no mitigating circumstances sufficient to outweigh the aggravating circumstances or circumstance found. . . . the law never specifies that a sentence of death is appropriate; the jury may consider the option of sentencing the defendant to death where the State has established beyond a reasonable doubt that an aggravating circumstance exists and the mitigating circumstances is not sufficient to outweigh the aggravating circumstances."

Opp. Ex. 8.1, penalty jury instruction #8 at DS-5295/ROA 2213.

Although the State has conceded error McConnell in Mr. Witter's case, it argued the Court must reweigh the only remaining aggravating circumstance in this case against the mitigating evidence presented. Motion to Dismiss, p. 13. This Court cannot rationally substitute its judgment, some twelve years after trial, for that of the jurors who heard live testimony. Mr. Witter's jury was instructed on four possible statutory mitigators and were specifically allowed to consider "any other mitigating evidence." Opp Ex. 8.1, penalty jury instruction #11 at DS-5299/ROA 2217. At this juncture, it is impossible to establish which mitigators the jury found and such is a prerequisite to the fair re-weighing the aggravators in Mr. Witter's case.

The "reweighing process" (harmless error analysis), in the instant case, would unlawfully transform the Court into a jury. It is not possible for the Court, in re-weighing of the single aggravator, involving a prior "violent" conviction, against unspecified mitigating evidence, to understand what evidence Mr. Witter's jury found to be mitigating, or what weight was granted such evidence.[2] The Court cannot re-weigh the aggravating and mitigating evidence in Mr. Witter's case without making a factual determination of what evidence is mitigating-- as the Court initially instructed the jury. With no record of the jurors' determination of mitigating evidence, and with the quantity of available mitigating evidence, due process and fundamental fairness demand that the Court convene a jury to determine the mitigating evidence and whether such evidence outweighs the aggravating factors. Only after another jury makes the determination about which mitigators exist and what weight they carry, can the selection process for the death

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[2] The State argues the Court should not consider any extra-record mitigating evidence in the McConnell prejudice analysis because such a review would include evidence which was not tested by the adversarial process. Motion to Dismiss, page 29. The State's argument further supports Mr. Witter's contention that it is improper, in this case, for the Court to determine and weigh evidence in this case without the benefit of the jury's findings. In either situation the Court is asked to determine the existence and weight of mitigating evidence in the absence of the jury's thought process regarding that evidence.

penalty comport with due process, the right to a fair trial, and fundamental fairness.[3]

B. MR. WITTER IS ENTITLED TO HAVE ALL AVAILABLE MITIGATING EVIDENCE CONSIDERED WHEN THE EVIDENCE IS RE-WEIGHED IN HIS CASE.

The State contends that when Mr. Witter's mitigating and aggravating factors are re-weighed, the fact-finder at his new penalty hearing will be foreclosed from considering any mitigating evidence that was not presented in Mr. Witter's original trial. Motion to Dismiss, p. 13. The State cites Canape v. State 109 Nev. 864, 859 P.2d 1059 (1993), for the proposition that re-weighing can not involve evidence outside the record. The State's reliance on Canape is misplaced, as it is distinguishable from the instant case.

In Canape, the Supreme Court specifically held that no mitigating evidence was offered at trial. Therefore, in that case, the Court balanced the defendant's one aggravator against no evidence. Id. at 881 ("We have thoroughly searched the record and find no evidence of mitigating circumstances, even in the case presented by the prosecution. The absence of specific mitigating evidence presented a daunting challenge to Canape's counsel who sought to fill the vacuum by arguing . . . ."). The Supreme Court held that reasonable basis was offered for a juror to find any single mitigating factor.

In Mr. Witter's trial, the jury considered mitigating testimony in some quantity from his father, his aunt, and his sisters. See testimony of Lewis Witter, ROA at 1941-1971; Lani Sanders, ROA at 1986-2012; Ruth Fabela, ROA at 1892-1905; Tina Whitesell, ROA at 1906-1940. Because the instant case involved substantial mitigating evidence, Canape does not inform the Court as to the manner and process for re-weighing aggravating and mitigating evidence.

If the fact-finder undertakes the task of re-weighing Mr. Witter's single remaining aggravator against the available mitigating evidence, due process and

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[3] See Petition, pages 41 -45 for a summary of trial counsel's punishment evidence.

fundamental fairness demands the consideration of all available mitigating evidence–whether from the trial or habeas records. In State v. Haberstroh, 119 Nev. 173,184, 69 P.3d 676, 684 (2003), the Supreme Court confronted a situation similar to the instant case. The Supreme Court considered all the mitigating evidence before it–evidence not only from the trial record but also evidence developed in the habeas proceedings. Indeed, the Supreme Court ultimately held that the mitigating evidence outweighed the defendant's four remaining aggravators and ordered a new sentencing phase. Id. at 184. Similarly in State v. Bennett 119 Nev. 589, 81 P.3d 1 Nev., 2003, the Supreme Court considered prejudice which resulted from McConnell along with the prejudice which resulted from Brady error, and ordered a new sentencing hearing. Id. at 598 ("... [W]e conclude that the finding of the improper aggravator in this case, combined with the prejudicial impact of the Brady violations identified below, so undermined the reliability of the jury's sentencing determination. . . .). The Supreme Court, in Haberstroh and Bennett, established a practice which requires the fact-finder to consider all of the mitigating evidence it has been presented with–evidence presented at trial as well as evidence later raised in Mr. Witter's habeas proceedings– in determining harm under McConnell.

The United States Supreme Court dictated a similar practice with regard to claims of a miscarriage of justice.[4] In House v. Bell 126 S.Ct. 2064 (2006), the Supreme Court provided guidance on the review of a claim of miscarriage of justice:

> ... the habeas court must consider 'all the evidence,' old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under 'rules of admissibility that would govern at trial.' See id., at 327-328, 115 S.Ct. 851 (quoting Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L.Rev. 142, 160 (1970)). Based on this total record, the court must make 'a probabilistic determination about what reasonable, properly instructed jurors would do.' [citing Schlup v. Delo]

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[4] The Nevada Supreme Court held the reliance of the jury on an invalid aggravator, resulting in a death sentence, was a miscarriage of justice. See Leslie v. Warden, 118 Nev. 773, 780, 59 P.3d 440, Nev., 2002.

513 U.S., at 329, 115 S.Ct. 851.

Id. at 2077. Therefore, when faced with a possible miscarriage of justice, the fact-finder must consider all of the evidence available, not merely what was before the jury. Because the jury's consideration of an invalid aggravator results in a miscarriage of justice, see Leslie v. Warden, 118 Nev. 773, 780, 59 P.3d 440, Nev., 2002, any re-weighing of the aggravating and mitigating evidence in Mr. Witter's case must include all of the mitigation evidence before the Court.

IV.

CUMULATIVE ERROR

THE COURT MUST CONSIDER ALL PENALTY PHASE ERROR

In addition to the consideration of all the mitigating evidence before it, the Court must also consider the weight of any punishment error in its harm analysis. Under the cumulative error doctrine, the cumulative effect of several trial errors may prejudice a defendant to such an extent that his conviction must be overturned. See United States v. Frederick, 78 F.3d 1370, 1381 (9th Cir.1996); see also Hays v. Farwell ___ F.Supp.2d ___, 2007 WL 923946 D.Nev., (March 22, 2007)(Order from Judge Hunt). Therefore, the cumulative effect of multiple errors at trial may support a reversal of the defendant's conviction or sentence, even when the prejudice from each individual errors does not rise to that level.

The State presented false testimony from the San Jose police officers in Mr. Witter's trial. Prosecutors produced officers from the San Jose Police Department, as alleged gang experts, whom falsely testified that Mr. Witter was a gang member. The State further argued that Mr. Witter was a gang member based on his incarceration in California. The State suppressed records which would have impeached their witnesses and evidence. The prosecutors emphasized the alleged gang affiliation in their argument. Therefore, Mr. Witter's jury relied on this false testimony and argument as they weighed the aggravating and mitigating evidence in his case.

In his Petition for Writ of Habeas Corpus, Mr. Witter has demonstrated Brady violations and the ineffective assistance of his trial counsel in the penalty phase of his trial. See Petition, Claim One, p. 18. Undersigned counsel, during the preparation of Mr. Witter's federal Petition for Writ of Habeas Corpus, discovered that the records from the San Jose Police Department and records from the California Department of Corrections failed to include any reference to Mr. Witter's membership in a gang. Even if the Court determines Mr. Witter's Brady and McConnell errors independently are not prejudicial, Mr. Witter contends their cumulative impact surely fatally diminishes any reliability in the sentence determined.

Mr. Witter further alleged that his trial counsel was ineffective for failing to adequately investigate, prepare and present testimony in the penalty phase of his trial. See Petition, Claim Two, p. 40. Trial counsel failed to present substantial evidence that Mr. Witter suffered from Fetal Alcohol Effect even though trial counsel sought and obtained two continuances in order to locate an expert on Fetal Alcohol Syndromes.[5] Fetal Alcohol Effect was relevant to Mr. Witter's actions in this case and, beginning with his childhood, prevented him from having the neurological capacity to conform his conduct. Trial counsel failed to adequately interview witnesses from Mr. Witter's family whom later testified. While such witnesses described some of the dysfunction in Mr. Witter's childhood, each witness would have further described many behaviors which are classic symptoms of Fetal Alcohol Effect and each witness would have denied that Mr. Witter belonged to a gang.

Trial counsel failed to present witnesses regarding Mr. Witter's prior felony conviction even though those witnesses, Gina Reyes and Mary Byrd, offered to pay their own expenses to appear. Pet. Ex. 2.13. Ms. Reyes and Ms. Byrd would have described

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[5] Mr. Witter was diagnosed by a medical doctor with Fetal Alcohol Effect during post-conviction proceedings. Mr. Witter's habeas petition included a lengthy declaration from a FAS /FAE expert explaining the condition and the effect of the disorder on Mr. Witter's behavior and development. See Petition, Claim Two, p. 48.

the level of intoxication Mr. Witter displayed during the previous offense and his unawareness of the offense afterwards. See Petition, pp. 109-112. They would have described behaviors which evidenced Mr. Witter's Fetal Alcohol Effect, including his loss of impulse control and uncheckable aggression. Once again, even if the Court determined the prejudice Mr. Witter suffered as a result of counsels' errors at trial was insufficient alone to support the reversal of this case, this error must be considered in combination with the error resulting from McConnell and Brady claims. Such cumulative error fatally diminished any reliability in the sentence determined.

V.

PROCEDURAL BARS

A. THE COURT CANNOT APPLY THE ALLEGED BARS UNDER NEV. REV. STAT. §§ 34.726, 34.810, or 34.800 WITHOUT VIOLATING PETITIONER'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION UNDER THE STATE AND FEDERAL CONSTITUTIONS.

The State seeks to bar consideration of Mr. Witter's constitutional claims by invoking an alleged default under Nev. Rev. Stat. §§ 34.726, 34.800, and 34.810, and common law laches. However, the statutory provisions upon which the State relied are not consistently applied and do not provide adequate notice of when they will be applied or excused. The arbitrary application of these statutes to similarly situated habeas petitioners, without adequate notice, violates due process, equal protection, and fundamental fairness.

The Nevada Supreme Court asserts it applies Nevada procedural default rules consistently in all capital habeas cases. Despite the devotion of significant effort to the analysis, however, e.g., State v. District Court (Riker), 121 Nev. 225, 112 P.3d 1070 (2005); Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001), the Supreme Court has never reconciled its assertion that application of the statutory default rules is mandatory with its selective and discretionary exercise of its power to review claims in habeas appeals without reference to any default rules. E.g., Rippo v. State, 122 Nev. ___, 146

P.3d 279, 285 (2006); Hill v. State, 114, Nev. 169, 178-179, 953 P.2d 1077 (1998)(reviewing claim raised for first time on appeal from second state habeas); Bejarano v. State, 106 Nev. 840, 843, 801, P.2d 1388 (1990)(addressing ineffective assistance issue *sua sponte* on habeas appeal); Hardison v. State, No. 24195, Order of Remand (May 24, 1994)(addressing claims on merits and granting relief despite timeliness and successive petition bars raised by state)[6] Pet. Ex. 1.14; see also, 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 added); 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); 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) Pet. Ex. 1.9; Farmer v. State, No. 22562, Order Dismissing Appeal (February 20, 1992) (denying claim of improper admission of victim impact evidence on merits despite default), Pet. 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 810), Pet. Ex. 1.12; Hill v. State No. 18253, Order Dismissing Appeal (June 29, 1987) (dismissing untimely appeal from denial of second post-conviction relief petition but *sua*

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[6] The unpublished dispositions are not cited as precedent, see Nev. Sup. Ct, Rule 123, but to demonstrate factually the Supreme Court's inconsistent application of the default rules. See Riker, 112 P.2d at 1076 n.25; Powell v. Lambert, 357 F.3d 871, 879 (9th Cir. 2004).

sponte directing trial court to entertain merits of new petition), Pet. Ex. 1.15; Jones v. Warden, No. 39091, Order of Affirmance (December 19, 2002) (rejecting petitioner's three-judge panel claims on merits despite direct appeal and subsequent petition bar), Pet. Ex. 1.17; 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), Pet. 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"), Pet. 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), Pet. Ex. 1.26; Nevius v. Warden (Nevius II), No. 29027, Order Dismissing Appeal (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 . . . ."), Pet. Ex. 1.27; Nevius v. Warden (Nevius III), Order Denying Rehearing (July 17, 1998) (same), Pet. Ex. 1.28; 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), Pet. 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), Pet. Ex. 1.43; Ybarra v. Director, No. 19705, Order Dismissing Appeal (June 29, 1989) (addressing previously-raised claim without reference to default rules), Pet. Ex. 1.46.

The Nevada Supreme Court does not consistently apply timeliness rules (the one-year rule of Nev. Rev. Stat. § 34.726 and the five year rule of Nev. Rev. Stat. §

34.800(2) (laches)) to bar its review of constitutional claims in successive capital habeas petitions, despite its contention, in State v. District Court (Riker), 121 Nev. 225, 112 P.3d 1070, 1077 (2005), that timeliness bars must be applied regardless of any showing of cause to excuse the successive petition bar of § 34.810. See, e.g., Hill v. State, 114 Nev. 169, 953 P.2d 1077 (1998) (addressing claims on merits raised for first the on habeas appeal to Nevada Supreme Court; case final on direct appeal in 1986 and successive petition claims filed September 19, 1996); Bennett v. State, 111 Nev. 1099, 901 P.2d 676 (1995)(case final on direct appeal in 1990; amended petition filed December 30, 1993); 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); Farmer v. State, No. 29120, Order Dismissing Appeal (November 20, 1997) (case final on direct appeal in 1986; successive petition filed August 28, 1995), Pet. Ex. 1.11; 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), 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); Nevius v. Warden, No. 29027, Order Dismissing Appeal (October 9, 1996) (case final on direct appeal in 1985; successive petition filed August 23, 1996), Pet. Ex. 1.27; Nevius v. Warden, Order Denying Rehearing (July 17, 1998) (successive petition filed February 7, 1997), Pet. Ex. 1.28; Riley v. State, No. 33750, Order Dismissing Appeal (November 19, 1999) (case final on direct appeal in 1991; successive petition filed August 26, 1998), Pet Ex. 1.36; Sechrest v. State, No. 29170, Order Dismissing Appeal (November 20, 1997) (case final on direct appeal in 1985; successive petition filed July 27, 1996), Pet. Ex. 1.39; see also, Koerner v. Grigas, No. 24963, Order Dismissing

Appeal (Nov. 24, 1993) (non-capital successive petition filed January 4, 1993, petition filed seven years after judgment of conviction [no direct appeal], Koerner v. Grigas, 328 F.3d 1039, 1043-44 (9th Cir. 2003)); Jones v. Warden, No. 39091, Order of Affirmance (December 19, 2002) (addressing all three-judge panel claims on merits; case final on direct appeal in 1991; successive petition filed May 1, 2000), Pet. Ex. 1.17.

The Nevada Supreme Court also expanded the definition of "cause" to excuse procedural defaults in ways that are inconsistent with its general formulation of cause as an "impediment external to the defense," e.g., Pellegrini v. State, 117 Nev. 860, 886, 34 P.3d 519 (2001), to include ineffective assistance of counsel in post-conviction proceedings, when appointment of counsel is mandatory, as cause to excuse the successive petition bar, Crump v. Warden, 113 Nev. 293, 302-202, 934 P.2d 247 (1997); and it has further broadened that definition to include situations in which appointment of counsel is not mandatory. Riker, 112 P.3d at 1080 (failure to appoint counsel may overcome timeliness and successive petition bar even when appointment of counsel not mandatory, discussing Stevens). Similarly, the Court has held that a miscarriage of justice, sufficient to overcome any procedural default, exists if a petitioner is "actually innocent" of the death penalty, due to the prejudicial finding of an invalid aggravating factor. Leslie v. Warden, 118 Nev. 778, 780, 59 P.3d 440 (2002); State v. Bennett 119 Nev. 589, 81 P.3d 1 Nev., 2003. These cases demonstrate the definition of cause, just as the application of the default rules in general, lies completely within the discretion of the Supreme Court, and that litigants have no adequate notice of what definition will be applied in any particular case.

The State itself admitted that the Nevada Supreme Court disregarded procedural default rules on grounds which 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)), Pet. 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"), Pet. Ex. 1.29. Similarly in Rippo v. State 146 P.3d 279 Nev.,2006, while the State asserts the Nevada Supreme Court found cause to hear the McConnell claim on appeal from the determination of McConnell's claim after district court adjudication of the petition, the Nevada Supreme Court further relied upon the declaration that "the *McConnell* issue presents questions of law that do not require factual determinations outside the record. The State conceded that no purpose would be served by requiring Rippo to file a successive petition invoking *McConnell* in order to decide his claim." Id. at p. 283; see also Motion to Dismiss, p. 23. A State concession and a lack of factual implications are not mentioned in the statues describing procedural bar. In Rippo the Nevada Supreme Court again graciously waived procedural bars.

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. As Justice Kennedy wrote in Lonchar v. Thomas, 517 U.S. 314, 323 (1996), "'[t]here 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." Such a practice cannot be constitutionally applied to bar consideration of Mr. Witter's claims. Precluding review of Mr. Witter's constitutional claims on the basis of such default rules would violate the due process right to adequate notice and the equal protection right to consistent

treatment of similarly-situated litigants. E.g., Bush v. Gore, 531 U.S. 98, 106-109 (2000) (per curiam); Village of Willowbrook v. Olech, 528 U.S. 562, 564-565 (2000) (per curiam); Myers v. Ylst, 897 F.2d 417, 421 (9th Cir. 1990) (equal protection requires consistent application of state law to similarly-situated litigants).

Whatever the Nevada Supreme Court has written with respect to its application of default rules, this Court is bound under the Supremacy Clause, U.S. Const. Art. VI, to enforce the relevant federal constitutional guarantees, including Mr. Witter's right to due process and equal protection in the application of state procedural rules to his case "any thing in the Constitution or Laws of any State to the Contrary notwithstanding." Accordingly, the Court must consider Mr. Witter's federal constitutional objection to the application of the default rules invoked by the state, and it must reject those rules as a basis for refusing to review the merits of his substantive constitutional claims.

B. MR. WITTER CAN DEFEAT THE PRESUMPTION OF PREJUDICE UNDER NEV. REV. STAT. § 34.800

The State argues that the rebutable presumption of prejudice of Nev. Rev. Stat. § 34.800(2) bars consideration of Mr. Witter's habeas petition because seventeen years have passed his direct appeal and the instant habeas petition. The State claims "if the court were to require an evidentiary hearing on long delayed petitions such as in this case, the State would have to call and find long lost witnesses whose once vivid recollections have faded and regather evidence that, in many cases, has been lost or destroyed because of the lengthy passage of time." Motion to Dismiss at 19 - 20. The State provides no evidence it has attempted to locate witnesses in this case or that any evidence was lost.

The presumption of prejudice is excused if Mr. Witter demonstrates a miscarriage of justice. See Mitchell v. State 149 P.3d 33, 37 Nev.,2006. Mr. Witter, through the McConnell error, and the voluminous evidence of ineffective assistance of counsel at punishment has proved that he is ineligible for death and consequently the death sentence is a miscarriage of justice. See Leslie v. Warden 118 Nev. 773, 59 P.3d

440 (2002) (if the jury relied on an invalid aggravator or skewed weighing of mitigation against aggravators and a death sentenced resulted, a miscarriage of justice exists). The doctrine of laches is overcome.

The presumption of prejudice is further rebutted. The instant offense occurred November 14, 1993. Trial occurred in June and July, 1995. The State's punishment case was presented through police officers, a parole agent, a jail officer, two victims of prior offenses, and three of the victim's family members. Each of the police officers and the parole agent testified exclusively from reports of interactions with Mr. Witter. See Officer Ronald A. Ezell, Vol IX p.65, ROA 1634; Officer Polmeroy, Vol IX p. 89, ROA 1658; Parole Agent Linda Rose, Vol IX p. 95 - 96, ROA 1664 - 1665 / 109 - 1678; Officer James Ford, Vol IX p. 121, ROA 1690; Officer Timothy Jackson Vol. IX p. 166, ROA 1735. These witnesses had little or no independent memory of the events which they testified to and were not hindered in their testimony. The remaining state's witnesses were either victims of prior offenses or related to the deceased victim. The victim witnesses clearly remember the trauma of the offense in their lives. The State would suffer no prejudice in a new punishment trial as a result of the time elapsed.

The remaining time bars in NRS 34.800(1) are further excepted from application to Mr. Witter's petition. Such time bars do not apply if the petition is based upon grounds about which Mr. Witter, through the exercise of reasonable diligence, could not have had knowledge before the circumstances prejudicial to the state occurred, or if Mr. Witter demonstrated that a fundamental miscarriage of justice occurred in his proceedings. NRS §34.800(1) (a, b). Mr. Witter's petition is based upon a Brady claim in which the State suppressed records which demonstrated evidence he was not a gang member, even while the State presented testimony suggesting that Mr. Witter was a gang member. Because the state suppressed these records, they were not available through Mr. Witter's reasonable diligence. Moreover, Mr. Witter produced evidence that two of the three aggravators in his case were invalid. The State conceded these facts and a

miscarriage of justice resulted. The petition is based on and includes grounds which Mr. Witter did not know of prior to any alleged prejudice attaching to the State. This petition should not be time barred by NRS §34.800(1).

C. MR. WITTER IS NOT BARRED UNDER THE DOCTRINE OF LAW OF THE CASE

The State argued that many issues in Mr. Witter's habeas petition should be barred under the law of the case doctrine. See Motion to Dismiss, pp. 25-36. The law of the case doctrine holds that a prior decision of legal issues should be followed in a later appeal unless: the evidence on a subsequent trial is substantially different; controlling authority has since made a contrary decision of the law applicable to such issues; or. the decision is clearly erroneous and would work a manifest injustice. Kimball v. Callahan, 590 F.2d 768, 771 (9th Cir.), *cert. denied*, 444 U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1979); League of Women Voters of California v. F.C.C., 798 F.2d 1255, 1256 (9th Cir.1986); United States v. Houser, 804 F.2d 565, 568 (9th Cir.1986); Handi Investment Co. v. Mobil Oil Corp., 653 F.2d 391, 392 (9th Cir.1981). The issues in Mr. Witter's habeas petition contain substantially different evidence than similar issues presented in his initial habeas proceedings.

The State argued that Mr. Witter's second claim, regarding ineffective assistance in developing evidence of Fetal Alcohol Syndrome/Effect, should be barred. See State's Motion to Dismiss, pp. 26-27. Mr. Witter's previous state writ counsel alleged that trial counsel was ineffective for not retaining a fetal alcohol expert even though trial counsel repeatedly discussed the need for such an expert with the trial judge. See Pet. Ex. 4.1, State Petition, 08/11/98, pp. 18-20, 22; see also Pet. Ex. 4.2, State writ evidentiary hearing, 02/26/99, testimony of Philip Kohn, p. 5-20, 36-40. State writ counsel still did not locate and present evidence from a fetal alcohol expert to demonstrate such testimony would have undermined the validity of Mr. Witter's sentence. The instant habeas petition provided that crucial evidence which the previous state writ counsel failed to develop. See Declaration of Dr. Natalie Novick Brown, Pet. Ex. 2.27.

The instant petition, through the expert opinion of Dr. Brown, explained that Mr. Witter suffered from Fetal Alcohol Effect and demonstrated how that syndrome neurologically incapacitated Mr. Witter from his birth. See Petition, pp. 51-71. As a result of the ineffective assistance of Mr. Witter's prior state writ counsel, by failing to develop and produce evidence of fetal alcohol effect in the initial state habeas petition, the factual allegations and evidence in the instant habeas petition was substantially different. This claim is not barred by law of the case doctrine.

Similarly, the State argued that Mr. Witter's claim of ineffective assistance of trial counsel for the failure of counsel to present a gang expert should be barred by law of the case. Motion to Dismiss, pp. 27, 31-32. Mr. Witter raised a claim in the instant habeas petition concerning trial counsels' failure to explore the California Youth Authority and counsels' failure to explain why an incarcerated child might join a gang. Mr. Witter further raised a claim which contended he was not in a gang at the time of the offense. Mr. Witter did not contend, in the instant habeas petition, that trial counsel was ineffective for not calling a gang expert. Claims involving the failure to investigate Mr. Witter's records at the California Youth Authority and explain the conditions at California Youth Authority are substantially different than the claim in the initial state habeas petition involving the failure to call a gang expert. Mr. Witter's claims are not barred by law of the case.

The State offered a "Conclusion of Law" from the initial habeas proceedings and suggested that law of the case doctrine mandated that no error of any magnitude could ever rise to the level of prejudice necessary for a reversal because of the facts of this case. Conclusion of Law #20, Motion to Dismiss, p. 27. Such a conclusion would eliminate the great writ all together. A blanket conclusion about any possible prejudice cannot make disparate issues in this petition and the first petition similar enough for law of the case to apply. A conclusion about prejudice, no matter how extravagant, does not make underlying issues similar.

The State presented "Conclusion of Law #21,"alleging that appellate counsel was not ineffective in failing to raise a Batson claim. The state argued this conclusion damned Mr. Witter's claim that the State violated Batson v. Kentucky 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), by knowingly removing venire members on the basis of their race. Mr. Witter's claim is substantially different than the issue addressed by this Conclusion of Law. Mr. Witter argued, through an analysis of the prosecutor's notes, that the prosecutor lied regarding the a race-neutral reason for his peremptory challenge and therefore, having offered no valid race neutral reason for the challenge. In this analysis, Mr. Witter's *prima facie* showing of the discriminatory use of peremptory challenges based on race remained un-rebutted. Mr. Witter's claim insisted and demonstrated the Constitution and Batson were violated in his trial– which is a substantially different claim than the claim in the intial state habeas petition of appellate ineffective assistance. The doctrine of law of the case does not bar Mr. Witter's current claim.

D. INITIAL POST-CONVICTION ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE VOIDING PROCEDURAL BARS FOR THIS PETITION

Mr. Witter contends his first state post-conviction attorney rendered ineffective assistance of counsel and that such error excused Mr. Witter from the default rules invoked by the State. Good cause to exclude the petition from the time bars and successive petition bars exists if first state writ counsel was ineffective and the writ was filed after January 1, 1993. Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997).[7] Mr.

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[7] Mr. Witter would be unduly prejudiced by the dismissal of his habeas petition because he is innocent of the elements that make him eligible for death. Leslie v. Warden, 118 Nev. 773, 780, 59 P.3d 440 (2002) (fundamental miscarriage of justice meets the exception to procedural default). Mr. Witter alleged, and the State agreed, that this case contains McConnell error. The miscarriage of justice exception to the procedural default rules created by the McConnell error applies to the entire petition. NRS §34.800 provides the petition may be dismissed unless "the petition is based upon grounds of which he could not have had knowledge" or "the petitioner demonstrates that a fundamental miscarriage of justice has occurred in the proceedings resulting in the judgment of conviction or sentence." Both exceptions apply to the petition *in toto* not to individual claims. Mr. Witter has proven, or will prove, the miscarriage of justice exception in the McConnell error. Moreover, Mr. Witter's petition demonstrated Brady error based on the state

Witter's first state post-conviction counsel filed his supplement to the *pro se* petition on August 11, 1998.

Mr. Witter's first post-conviction counsel rendered ineffective assistance, requiring this Court to review the present claims. The main purpose of collateral litigation is to establish facts outside the record that would have a reasonable possibility or probability of changing the result. Bennett v. State, 111 Nev. 1099, 1108, 901 P.2d 676 (1995); Wilson v. State, 105 Nev. 110, 114-115, 771 P.2d 583 (1989); In re Marquez, 1 Cal. 4th 584, 822 P.2d 435, 446 (1992) ("To determine whether prejudice has been established, we compare the actual trial with the hypothetical trial that would have taken place had counsel competently investigated and presented the . . . defense."); see generally Strickland v. Washington, 466 U.S. 668, 693-694 (1984). State writ counsel prepared and delivered a petition with three main issues which included supporting points. State writ counsel pled that trial counsel was ineffective at guilt because he did not present an FAS expert in the guilt/innocence trial and that trial counsel conceded guilt in his opening statement. See Petition, pp. 19, 22. State writ counsel pled ineffective assistance at punishment contending: trial counsel failed to present a gang expert; that trial counsel did not present a FAS expert in the punishment trial; that trial counsel did not object to improper opening statement at punishment; that trial counsel did not object to improper victim impact testimony; and, that trial counsel failed to offer a specific jury instruction. See Petition, pp. 20, 22, 24, 26, 28. State writ counsel also pled numerous instances of appellate ineffective assistance of counsel. See Petition at 30-37.

State writ counsel knew that trial counsel requested multiple continuances to secure a FAS/FAE expert. Mr. Witter filed a *pro se* motion requesting trial counsel be removed for not securing such an expert. Trial counsel did not secure such an expert or offer any FAS/FAE evidence at trial. Although state writ counsel pled trial counsel's conduct was ineffective, counsel failed to secure a FAS/FAE expert in order to

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suppressing records denying Mr. Witter's gang affiliation.

demonstrate what FAS/FAE evidence was available and how that evidence was material to Mr. Witter's case. A FAS/FAE expert was readily available had trial counsel adequately investigated or developed a reasonable understanding of FAS/FAE. See Declaration of Dr. Natalie Novick Brown, Pet. Ex. 2.27, and Petition, pp. 51-71. State writ counsel further failed to collect relevant records or adequately interview Mr. Witter's family and friends to determine the available punishment evidence, not the least of which were symptoms of FAS/FAE and evidence of their impact on Mr. Witter's behavior and development. Trial counsel had access to Mr. Witter's family, friends, and others witnesses. Information which identified such witnesses was in trial counsel's files. Evidence or testimony was readily accessible from available records as well as from these witnesses. See Petition pp. 71- 107 (Summary of Petitioner's California Youth Authority records, Family Court records from San Francisco, adoption records, summaries of federal post-conviction interviews with Petitioner's extended families and friends).

State writ counsel faulted trial counsel for not presenting expert evidence on gangs even though state writ counsel never interviewed any witness nor sought a gang expert in order to demonstrate the availability and materiality of such testimony.[8] An expert who could explain California Youth Authority and why interred youths frequently join gangs was readily available. See Petition, pp. 115-119. Therefore, state writ counsel identified several issues but failed to perform the crucial writ lawyer function - to establish facts outside the record which demonstrated a violation of Mr. Witter's constitutional rights as well as the reasonable possibility or probability such error would have changed the result at trial. State writ counsel performance in this case fell below that to be expected of an attorney representing a client convicted of first degree murder,

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[8] Should the Court determine that the San Jose PD and California Department of Prison / Parole records, and family testimony denying Mr. Witter's membership in a gang were available to state writ counsel supporting the Brady/Napue claim in the instant petition, state writ counsel was further ineffective for not seeking those records and interviews and providing them in the first state habeas proceedings.

and sentenced to death, in habeas corpus proceedings. Counsel held an obligation to not only identify error, but to conduct such investigation as is necessary to present evidence of the prejudice which resulted from these errors.

State writ counsel further failed to identify, investigate and present claims which any reasonable writ counsel would have raised. State writ counsel did not plead or investigate trial counsel's unreasonable failure to investigate Mr. Witter's prior offense. State writ and trial counsel failed to interview Gina Martin, Mary Byrd, Donnie Sanders or Linda Rose about Mr. Witter's prior offense. Gina Martin, Mary Byrd, and Donnie Sanders were eyewitnesses with relevant evidence. Donnie Sanders could have testified, either at trial or during the state habeas proceedings:

> [Mr. Witter] was wasted when he stabbed David Rumsey. Lani, [Mr. Witter], and I were drinking at our place the night it happened. [Mr. Witter] and Gina Martin had recently broken-up before the Rumsey incident. Gina called [Mr. Witter] 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, [Mr. Witter] 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 [Mr. Witter] 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.

Pet. Ex. 2.11. Gina Martin could have testified:

> I distinctly remember the Scott Rumsey incident. 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 [Mr. Witter] by the kitchen. I threw pots and pans at him. He left and ran across a field by our

> house. [Mr. Witter] 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, [Mr. Witter] called me and said, "What am I doing here? What happened?" [Mr. Witter] didn't have any memory of what happened. [Mr. Witter] 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.

Pet. Ex. 2.12. Gina's mother, Mary Byrd could have testified:

> 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 [Mr. Witter] 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 [Mr. Witter] 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.

Pet. Ex. 2.13.

Ms. Martin's testimony could have demonstrated to the jury that she, in effect, instigated Mr. Witter's wrath when she 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 remain sober when confronted with issues such as rejection and abandonment. See Declaration of Gina Martin, Pet. Ex. 2.11. Mr. Sanders' testimony could have demonstrated Mr. Witter's intoxicated state of mind prior to and during the incident. State writ and post-conviction counsel, through their failure to locate and present such evidence, failed in their constitutional obligations to Mr. Witter.. See Petition, p. 108 - 112.

State writ or trial counsel ineffectively failed to interview and offer

testimony from Danny Sanders, Mr. Witter's brother-in-law, even though Mr. Sanders was with Mr. Witter on the night of the offense and in the days leading up to the offense. He had known Mr. Witter since adolescence. Mr. Sanders could have told counsel and the jury:

> I brought [Mr. Witter] to Las Vegas when he did what he did in November 1993. .
>
> . . . . 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 [Mr. Witter] where I told Lani, "I'm done helping [Mr. Witter] out." [Mr. Witter] was doing a lot of drugs during the period leading up to the Vegas trip. . . . . Before we went on the road, [Mr. Witter] was drunk every day and he was smoking a lot of weed. When he was at home, [Mr. Witter] drank until he passed out. [Mr. Witter] 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 . . . we went to Dallas [just before Las Vegas]. When we arrived in Dallas, we met up with my cousin, John Sanders. John was living in Euless, Texas at the time. [Mr. Witter] and I hung with John for a while before I called it a night. John and [Mr. Witter] went to the bowling alley to get some more drinks. They got drunk, especially [Mr. Witter]. The police were called because [Mr. Witter] 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 [Mr. Witter] was shouting at them 'fuck you! I'm not coming out!' When [Mr. Witter] 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, [Mr. Witter] 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 [Mr. Witter] up at the police station, [Mr. Witter] 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.
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> . . . . 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 [Mr. Witter] 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 [Mr. Witter] called his girlfriend, Carmen Kendrick. While I was talking with Lani, I overheard [Mr. Witter]'s call with Carmen. We were using 2 payphones right beside one another. [Mr. Witter] got more and more upset as the phone call went on. At one point I heard [Mr. Witter] say, "Why Carmen, why are you doing this. I'm trying to get my act together." When [Mr. Witter] 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. [Mr. Witter], and some of the family, like Lani and I, thought Carmen was pregnant with Will's baby because she told [Mr. Witter] 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." [Mr. Witter] and her had a name picked out. They were supposed to use Lani's name somewhere in the name.

[Mr. Witter] 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 [Mr. Witter] 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. [Mr. Witter]'s ex-girlfriend, Gina Martin, also got an abortion when she and [Mr. Witter] 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. [Mr. Witter] was so upset after the phone call I decided to call her back. I called her and said, "What are you doing to [Mr. Witter]?" 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 [Mr. Witter]. Lani said she called, but Carmen refused to answer her calls.

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

[Mr. Witter] 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 [Mr. Witter] did this straight. [Mr. Witter] had to be very drunk. A sober Will Witter would be incapable of doing such violence. [Mr. Witter] is the greatest guy in the world when sober.

Pet. Ex. 2.11, see also Petition, pp. 119-122.

The instant murder and assault was described by the victim, security guards, police officers, detectives and crime scene personnel. Donny Sanders could have described Mr. Witter and what occurred with him immediately before the offense and the days leading up to it. 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 the effect of alcohol on his behavior– from outgoing to angry and out of control– even in the days before the incident. Even if Donny Sanders' testimony was not relevant to Mr. Witter's guilt, his testimony was relevant to the punishment trial. Trial counsel and state writ counsel were ineffective for failing to investigate, uncover, and present such evidence.

The great weight of the newly uncovered mitigation evidence makes Mr. Witter ineligible for the death penalty. As the evidence would render Mr. Witter ineligible for the death penalty, the Court must reach and review this issue regardless of procedural bar and grant relief accordingly. See Leslie v. Warden 118 Nev. 773, 59 P.3d 440 (2002). This Court should further reach and review these issues because state writ counsel rendered ineffective assistance in failing to identify, investigate and present such evidence and claims.

VI.

BATSON ISSUE

The State argued Mr. Witter's Batson claim was defaulted because it was not raised on direct appeal. However, Mr. Witter's s Batson claim relied on the prosecutor's handwritten notes and a deposition of the prosecutor Gary Guymon to

demonstrate the prosecutor lied in his race-neutral explanation. Petition, pp. 126-152. This evidence was suppressed by the State and was unavailable to Mr. Witter at the time of direct appeal. The material evidence supporting this claim meets the exception to a time bar and/or procedural bar because the prosecutors' written notes were only recently available to counsel.

VII.

FIFTH AMENDMENT ISSUE

The State argued that Mr. Witter's Fifth Amendment claim, alleging error in the use of Mr. Witter's statement against him in preparation for trial, was defaulted for not being raised on direct appeal. Motion to Dismiss, p. 38 - 40, 40. However, this claim relied upon facts outside the record and could not have been raised on direct appeal. Gibbons v. State, 97 Nev. 520, 634 P.2d 1214 (1981); Johnson v. State, 117 Nev. 153, 17 P.3d 1008 (2001). Mr. Witter's claim demonstrated he was not warned, in accordance with the Fifth Amendment, that his statements might be used against him prior to making the statements, and that the State used his statements to prepare for punishment and to cross-examine non-expert witnesses. Petition, pp. 172-178. Because Mr. Witter's claim relied upon evidence outside the trial record, the claim could not have been raised on direct appeal.

VIII.

ELECTED JUDGES

With regard to Mr. Witter's elected judges claim, claim thirteen, the State argued that "a judge is presumed not to be biased and the burden is on the party making the challenge to show that a judge will not be fair in carrying out their duties," citing Goldman v. Bryan 104 Nev. 644, 764 P.2d 1296 (1988). See Petition, p. 221. However, the State's argument and authorities apply only to cases in which a party moved for recusal on the basis of judicial bias. Mr. Witter's claim argued that due process was violated when a judge whose elected position vested him with an interest in a capital case

over which he or she presides.[9] When this issue arises, bias of the individual official is not considered and it is not necessary. In Tumey v. Ohio, 273 U.S. 510, 532 (1927), the mayor of a village served as a judge of cases involving violation of the state prohibition act, and the mayor received a portion of any fine levied upon conviction. The Supreme Court held that disqualification of the mayor was required by due process because the mayor held an interest in convicting the defendant. Reviewing British authorities, the Supreme Court noted that "it is very clear that the slightest pecuniary interest of any officer, judicial or quasi-judicial, in the resolving of the subject matter which he was to decide, rendered the decision voidable." Id. at 524 (citations omitted). The Court concluded that, regardless of the evidence against the defendant, the conflicting interests of the judge resulted in a lack of impartiality that required reversal of the conviction. Id. at 534. The Supreme Court looked to whether the circumstances at issue "would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused. . ." Id. at 532; accord Ward v. Village of Monroeville, 409 U.S. 57, 59-62 (1972) (mayor's interest in obtaining funds for village from fines levied, without personal pecuniary interest, required disqualification). In neither Tumey and Ward did the Supreme Court undertake any analysis of whether the individual judge was biased--the test of disqualification for such a bias was objective. In deed, in Ward, the Supreme Court held that a procedure for disqualification for actual bias was irrelevant to its analysis, Ward, 409 U.S. at 61. Thus, in the instant habeas petition Mr. Witter demonstrate that all Nevada judges have an interest due to the potential electoral consequences of an unpopular decision in a capital case. In fact, Nevada had a recent demonstration of the dangers of popular elections when a sitting

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[9] Since the general threshold standard of the due process clause is the practice at the time of the adoption of the constitution, this argument applies only to capital cases. At the time of the adoption of the constitution, all judges capable of presiding over capital trials had tenure during good behavior.

justice of the Supreme Court was defeated by groups targeting her vote in a particular controversial decision.[10]

The State further urged that Mr. Witter was convicted by a jury and not the judge. Such a claim is irrelevant to the determination of Mr. Witter's claim. The judge was obliged to insure the fairness of the proceeding. The judge, by his elected position, possessed at least a possible temptation, by his desire to remain in elected office, not to hold the balance nice, clear, and true between the state and the accused. The fact that the judge was not the sentencer is irrelevant. See Bracey v. Gramley, 520 U.S. 899 (1997) (no mention of whether the court's role was as ultimate sentencer in analysis of discovery on judicial basis claim); People v. Collins, 478 N.E.2d 267, 272 (Ill. 1985) (state case involved in Bracey, showing jury was sentencing body). Due process was violated.

IX.

NATURAL CONSEQUENCES OF ATKINS V. VIRGINIA

In its response to Mr. Witter's claim that Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) should be extended to those with congenital neurological defects like FAS / FAE, the State argued that no court can be sure any defendant is properly diagnosed with FAS / FAE. Motion to Dismiss, pp. 46 - 47, Petition pp. 51-71. Opp. Ex. 8.2, second declaration of Dr. Natalie Novick-Brown.

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[10] See Sherman Fredrick, Editorial, "Voters like R-J's Ideas: Guess Who Hates That?" Las Vegas Review-Journal (November 12, 2006); editorial "Brian Greenspun on Tuesday's Victories Amid a Judicial Warning," Las Vegas Sun (November 9, 2006); Carri Geer Thevenot, "Supreme Court's Becker Falls to Saitta; Douglas Retains Seat: Political Consultant Says Justice Hurt by Guinn v. Legislature Ruling in 2003," Las Vegas Review-Journal (November 8, 2006); editorial, "Nancy Becker Must be Removed: Supreme Court Justice Backed Guinn v. Legislature Travesty," Las Vegas Review-Journal (November 5, 2006); editorial, "Nancy Becker has the Right Stuff: State Supreme Court Justice has Faithfully and Honestly Interpreted the Constitution," Las Vegas Sun (October 22, 2006); Jeff German, "Far Right Targets Justice Becker: Supreme Court Vote on Tax Increase was Right Thing to do, She Says," Las Vegas Sun (October 15, 2006); Jon Ralston, "Campaign Ad Reality Check," Las Vegas Sun (October 3, 2006); Jon Ralston, "Jon Ralston is Impressed at the Clarity and Brevity Displayed by Lawyer-Politicians," Las Vegas Sun (September 22, 2006); Michael J. Mishak, "Libertarian Lawyer has More Issues Up His Sleeve: Waters' Next Targets: Campaign Funds, Real Estate Tax," Las Vegas Sun (September 16, 2006); Sam Skolnik, "Who Owns Whom is Supreme Theme: Becker, Saitta Race is Rife with Accusations," Las Vegas Sun (August 27, 2006).

The State further argued that should this Court extend Atkins to other congenitally damage individuals, Mr. Witter cannot meet the standards of Atkins. Motion to Dismiss, p. 47. Mr. Witter did not claim he met the standard for mental retardation. Mr. Witter suffers from Fetal Alcohol Effect. Should this Court, or any other court, extend the substantial law supporting Atkins to others born with neurological disorders, Mr. Witter's burden is only to prove that he suffered from the congenital neurological disorder, not mental retardation.

The United States Supreme Court, in Atkins stated:

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.
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> In light of these deficiencies, our death penalty jurisprudence provides two reasons consistent with the legislative consensus that the mentally retarded should be categorically excluded from execution. First, there is a serious question as to whether either justification that we have recognized as a basis for the death penalty applies to mentally retarded offenders. *Gregg v. Georgia,* 428 U.S. 153, 183, 96 S.Ct. 2909, 49 L.Ed.2d 859, (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.), identified "retribution and deterrence of capital crimes by prospective offenders" as the social purposes served by the death penalty. Unless the imposition of the death penalty on a mentally retarded person "measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *Enmund,* 458 U.S., at 798, 102 S.Ct. 3368. With respect to retribution-the interest in seeing that the offender gets his "just deserts"-the severity of the appropriate punishment necessarily depends on the culpability of the offender. Since *Gregg,* our jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crime. For example, in *Godfrey v. Georgia,* 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398

> (1980), we set aside a death sentence because the petitioner's crimes did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder." Id., at 433, 100 S.Ct. 1759. If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate.
>
> With respect to deterrence-the interest in preventing capital crimes by prospective offenders-"it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation,' " *Enmund*, 458 U.S., at 799, 102 S.Ct. 3368. Exempting the mentally retarded from that punishment will not affect the "cold calculus that precedes the decision" of other potential murderers. *Gregg*, 428 U.S., at 186, 96 S.Ct. 2909. Indeed, that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded *320 offenders. The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable-for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses-that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the deterrent effect of the death penalty with respect to offenders who are not mentally retarded. Such individuals are unprotected by the exemption and will continue to face the threat of execution. Thus, executing the mentally retarded will not measurably further the goal of deterrence.

Atkins. at 2251/318. The death penalty, as applied to persons with a diminished capacity to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others, serves no constitutional function. Mr. Witter demonstrated that, because of Fetal Alcohol Effect, he has a diminished capacity to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. In accord with the Eighth Amendment and the United States

Supreme Court, Mr. Witter's execution would violate the Constitution because of his unique and demonstrated disabilities. Mr. Witter is not mentally retarded and made no such claim. The standard for mental retardation should not be applied to him. However, the Supreme Court's holding in Atkins should be extended to other persons with similar neurological conditions.

X.

LETHAL INJECTION CLAIM

The State argued that Mr. Witter's Lethal Injection claim was procedurally barred. Motion to dismiss, p. 50, see also Petition, p. 208. Mr. Witter contends that, should this claim not be ripe for adjudication, this Court cannot reach the issue of procedural bar. See Poland v. Stewart, 117 F.3d 1094, 1104 (9th Cir. 1997) (lethal gas claim unripe so the circuit court will not reach the state's argument on procedural bar). Moreover, should the Court entertain this claim, the procedural bar is not applicable to the instant case because Mr. Witter's counsel in his initial state habeas proceedings was ineffective for the failure to develop and litigate this claim. The State argued that the materials which are the basis of this claim were previously available. This argument supports Mr. Witter's contention that his counsel in the initial state habeas proceedings was ineffective.[11]

In the alternative, Mr. Witter can show cause to excuse any procedural default of his claim that execution by lethal injection constitutes cruel and unusual

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[11] The State informed the Court that Mr. Witter's statement that Nevada had the highest death penalty rate in country was patently false. Motion to Dismiss, p. 48. The State misinterpreted that statement. The State reviewed the execution rate for Nevada. However, the undersigned counsel relied upon data revealing per capita death sentences, not executions. Nevada does not have the highest execution rate of any state and counsel never suggested such was the case. Currently Nevada and Alabama are first and second in per capita death sentences. Nevada has 80 persons on death row with a population of 2,495,529. Alabama has a death row population of 195 with a population of 4,559, 030. See http://quickfacts.census.gov/qfd/states/01000.html for census data and http://www.deathpenaltyinfo.org/article.php?scid=9&did=188#year for death row populations. Nevada's recent population growth alone accounts for its loss of status as the leader in per capita death sentences. At the time of Mr. Witter's death sentence, Nevada was the leader in per capita death sentences.

punishment because the state suppressed information to support that claim. See e.g., Banks v. Dretke, 540 U.S. 668,695-698 (2004). In the past, the Nevada Department of Corrections refused all requests for disclosure of its execution protocol. See Pet. Ex. 7.4. The undersigned counsel received a copy of the protocol, which was requested and received by a member of the media, for the first time in April of 2006. See Pet. Ex. 7.3. Mr. Witter is now able to show that execution by lethal injection in Nevada constitutes cruel and unusual punishment based on its protocol. See Pet. Ex. 7.2. Moreover, the scientific evidence showing that the chemicals used in the execution process are likely to cause unnecessary pain was not published until recently. See Pet. Ex. 7.1 at 1412-14. Due to the state's suppression of the protocol, Mr. Witter was unable to raise his constitutional claim adequately. Cause and prejudice exists due to the novel nature of the claim since the research supporting it was only recently published. See Reed v. Ross, 468 U.S. 1, 13-16 (1984). Petitioner can show "cause" to excuse any procedural default of his lethal injection claim.

XI.

CONCLUSION

For the foregoing reasons, Mr. Witter respectfully requests that this Court deny the State's Motion to Dismiss his Petition for Writ of Habeas Corpus.

DATED this 28th day of June, 2007.

Respectfully submitted,

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Attorneys for Petitioner

CERTIFICATE OF SERVICE

In accordance with Rule 5(b) of the Nevada Rules of Civil Procedure, the undersigned hereby certifies that on the 28th day of June 2007, a true and correct copy of the foregoing PETITIONER'S OPPOSITION TO THE MOTION TO DISMISS, was deposited in the United States mail, first class postage prepaid, addressed to counsel as follows:

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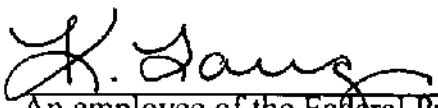

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM WITTER,
#1204227

Defendant.

CASE NO: C117513

DEPT NO: II

STATE'S REPLY TO DEFENDANT'S OPPOSITION TO MOTION TO DISMISS

DATE OF HEARING: 7/12/07
TIME OF HEARING: 10:30 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through STEVEN S. OWENS, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in State's Reply to Defendant's Opposition to Motion to Dismiss.

This Reply is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

Defendant maintains that the proper standard of review for the district court to use when evaluating a Motion to Dismiss is that it must liberally construe the defendant's petition and accept as true all of the factual allegations. While this may be the proper standard for a Motion for Summary Judgment in a civil case or for dismissal under NRCP Rule 12(b)(5), the Nevada Supreme Court has determined that is not the proper standard when considering dismissal of a Petition for Writ of Habeas Corpus.

"[H]abeas corpus is a proceeding which should be characterized as neither civil nor criminal for all purposes. It is a special statutory remedy which is essentially unique." Hill v. Warden, 96 Nev. 38, 40, 604 P.2d 807, 808 (1980). "This court may look to general civil or criminal rules for guidance only when the statutes governing habeas proceedings have not addressed the issue presented." Mazzan v. State, 109 Nev. 1067, 1070, 863 P.2d 1035, 1036 (1993). NRS 34.820 specifcally provides for the procedure in cases where the petitioner has been sentenced to death. NRS 34.770, NRS 34.800 and NRS 34.810 provide for the manner in which the district court decides whether an evidentiary hearing should be held, a petition should be dismissed or a writ should be granted.

None of the statutes governing petitions for post-conviction relief provide for the civil remedy of summary judgment as a method for determining the merits of a post-conviction petition for a writ of habeas corpus. Beets v. State, 110 Nev. 339, 871 P.2d 357 (1994). The Nevada Rules of Civil Procedure apply only to the extent they are not inconsistent with NRS Chapter 34. NRS 34.780. Because NRS Chapter 34 addresses the applicable standards for resolving post-conviction petitions for a writ of habeas corpus, the rules of civil procedure and the standard for summary judgment enunciated by the defense simply do not apply.

Additionally, the petition in the instant case is Defendant's second attempt at state post-conviction relief and constitutes a successive petition per NRS 34.810. Any claims of ineffective assistance of counsel either at trial or on appeal should have been raised in the first post-conviction proceedings, are now procedurally barred absent a showing of good cause or prejudice. The defense's burden of proof for such defaulted claims is the higher

standard of clear and convincing evidence. Means v. State, 120 Nev. 1001, fn 29, 103 P.3d 25 (2004).

It has long been the rule in Nevada that "[t]he law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969); *see also* Bejarano v. State, 106 Nev. 840, 801 P.2d 1388 (1990). Additionally, the law of the case doctrine "cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Hogan v. State, 109 Nev. 952, 959, 860 P.2d 710, 715 (1993). This limitation forbids "a more focused review of the issues stemming from the illumination of hindsight" to avoid application of the law of the case doctrine. Id. Defendant's attempt to distinguish his current claims from past claims is only an exercise in semantics and futility. No matter how artfully Defendant re-crafts his arguments, it remains that the Nevada Supreme Court disposed of many of these same issues previously.

The legal standard and reasoning process by which this court is to evaluate the McConnell claim has been explained and implemented by the Nevada Supreme Court in at least three different published cases. Bejarano v. State, 122 Nev. ___, 146 P.3d 265 (2006); Rippo v. State, 122 Nev. ___, 146 P.3d 279 (2006); Archanian v. State, 122 Nev. ___, 145 P.3d 1008 (2006). In Bejarano, the Nevada Supreme Court explained the re-weighing process as follows:

> Reweighing requires us to answer the following question: ***Is it clear beyond a reasonable doubt that absent the invalid aggravators the jury still would have imposed a sentence of death?*** If we answer this question "yes," then the errors were harmless, and Bejarano's McConnell claim is procedurally barred for lack of a showing of prejudice. If we answer this question "no," then prejudice has been shown, and we must remand to the district court for a new penalty hearing. Id. citing State v. Bennett (Bennett III), 119 Nev. 589, 604, 81 P.3d 1, 11-12 (2003); Leslie v. Warden, 118 Nev. 773, 782-83, 59 P.3d 440, 446-7 (2002).

The Bejarano Court then reviewed only that evidence, both aggravating and mitigating, that had been presented at the original penalty hearing absent the invalid felony-aggravators. Id. Although other procedurally defaulted claims existed in the case, such were not considered in the reweighing process. Id. A proper reweighing or harmless error analysis does not ***add*** to what the jury already found, but asks only whether the outcome would have been the same ***without*** the alleged error. In the only three published cases where the Nevada Supreme Court has conducted reweighing under McConnell, the error has been found harmless every time. Bejarano, supra; Rippo, supra; Archanian, supra.

In a harmless error analysis, the court simply removes the two felony-aggravators from the equation and considers whether the jury still would have imposed a sentence of death. Bejarano, supra. Removal of the felony aggravators does not change in any way the evidence that was admitted in the penalty hearing. The mere labeling of the burglary and attempt sexual assault convictions as aggravators has only an "inconsequential" impact that can not fairly be regarded as a constitutional defect in the sentencing process. *See* Brown v. Sanders, 126 S.Ct. 884 (2006). Faced with exactly the same evidence in aggravation and mitigation, the jury obviously would have still sentenced the Defendant to death.

Even the case authority relied upon by the defense, follows the same reweighing process of looking only at the evidence actually presented to the jury when an aggravating circumstance is subsequently invalidated. Leslie v. Warden, 118 Nev. 773, 59 P.3d 440 (2002). Although in Leslie the invalidation of the "at random and without apparent motive" aggravator was not found harmless and a new penalty hearing was ordered in that case, the reweighing analysis did not include new matters outside the record. Id. House v. Bell is distinguished because it is an actual innocence case based on newly discovered evidence. House v. Bell, 126 S.Ct. 2064 (2006). A McConnell error, on the other hand, has nothing to do with newly discovered evidence. Rather, it concerns only an invalid aggravating circumstance that should not have been given to the jury.

The defense is arguing for a change in law and rejects the kind of reweighing engaged in by the Nevada Supreme Court in Bejarano, Rippo, and Archanian, supra. However, the

district court is bound by this precedent and any good faith arguments by the defense for a change in law are now preserved for the record and can be addressed to the Nevada Supreme Court on appeal. In the meantime, the law on reweighing remains that when invalidating an aggravating circumstance, the harmless error analysis does not include new evidence that was never presented to the jury.

The defense acknowledges that Atkins only exempts the mentally retarded from the death penalty. Atkins v. Virginia, 536 U.S. 304 (2002). Any argument for an extension of that same rationale to fetal alcohol syndrome is a novel argument not endorsed by any court. A claim that requires a change or extension of law can not qualify for consideration in a successive habeas petition because one can not show good cause and prejudice. Only if the Nevada or United States Supreme Court first adopted such a legal ruling would Witter then have cause to overcome the procedural bars.

Defendant maintains that release of written protocol standards to him in April of 1996 constitutes good cause for not challenging the particular chemicals and injection procedures earlier. Even if this is true, it does not change the fact that a challenge to the execution protocol is not cognizable in a petition for writ of habeas corpus because it neither requests relief from a judgment of conviction nor a sentence. NRS 34.720. Defendant's sentence would remain lawful and unaffected by such a challenge because Defendant was only sentenced to lethal injection, not to a particular execution protocol. Such protocol can be changed at any time and solely within the discretion of the Department of Corrections. NRS 176.355. Defendant can not direct this court to any case where execution protocols have been successfully raised in a post-conviction petition. Additionally, if and when Defendant's execution ever becomes imminent, it is likely that the protocols in effect at that time will be different, making such a challenge at this time either moot or not ripe for adjudication.

Defendant alleges that ineffective assistance of his post-conviction counsel constitutes good cause for not raising his claims in the successive petition sooner. The State agrees that as a death row petitioner, Defendant had a right to effective assistance of counsel in his first post-conviction proceeding, so he may raise claims of ineffective assistance of post-

conviction counsel in a successive petition. *See* McNelton v. State, 115 Nev. 296, 416 n.5, 990 P.2d 1263, 1276 n.5 (1999); Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997). However, he must raise these matters in a reasonable time to avoid application of procedural default rules. *See* Pellegrini v. State, 117 Nev. 860, 869-70, 34 P.3d 519, 525-26 (2001) (holding that the time bar in NRS 34.726 applies to successive petitions); *see* generally Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506-07 (2003) (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing).

Defendant waited seven years after conclusion of his first post-conviction proceedings in September of 2000 to file the instant petition. Instead of timely filing a successive state petition to challenge the effectiveness of his first post-conviction counsel, Defendant proceeded to federal court where he managed to file a timely federal habeas petition on September 18, 2001, in case 2:01-CV-01034-RLH(LRL). Even then, Defendant waited an additional six years before returning to state court.

The fatal flaw in Defendant's current petition is that he can not demonstrate good cause for this delay. Pursuit of federal remedies does not constitute good cause to overcome state procedural bars. Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989). Colley argued that he appropriately refrained from filing a state habeas petition during the four years he pursued a federal writ of habeas corpus. The Nevada Supreme Court disagreed:

> Should we allow Colley's post-conviction relief proceeding to go forward, we would encourage offenders to file groundless petitions for federal habeas corpus relief, secure in the knowledge that a petition for post-conviction relief remained indefinitely available to them. This situation would prejudice both the accused and the State since the interest of both the petitioner and the government are best served if post-conviction claims are raised while the evidence is still fresh.

Id. The state procedural rules simply do not afford a petitioner the luxury of federal counsel and an investigation before being required to bring state claims. Accordingly, no matter how

diligent and expansive the federal investigation may have been, it does not constitute good cause as a matter of law.

DATED this 5th day of July, 2007.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/ STEVEN S. OWENS
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of STATE'S REPLY TO DEFENDANT'S OPPOSITION TO MOTION TO DISMISS, was made this 5th day of July, 2007, by facsimile transmission to:

GERALD BIERBAUM
GARY TAYLOR
FAX # (702) 388-5819

/s/ M. Beaird

Employee for the District Attorney's Office

SSO/ed

ORIGINAL

SUPP
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Attorneys for Petitioner

CLERK OF THE COURT
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FILED

DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM WITTER, Petitioner, vs. E.K. McDANIEL, et al., Respondents.	Case No. C117513 Dept. No. II SUPPLEMENTAL OPPOSITION TO MOTION TO DISMISS Hearing Date: August 30, 2007 Hearing Time: 10:30 AM

Petitioner submits the following supplemental opposition to the state's motion to dismiss his petition for writ of habeas corpus, in order to complete the record before this Court. In the previous hearing in this matter, counsel for petitioner referred to unpublished dispositions by the Nevada Supreme Court as illustrations of that Court's practice in reviewing the effect of error under McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004). This supplement is intended to complete the record before this Court by placing those dispositions before it.

Although the state has correctly pointed out that the Nevada Supreme Court has not reversed a death sentence on the basis of McConnell error in a published decision, in an unpublished disposition, Williams v. State, No. 45796, Order Affirming in Part, Reversing in Part, and Remanding (June 22, 2007), the Nevada Supreme Court ordered a new penalty hearing based on the

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invalidity of felony-murder aggravating factors in a case involving two murders. Ex.1[1]. This disposition is not cited as legal authority. Cf. Nev. Sup. Ct. Rule 123. Rather, it is cited as evidence that a violation of equal protection of the laws, under the state and federal constitutions, U.S. Const. Amend. XIV; Nev. Const. Art. 4 § 21, will result if this Court disregards the prejudicial effect of the felony murder aggravating factor in this case, as the state urges. "The Equal Protection Cause of the Fourteenth Amendment. . . is essentially a direction that all persons similarly situated should be treated alike." City of Clelburne v. Clelburne Living Center, Inc., 473 U.S. 432, 439 (1985), citing Plyer v. Doe, 457 U.S. 202, 216 (1982); Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). Petitioner is similarly situated to the petitioner in Williams; and, with respect to the egregiousness of the offense (in Williams, the killing of an innocent elderly couple for the purpose of getting money for drugs), petitioner's case is no more aggravated. Under these circumstances, disregarding the effect of the felony murder aggravating factor would violate the constitutional guarantee of equal protection.

The state has also argued that this Court cannot consider evidence not presented to the jury in the original penalty hearing in assessing whether the invalid aggravating factor has led to a miscarriage of justice. The state disregards the theory of overcoming procedural defaults imposed by Leslie v. Warden, 118 Nev. 778, 780, 59 P.3d 440 (2002). Leslie made it clear that a prejudicially invalid aggravating factor could be reviewed, despite any procedural defaults, because in such a situation the petitioner would be considered "actually innocent" of the death penalty, and refusing to review the claim would result in a "miscarriage of justice." In assessing such a claim,

> The habeas court must consider "all the evidence," old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under "rules of admissibility that would govern at trial." See id., at 327-328, 115 S.Ct. 851 (quoting Friendly, is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U.Chi. L. Rev. 142, 160 (1970)). Based on this total record, the court must make a probabilistic determination about what reasonable, properly instructed jurors would do."

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[1] This disposition is a court record of which this Court can, and on request must, take judicial notice. Nev. Rev. Stat. §§ 47.130(2)(b), 47.150(2); Cannon v. Taylor, 88 Nev. 89, 92, 493 P.2d 1313 (1972).

House v. Bell, 126 S.Ct. 2064, 2077 (2006), quoting Schlup v. Delo, 513 U.S. 298 (1995). Accordingly, this Court must consider all of the evidence in the petition, regardless of any purported default, in addressing the prejudicial effect of the McConnell, error.

Again, while the Nevada Supreme Court has not applied Schlup in a published decision, in an order denying en banc review, Williams v. State, No. 44706, Order Denying En Banc Reconsideration, at 2 (July 5, 2007), the Supreme Court did review evidence of the petitioner's brain damage in determining the question of "actual innocence" as a result of McConnell error. Ex. 2.[2] This disposition is also not cited as legal authority, cf. Nev. Sup. Ct. Rule 123, but to demonstrate an equal protection violation if the same rule is not applied to petitioner's case. Whether or not a particular state rule or practice is itself required by the federal constitution, the federal equal protection clause requires that "once the state has established a rule it must be applied evenhandedly." Myers v. Ylst, 897 F.2d 417, 421, 426 n.9 (9th Cir. 1990), quoting LaRue v. McCarthy, 833 F.2d 140, 142 (9th Cir. 1987); see also Village of Willowbrook v. Olech, 528 U.S. 562, 564-565 (2000) (per curiam); Louis v. Supreme Court of Nevada, 490 F.Supp. 1174, 1183 (D. Nev. 1980) ("Where waivers of a rule are not granted with consistency and no explanation is given for the disparity in treatment, a finding of denial of equal protection may be appropriate. [Citations]") The fact that creation of a rule, or the failure to apply a rule, occurs in an unpublished disposition is of no moment because "the equal protection clause prohibits de facto as well as explicit, or open unequal and arbitrary treatment." Myers, 897 F.2d at 421.[3] Under these circumstances, this Court cannot disregard the mitigating evidence presented in the habeas corpus petition without violating the state and federal guarantees of equal protection of the laws.

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[2] See footnote 1, above.

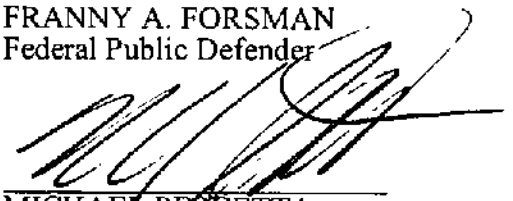
[3] In the parallel situation of inconsistent application of procedural default rules, courts must consider unpublished decisions because "it is the actual practice of state courts, not merely the precedents contained in their published opinions, that determine the adequacy of procedural bars preventing the assertion of federal rights." Powell v. Lambert, 357 F.3d 871, 879 (9th Cir. 2004), citing Valerio v. Crawford, 306 F.3d 742, 776 (9th Cir. 2002)(en banc).

For the reasons stated above and in petitioner's previous moving papers, petitioner submits that this Court should deny the state's motion to dismiss and vacate the death sentence.

Dated this 28th day of August, 2007.

Respectfully submitted,

FRANNY A. FORSMAN
Federal Public Defender



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CERTIFICATE OF SERVICE

In accordance with Rule 5(b) of the Nevada Rules of Civil Procedure, the undersigned hereby certifies that on the 28th day of August 2007, a true and correct copy of the foregoing SUPPLEMENTAL OPPOSITION TO MOTION TO DISMISS, was deposited in the United States mail, first class postage prepaid, addressed to counsel as follows:

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Robert E. Wieland
Senior Deputy Attorney General
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Reno, Nevada 89511

An employee of the Federal Public Defender

RECEIPT OF COPY

RECEIPT OF A COPY of the foregoing: SUPPLEMENTAL OPPOSITION TO MOTION TO DISMISS is hereby acknowledged this 28th day of August 2007.

CLARK COUNTY DISTRICT ATTORNEY

David Roger
Clark County District Attorney
Steve S. Owens
Chief Deputy District Attorney
200 Lewis Ave.
Las Vegas, Nevada 89155

EXHIBIT 1

EXHIBIT 1

IN THE SUPREME COURT OF THE STATI

CARY WALLACE WILLIAMS,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K. MCDANIEL,
Respondent.

ORDER DENYING EN BANC RECONSIDERATION

This is a petition for en banc reconsideration of this court's decision in Williams v. Warden.[1] This court denied appellant Cary Williams's petition for rehearing challenging the court's order affirming the district court's order denying his postconviction petition for a writ of habeas corpus as procedurally barred.[2] We have considered Williams's petition for en banc reconsideration and concluded that relief is not warranted.[3] However, one claim in the petition merits comment. Williams argues that en banc reconsideration is necessary because this court's order of affirmance did not adequately address his argument that his counsel's ineffectiveness in failing to present significant mitigating evidence was not procedurally barred pursuant to Leslie v. Warden.[4] Specifically, Williams contends that evidence of a brain defect

[1]Docket No. 44706 (Order of Affirmance, December 8, 2006).

[2]Williams v. Warden, Docket No. 44706 (Order Denying Rehearing, January 16, 2007).

[3]See NRAP 40A. We also deny appellant's January 29, 2007, request to take judicial notice.

[4]118 Nev. 773, 59 P.3d 440 (2002).

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demonstrates that he is "actually innocent" of the death penalty, and thus, he has shown a fundamental miscarriage of justice sufficient to overcome applicable procedural bars. We disagree.

In Leslie, this court considered appellant's procedurally barred claim that an aggravating circumstance was invalid because not considering it would result in a fundamental miscarriage of justice.[5] We concluded that appellant was actually innocent of the "at random and without apparent motive" aggravating circumstance;[6] however, that holding alone did not render him ineligible for the death penalty. We remanded Leslie for a new penalty hearing because we concluded that there was a reasonable probability that absent the invalid aggravating circumstance the jury would not have imposed death.[7]

Williams's case is significantly distinguishable from Leslie. First, Williams argues that the existence of the brain damage evidence alone is sufficient to render him "innocent" of the death penalty. However, the omission of this evidence from the sentencing panel's consideration does not conclusively prove, as Williams suggests, that he would not have received the death penalty. Second, unlike mitigation evidence, an aggravating circumstance must be proved beyond a reasonable doubt. Therefore, Leslie implicated a different standard of proof. Consequently, we conclude that Leslie is inapposite.

Further, as Williams's petition was untimely filed and successive, he must demonstrate good cause for failing to raise this claim

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[5]Id. at 780, 59 P.3d 445.

[6]Id.

[7]Id.

previously and actual prejudice.[8] We conclude that he failed to do so. The brain damage evidence was discovered in 1999, yet Williams waited four years to file the instant petition raising this claim. Further, the medical evaluations upon which Williams relies primarily focused on the impact Williams's brain damage had on his decision to plead guilty. These evaluations did not suggest that Williams was incompetent, insane, or lacked the capacity to understand his actions in murdering the victim and her unborn child. Further, although mental health experts could have been called to testify about Williams's traumatic childhood, evidence of his childhood was presented in mitigation, although in a tamer fashion than Williams now desires. Moreover, although the brain damage evidence reveals that Williams is of low average to average intelligence, experiences difficulty in decision-making, and exhibits poor judgment, Williams testified articulately and at length during the penalty hearing about his brief time in college, where he pursued a degree in criminology. He also testified that he dreamed of escaping his surroundings by getting a good education. The penalty hearing transcript further reveals that Williams maintained his composure under intense cross-examination.

We are not persuaded that even assuming trial counsel had discovered and presented the brain damage evidence that Williams now argues should have been presented in mitigation that it had a reasonable probability of altering the outcome of the penalty hearing or that he has demonstrated a fundamental miscarriage of justice sufficient to overcome

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[8]See NRS 34.726; NRS 34.810(3).

applicable procedural bars. Accordingly, we

ORDER the petition DENIED.[9]

Gibbons, J.

Parraguirre, J.

Douglas, J.

Saitta, J.

MAUPIN, C.J., with whom CHERRY, J. agrees, dissenting:

Williams alleged that his counsel was ineffective for failing to introduce mitigation evidence, to-wit: that he suffered from a brain defect that rendered him "actually innocent" of the death penalty. He supported his claim with evidence from two mental health professionals who represented that he suffered from a brain defect, which affected his judgment and left him with increased impulsivity issues, poor overall problem solving abilities, and difficulty incorporating significant information into his decision making process. The evidence also indicates that a mental health expert could have testified at the penalty hearing about how Williams's turbulent, chaotic, and abusive upbringing affected his behavior and personality. However, this evidence was not discovered and may not have been reasonably available until after the penalty hearing was conducted. I believe that Williams may be able to demonstrate good cause and actual prejudice sufficient to overcome

[9]The Honorable James W. Hardesty, Justice, did not participate in the decision of this matter.

applicable procedural bars. More specifically, because we have now stricken two of the original aggravating circumstances, whether Williams can overcome the procedural bars precluding consideration of the alleged brain defect mitigating evidence takes on a new significance respecting this court's reweighing analysis. Consequently, I would grant reconsideration to allow a remand of this matter to the district court for a full evidentiary hearing concerning the extent of any actual physical brain damage and its impact on Williams's eligibility for the death penalty.[10] Then, and only then, would this court be in a position to evaluate whether, under Leslie, procedural bars are inapplicable because a fundamental miscarriage of justice has occurred.

_____, C. J.
Maupin

I concur:

_____, J.
Cherry

cc: Second Judicial District Court Dept. 9, District Judge
Federal Public Defender/Las Vegas
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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[10]See Thomas v. State, 120 Nev. 37, 44, 83 P.3d 818, 823 (2004) ("A petitioner for post-conviction relief is entitled to an evidentiary hearing only if he supports his claims with specific factual allegations that if true would entitle him to relief.").

EXHIBIT 2

EXHIBIT 2

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTOINE LIDDELL WILLIAMS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45796

FILED

JUN 22 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus in a death penalty case. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

In October 1995, a jury found appellant Antoine Williams guilty of two counts of first-degree murder of a victim 65 years of age or older; two counts of robbery of a victim 65 years of age or older; and one count each of burglary, possession of a stolen vehicle, and possession of a controlled substance. After the jury was unable to reach a unanimous verdict regarding punishment, a three-judge panel conducted a second penalty hearing and found the following aggravating circumstances: the murders were committed during a robbery and/or burglary; Alice Nail's murder was committed to avoid or prevent a lawful arrest; the murders were committed to receive money or any other thing of monetary value; and Williams had been convicted of more than one murder in the instant proceeding. In March 1996, the panel concluded that the aggravating

factors outweighed the mitigating factors and sentenced Williams to death for each murder.[1]

This court affirmed Williams's conviction and sentence on direct appeal.[2] Williams filed a postconviction petition for a writ of habeas corpus, which the district court denied. This court affirmed the district court on appeal.[3] Williams sought relief in federal court. On October 25, 2004, Williams filed a second postconviction petition for a writ of habeas corpus in the Nevada district court, which the district court denied as procedurally barred. This appeal followed.

Williams filed the second petition nearly six years after this court issued the remittitur from his direct appeal; therefore, it was untimely filed.[4] Moreover, his petition was successive because he had

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[1]We note that in response to the United States Supreme Court decision in Ring v. Arizona, 536 U.S. 584 (2002), the Legislature has amended NRS 175.556 to provide that penalty hearings may no longer be conducted by a three-judge panel, but must proceed before a jury. See 2003 Nev. Stat., ch. 366, § 3, at 2083; see also Johnson v. State, 118 Nev. 787, 59 P.3d 450 (2002).

[2]Williams v. State, 113 Nev. 1008, 945 P.2d 438 (1997), receded from in part by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

[3]Williams v. State, Docket No. 35559 (Order of Affirmance, October 9, 2000).

[4]See NRS 34.726(1).

previously filed a postconviction habeas petition in the district court.[6] Williams's petition was therefore procedurally barred absent a demonstration of good cause and prejudice.[6] He argues that the district court erred in concluding that procedural default rules precluded review of his petition.

Williams first claims that his death sentence is unconstitutional because the State used the same felony charges supporting his conviction on a felony-murder theory to establish two of the aggravating circumstances in violation of McConnell v. State.[7] In McConnell, this court deemed "it impermissible under the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated."[8] This court recently held in Bejarano v. State that McConnell has retroactive application.[9] Thus, Williams can show good cause for failing to raise this claim previously. In this case, the information charged both murders under the theories of premeditation and felony murder based on the perpetration of a robbery and/or burglary. The verdicts are

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[5]See NRS 34.810(1)(b) and (2).

[6]See NRS 34.726(1); 34.810(3).

[7]120 Nev. 1043, 102 P.3d 606 (2004).

[8]Id. at 1069, 102 P.3d at 624.

[9]122 Nev. ___, 146 P.3d 265 (2006).

silent as to which theory or theories the jury relied on in finding Williams guilty of each murder. Therefore, pursuant to McConnell, the burglary and robbery aggravating circumstances must be stricken.

Additionally, McConnell applies in this case with equal force to the receiving-money aggravator pursuant to NRS 200.033(6) because it was based on the robbery of the victims.[10] Accordingly, the receiving-money aggravator is also invalid and must be stricken.

Although Williams can demonstrate good cause for failing to raise this claim previously, he must still demonstrate actual prejudice resulting from consideration of the erroneous aggravating circumstances. After striking the burglary, robbery, and receiving-money aggravating circumstances, two remain respecting Alice Nail's murder: the murder was committed to avoid or prevent a lawful arrest, and Williams had been convicted of more than one murder in the immediate proceeding. Respecting William Nail's murder, one remains: Williams had been convicted of more than one murder in the immediate proceeding. The sentencing panel found three mitigating circumstances for each murder–Williams's remorse, his involvement with cocaine, and "any other mitigating circumstances."

We may uphold Williams's death sentence based in part on an invalid aggravator either by reweighing the aggravating and mitigating

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[10]Id.

evidence or conducting a harmless-error review.[11] If we cannot conclude beyond a reasonable doubt that the sentencing panel would have found Williams death eligible and imposed death absent the erroneous aggravating circumstances, we must remand the matter to the district court for a new penalty hearing.[12] On the other hand, if we conclude beyond a reasonable doubt that the sentencing panel would have nonetheless found Williams death eligible and imposed death, then the error was harmless, and Williams's claim is procedurally barred because he has failed to demonstrate actual prejudice.

During the penalty hearing, Williams made a lengthy statement in which he expressed remorse by accepting full responsibility for the murders and apologizing to the Nails' family members. Williams stated that he was unable to sleep, that he felt badly about and regretted his actions, and that he "sees the Nails' faces." Williams also introduced evidence of his cocaine addiction and its impact on his life, including losing his job and girlfriend. However, Williams stated that his cocaine addiction did not excuse murdering the Nails. The sentencing panel evidently considered this evidence credible and persuasive, as it found that Williams's remorse and cocaine addiction, along with "any other

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[11]See Clemons v. Mississippi, 494 U.S. 738, 741 (1990).

[12]See Browning v. State, 120 Nev. 347, 364, 91 P.3d 39, 51-52 (2004); Leslie v. Warden, 118 Nev. 773, 782-83, 59 P.3d 440, 446-47 (2002).

mitigating circumstance," mitigated the double murders. In light of the mitigating evidence presented coupled with the jury's inability to reach a unanimous verdict regarding punishment, we cannot conclude beyond a reasonable doubt that Williams would be found death eligible and sentenced to death absent the multiple erroneous aggravating circumstances. Therefore, we reverse that portion of the district court's order and remand this matter for a new penalty hearing before a jury.

Williams further argues that the district court erred in denying the following claims: the preventing-a-lawful-arrest aggravating circumstance is invalid; the sentencing panel did not find that the aggravating circumstances were not outweighed by the mitigating circumstances beyond a reasonable doubt; the trial court and the three-judge panel were not impartial; the jury was not impartial; the district court's instructions on reasonable doubt, "equal and exact justice," and premeditation were erroneous; Nevada's death penalty scheme is arbitrary and capricious; lethal injection constitutes cruel and unusual punishment under the Eighth Amendment; the State's use of prior convictions in the penalty phase violated double jeopardy principles; his absence during off-the-record meetings and bench conferences rendered his trial unfair; and the trial court's failure to ensure that certain pretrial and trial proceedings were recorded and held in public deprived him of his due process rights. However, these claims could have been raised on direct appeal, and nothing in Williams's submissions demonstrates good cause

for failing to raise them earlier or actual prejudice from the district court's refusal to consider them.[13]

Williams also claims that prosecutorial misconduct mandated reversal of his conviction and sentence. However, this court considered and rejected this claim in his direct appeal.[14] Therefore, further consideration of it is barred by the law of the case.[15]

Williams asserts that this court's earlier review of his case was unfair and inadequate for several reasons. Considering his argument and submissions to this court, we conclude that he has not demonstrated that this court's review of his conviction and death sentences was unfair or inadequate.

Williams next argues that his conviction and sentence are invalid because his trial and sentencing and direct appeal were conducted before judicial officers whose tenure in office was not based on good behavior but dependent on popular election. However, he wholly fails to substantiate this claim with any specific factual allegations demonstrating actual prejudice.[16]

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[13]See NRS 34.810(3).

[14]Williams, 113 Nev. at 1023, 945 P.2d at 447.

[15]See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

[16]Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

Williams also contends that the district court erred in denying several claims of ineffective assistance of trial and appellate counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, Williams must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defense.[17] He must demonstrate prejudice by showing a reasonable probability that but for counsel's errors the result of the proceeding would have been different.[18]

Because we are remanding for a new penalty hearing, we do not address Williams's complaints that his counsel were ineffective in regard to issues involving the penalty hearing. Williams also argues that his trial and appellate counsel were ineffective for failing to raise other claims presented in this appeal. Other than to state that counsel had no tactical basis for not addressing these matters and had counsel done so there was a reasonable probability of a more favorable outcome, Williams neglects to explain how he was prejudiced by counsel's alleged deficiencies. Consequently, we conclude that Williams failed to demonstrate prejudice.

Williams argues finally that his postconviction counsel was ineffective for not securing funds for investigation of issues outside the

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[17]See Strickland v. Washington, 466 U.S. 668, 687 (1984); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

[18]See Thomas v. State, 120 Nev. 37, 43-44, 83 P.3d 818, 823 (2004).

trial record or seeking discovery of information outside the record through litigation. As a death row petitioner Williams had a right to the effective assistance of counsel in his first postconviction proceeding, so he may raise claims of ineffective assistance of postconviction counsel in a second petition.[19] However, he must raise these matters in a reasonable time or risk application of procedural default rules.[20] Williams waited four years after this court decided his appeal from the denial of his first habeas petition, when he should have been aware of claims respecting postconviction counsel, to file the instant petition. We conclude that Williams waited an unreasonable time to raise these claims and that he has not demonstrated good cause for his untimely filing. And because Williams fails to explain his claims in any detail, they are nothing more than bare claims unsupported by specific factual allegations.[21] Consequently, we conclude that he did not demonstrate actual prejudice

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[19]See McNelton v. State, 115 Nev. 396, 416 n.5, 990 P.2d 1263, 1276 n.5 (1999); Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997).

[20]See Pellegrini v. State, 117 Nev. 860, 869-70, 34 P.3d 519, 525-26 (2001) (holding that the time bar provided in NRS 34.726 applies to successive petitions); see generally Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506-07 (2003) (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing).

[21]See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

and that the district court did not err in denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

Maupin, C.J.

Gibbons, J.

Hardesty, J.

Parraguirre, J.

Douglas, J.

Cherry, J.

Saitta, J.

cc: Hon. Sally L. Loehrer, District Judge
Federal Public Defender/Las Vegas
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

ORDR
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FILED
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
WILLIAM WITTER,
#1204227
Defendant.

CASE NO: C117513
DEPT NO: II

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: 8/30/07
TIME OF HEARING: 10:30 A.M.

THIS CAUSE having come on for hearing before the Honorable VALORIE J. VEGA, District Judge, on the 30th day of August, 2007, the Petitioner not being present, represented by MICHAEL PESCETTA, Federal Public Defender, the Respondent being represented by DAVID ROGER, District Attorney, by and through STEVEN S. OWENS, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

On June 28, 1995 a jury found William Witter (hereinafter "Defendant") guilty of Murder with Use of a Deadly Weapon, Attempted Sexual Assault with Use of a Deadly

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Weapon, and Burglary. A penalty hearing was held on July 10, 1995 through July 13, 1995, after which, by way of special verdict, the jury sentenced Witter to death by lethal injection. On July 22, 1996, the Nevada Supreme Court affirmed Defendant's conviction and sentence in a published opinion. Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996), *cert. denied,* 520 U.S. 1217 (1997).

On October 27, 1997, Defendant filed his first Petition for Writ of Habeas Corpus (Post-Conviction). Counsel was appointed to represent Defendant. On August 11, 1998, Defendant's post-conviction counsel filed a supplemental brief in support of the petition. Following an evidentiary hearing at which Defendant's trial and appellate counsel testified, the district court denied relief on September 25, 2000. The Nevada Supreme Court affirmed the district court's denial of relief on August 10, 2001.

Following pursuit of federal remedies over the last several years, Defendant filed the instant petition for writ of habeas corpus on February 14, 2007. The State moved to dismiss the petition on procedural grounds on May 1, 2007. The Defendant filed his Opposition on June 28, 2007, and the State filed its Reply on July 5, 2007. Arguments were heard on July 12, 2007, and the district court announced its decision on August 2nd and 30th, 2007.

The current post-conviction petition was filed approximately ten years after direct appeal in violation of the one-year rule in NRS 34.726 and Defendant has failed to establish good cause for this delay. Additionally, the State has pleaded laches under NRS 34.800 raising a rebuttable presumption of prejudice to the State due to delay in excess of five years. Also, because the current petition is Defendant's second, it is a successive petition under NRS 34.810. Defendant has not alleged or proven specific facts that demonstrate actual prejudice and good cause for failing to present his claims in an earlier proceeding or for presenting them again.

Ineffective assistance of post-conviction counsel does not constitute good cause as it does not excuse Defendant's pursuit of federal remedies and delay of six years before returning to state court to raise such claims. The court grants the motion to dismiss in part as to Ground 12 as death penalty execution protocol by lethal injection has been determined not

to constitute cruel and unusual punishment and is constitutional pursuant to McConnell v. State, 120 Nev. 1043 (2004). Other than as to Ground 4, the balance of the motion to dismiss is granted based on the law of the case or being time barred without legal excuse for any delay or no showing of any change in the outcome pursuant to NRS 34.800, 34.810 and Crump v. Warden, 113 Nev. 293 (1997).

The court denies the motion to dismiss as to Ground 4 pursuant to EDCR 3.20, NRS 34.726, McConnell v. State, 120 Nev. 1043 (2004) and Bejarano v. State, 122 Nev. Adv. Op. 92 (2006). The Defendant has shown good cause for delay due to the Nevada Supreme Court's decisions in McConnell and Bejarano. This court does not sit as fact-finder. This court reweighs with the harmless error analysis beyond a reasonable doubt.

McConnell requires striking of the burglary and sexual assault felony aggravators leaving one remaining aggravator of a prior felony conviction involving the use or threat of violence based on Defendant's 1996 conviction for stabbing David Rumsey with a butcher knife. Against this aggravator, the court reweighs and considers mitigating evidence that Defendant was under the influence of extreme mental or emotional disturbance for having been advised by his girlfriend that she had aborted their child as well as other mitigating evidence presented, for an extremely dysfunctional family, for alcohol and controlled substance abuse and for psychologocial issues, that the Defendant was low average or just below average intelligence, had possible Attention Deficit Hyperactivity Disorder, ADHD, Antisocial Personality Disorder and possible Developmental Arithmetic Disorder. This court finds harmless error beyond a reasonable doubt with the aggravator outweighing the mitigators, therefore, the sentence previously imposed stands.

CONCLUSIONS OF LAW

Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. NRS 34.726.

NRS 34.800(2) creates a rebuttable presumption of prejudice to the State if "[a] period of five years [elapses] between the filing of a judgment of conviction, an order imposing sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction ... ." See NRS 34.800.

A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the Defendant to assert those grounds in a prior petition constituted an abuse of the writ. NRS 34.810(2). The petitioner has the burden of pleading and proving specific facts that demonstrate: (a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and (b) Actual prejudice to the petitioner. NRS 34.810(3).

Good cause to overcome procedural bars might be shown where the legal basis for a claim was not reasonably available at the time of any default. See e.g., Bejarano v. State, 122 Nev. ___, 146 P.3d 265 (2006). As a death row petitioner, Defendant had a right to effective assistance of counsel in his first post-conviction proceeding, so he may raise claims of ineffective assistance of post-conviction counsel in a successive petition. See McNelton v. State, 115 Nev. 296, 416 n.5, 990 P.2d 1263, 1276 n.5 (1999); Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997). However, he must raise these matters in a reasonable time to avoid application of procedural default rules. See Pellegrini v. State, 117 Nev. 860, 869-70, 34 P.3d 519, 525-26 (2001) (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506-07 (2003) (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing). Pursuit of federal remedies does not constitute good cause to overcome state procedural bars. Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989).

The Nevada Supreme Court's overruling of 20 years of precedent in McConnell v. State, 120 Nev. 1043, 102 P.2d 606 (2004) and application of that ruling retroactively in

Bejarano supra, constitutes intervening case authority giving rise to a new claim not previously available to Defendant. The appropriate inquiry is whether it is clear beyond a reasonable doubt that absent the invalid aggravators the jury still would have imposed a sentence of death. Bejarano v. State, 122 Nev. ___, 146 P.3d 265 (2006); Rippo v. State, 122 Nev. ___, 146 P.3d 279 (2006); Archanian v. State, 122 Nev. ___, 145 P.3d 1008 (2006).

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-conviction Relief shall be, and it is, hereby denied.

DATED this 25th day of September, 2007.

DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER, was made this 17th day of September, 2007, by facsimile transmission to:

MICHAEL PESCETTA
FAX #(702) 388-5819

Eileen Davis

Employee for the District Attorney's Office

SSO/ed

P:/WPDOCS/ORDR/FORDR/308/30894004

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OFFICE OF THE DISTRICT ATTORNEY
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Telephone No. (702) 671-2750

TO: Michael Pescetta FAX#: (702) 388-5819

FROM: Steven S. Owens

SUBJECT: William Witter Findings

DATE: September 6, 2007

To Michael:
Following are the proposed Findings of Fact, Conclusions of Law & Order.
We will be submitting them to the Judge on Monday, September 17th.
Sincerely,
Steven S. Owens

****
*** TX REPORT ***
****

TRANSMISSION OK

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DATE: September 17, 2007

NO. OF PAGES, EXCLUDING COVER PAGE: ____

ORIGINAL

NOTC
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Attorneys for Petitioner

FILED
Oct 29 3 17 PM '07
CLERK OF THE COURT

CLARK COUNTY

DISTRICT OF NEVADA

WILLIAM L. WITTER Petitioner, vs. E.K. McDANIEL, Warden of Ely State Prison, and CATHERINE CORTEZ MASTO, Attorney General of the State of Nevada, Respondents.	Case No. C-117513 Dept. No. 2 NOTICE OF APPEAL

NOTICE is hereby given that petitioner, William Witter, appeals to the Nevada Supreme Court from the Findings of Fact and Conclusions of Law and Order denying the Petition for Post-Conviction Relief entered in this action on September 26, 2007. Notice of Entry of Decision and Order of the foregoing order was entered and mailed on September 29, 2007.

Respectfully submitted this 29th day of October 2007.

FRANNY A. FORSMAN
Federal Public Defender

Gerald Bierbaum
Assistant Federal Public Defender

Gary Taylor
Assistant Federal Public Defender

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CERTIFICATE OF MAILING

In accordance with Rule 5(b) of the Nevada Rules of Civil Procedure, the undersigned hereby certifies that on this 29th day of October 2007, she caused to be deposited for mailing in the United States mail, first-class postage prepaid, a true and correct copy of the foregoing **NOTICE OF APPEAL** addressed to the parties as follows:

David Roger
Clark County District Attorney
Steven S. Owens
Chief Deputy District Attorney
Office of the District Attorney
Regional Justice Center, Third Floor
200 Lewis Avenue
Las Vegas, Nevada 89155

Catherine Cortez Masto
Attorney General
Victor Hugo Schulze II
Deputy Attorney General
Attorney General's Office
555 E. Washington Ave., #3900
Las Vegas, Nevada 89101

William L. Witter
Id No. 47405
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301

An employee of the Federal Public Defender

FILED

JAN 20 2010

CLERK OF COURT

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM LESTER WITTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 50447

District Court Case No. C117513

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows: "ORDER the judgment of the district court AFFIRMED."

Judgment, as quoted above, entered this 20th day of October, 2009.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows: "Rehearing denied."

Judgment, as quoted above, entered this 16th day of December, 2009.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada, this 12th day of January, 2010.

Tracie Lindeman, Supreme Court Clerk

By: A. Ingerson
Deputy Clerk

09-25577

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM LESTER WITTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50447

FILED

OCT 20 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant William Lester Witter's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

Witter's convictions are the result of an incident in which he stabbed and then tried to sexually assault Kathryn Cox in a Las Vegas parking garage. When Cox's husband, James, arrived to pick her up and interrupted the attack, Witter stabbed him 16 times, killing him. Witter was convicted by a jury of first-degree murder, attempted sexual assault, attempted murder, and burglary, and was sentenced to death. This court affirmed his convictions and sentence. Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996), receded from on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

On October 27, 1997, Witter filed a post-conviction petition for a writ of habeas corpus. Following an evidentiary hearing, the district court denied the petition. This court affirmed. Witter v. State, Docket No. 36927 (Order of Affirmance, August 10, 2001).

On February 14, 2007, Witter filed a second post-conviction petition for a writ of habeas corpus. The State sought to dismiss the petition as procedurally barred. After hearing argument, the district court found the petition procedurally barred and dismissed all of Witter's claims except his challenge to the validity of two felony aggravators, which was denied on the merits. This appeal followed.

On appeal, Witter claims that the district court erred in upholding his death sentence despite the invalidation of two aggravating circumstances pursuant to this court's decision in McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004), and in dismissing his remaining claims. We conclude that the district court did not err in denying Witter's petition.

McConnell claim

Witter argues that the district court erred by denying his claim that the jury's consideration of two invalid felony aggravators resulted in prejudice. In sentencing Witter to death, the jury found four aggravating circumstances, three of which remain:[1] (1) Witter has a previous conviction for a violent felony, (2) the murder was committed while Witter was engaged in the commission of a burglary, and (3) the murder was committed while Witter was engaged in the commission of a sexual assault. In his petition below, Witter claimed that his death sentence should be reversed because the two felony aggravators were invalid pursuant to this court's decision in McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004). The district court found that the claim was

[1]The aggravator for a murder committed to avoid or prevent a lawful arrest was stricken on direct appeal. Witter, 112 Nev. at 929, 921 P.2d at 900.

procedurally barred pursuant to NRS 34.726, 34.800, and 34.810, but that Witter had good cause for his delay. Accordingly, the district court struck the two felony aggravators. The district court reweighed the remaining aggravating circumstance against the mitigating evidence and concluded that the error was harmless. Witter now argues that the district court erred in upholding the death sentence.

Witter's petition was untimely and successive and the State specifically pleaded laches in a motion to dismiss. See NRS 34.726; NRS 34.810(2); NRS 34.800(2). Moreover, his McConnell claim was barred because it was appropriate for direct appeal. See NRS 34.810(1)(b)(2). Thus, in order for his claim to be considered on its merits, Witter had to demonstrate both good cause for failing to raise the claim earlier and actual prejudice. NRS 34.726; NRS 34.810(1), (3).

There is no dispute that Witter has good cause to raise his McConnell claim in an untimely and successive petition. See Bejarano v. State, 122 Nev. 1066, 1072, 1078, 146 P.3d 265, 270, 274 (2006) (explaining that "[g]ood cause . . . may be established where the factual or legal basis for the claim was not reasonably available," and holding that McConnell is retroactive). However, to overcome the procedural bars Witter also had to demonstrate actual prejudice. Prejudice is shown if "there is a reasonable doubt that the jury would have returned a sentence of death absent any stricken aggravating circumstances." Id. at 1073, 146 P.3d at 270-71.

This court must therefore decide whether it is beyond a reasonable doubt both that the jury would have found Witter death eligible and that the jury would have selected the death penalty absent the erroneous aggravating circumstances. If the court cannot make both

determinations, then a new penalty hearing is required. See Hernandez v. State, 124 Nev. ___, ___, 194 P.3d 1235, 1240-41 (2008); Bejarano, 122 Nev. at 1081-82, 146 P.3d at 276; Leslie v. Warden, 118 Nev. 773, 784, 59 P.3d 440, 448 (2002).

The remaining aggravator is based on Witter's 1986 conviction for assault with a deadly weapon resulting in great bodily injury. The evidence at the penalty hearing showed that after returning from a night out, Witter's ex-girlfriend, Gina Martin, and David Rumsey were talking when they heard glass breaking in the carport. Witter was outside screaming and breaking the glass out of the car. When Rumsey stated that he did not want to fight, Witter stabbed him in the midsection with a butcher knife. Rumsey ran into the house, and Witter chased him. Rumsey was able to lock himself in the master bedroom until paramedics and police arrived. Witter was arrested and taken to the jail for booking, during which he told police that he "wanted to kill Rumsey and was sorry that he didn't do it." Rumsey spent four weeks in the hospital recovering from numerous cuts to his intestines and bowels. Witter was charged with attempted murder and assault with a deadly weapon and pleaded guilty to the lesser offense.

As mitigating evidence, several members of Witter's family testified that Witter's mother was an alcoholic drug user, his father was a convicted felon with drug and alcohol problems, and he suffered physical abuse as a child. Evidence was presented that Witter began abusing drugs and alcohol at the age of 12. In addition, psychologist Lewis Etcoff testified that (1) Witter had an IQ of 83 (which was "low average"), (2) he had a history of drug abuse and was alcohol and drug dependent, (3) Witter's family was dysfunctional, and (4) on one occasion Witter's uncle

had fondled Witter's genitalia. Dr. Etcoff diagnosed Witter with Anti-social Personality Disorder and, because he had no other evidence to support his conclusions, he only provisionally diagnosed Witter with Attention Deficit Hyperactivity Disorder and Developmental Arithmetic Disorder. Finally, Witter's sister testified that on the night of the murder Witter had just been told by his girlfriend that she had obtained an abortion of the child they were expecting. Dr. Etcoff testified that Witter had told him the same thing.[2]

We conclude beyond a reasonable doubt that the jury would have found Witter death eligible absent the felony aggravating circumstances. The remaining aggravator is compelling and involved a violent attack in which Witter stabbed the victim with a seven-inch butcher knife and cut the victim's bowels in ten places, almost killing him. On the other hand, the mitigating circumstances—that Witter: (1) was under the influence of an extreme mental or emotional disturbance, (2) came from a dysfunctional family with alcohol and substance abuse and

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[2]Contrary to Witter's arguments, the reweighing analysis is limited to the trial record. See Rippo v. State, 122 Nev. 1086, 1093-94, 146 P.3d 279, 284 (2006); Archanian v. State, 122 Nev. 1019, 1040-41, 145 P.3d 1008, 1023 (2006); see also Bridges v. State, 116 Nev. 752, 766, 6 P.3d 1000, 1010 (2000) (stating that this court "elected to explicitly reweigh the aggravating and mitigating circumstances based upon our independent review of the trial record"). In Haberstroh v. State, 119 Nev. 173, 184 n.23, 69 P.3d 676, 683 n.23 (2003), this court emphasized that its reweighing did not involve factual findings "other than those of the jury at the original penalty hearing." Because the reweighing analysis asks whether it is "clear beyond a reasonable doubt that absent the invalid aggravators the jury still would have imposed a sentence of death," Bejarano, 122 Nev. at 1081, 146 P.3d at 276, the analysis, by its very nature, addresses the evidence considered by the jury.

psychological issues, (3) had below average intelligence, (4) had possible Attention Deficit Hyperactivity Disorder, (5) had possible Antisocial Personality Disorder, and (6) had possible Developmental Arithmetic Disorder—are not particularly compelling.[3]

We further conclude beyond a reasonable doubt that the jury would have selected the death penalty. Evidence was presented of Witter's numerous misdemeanor convictions for being drunk in public, resisting arrest, vandalism, disturbing the peace, DUI, and hit and run, as well as his arrests for arson, resisting arrest, fighting, drunk driving, burglary, vandalism, and various drug offenses. Evidence was also presented that Witter had been incarcerated as a juvenile for rape. In addition, the State presented evidence that Witter was affiliated with a gang, had committed acts of domestic violence, and that while in jail he had been found with a shank. In conjunction with the victim impact testimony of James Cox's family, including the testimony of his widow who had personally witnessed and survived the attack, we conclude that it is beyond a reasonable doubt that the jury would have selected the death penalty.

Accordingly, the district court did not err in denying Witter relief because he failed to demonstrate actual prejudice and thus his

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[3]Witter argues that because the jury that sentenced him to death did not use a special verdict form, there is no way of knowing which mitigators the jury considered and therefore reweighing is improper because it would involve fact-finding. Witter's claim is without merit. The district court considered every mitigating circumstance for which Witter offered evidence at trial, and we have done the same.

McConnell claim was procedurally barred.[4] See Bejarano, 122 Nev. at 1073, 146 P.3d at 270-71.

Remaining claims

In addition to the claim addressed above, Witter's petition included claims that (1) the prosecution committed misconduct by withholding evidence and presenting false testimony, (2) trial counsel was ineffective for failing to investigate the mitigating and aggravating evidence, (3) the prosecution exercised its peremptory challenges in a racially discriminatory manner, (4) the trial court erred by limiting voir dire questioning, (5) he was prejudiced by the disclosure of his mental health records, (6) the trial court erroneously instructed the jury on reasonable doubt, mitigating evidence, and aggravating evidence, (7) the State improperly introduced his juvenile records, (8) he was prejudiced by a "death-qualified" jury, (9) the trial court improperly admitted victim impact evidence, (10) the trial court made improper comments about the Bible during voir dire, (11) he was prejudiced by an elected judiciary, (12) the conditions on death row violate the Eighth Amendment, (13) the death penalty is invalid under international law, (14) Nevada's capital punishment system is arbitrary and capricious, (15) the death penalty

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[4]In its written order, the district court denied the State's motion to dismiss Witter's McConnell claim as procedurally barred. This ruling was at odds with the district court's later determination that absent the stricken aggravators, the jury would still have imposed a sentence of death. Because there was no reasonable doubt that the jury would have found Witter death eligible and returned a sentence of death absent the stricken aggravating circumstances, Witter failed to show prejudice and his claim was procedurally barred.

violates the Eighth Amendment, (16) he was prejudiced by numerous trial errors and instances of ineffective assistance of counsel, and (17) Nevada's lethal injection protocol is unconstitutional.[5]

Witter's petition was untimely and successive. See NRS 34.726; 34.810(2). Accordingly, in order for Witter's claims to be considered on their merits, he had to demonstrate both good cause for his delay and for failing to raise the claims previously and actual prejudice. NRS 34.726(1); NRS 34.810(1), (3). In addition, many of his claims had already been resolved by this court and were barred by the doctrine of the law of the case. See Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). Moreover, because Witter's petition was filed more than 5 years after the resolution of his prior petition and the State specifically pleaded laches in a motion to dismiss, Witter had to overcome the presumption of prejudice to the State. See NRS 34.800(2).

Witter claims that he demonstrated good cause to overcome the procedural bars by showing that: (1) his counsel was ineffective, (2) the procedural bars are discretionary and are applied inconsistently, (3) the delay in filing was not his fault because he was represented by counsel, (4) the State withheld evidence, (5) the legal basis for two claims was not previously available, and (6) overcoming the procedural bars to one claim exempts an entire petition from the procedural bars, and Witter also

---

[5]To the extent that Witter challenges the specific lethal injection protocol used by the Nevada Department of Corrections, Witter's claim is not cognizable in a post-conviction petition for a writ of habeas corpus. McConnell v. State, 125 Nev. ___, ___, 212 P.3d 307, 311 (2009).

claims that the district court erred in applying the doctrine of the law of the case. Witter's claims are without merit.

Ineffective assistance of counsel

Witter claims that the ineffective assistance of trial, appellate, and post-conviction counsel provides him with good cause to overcome the procedural bars. While the ineffective assistance of post-conviction counsel may provide good cause for filing a successive petition, Crump v. Warden, 113 Nev. 293, 304-05, 934 P.2d 247, 254 (1997); see also McKague v. Warden, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996), this principle is not unfettered. In Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003), this court explained that "to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted." See also Edwards v. Carpenter, 529 U.S. 446, 452-53 (2000) (concluding that procedurally defaulted claim of ineffective assistance of counsel cannot serve as cause for another procedurally defaulted claim).

Other than to argue that trial and appellate counsel committed tactical errors during their representation, Witter fails to explain how any of these alleged deficiencies precluded him from filing his second post-conviction petition until ten years after resolution of his direct appeal. And while his post-conviction counsel claims were not available until this court resolved his first post-conviction appeal in August of 2001, Witter fails to explain the additional delay of five and a half years before filing his second post-conviction petition. Therefore, the district court did not err in denying Witter's claim of good cause based on the ineffective assistance of counsel.

Discretion and inconsistent application of the procedural bars

Witter claims that application of the procedural bars to his petition violates due process because the bars are discretionary and are inconsistently applied.

As to Witter's claim that the procedural bars are discretionary, this court has established that procedural default rules are mandatory. See Clem v. State, 119 Nev. 615, 623 n.43, 81 P.3d 521, 527 n.43 (2003); Pellegrini v. State, 117 Nev. 860, 886, 34 P.3d 519, 536 (2001). In fact, in State v. Dist. Ct. (Riker), this court expressly stated that Riker's claim that this court has asserted discretion to disregard the procedural bars was "a frivolous claim." 121 Nev. 225, 239, 112 P.3d 1070, 1079 (2005). Therefore, Witter's claim is without merit.

As to Witter's proposition that the procedural bars cannot be applied to him because this court applies them inconsistently, this court has previously rejected similar claims. See Riker, 121 Nev. at 236, 112 P.3d at 1077.

Witter's argument that Rippo v. State, 122 Nev. 1086, 146 P.3d 279 (2006), is evidence of this court's inconsistency is without merit. Although the instructional error that we addressed in that opinion was procedurally barred, see NRS 34.810(1)(b)(2), Witter's claim fails because the instructional error addressed sua sponte in that case was related to this court's reweighing process after striking several McConnell aggravators. The issue was not discussed outside of that context. The circumstances in Rippo resulted because the erroneous jury instruction given in that case had direct relevance to this court's reweighing analysis, and those unique circumstances do not support Witter's contention that this court inconsistently applies the procedural bars.

"Fault" under NRS 34.726

Witter claims that the delay in filing was not his "fault" under NRS 34.726 because he was represented by counsel during the proceedings. Witter's claim is without merit. By the very nature of the attorney-client relationship, counsel operates on behalf and in place of a defendant. Accepting Witter's interpretation ascribes a meaning to the statute not contemplated by the Legislature. This court has interpreted NRS 34.726(1) as requiring "a petitioner [to] show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). This language contemplates that the delay in filing a petition must be caused by a circumstance not within the control of the defense team as a whole, not solely the defendant. Counsel's actions are routinely imputed to a defendant. Considering the nature and purpose of legal representation, we conclude that Witter's view that NRS 34.726(1) contemplates only delay personally caused by a petitioner is untenable.

Moreover, even if this court accepted Witter's interpretation of NRS 34.726(1), he waited more than five years after the district court denied his first habeas petition to file the instant petition, and he offers no explanation for the delay.

Withholding of evidence

Witter claims he has good cause to raise two of his claims now because the prosecution withheld evidence that prevented him from raising them earlier. Specifically, Witter refers to the prosecutor's handwritten notes taken during trial and alleged evidence that he was not a gang member. Having reviewed the record on appeal and carefully

considered Witter's claims in this regard, we conclude that Witter's claims are wholly without merit.

Legal basis not previously available

Witter claims that he has good cause to raise two claims untimely because the legal basis for those claims was not previously available. Specifically, he refers to the United States Supreme Court's decisions in Roper v. Simmons, 543 U.S. 551 (2005), and Atkins v. Virginia, 536 U.S. 304 (2002). Those cases, however, do not support the propositions for which Witter cites them, and both opinions were issued more than one year prior to the filing of his petition. Therefore, these two cases do not provide good cause.

Application of procedural bars to the petition as a whole

Witter argues that the district court erred in dismissing his remaining claims because he had good cause and prejudice to overcome the procedural bars to his McConnell claim. Witter claims that the procedural bars apply only to a petition as a whole, and should not be applied to individual claims. Witter's claim is without merit for two reasons.

First, Witter has not overcome the procedural bars to any of his claims, including his McConnell claim. Thus, all of his claims are procedurally barred.

Second, Witter incorrectly interprets Nevada case law in arriving at his conclusion. He cites State v. Powell, 122 Nev. 751, 138 P.3d 453 (2006), for the proposition that procedural bars address a habeas petition as a whole and should not be applied to each individual claim. However, the issue in Powell was whether a supplemental pleading filed two years after the original petition was barred as untimely despite the

fact that the original petition was timely filed. Id. at 755-59, 138 P.3d at 456-58. This court in Powell determined that NRS 34.726 and NRS 34.800 apply to petitions and not to supplemental claims, and concluded that Powell's supplement was not time barred under NRS 34.726. Id. at 757-59, 138 P.3d at 457-58. Nothing in Powell suggests that overcoming a procedural bar to an individual claim excuses the procedural bar for the entire petition.

Witter also cites State v. Bennett, 119 Nev. 589, 81 P.3d 1 (2003), and argues that in that case this court held an entire habeas petition exempted from the procedural bars because of one meritorious Brady claim. Witter's claims are belied by the plain language of that opinion. In Bennett this court specifically stated that some of the claims were barred by the doctrine of the law of the case and that others were barred by NRS 34.810 "because Bennett has not demonstrated good cause and prejudice for failing to raise them earlier." 119 Nev. at 605-06, 81 P.3d at 12.

This court has not concluded that where a petition is untimely and barred by laches, a showing of good cause and prejudice sufficient to overcome the procedural bars to a single claim operates to render all of the additional claims timely. Such a conclusion is untenable and Witter's claim in this regard is wholly without merit.

Doctrine of the law of the case

Witter argues that the district court erred in finding several of his claims barred by the doctrine of the law of the case. See Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). The district court's order did not specify which claims were denied on that basis. However, the

argument provides Witter no relief because all of his claims are procedurally barred.

Having considered Witter's claims and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Hardesty

_____, J.
Parraguirre

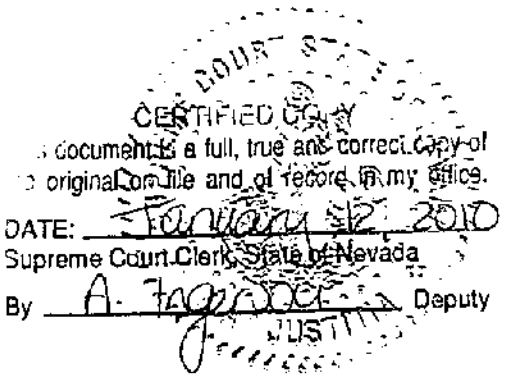
_____, J.
Douglas

_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

cc: Hon. Valorie Vega, District Judge
Federal Public Defender/Las Vegas
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk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DATE: January 12 2010
Supreme Court Clerk, State of Nevada
By A. Fagerstrom Deputy

09-30582

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM LESTER WITTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50447

FILED

DEC 16 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied.[1] NRAP 40(c).

It is so ORDERED.[2]

Hardesty, C.J.

Parraguirre, J.

Douglas, J.

Cherry, J.

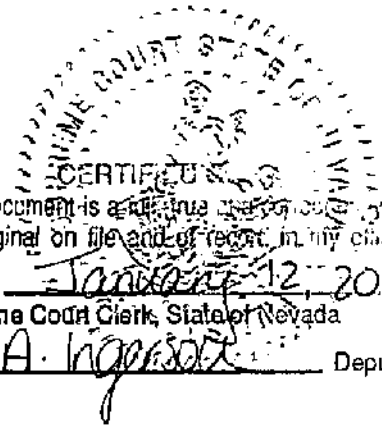
Saitta, J.

Gibbons, J.

[1]We deny appellant's motion, filed on November 10, 2009, requesting this court to take judicial notice of court documents filed in other cases.

[2]The Honorable Kristina Pickering, Justice, voluntarily recused herself from participation in this matter.

cc: Hon. Valorie Vega, District Judge
Federal Public Defender/Las Vegas
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk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the original on file and of record in my office.
DATE: January 12, 2010
Supreme Court Clerk, State of Nevada
By A. Ingersoll Deputy

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM LESTER WITTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 50447

District Court Case No. C117513

REMITTITUR

TO: Steven D. Grierson, Clark District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: January 12, 2010

Tracie Lindeman, Clerk of Court

By: A. Ingersoll
Deputy Clerk

cc (without enclosures):
Hon. Valorie Vega, District Judge
Attorney General/Carson City
Clark County District Attorney
Federal Public Defender/Las Vegas

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on JAN 20 2010.

HEATHER LOFQUIST
Deputy District Court Clerk

10-00048

ORIGINAL

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Attorneys for Petitioner

2008 APR 28 P 4:03

CLERK OF THE COURT

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: 6-17-08
Hearing Time: 9:00 a.m.

(Death Penalty Habeas Corpus Case)

CLERK OF THE COURT
APR 28 2008
RECEIVED

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 is being held in custody in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States of America and Article 1, Sections 1, 3, 6, and 8 of the Constitution of the State of Nevada.

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. 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. The jury found burglary, attempted sexual assault and that Mr. Witter was convicted of a prior violent felony as aggravating circumstances. 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 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 habeas petition which did not refer to any material outside the appellate record.[1] Following an evidentiary hearing 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.

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[1] Pursuant to Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997), Mr. Witter was entitled to the effective assistance of counsel in his state post conviction proceedings.

7. Mr. Witter filed a pro per petition for writ of habeas corpus in the United States District Court. The Court appointed the Law Offices of the Federal Public Defender to represent Mr. Witter on September 17, 2001.

8. On November 23, 2005, Mr. Witter filed an amended petition for writ of habeas corpus, followed by a motion for stay and abeyance on March 7, 2006. Respondents filed a motion to dismiss the petition, arguing Mr. Witter's claims were unexhausted, untimely, and not cognizable in federal habeas review. Respondents also filed an opposition to the motion for stay and abeyance. On November 30, 2006, the United States District Court granted Mr. Witter's motion for stay and abeyance pending the exhaustion of state court remedies.

9. Mr. Witter filed a petition for writ of habeas corpus in this court and a Supplemental Claim to Petition for Writ of Habeas Corpus. On August 2, 2007 and August 30, 2007, the district court denied relief.

10. Mr. Witter timely filed a notice of appeal. The opening brief is currently due in the Nevada Supreme Court on April 29, 2008.

11. Polk v. Sandoval, 503 F.3d 903, 909 (9th Cir. 2007), was decided on September 11, 2007, after the district court denied relief on Mr. Witter's last habeas petition.

12. No prejudice will result to the prosecution 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.

13. 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

14. Grounds for Relief:

Mr. Witter 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 state and federal constitutional guarantees of due process, equal protection, and a reliable sentence due to the substantial and injurious effect of the trial judge's instructions to the jury. U.S. CONST. AMENDS. V, VI, XIV; NEVADA CONST. Art I, §§ 1, 3, 8 and Art IV, § 21.

SUPPORTING FACTS

1. The trial judge instructed the jury regarding premeditation, but did not instruct the jury regarding wilfulness and deliberation. The resulting instruction was unconstitutional and injuriously affected the verdict by omitting independent jury findings on essential elements of the offense: wilfulness and deliberation.

2. In Nevada, first degree murder is a willful, deliberate, and premeditated killing. N.R.S. 200.030(1)(a). Despite the statutory definition of first degree murder, the trial judge's instructions failed to require the jury to find the elements of wilfulness or deliberation. The trial court instructed the jury:

> Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.

> Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

Ex. 1. This instruction allowed the jury to presume wilfulness and deliberation if they determined the murder was premeditated.

3. The jury's failure to consider the individual elements of wilfulness and deliberation was Constitutional error. The Supreme Court held that a defendant was deprived of due process if a jury instruction had "the effect of relieving the State of the burden of proof enunciated...on the critical question of petitioner's state of mind." Sandstrom v. Montana, 442 U.S. 510, 521, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); Francis v. Franklin, 471 U.S. 307, 326, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985) (reaffirming "the rule of Sandstrom and the wellspring due process principle from which it was drawn."); see also In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) ("the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); see Polk v. Sandoval 503 F.3d 903, 909 (9th Cir. 2007).

4. The Nevada Supreme Court held that deliberation is a critical element of the *mens rea* necessary to prove first-degree murder. "In order to establish first-degree murder, the premeditated killing must also have been done deliberately, that is, with coolness and reflection." Byford v. State, 116 Nev. 215, 994 P.2d 700, 714 (2000) (citation omitted). The trial judge's instruction relieved the prosecution of the burden to prove the critical elements of "deliberation," and "wilfulness," violated due process, and created error.

5. The errant instruction left no room for the state to establish deliberation and permitted Mr. Witter's conviction for first-degree murder even if his

determination to kill was a "mere unconsidered and rash impulse" or "formed in passion." Byford, 994 P.2d at 714. The prosecutor exacerbated the error in his argument:

> The only other question for this crime then is whether or not this is first degree murder or second degree murder. The distinguishing feature between the two is premeditation and deliberation. ....
>
> * * *
>
> Read it with me "Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of killing. Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes, from the evidence, that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the as constituting the killing, it is willful, deliberate and premeditated murder."
>
> Based on my experience, that is probably not what you thought premeditation is. Normally when we think of premeditation, we think of somebody who has plotted this out in advance; sat down and drawn up a plan and said 'okay, I'm going to kill this person. I'm going to do it on this date, in this manner, at this time, under these conditions;' goes to the store, buys whatever he needs to do it and brings everything that he needs and carries out his planned and plotted out murder.
>
> And that is not what premeditation means. It is not related to time; doesn't have anything to do with time. It has to do with making a decision, forming a decision or making a determination in your mind. It's the decision making process that we are talking about, and decisions can be arrived at like that or they could take a long time, and that's why it's not - time doesn't factor into this. You look at and decide whether or not he had formed the decision, made the determination to kill James Cox.
>
> If the answer to that question is yes, then there's premeditation. It can happen as quickly as successive thoughts of the mind and thoughts can happen quickly.
>
> . . . .
>
> Premeditation is a design, a determination to kill. Premeditation may not be for a day, it may be as instantaneous as successive thoughts of the mind. If this design was as complete as the design of a home, then I submit to you, the defendant wouldn't be here today.

TT 06/28/95, p. 59, 92 (emphasis added). The prosecutor argued, "It's the decision making process that we are talking about, and decisions can be arrived at like that or they could take a long time, and that's why it's not - time doesn't factor into this. You look at and decide whether or not he had formed the decision, made the determination to kill James Cox." The prosecutors argument sought to persuade the jury that deliberation, or cool reflective thought, was not required for a first degree murder conviction. The jury, therefore, was never required to determine whether Mr. Witter's conduct was deliberate or wilful, and the prosecutor persuaded the jury to ignore any such requirement.

6. When the trial court creates Constitutional error in jury instructions, the record must be clear beyond a reasonable doubt that the jury would have found the defendant guilty absent the errant instruction, to avoid a reversal. Santana v. State 148 P.3d 741 (2006) Mr. Witter's jury was directed, through instruction and argument, not to consider wilfulness or deliberation, essential elements of first degree murder. Evidence that Mr. Witter's actions were not wilful or deliberate was available. Mr. Witter was intoxicated; prosecutors argued that Mr. Witter's blood alcohol content was between .13 and .19. See argument, TT 06/28/95, p. 64 - 65. Removing deliberateness and wilfulness allowed the jury to ignore evidence of Mr. Witter's intoxication and the role it played in the offense. By removing deliberation and wilfulness from the jury's consideration, the trial judge prevented the jury's evaluation of Mr. Witter's culpability under the individual circumstances of the offense. Mr. Witter's intoxication weighed heavily against any deliberate action or rational thought.

7. The prosecution argued a felony murder theory and a premeditated murder theory to support Mr. Witter's first degree murder conviction. The jury was not offered a special verdict form to demonstrate which theory supported their murder conviction. Ex. 2. Without a special verdict form, this Court should not presume Mr. Witter's conviction valid. The jury may have convicted Mr. Witter under either a felony murder theory or an premeditated murder theory. Mills v. Maryland 486 U.S. 367, 108

S.Ct. 1860 (1988) ("With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict," citing Yates v. United States, 354 U.S. 298, 312, 77 S.Ct. 1064, 1073, 1 L.Ed.2d 1356 (1957); Stromberg v. California, 283 U.S. 359, 367-368, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931); see also Johnson v. State 118 Nev. 787, 59 P.3d 450 (2002).

8. Because the trial judge erred in failing to require the jury to find each element of first degree murder, and because it is not clear beyond a reasonable doubt that the jury would have convicted Mr. Witter absent the error in jury instruction, this Court should reverse Mr. Witter's conviction of First Degree murder.

PRAYER FOR RELIEF

Mr. Witter has demonstrated he is entitled to relief. For the reasons stated above, Mr. Witter prays this Court:

1) issue a Writ of Habeas Corpus;

2) vacate Mr. Witter's conviction and sentence;

3) order an argument on the merits;

4) enter an order granting Mr. Witter a new trial on all issues.

Respectfully submitted this 28 day of April, 2008.

FRANNY A. FORSMAN
Federal Public Defender

Gerald J. Bierbaum
Assistant Federal Public Defender

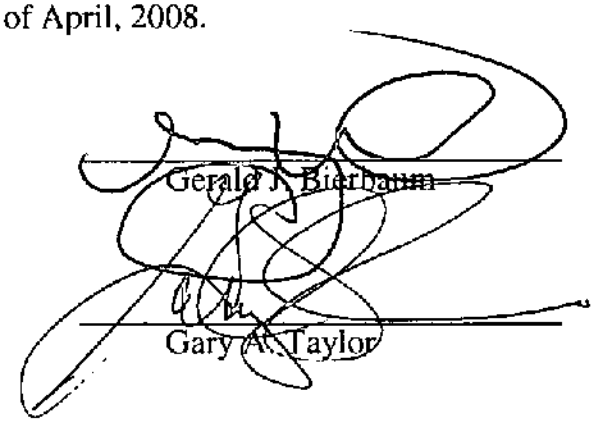
Gary A. Taylor
Assistant Federal Public Defender

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 April , 2008.

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 28th day of April, 2008.



CERTIFICATE OF MAILING

In accordance with the Nevada Rules of Civil Procedure, the undersigned hereby certifies that on this 28 day of April, 2008 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:

Catherine Cortez Masto
Attorney General
Robert E. Wieland
Senior Deputy Attorney General
Criminal Justice Division
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511

Office of the District Attorney
Regional Justice Center, Third Floor
Attn: Steven Owens, Deputy District Attorney
200 Lewis Avenue
PO Box 552212
Las Vegas, Nevada 89155

An employee of the Federal Public Defender

EXHIBIT 1

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- WILLIAM LESTER WITTER, #1204227 Defendant.	)	CASE NO. C117513 DEPT. NO. IX DOCKET NO. W

INSTRUCTIONS TO THE JURY (INSTRUCTION NO. I)

MEMBERS OF THE JURY:

It is now my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence. You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the Court.

Witter, William
Recd. 2/12/02 DS-8903
Prior Counsel- D. Schieck

INSTRUCTION NO. 2

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

Witter, William
Recd. 2/12/02 DS-8904
Prior Counsel- D. Schieck

INSTRUCTION NO. 3

An Information is but a formal method of accusing a person of a crime and is not of itself any evidence of their guilt.

In this case, it is charged in an Information that on or about the 14th day of November, 1993, the defendant committed the following offenses:

COUNT I - MURDER WITH USE OF A DEADLY WEAPON

did then and there wilfully, feloniously, without authority of law, 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, kill JAMES HAROLD COX, a human being, by stabbing at and into the body of the said JAMES HAROLD COX with a deadly weapon, to-wit: a knife.

COUNT II - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON

did then and there, without authority of law and with malice aforethought, wilfully and feloniously attempt to kill KATHRYN TERRY COX, a human being, by stabbing at and into the body of the said KATHRYN TERRY COX, with a deadly weapon, to-wit: a knife.

COUNT III - ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously attempt to sexually assault and subject KATHRYN TERRY COX, a female person, to sexual penetration, to-wit: by telling KATHRYN TERRY COX that he was going to rape her, by instructing her to suck his penis, by cutting and tearing her outer garments, by pulling her pants and pantyhose down around her ankles and by fondling her body, against her will, said defendant using a deadly weapon, to-wit: a knife, during the commission of said crime.

///

Witter, William
Recd. 2/12/02 DS-8905
Prior Counsel- D. Schieck

COUNT IV - BURGLARY

did then and there wilfully, unlawfully, and feloniously enter, with intent to commit sexual assault and/or murder, that certain 1988 Mercury, bearing Nevada License No. 303 CRL, owned by JAMES HAROLD COX and/or KATHRYN TERRY COX.

It is the duty of the jury to apply the rules of law contained in these instructions to the facts of the case and determine whether or not the defendant is guilty of one or more of the offenses charged.

Each charge and the evidence pertaining to it should be considered separately. The fact that you may find a defendant guilty or not guilty as to one of the offenses charged should not control your verdict as to any other defendant or offense charged.

INSTRUCTION NO. 4

To constitute the crime charged, there must exist a union or joint operation of an act forbidden by law and an intent to do the act.

The intent with which an act is done is shown by the facts and circumstances surrounding the case.

Do not confuse intent with motive. Motive is what prompts a person to act. Intent refers only to the state of mind with which the act is done.

Motive is not an element of the crime charged and the State is not required to prove a motive on the part of the defendant in order to convict. However, you may consider evidence of motive or lack of motive as a circumstance in the case.

Witter, William
Recd. 2/12/02 DS-8907
Prior Counsel- D. Schieck

INSTRUCTION NO. 5

Murder is the unlawful killing of a human being, with malice aforethought, whether express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned.

Witter, William
Recd. 2/12/02 DS-8908
Prior Counsel- D. Schieck

INSTRUCTION NO. 6

Malice aforethought means the intentional doing of a wrongful act without legal cause or excuse or what the law considers adequate provocation. The condition of mind described as malice aforethought may arise, not alone from anger, hatred, revenge or from particular ill will, spite or grudge toward the person killed, but may result from any unjustifiable or unlawful motive or purpose to injure another, which proceeds from a heart fatally bent on mischief or with reckless disregard of consequences and social duty. Malice aforethought does not imply deliberation or the lapse of any considerable time between the malicious intention to injure another and the actual execution of the intent but denotes rather an unlawful purpose and design in contradistinction to accident and mischance.

Witter, William
Recd. 2/12/02 DS-8909
Prior Counsel- D. Schieck

INSTRUCTION NO. 7

Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.

Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

Witter, William
Recd. 2/12/02 DS-8910
Prior Counsel- D. Schieck

INSTRUCTION NO. 8

The intention to kill may be ascertained or deduced from the facts and circumstances of the killing, such as the use of a weapon calculated to produce death, the manner of its use, and the attendant circumstances characterizing the act.

Witter, William
Recd. 2/12/02 DS-8911
Prior Counsel- D. Schieck

INSTRUCTION NO. 9

Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.

Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

Witter, William
Recd. 2/12/02 DS-8912
Prior Counsel- D. Schieck

INSTRUCTION NO. 10

A killing which is committed in the perpetration of the felony of Attempted Sexual Assault or Burglary is deemed to be Murder in the First Degree, whether the killing was intentional, unintentional or accidental. This is called the Felony-Murder rule.

Proof of premeditation, deliberation and malice aforethought are not required.

The specific intent to commit Attempt Sexual Assault or Burglary must be proven beyond a reasonable doubt.

Witter, William
Recd. 2/12/02 DS-8913
Prior Counsel- D. Schieck

INSTRUCTION NO. 11

You are instructed that if you find a defendant guilty of murder of the first degree, you must also determine whether or not a deadly weapon was used in the commission of this crime.

Witter, William
Recd. 2/12/02 DS-8914
Prior Counsel- D. Schieck

INSTRUCTION NO. 12

A deadly weapon is any instrumentality which is inherently dangerous. Inherently dangerous means that the instrumentality itself, if used in the ordinary manner contemplated by its design and construction, will, or is likely to, cause a life-threatening injury or death.

A knife may or may not be a deadly weapon, and it is up to you to determine whether such an instrumentality, under the facts of this case, falls into that classification.

Witter, William
Recd. 2/12/02 DS-8915
Prior Counsel- D. Schieck

INSTRUCTION NO. 13

If you find beyond a reasonable doubt that a defendant committed Murder of the First Degree with the Use of a Deadly Weapon, then you are instructed that the verdict of Murder of the First Degree with the Use of a Deadly Weapon is the appropriate verdict.

If, however, you find that a deadly weapon was not used in the commission of the Murder, but you do find that a Murder was committed, then you are instructed that the verdict of Murder of the First Degree Without the Use of a Deadly Weapon is the appropriate verdict.

You are instructed that you cannot return a verdict of both Murder of the First Degree with the Use of a Deadly Weapon and Murder of the First Degree without the Use of a Deadly Weapon.

Witter, William
Recd. 2/12/02 DS-8916
Prior Counsel- D. Schieck

INSTRUCTION NO. 14

The offense of First Degree Murder necessarily includes the lesser offense of Second Degree Murder.

If you are convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but you have a reasonable doubt whether such murder was of the first or of the second degree, you must give the defendant the benefit of that doubt and return a verdict of murder of the second degree.

Witter, William
Recd. 2/12/02 DS-8917
Prior Counsel- D. Schieck

INSTRUCTION NO. 15

A Murder which is not Murder of the First Degree is a Murder of the Second Degree.

The distinguishing feature between first and second degree murder is the presence or absence of premeditation and deliberation. If the killing is done with malice, but without deliberation and premeditation, that is, without the willful, deliberate and premeditated intent to take life which is an essential element of First Degree Murder, then the offense is Murder of the Second Degree.

In practical application this means that the unlawful killing of a human being with malice aforethought, but without a deliberately formed and premeditated intent to kill, is Murder of the Second Degree.

If you believe from the evidence beyond a reasonable doubt that the defendant is guilty of Murder, and there is in your minds a reasonable doubt as to which of the two degrees he is guilty, he must be convicted of the lower of such degrees which is Murder of the Second Degree.

Witter, William
Recd. 2/12/02 DS-8918
Prior Counsel- D. Schieck

INSTRUCTION NO. 16

You are instructed that if you find a defendant guilty of murder of the second degree you must also determine whether or not a deadly weapon was used in the commission of this crime.

Witter, William
Recd. 2/12/02 DS-8919
Prior Counsel- D. Schieck

INSTRUCTION NO. 17

If you find beyond a reasonable doubt that a defendant committed Murder of the Second Degree with the Use of a Deadly Weapon, then you are instructed that the verdict of Murder of the Second Degree with the Use of a Deadly Weapon is the appropriate verdict.

If, however, you find that a deadly weapon was not used in the commission of the Murder, but you do find that a Murder was committed, then you are instructed that the verdict of Murder of the Second Degree without the Use of a Deadly Weapon is the appropriate verdict.

You are instructed that you cannot return a verdict of both Murder of the Second Degree with the Use of a Deadly Weapon and Murder of the Second Degree without the Use of a Deadly Weapon.

Witter, William
Recd. 2/12/02 DS-8920
Prior Counsel- D. Schieck

INSTRUCTION NO. 18

The elements of an attempt to commit a crime are: 1) the intent to commit the crime; 2) performance of some act towards its commission; and 3) failure to consummate its commission.

An act done with intent to commit a crime, and tending but failing to accomplish it, is an attempt to commit that crime.

Witter, William
Recd. 2/12/02 DS-8921
Prior Counsel- D. Schieck

INSTRUCTION NO. 19

While it is true the overt act ought to be a direct unequivocal act done toward the commission of the offense, whenever the design of a person to commit a crime is clearly shown, any act intentionally done in furtherance thereof will constitute an attempt.

Witter, William
Recd. 2/12/02 DS-8922
Prior Counsel- D. Schieck

INSTRUCTION NO. 20

Attempted murder is the performance of an act or acts which tend, but fail, to kill a human being, when such acts are done with express malice, namely, with the deliberate intention unlawfully to kill.

It is not necessary to prove the elements of premeditation and deliberation in order to prove attempted murder.

Witter, William
Recd. 2/12/02 DS-8923
Prior Counsel- D. Schieck

INSTRUCTION NO. 21

You are instructed that if you find the defendant guilty of Attempt Murder you must also determine whether or not a deadly weapon was used in the commission of this crime.

Witter, William
Recd. 2/12/02 DS-8924
Prior Counsel- D. Schieck

INSTRUCTION NO. 22

If you find beyond a reasonable doubt that a defendant committed Attempt Murder with the Use of a Deadly Weapon, then you are instructed that the verdict of Attempt Murder with the Use of a Deadly Weapon is the appropriate verdict.

If, however, you find that a deadly weapon was not used in the commission of the Attempt Murder, but you do find that an Attempt Murder was committed, then you are instructed that the verdict of Attempt Murder without the Use of a Deadly Weapon is the appropriate verdict.

You are instructed that you cannot return a verdict of both Attempt Murder with the Use of a Deadly Weapon and Attempt Murder without the Use of a Deadly Weapon.

Witter, William
Recd. 2/12/02 DS-8925
Prior Counsel- D. Schieck

INSTRUCTION NO. 23

A person who subjects another person to sexual penetration against the victim's will or under conditions in which the perpetrator knows or should know that the victim is physically incapable of resisting, is guilty of sexual assault.

As used in these instructions, "sexual penetration" means fellatio, or any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital opening of the body of another, including sexual intercourse.

Fellatio means oral sexual stimulation of the male penis.

Witter, William
Recd. 2/12/02 DS-8926
Prior Counsel- D. Schieck

INSTRUCTION NO. 24

If you find beyond a reasonable doubt that the defendant committed the crime of Attempt Sexual Assault with the Use of a Deadly Weapon, then you are instructed that the verdict of Attempt Sexual Assault with the Use of a Deadly Weapon is the appropriate verdict.

If, however, you find that a deadly weapon was not used in the commission of the Attempt Sexual Assault, but you do find that an Attempt Sexual Assault was committed, then you are instructed that the verdict of Attempt Sexual Assault is the appropriate verdict.

You are instructed that you cannot return a verdict of both Attempt Sexual Assault with the Use of a Deadly Weapon and Attempt Sexual Assault.

Witter, William
Recd. 2/12/02 DS-8927
Prior Counsel- D. Schieck

INSTRUCTION NO. 25

Any person who by day or night, enters any vehicle with intent to commit a felony is guilty of Burglary.

Witter, William
Recd. 2/12/02 DS-8928
Prior Counsel- D. Schieck

INSTRUCTION NO. 26

You are instructed that the offense of Burglary is complete if you find that entry was made into a vehicle with the intent to commit Sexual Assault or Murder, or an attempt to commit said crimes.

An entry is deemed to be complete when any portion of an intruder's body, however slight, penetrates the space within the vehicle.

Every person who, in the commission of a burglary, commits any other crime, may be prosecuted for each crime separately.

Witter, William
Recd. 2/12/02 DS-8929
Prior Counsel- D. Schieck

INSTRUCTION NO. 27

No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of that person's condition. However, whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the fact of one's intoxication may be taken into consideration in determining such purpose, motive or intent.

Witter, William
Recd. 2/12/02 DS-8930
Prior Counsel- D. Schieck

INSTRUCTION NO. 28

At this point in the proceedings you may not discuss or consider the subject of punishment. Your duty now is confined to a determination of the guilt or innocence of the defendant.

Witter, William
Recd. 2/12/02 DS-8931
Prior Counsel- D. Schieck

INSTRUCTION NO. 29a

It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. You must not draw any inference from the fact that he does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberation in any way.

Witter, William
Recd. 2/12/02 DS-8932
Prior Counsel- D. Schieck

INSTRUCTION NO. 29

The defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the defendant is the person who committed the offense.

A reasonable doubt is one based on reason. It is not 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 a 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.

If you have a reasonable doubt as to the guilt of the defendant, he is entitled to a verdict of not guilty.

Witter, William
Recd. 2/12/02 DS-8933
Prior Counsel- D. Schieck

INSTRUCTION NO. 30

The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel.

There are two types of evidence; direct and circumstantial. Direct evidence is the testimony of a person who claims to have personal knowledge of the commission of the crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a chain of facts and circumstances which tend to show whether the defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. Therefore, all of the evidence in the case, including the circumstantial evidence, should be considered by you in arriving at your verdict.

Statements, arguments and opinions of counsel are not evidence in the case. However, if the attorneys stipulate to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

You must not speculate to be true any insinuations suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

You must disregard any evidence to which an objection was sustained by the court and any evidence ordered stricken by the court.

Anything you may have seen or heard outside the courtroom is not evidence and must also be disregarded.

Witter, William
Recd. 2/12/02 DS-8934
Prior Counsel- D. Schieck

INSTRUCTION NO. 31

The credibility or believability of a witness should be determined by his manner upon the stand, his relationship to the parties, his fears, motives, interests or feelings, his opportunity to have observed the matter to which he testified, the reasonableness of his statements and the strength or weakness of his recollections.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his testimony which is not proved by other evidence.

Witter, William
Recd. 2/12/02 DS-8935
Prior Counsel- D. Schieck

INSTRUCTION NO. 32

A witness who has special knowledge, skill, experience, training or education in a particular science, profession or occupation is an expert witness. An expert witness may give his opinion as to any matter in which he is skilled.

You should consider such expert opinion and weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if, in your judgment, the reasons given for it are unsound.

Witter, William
Recd. 2/12/02 DS-8936
Prior Counsel- D. Schieck

INSTRUCTION NO. 33

Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess.

A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

Witter, William
Recd. 2/12/02 DS-8937
Prior Counsel- D. Schieck

INSTRUCTION NO. 34

When you retire to consider your verdict, you must select one of your number to act as foreperson who will preside over your deliberation and will be your spokesperson here in court.

During your deliberation, you will have all the exhibits which were admitted into evidence, these written instructions and forms of verdict which have been prepared for your convenience.

Your verdict must be unanimous. As soon as you have agreed upon a verdict, have it signed and dated by your foreperson and then return with it to this room.

Witter, William
Recd. 2/12/02 DS-8938
Prior Counsel- D. Schieck

INSTRUCTION NO. 35

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be and by the law as given you in these instructions, with the sole, fixed and steadfast purpose of doing equal and exact justice between the defendant and the State of Nevada.

GIVEN:

DISTRICT JUDGE

EXHIBIT 2

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM LESTER WITTER,
#1204227

Defendant.

CASE NO. C117513

DEPT. NO. IX

DOCKET NO. W

—FILED IN OPEN COURT—
June 28 1995 19 5:10 PM
LORETTA BOWMAN, CLERK
By Bernice Stucky Deputy

V E R D I C T

We, the jury in the above entitled case, find the defendant WILLIAM LESTER WITTER, Guilty of COUNT I - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON.

DATED this 28 day of June, 1995.

Mark a. Glenn
FOREPERSON

1549

CE31

Witter, William
Recd. 2/12/02 DS-4612
Prior Counsel- D. Schieck

ORIGINAL

FILED

2008 JUL 15 A 8:55

CLERK OF THE COURT

RSPN
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM WITTER,
#1204227

Defendant.

CASE NO: C117513

DEPT NO: II

RESPONSE AND MOTION TO DISMISS 3RD POST-CONVICTION PETITION

DATE OF HEARING: 8/7/08
TIME OF HEARING: 10:30 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through STEVEN S. OWENS, Chief Deputy District Attorney, and hereby submits the attached Response and Motion to Dismiss Defendant's 3rd Petition for Writ of Habeas Corpus.

This response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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RECEIVED
JUL 15 2008
CLERK OF THE COURT

POINTS AND AUTHORITIES

INTRODUCTION

This case concerns a successive state petition for writ of habeas corpus filed herein on April 28, 2008. In 1995, Petitioner was convicted of Murder With Deadly Weapon, Attempt Sexual Assault With Deadly Weapon, and Burglary following a jury trial for stabbing to death James Cox and assaulting his wife, Kathryn Cox, and was sentenced to death. Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996). Witter's first state habeas petition was denied in 2000, which decision was affirmed on appeal in an unpublished order by the Nevada Supreme Court in 2001. Petitioner pursued a federal habeas petition in 2001 until returning to state court with a second state habeas petition which was denied by written findings filed in Septemer 2007. The matter is currently on appeal to the Nevada Supreme Court. Meanwhile, Witter now has filed a third state habeas petition raising a single issue regarding the constitutionality of Jury Instruction #9 on premeditation.

ARGUMENT

The instant post-conviction petition is filed almost twelve (12) years after the direct appeal in violation of the one-year time bar of NRS 34.726. Additionally, the current petition is Witter's third attempt at post-conviction relief and is barred as a successive petition per NRS 34.810. The State also affirmatively pleads laches and invokes the five-year time bar of NRS 34.800. Absent a showing of good cause and prejudice sufficient to overcome each of these bars, Witter's petition must be dismissed. Additionally, as this issue was previously raised in the case and addressed on the merits it is barred by law of the case where the facts are substantially the same.[1]

Witter alleges that recent intervening case authority of Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), constitutes good cause for failing to challenge Jury Instruction #9

[1] On direct appeal, the Nevada Supreme Court held that Witter was not entitled to a specific instruction separately defining "deliberation" because jury instruction #9 in this case accurately defined both premeditation and deliberation. Witter v. State, 112 Nev. 908, 917-18, 921 P.2d 886, 893 (1996)

previously or for raising it again. Although Polk v. Sandoval was published on September 11, 2007, the basis for the 9th Circuit's ruling was not new law but was federal precedent decided decades earlier. See Sandstrom v. Montana, 442 U.S. 510 (1979); Francis v. Franklin, 471 U.S. 307 (1985); In re Winship, 397 U.S. 358 (1970). In other words, the underlying argument and authority relied upon in Polk v. Sandoval has always been available to the defense and the Polk opinion in 2007 does not provide Witter with any new claim.

Furthermore, the holding in Polk v. Sandoval has no application to Witter's case which was final on direct appeal in December of 1996. At that time, Nevada defined murder in accord with the so-called *Kazalyn* instruction and viewed the term "deliberate" as simply redundant to "premeditated." Powell v. State, 108 Nev. 700, 708-10, 838 P.2d 921, 926-27 (1992). Under such a definition of murder, Instruction #9 in the present case is a correct statement of law. There is no unconstitutional mandatory presumption or failure to instruct on a material element where premeditation and deliberation are synonymous. It was not until the year 2000 that Nevada departed from the *Kazalyn* instruction and changed the definition of murder to include willful, deliberate and premeditated as three distinct elements. Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). It is only under Byford's new definition of murder that the 9th Circuit found the *Kazalyn* instruction to violate federal law. Unlike Witter, Polk was entitled to the Byford change in law because Polk's case was not yet final on direct appeal when Byford was published in 2000. The Polk decision does not address retroactivity and the law remains that Nevada's change in the premeditation/deliberation instruction has only prospective application. Garner v. State, 116 Nev. 770, 6 P.3d 1013 (2000).

Even if Byford and the new definition of murder were to apply to Witter's case, any error in Instruction #9 would be harmless beyond a reasonable doubt. Witter was prosecuted under alternative theories of premeditated murder and felony-murder. Although there was no special verdict distinguishing these two theories, because the jury unanimously found Witter guilty of the underlying attempt sexual assault and burglary charges, the jury must

have also agreed unanimously upon the associated felony-murder theories. In Bridges v. State, 116 Nev. 752, 6 P.3d 1000, 1008 (2000), the defendant argued that the jury was improperly instructed as to premeditation and deliberation. This Court ruled that the defendant was not entitled to relief on this issue because the Byford instruction was not retroactive and the evidence of First Degree Murder under a felony murder theory was overwhelming. Id. The same applies to Witter.

The Nevada Supreme Court appears poised to revisit this issue and provide some clarification in light of the 9th Circuit's recent Polk v. Sandoval decision. See Avrim Nika SC 46586. However, exactly when an opinion may be forthcoming in the Nika case is impossible to predict and could be many months or even a year away.

In the meantime, Polk v. Sandoval provides Witter with no good cause for challenging Jury Instruction #9 again in violation of the time and procedural bars. Law of the case continues to control the resolution of this issue.

WHEREFORE, the State respectfully requests that Witter's third post-conviction petition be denied.

DATED this 11th day of July, 2008.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY _____
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of Response and Motion to Dismiss 3rd Post-Conviction Petition, was made this 15th day of July, 2008, by facsimile transmission to:

GERALD J. BIERBAUM
GARY A. TAYLOR
FAX #(702) 388-5819

Eileen Davis

Employee for the District Attorney's Office

SSO/ed

****
*** TX REPORT ***
****

TRANSMISSION OK

TX/RX NO	0642	
CONNECTION TEL		3885819
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SUBJECT: William Witter, C117513

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DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM L. WITTER, Petitioner, vs. E.K. McDANIEL, et al., Respondents.	Case No. C117513 Dept. No. 2 REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND OPPOSITION TO MOTION TO DISMISS Hearing Date: 10/28/08 Hearing Time:10:00 A.M.

Mr. Witter contends that Polk v. Sandoval, 503 F3d 903 (9th Cir. 2007), provided this Court with authority to both excuse his post-conviction habeas petition from any procedural bar (NRS 34.726, NRS 34.810, Laches) and supported an order from the Court granting relief. Respondent argues that "the basis for the 9th Circuit ruling [in Polk] was not new law but was federal precedent decided decades earlier." Motion to Dismiss, p.3. Thus, Respondent believed that, since the Court of Appeals in Polk, supra, relied on earlier cases, Mr. Witter's Polk claim was available during his earlier state post-conviction proceedings and his current claim must be untimely. However, Respondent's argument was defeated by the language of Polk itself.

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In Polk, the Court of Appeals held that the Nevada Supreme Court routinely erred in its analysis the Kazalyn instruction by not recognizing due process:

> Instead of acknowledging the violation of Polk's due process right, the Nevada Supreme Court concluded that giving the Kazalyn instruction in cases predating Byford [v. State 116 Nev. 215, 994 P.2d 700 (2000)] did not constitute constitutional error. In doing so, the Nevada Supreme Court erred by conceiving of the Kazalyn instruction issue as purely a matter of state law. Rather, the question of whether there is a reasonable likelihood that the jury applied an instruction in an unconstitutional manner is a "federal constitutional question." [cite omitted]. The state court failed to analyze its own observations from Byford under the proper lens of Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979), Frances v. Franklin [471 U.S. 307, 105 S.Ct. 1965 (1985)], and In Re Winship, [397 U.S. 358, 90 S.Ct. 1068 (1970)] and thus ignored the law the Supreme Court clearly established in those decisions-that an instruction omitting an element of the crime and relieving the state of its burden of proof violates the federal Constitution. See Evanchyk v. Stewart, 340 F.3d 933, 939-40 (9th Cir.2003). Since the Nevada Supreme Court "fail[ed] to apply the correct controlling authority," its decision was contrary to clearly established federal law, as determined by the Supreme Court. Clark v. Murphy, 331 F.3d 1062, 1067 (9th Cir.2003) (citing Williams v. Taylor, 529 U.S. 362, 413-14, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)).

Polk at 911. The Court of Appeals held the Nevada Supreme Court erroneously determined that the Kazalyn instruction did not offend a defendants rights to due process under the United States Constitution. Although the Court of Appeals holding was based on United States Supreme Court precedent, this was the first time the erroneous analysis by the Nevada Supreme Court was recognized. Before Polk, supra, the only authority available to Mr. Witter was that from the Nevada Supreme Court, which failed to recognize a due process issue arising from the Kazalyn instruction. Under previous authority, this claim did not exist. The opinion in Polk, supra, was new precedent and the failure to raise this issue earlier cannot be attributed to Mr. Witter. The dismissal of this petition will unduly prejudice Mr. Witter. See NRS 34.726(1)(a, b).

Respondent argued that "It was not until the year 2000 that Nevada . . . changed the definition of murder . . ."citing Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). Motion to Dismiss, p. 3. Neither the Nevada Legislature, nor the Nevada Supreme Court, changed or expanded the statutory definition of murder. In Garner v. State 116 Nev. 770, 789, 6 P.3d 1013, 1025 n. 9 (2000), the Nevada Supreme Court held "[b]asically, Byford interprets and clarifies the meaning of a preexisting statute by resolving conflicting lines

in prior case law. Therefore, its reasoning is not altogether new." The Nevada Supreme Court did not create a new definition of murder in Byford, supra.

Similarly, the current statutory definition of first degree murder, Nev. Rev. Stat. § 200.030(1)(a), included the same language regarding premeditation and deliberation which was first enacted by the territorial legislature in 1861. The original statute provided:

> All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful deliberate, and premeditated killing, or which shall be committed in the perpetration, or attempt of perpetrate, any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree. . . .

1861 Nev. Stat. § 17 at 58-59. The relevant language remained in all versions of the statute continuously until now. See 5 Hillyer, Nevada Compiled Laws § 10068 at 3077 (1920), 2 Revised Laws of Nevada, § 6386 at 1832 (1912), Cutting, Compiled Laws of Nevada § 4672 at 910 (1900), Baily and Hammond, General Statutes of Nevada § 4581 at 1018 (1885).

The legal and dictionary definitions of these terms at the time the statute was adopted are indistinguishable from their common meanings. Premeditation is:

> [a] design formed to commit a crime. . . before it is done. . . . Premeditation differs essentially from will, because it supposes besides an actual will, a deliberation and continued persistence which indicate more perversity. The preparation of arms or other instruments required for the execution of the crime, are indications of a premeditation, but are not absolute proof of it. . . . Murder by poisoning must of necessity be done with premeditation.

John Bouvier, Law Dictionary (1856), s.v. premeditation (emphasis added). Deliberation means "[t]he act of the understanding, by which the party examines whether a thing proposed ought to be done or not to be done. . . ." Id., s.v. deliberation.[1] Neither the

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[1] Premeditation is the process simply of thinking about a proposed killing before engaging in the homicidal conduct, and "deliberation" is the process of carefully weighing such matters as the wisdom of going ahead with the proposed killing, the manner in which the killing will be accomplished, and the consequences which may be visited upon the killer if and when

Nevada statue defining murder, nor the core concepts providing that definition, have changed for more than a hundred years. The definition recognized in Byford, supra, has been present since the inception of the murder statute. Contrary to Respondent's argument, Byford did not change the definition of murder or provide a "new" definition. Motion to Dismiss, p. 3. The due process violation associated with the erroneous Kazalyn instruction was not based upon a new statutory definition.

Respondent argued that Mr. Witter was not entitled to a proper jury instruction that comports with due process because his case was affirmed on appeal in 1996. Respondent argued that "the Polk decision does not address retroactivity and the law remains that Nevada's change in the premeditation / deliberation instruction has only prospective application." Motion to Dismiss, p. 3. Respondent is incorrect. In Polk, supra, the Court of Appeals considered only whether an erroneous jury instruction violated due process. Any "change" in Nevada State law was not an issue before the Court :

> Instead of acknowledging the violation of Polk's due process right, the Nevada Supreme Court concluded that giving the Kazalyn instruction in cases predating Byford did not constitute constitutional error. In doing so, the Nevada Supreme Court erred by conceiving of the Kazalyn instruction issue as purely a matter of state law. Rather, the question of whether there is a reasonable likelihood that the jury applied an instruction in an unconstitutional manner is a "federal constitutional question." [citation omitted]. The state court failed to analyze its own observations from Byford under the proper lens of Sandstrom, Franklin, and Winship, and thus ignored the law the Supreme Court clearly established in those decisions- that an instruction omitting an element of the crime and relieving the state of its burden of proof violates the federal Constitution. See Evanchyk v. Stewart, 340 F.3d 933, 939-40 (9th Cir.2003).

Polk at 911. The date on which Mr. Witter was convicted, sentenced, or his appeal affirmed, is irrelevant. The trial judge provided the jury an erroneous jury instruction which violated Mr. Witter's state and federal rights to due process. Mr. Witter does not seek access to a newly minted state statutory protection. Mr. Witter demonstrated, and

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apprehended. "Deliberation" is present if the thinking, i.e., the "premeditation," is being done in such a cool mental state, under such circumstances, and for such a period of time as to permit 'careful weighing' of the proposed decision. Although the process requires "some" time no specific length of time is necessary. Charles E. Torcia, Wharton's Criminal Law § 140 at 181-184 (14th ed. 1979) (footnotes omitted); id. § 142 (15th ed. 2007); 2 Wayne R. LaFave, Substantive Criminal Law § 14.7(a) at 477-478 (2d ed. 2003).

attempts to persuade the Court to recognize, the same due process error which was identified by the Court of Appeals in Polk, supra.

Respondent argued that any Polk error in Mr. Witter's trial was harmless beyond a reasonable doubt because Mr. Witter was prosecuted under two different theories– premeditated murder and felony murder. Respondent argued the evidence was sufficient to support Mr. Witter's conviction under a theory of felony murder. Motion to Dismiss, p. 3 - 4. However, Respondent's argument fails. The United States Supreme Court held:

> With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict. See, *e.g.*, Yates v. United States, 354 U.S. 298, 312, 77 S.Ct. 1064, 1073, 1 L.Ed.2d 1356 (1957); Stromberg v. California, 283 U.S. 359, 367-368, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931). In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds. See, *e.g.*, Lockett v. Ohio, 438 U.S., at 605, 98 S.Ct., at 2965 ("[T]he risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty ... is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments"); Andres v. United States, 333 U.S. 740, 752, 68 S.Ct. 880, 886, 92 L.Ed. 1055 (1948) ("That reasonable men might derive a meaning from the instructions given other than the proper meaning of § 567 is probable. In death cases doubts such as those presented here should be resolved in favor of the accused"); accord, Zant v. Stephens, 462 U.S. 862, 884-885, 103 S.Ct. 2733, 2746-2747, 77 L.Ed.2d 235 (1983).

Mills v. Maryland 486 U.S. 367, 376, 108 S.Ct. 1860, 1866 (1988). Even though, assuming Respondent was correct, the jury's verdict might be supported under a felony murder theory, it cannot be supported under a theory of premeditated murder, given the holding in Polk, supra. The jury provided no special verdict, or indication, of the theory under which Mr. Witter was convicted. Indeed, from the record, it was impossible to determine which of the two grounds was relied upon by the jury. The Court may not solely rely on the presentation of evidence which supported a conviction under a theory of felony murder in order to avoid the consequences of Polk, supra.

Respondent argued that Mr. Witter's claim is barred under the doctrine of law of the case. Motion to Dismiss, p. 4. In Mitchell v. State 122 Nev. 1269, 149 P.3d 33 (2006), the Nevada Supreme Court held that, in circumstances involving intervening case

law, the court should decline to apply the doctrine of law of the case. Id. at 37; see also Hsu v. County of Clark 173 P.3d 724, 728 (2007). Polk is new, and intervening, case law. The doctrine of law of the case is inapplicable to Mr. Witter's claim.

Conclusion

For the reasons stated above, and in the allegations of the petition, Mr. Witter requests the Court deny Respondent's motion to dismiss his post-conviction habeas petition and grant him relief.

Respectfully submitted this 29th day of September, 2008.

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CERTIFICATE OF MAILING

In accordance with the Nevada Rules of Civil Procedure, the undersigned hereby certifies that on this 29th day of September, 2008 she deposited for mailing in the United States mail, first-class postage prepaid, a true and correct copy of the foregoing **REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND OPPOSITION TO MOTION TO DISMISS** addressed to the parties as follows:

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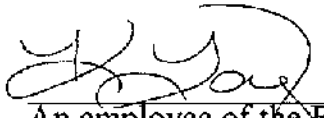

An employee of the Federal Public Defender

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM WITTER,
#1204227

Defendant.

CASE NO: C117513

DEPT NO: II

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: 10/28/08
TIME OF HEARING: 10:30 A.M.

THIS CAUSE having come on for hearing before the Honorable VALORIE J. VEGA, District Judge, on the 28th day of October, 2008, the Petitioner not being present, represented by GERALD BIERBAUM, Assistant Federal Public Defender, the Respondent being represented by DAVID ROGER, District Attorney, by and through STEVEN S. OWENS, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, this Court now makes the following findings of fact and conclusions of law.

This case concerns a successive State Petition for Writ of Habeas Corpus filed herein on April 28, 2008. In 1995, Petitioner was convicted of Murder with a Deadly Weapon, Attempt Sexual Assault with a Deadly Weapon and Burglary, following a jury trial for stabbing to death James Cox and assaulting his wife, Kathryn Cox, and was sentenced to

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death. Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996). Witter's first state habeas petition was denied in 2000, which decision was affirmed on appeal in an unpublished order by the Nevada Supreme Court in 2001. Petitioner pursued a federal habeas petition in 2001 until returning to State court with a second state habeas petition which was denied by written findings filed in Septemer 2007. The matter is currently on appeal to the Nevada Supreme Court. Meanwhile, Witter now has filed a third state habeas petition raising a single issue regarding the constitutionality of Jury Instruction #9 on premeditation.

FINDINGS OF FACT

The instant post-conviction petition is filed more than twelve (12) years after the direct appeal in violation of the one-year time bar of NRS 34.726. Additionally, the current petition is Witter's third attempt at post-conviction relief and is barred as a successive petition per NRS 34.810. The State also affirmatively pleads laches and invokes the five-year time bar of NRS 34.800. Absent a showing of good cause and prejudice sufficient to overcome each of these bars, Witter's petition must be dismissed.

This Court denies the petition and discharges the writ based on procedural grounds as being barred as successive under NRS 34 and also as Witter is not entitled to a new definition under Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), and, therefore, this petition and writ are precluded by the law of the case under Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992). Because this issue was previously raised in the case and addressed on the merits it is barred by law of the case where the facts are substantially the same. On direct appeal, the Nevada Supreme Court held that Witter was not entitled to a specific instruction separately defining "deliberation" because Jury Instruction #9 in this case accurately defined both premeditation and deliberation. Witter v. State, 112 Nev. 908, 917-18, 921 P.2d 886, 893 (1996).

Even if Byford and the new definition of murder were to apply to Witter's case, any error in Instruction #9 would be harmless beyond a reasonable doubt. Witter was prosecuted under alternative theories of premeditated murder and felony-murder. Although there was no special verdict distinguishing these two theories, because the jury unanimously found

Witter guilty of the underlying Attempt Sexual Assault and Burglary charges, the jury must have also agreed unanimously upon the associated felony-murder theories.

Alternatively, the Court further denies the petition and discharges the writ based on the totality of the circumstances of the interaction between Witter and the two victims at the time of the commission of the offense as it appears that evidence of deliberation is clear and any error in the instruction is harmless beyond a reasonable doubt pursuant to Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000) and Santana v. State, 122 Nev. 1458, 148 P.3d 741 (2006).

Polk v. Sandoval provides Witter with no good cause for challenging Jury Instruction #9 again in violation of the time and procedural bars. Law of the case continues to control the resolution of this issue.

CONCLUSIONS OF LAW

Witter alleges that recent intervening case authority of Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), constitutes good cause for failing to challenge Jury Instruction #9 previously or for raising it again. Although Polk v. Sandoval was published on September 11, 2007, the basis for the 9th Circuit's ruling was not new law but was federal precedent decided decades earlier. See Sandstrom v. Montana, 442 U.S. 510 (1979); Francis v. Franklin, 471 U.S. 307 (1985); In re Winship, 397 U.S. 358 (1970). In other words, the underlying argument and authority relied upon in Polk v. Sandoval has always been available to the defense and the Polk opinion in 2007 does not provide Witter with any new claim.

Furthermore, the holding in Polk v. Sandoval has no application to Witter's case which was final on direct appeal in December of 1996. At that time, Nevada defined murder in accord with the so-called *Kazalyn* instruction and viewed the term "deliberate" as simply redundant to "premeditated." Powell v. State, 108 Nev. 700, 708-10, 838 P.2d 921, 926-27 (1992). Under such a definition of murder, Instruction #9 in the present case is a correct statement of law. There is no unconstitutional mandatory presumption or failure to instruct on a material element where premeditation and deliberation are synonymous. It was not

until the year 2000 that Nevada departed from the *Kazalyn* instruction and changed the definition of murder to include willful, deliberate and premeditated as three distinct elements. Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). It is only under Byford's new definition of murder that the 9th Circuit found the *Kazalyn* instruction to violate federal law. Unlike Witter, Polk was entitled to the Byford change in law because Polk's case was not yet final on direct appeal when Byford was published in 2000. The Polk decision does not address retroactivity and the law remains that Nevada's change in the premeditation/deliberation instruction has only prospective application. Garner v. State, 116 Nev. 770, 6 P.3d 1013 (2000).

In Bridges v. State, 116 Nev. 752, 6 P.3d 1000, 1008 (2000), the defendant argued that the jury was improperly instructed as to premeditation and deliberation. This Court ruled that the defendant was not entitled to relief on this issue because the Byford instruction was not retroactive and the evidence of First Degree Murder under a felony murder theory was overwhelming. Id. The same applies to Witter.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

DATED this 24th day of November, 2008.

DISTRICT JUDGE

235

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BY
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of Findings of Fact, Conclusions of Law and Order, was made this 21st day of November, 2008, by facsimile transmission to:

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Eileen Davis

Employee for the District Attorney's Office

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SUBJECT: William Witter, C117513 - Findings

DATE: November 21, 2008

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DATE: November 14, 2008

Gentlemen:
The following Findings will be submitted to Judge Vega on November 21, 2008.
Sincerely,
Steven S. Owens

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CLARK COUNTY

DISTRICT OF NEVADA

WILLIAM L. WITTER, Petitioner, vs. E.K. McDANIEL, Warden of Ely State Prison, and CATHERINE CORTEZ MASTO, Attorney General of the State of Nevada, Respondents.	Case No. C117513 Dept. No. 2

NOTICE OF APPEAL

NOTICE is hereby given that petitioner, William Witter appeals to the Nevada Supreme Court from the Findings of Fact and Conclusions of Law and Order denying the Petition for Post-Conviction Relief entered in this action on November 24, 2008. Notice of Entry of Decision and Order of the foregoing order was filed and mailed on November 26, 2008.

Respectfully submitted this day of December, 2008.

FRANNY A. FORSMAN
Federal Public Defender

Gerald J. Bierbaum
Assistant Federal Public Defender

Gary A. Taylor
Assistant Federal Public Defender

CERTIFICATE OF MAILING

In accordance with Rule 5(b) of the Nevada Rules of Civil Procedure, the undersigned hereby certifies that on this 19th day of December, 2008, she caused to be deposited for mailing in the United States mail, first-class postage prepaid, a true and correct copy of the foregoing **NOTICE OF APPEAL** addressed to the parties as follows:

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