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DISTRICT COURT

CLARK COUNTY, NEVADA

SAMUEL HOWARD, Petitioner, -vs- THE STATE OF NEVADA, Respondent.	CASE NO: 81C053867 DEPT NO: XVII

OPPOSITION AND MOTION TO DISMISS FIFTH PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: 12/14/16
TIME OF HEARING: 9:30 AM

COMES NOW, the State of Nevada, by STEVEN WOLFSON, District Attorney, through JONATHAN E. VANBOSKERCK, Chief Deputy District Attorney, and hereby submits this Opposition and Motion to Dismiss Fifth Petition for Writ of Habeas Corpus (Post-Conviction).

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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POINTS AND AUTHORITIES

STATEMENT OF FACTS

This Court summarized the facts of this case in the Findings of Fact, Conclusions of Law and Order denying Petitioner's fourth demand for habeas relief:

> On March 26, 1980, around noon, a Sears' security officer, Keith Kinsey, observed Howard take a sander from a shelf, remove the packing and then claim a fraudulent refund slip from a cashier. Kinsey approached Howard and asked him to accompany Kinsey to a security office. Kinsey enlisted the aid of two other store employees. Howard was cooperative, alert and indicated there must be some mistake. In the security office, Kinsey observed Howard had a gun under his jacket and attempted to handcuff Howard for safety reasons. A struggle broke out and Howard drew a .357 revolver and pointed it at the three men. Howard had the men lay face down on the floor and took Kinsey's security badge, ID and a portable radio (walkie-talkie). Howard threatened to kill the three men if they followed him and he fled to his car in the parking lot. A yellow gold jewelry ID bracelet was found at the scene and impounded. It was later identified as Howard's. The Sears in question was located at the corner of Desert Inn Road and Maryland Parkway at the Boulevard Mall in Las Vegas, Nevada.
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> Dawana Thomas, Howard's girlfriend, was waiting for him in the car. Howard had told her to wait for him and she was unaware of his intentions to obtain money through a false refund transaction. Fleeing from the robbery, Howard hopped into the car, a 1980 black Oldsmobile Cutlass with New York plates 614 ZHQ and sped away from the mall. While escaping, Howard rear-ended a white corvette driven by Stephen Houchin. Houchin followed Howard when Howard left the scene of the accident. Howard pointed the .357 revolver out the window of the Olds and at Houchin's face, telling Houchin to mind his own business.
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> Howard drove to the Castaways Motel on Las Vegas Boulevard South and parked the car for a few hours. Thomas and Howard walked about and Howard made some phone calls. Later that evening Howard left for a couple of hours. When he returned he told Thomas that he had met up with a pimp, but the pimps' girls were with him so he couldn't rob him. Howard indicated he had arranged to meet with the "pimp" the next morning and would rob him then.
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> Howard and Thomas drove to the Western Six motel located on the Boulder Highway near the intersection of Desert Inn Road. The couple had stayed at this motel before and Howard instructed Thomas to register under an assumed name, Barbara Jackson. The motel registration card under that name was admitted into evidence and a documents' examiner compared handwriting on the card with Thomas' and indicated they matched.
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> Around 6:00 a.m. on March 27, 1980, Thomas and Howard left the motel and went to breakfast. After breakfast, Thomas dropped Howard off in the alley behind Dr. George Monahan's office. This was at approximately 7:00 a.m. Thomas went back to the motel room. Approximately an hour later, Howard returned to the motel. Howard had a CB radio with him that had loose wires and a gold watch she had never seen before. Howard told Thompson that he was tired of Las Vegas and to pack up their things as they were leaving for California.
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> Dr. Monahan was a dentist with a practice located on Desert Inn Road within walking distance of the Boulevard Mall. He was attempting to sell a

uniquely painted van and would park the van in the parking lot of the mall, at the Desert Inn and Maryland intersection and near the Sears store, then walk to his office. The van had a sign in it listing Dr. Monahan's home and business phone numbers and the business address.

About 4:00 p.m. on March 26, 1980, the afternoon of the Sears robbery, Dr. Monahan's wife, Mary Lou Monahan, received a phone call at her home inquiring about the van. The caller was a male who identified himself as "Keith" and stated he was a security guard at Caesar's Palace. He indicated he was interested in purchasing the van and wanted to know if someone could meet him at Caesar's during his break time at 8:00 p.m. Mrs. Monahan indicated the caller would have to talk to her husband who was expected home shortly. A second call was made around 4:30 p.m. and Dr. Monahan made arrangements to meet "Keith" at Caesar's later that night.

The Monahans and two relatives, Barbara Zemen and Mary Catherine Monahan, met "Keith" that evening at the appointed time and place. Howard was identified as the man who called himself "Keith". Howard was carrying a walkie-talkie radio at the time. Howard talked to Dr. Monahan for about ten minutes about purchasing the van and looked inside the van but did not touch the door handle while doing so. Howard arranged to meet Dr. Monahan the next morning to take a test drive. The Monahan's left Caesar's and parked the van at Dr. Monahan's office before returning home in another vehicle.

The next day, March 27, 1980, Dr. Monahan left his home at about 6:50 a.m. He took with him his wallet, a gold Seiko watch, daily receipts and the van title. When Mrs. Monahan arrived at the office at about 8:00 a.m. Dr. Monahan was not there and a patient was waiting for him. Dr. Monahan's truck was in the parking lot to the rear of the office. Dr. Monahan had not entered the office. A black man wearing a radio or walkie-talkie on his belt came into the office at about 7:00 a.m. that morning looking for Dr. Monahan and stating that he had an appointment with the doctor.

Mrs. Monahan called Caesar's Palace and learned no "Keith" fitting the description she gave worked security. After obtaining this information, Mrs. Monahan called the police to report her husband as a missing person. This occurred at about 9:00 a.m.

Charles Marino owned the Dew Drop Inn located near the corner of Desert Inn and Boulder Highway, just a few blocks from Dr. Monahan's office and almost across the road from the Western Six motel. Early on the morning of March 27, 1980, as he approached his business, he observed the Monahan van backing into the rear of the bar. When he arrived at the Inn, he looked in the driver's side and saw no one. He asked patrons if they knew anything about the van and no one spoke up. Marino remained at the business until the early afternoon. The van was still there and had not been moved. Later that day, at around 7:00 p.m. he received a call to return to the bar as a dead body had been found in the van.

In response to television coverage, the police learned the Monahan van was behind the Dew Drop Inn around 6:45 p.m. Dr. Monahan's body was found in the van under an overturned table and some coverings. He had been shot once in the head. The bullet went through Dr. Monahan's head and a projectile was recovered on the floor of the van. The projectile was compared to Howard's .357 revolver. Because the bullet was so badly damaged; forensic analysis could not establish an exact match. It was determined that the bullet could have come from certain makes and models of revolvers, Howard's included. The van's CB radio and a tape deck had been removed. Dr. Monahan's watch and wallet were missing. A fingerprint recovered from one of the van's doors matched Howard's.

Homicide detectives were aware of the Sears robbery that had occurred on March 26th. The description of the Sears suspect matched that given by

Mrs. Monahan of the man calling himself Keith at Caesar's Palace. Based upon that, the use of the name Keith, the walkie-talkie in possession of the suspect, the close proximity of the dental office to the Sears and the fact that the van had been parked in the Sears' parking lot, the police issued a bulletin to state and out-of-state law enforcement agencies describing the suspect and the car used in the Sears' robbery.

On March 27, 1980, while the police were searching for Dr. Monahan, Howard and Thompson drove to California. They left the motel between 8:00 a.m. and 9:00 a.m. and on the way they stopped for gas. At that time Howard had a brown or black wallet that had credit cards and photos in it. Howard went to the gas station rest room and when he returned he no longer had the wallet.

On March 28, 1980, Howard and Thompson went to a Sears in San Bernadino, California. Once again Howard left Thompson in the car while he entered the Sears, picked up merchandize and tried to obtain a refund on it. This time he used the stolen Kinsey Sears security badge in the attempt. The Sears personal were suspicious and left Howard at the register while they called Las Vegas. When they returned Howard had left. Howard had returned to the car and Thompson and Howard ducked down when the people from Sears stepped outside to view the parking lot.

On or about April 1, 1980, at around noon, Howard went to the Stonewood Shopping Center in Downey, California. He entered a jewelry store and talked to a security agent, Manny Velasquez. Another agent in the store, Robert Slater, who also worked as a police officer in Downey, saw Howard and noticed the grip of a gun under Howard's jacket. Slater talked to Velasquez and decided to call the Downey Police. Howard left the jewelry store went to the west end of the mall near a Thrifty drugstore. Downey Police officers observed Howard walking up and down the aisles of the drugstore, picking items up and replacing them on shelves. Howard was stopped on suspicion of carrying a concealed weapon. No gun was found on him nor was he carrying the walkie-talkie. A search of the aisles he had been in revealed a .357 magnum revolver and the walkie-talkie and Sears' security badge stolen from Kinsey.

Howard was arrested for carrying a concealed weapon and then identified and booked for a San Bernadino robbery. Howard was given his Miranda rights by Downey Police officers. Disputed evidence was presented regarding his response and whether he invoked his right to silence. Based on information in the all-points bulletin, the California authorities contacted the Las Vegas Metropolitan Police Department about Howard. On April 2, 1980, LVMPD Detective Alfred Leavitt went to California and, after reading Howard his Miranda rights, which Howard indicated he understood, interviewed Howard regarding the Sears robbery and Dr. Monahan's murder. Howard did not invoke his right to remain silent or to counsel at this time.

Howard told Detective Leavitt he recalled being at the Sears department store but no details about what happened and that he did not remember anything about March 27, 1980. He stated he could have killed Dr. Monahan but he didn't know.

Ed Schwartz was working as a car salesman in New York on October 5, 1979. When he arrived at work at approximately 9:00 a.m. Howard entered the agency and was looking at an Oldsmobile car. Howard showed Schwartz a New York driver's license and checkbook and told Schwartz that he worked for a security firm in New York. Howard asked if they could take a demonstration ride and Schwartz drove the car for a few blocks while Howard was the passenger. Howard asked if he could drive the car and the men switched seats. After driving for a short time, Howard pulled over and pointed an automatic pistol at Schwartz. Schwartz was told to get down on the floor of

the car and remove his shoes and pants. Schwartz complied and Howard took Schwartz' watch, ring and wallet. Schwartz got out of the car when ordered to do so and Howard drove off. The car was later found abandoned.[1]

Howard called witnesses who testified they saw the Monahan van being driven by a black man who did not match Howard's description, in particular the man had a large afro and Howard had short hair. John McBride state that he saw the van around 8:30 to 8:45 a.m. in his apartment complex which is located about five miles from Desert Inn and Boulder Highway. Lora Mallek was employed at a Mobile gas station at the corner of DI and Boulder Highway and she stated serviced the van when it pulled into the station between 3:00 p.m. and 4:00 p.m. Mallek testified that a black man with a large afro was driving, a black woman who did not match Thomas' description was in the passenger seat and a white man was sitting in the back.

Howard testified over the objection of counsel. He indicated he did not recall much about March 26, 1980. He remembered being in Las Vegas in general on and off and that at one point Dwana Thomas' brother, who was about Howard's height, age and weight, and had a large afro, visited them. Howard said he remembers incidents, not dates and Kinsey could have been telling the truth about the Sears store. Howard indicated he wasn't sure because when the Sears people gathered around him, it reminded him of Vietnam and he kind of had a flashback. Howard said he thinks he left Las Vegas immediately after the Sears incident. Howard also stated that he did not meet Dr. Monahan, rob or kill him as he couldn't be that callous.

On cross-examination, Howard admitted he left New York in the middle of his robbery trial and was asked about statements he made to Detective Leavitt. Howard also acknowledged he has used a number of aliases including Harold Stanback. Howard indicated he was taking the blame for Dawana and her brother Lonnie.

Dawana Thomas was called in rebuttal and indicated her brother Lonnie had not been in Las Vegas in March of 1980.

In the penalty phase, the State presented evidence on the details of Howard's 1979 New York conviction for robbery. A college nurse who knew Howard, Dorothy Weisband, testified that Howard robbed her at gunpoint taking her wallet and car. He forced her into a closet and demanded she removed her clothes. She refused and he left. After the robbery, Howard called Weisband trying to get more cash from her in return for her car and threatened her.

Howard testified regarding his military, family and mental health histories. Howard discussed his military service and stated he had suffered a concussion and received a purple heart.[2] Howard also stated he was on veteran's disability in New York.[3] He said he was in various mental health facilities in California including being housed in the same facility as Charlie Manson. He testified he had been diagnosed as a schizophrenic, but that some of the doctors thought he was malingering. When asked about his childhood, Howard became upset. He indicated he didn't want to talk about the death of his mother and sister. Howard indicated he was not mentally ill and knew what he was doing at all times.

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[1] This evidence was admitted to show identity and motive for the Monahan murder.

[2] The military records attached to the current Fourth Petition do not reflect any such injury or award.

[3] Howard's military records do not support this and there is nothing in the record substantiating any admission to a veteran's hospital. The record reflects Howard was never actually admitted to a hospital in New York because it required identification and he could not identify himself due to existing warrants for his arrest.

Findings of Fact, Conclusions of Law and Order, filed November 6, 2010, p. 12-19 (footnotes in original).

STATEMENT OF THE CASE

This Court also set forth the vast majority of the procedural history of this case in the 2010 Findings of Fact, Conclusions of Law and Order denying Petitioner's fourth habeas petition:

> On May 20, 1981 defendant Samuel Howard was indicted on one count of robbery with use of a deadly weapon involving a Sears security officer named Keith Kinsey on March 26, 1980; one count of robbery with use of a deadly weapon involving Dr. George Monahan and one count of murder with use of a deadly weapon involving Dr. Monahan, both committed on March 27, 1980. With respect to the murder count, the State alleged two theories: willful, premeditated and deliberate murder or murder in the commission of a robbery.
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> Howard was arrested in California where he was serving time for a robbery committed on or about April 1, 1980. He was extradited in November of 1982 and an initial appearance was set for November 23, 1982. At that time the matter was continued for appointment of counsel, the Clark County Public Defender's Office.
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> On November 30, 1982, Terry Jackson of the Public Defender's Office represented to the district court that Howard qualified for the Public Defender's services; however, Mr. Jackson indicated he had a personal conflict as he was a friend of the victim. The district judge determined that the relationship did not create a conflict for the Public Defender's Office, barred Mr. Jackson from involvement with the case and appointed another deputy public defender to Howard's case.
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> Howard's counsel requested a one week continuance to consult with Howard about the case. Howard objected, insisted on being arraigned and demanded a speedy trial. After discussion, the district court accepted a plea of not guilty and set a trial date of January 10, 1983.
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> Howard filed a motion in late in December asking for his counsel to be removed and substitute counsel appointed. Counsel filed a response addressing issues raised in the motion. After a hearing, the district court determined there were no grounds for removing the Clark County Public Defender's Office.
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> A motion for a psychiatric expert was filed. At a hearing, the district court inquired if this was for competency and Howard's counsel indicated it was not, but it was to help evaluate Howard's mental status at the time of the events. The district court granted the motion and appointed Dr. O'Gorman to assist the defense.
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> At a status check on January 4, 1983, defense counsel indicated the defense could not be ready for the January 10th trial date due to the need to conduct additional investigation and discovery. In addition, counsel noted Howard was refusing to cooperate with counsel. Howard objected to any continuance with knowledge that his attorneys' could not complete the investigations by that date. Given Howard's objections, the district court stated the trial would go forward as scheduled.
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> On the day of trial, defense counsel moved to withdraw stating that Mr. Jackson's conflict created mistrust in Howard and he therefore refused to cooperate. This motion was denied. Defense counsel then moved for a

continuance as they did not feel comfortable proceeding to trial in this case, given the issues involved, with only six weeks to prepare. After extensive argument and a recess so that counsel could discuss the issue with Howard, the district court granted the continuance over Howard's objections.

The guilt phase of the trial began on April 11, 1983 and concluded on April 22, 1983. The jury returned a verdict of guilty on all three counts. The penalty phase was set to begin on May 2, 1983. In the interim, one of the jurors tried to contact the trial judge about a scheduling problem. Because the district judge was on vacation, someone referred the juror to the District Attorney's Office. That Office referred the juror to the jury commissioner. Howard moved for a mistrial or elimination of the death penalty as a sentencing option based upon this contact. After conducting an evidentiary hearing, the district court denied Howard's motions.

Defense counsel made an oral motion to withdraw indicating they had irreconcilable differences with Howard over the conduct of the penalty phase. Counsel indicated they had documents and witnesses in mitigation, but that Howard had instructed them not to present any mitigation evidence. Howard also instructed them not to argue mitigation and they would not follow that directive, but would argue mitigation. Counsel also indicated that Howard told them he wished to testify, but would not tell them the substance of his testimony. Finally counsel indicated they had attempted to get military and mental health records but were unsuccessful because the agencies possessing the records would not send copes without a release signed by Howard and Howard refused to sign the releases. The district court canvassed Howard if this was correct and Howard confirmed it was true and that he did not want any mitigation presented. The district court found Howard understood the consequences of his decision and denied the motion to withdraw concluding defense counsel's disagreement with Howard's decision was not a valid basis to withdraw.

The penalty phase began on May 2, 1983 and concluded on May 4, 1983. The State originally alleged three aggravating circumstances: 1) the murder was committed by a person who had previously been convicted of a felony involving the use of violence - namely robbery with use of a deadly weapon in California, 2) prior violent felongy - a 1978 New York conviction in absentia for robbery with use of a deadly weapon; and 3) the murder occurred in the commission of a robbery. Howard moved to strike the California conviction because the conviction occurred after the Monahan murder and the New York conviction because it was not supported by a judgment of conviction. The district court struck the California conviction but denied the motion as to the New York conviction, noting that the records reflected a jury had convicted Howard and the lack of a formal judgment was the result of Howard's absconding in the middle of trial.

The State presented evidence of the aggravating circumstances and Howard took the stand and related information on his background. During a break in the testimony, Howard suddenly stated he didn't understand what mitigation meant and that he would leave it up to his attorneys to decide what to do. The district court asked Howard if he was now instructing his attorneys to present mitigation and he refused to answer the question. Howard did indicate that he wanted his attorney's to argue mitigation and defense counsel asked for time to prepare which was granted. The jury found both aggravating circumstances existed and that no mitigating circumstances outweighed the aggravating circumstances. The jury returned a sentence of death.

Howard appealed to the Nevada Supreme Court. Elizabeth Hatcher represented Howard on Direct Appeal. Howard raised the following issues on direct appeal: 1) ineffective assistance of counsel based on actual conflict arising out of Jackson's relationship with Dr. Monahan; 2) denial of a motion

to sever the Sears' count from the Monahan counts; 3) denial of an evidentiary hearing on a motion to suppress Howard's statements and evidence derived therefrom; 4) refusal to instruct the jury that accomplice testimony should be viewed with mistrust; 5) refusal to instruct the jury that Dawana Thomas was an accomplice as a matter of law; 6) denial of a motion to strike the felony robbery and New York prior violent felony aggravators; and 7) the giving of a anti-sympathy instruction and refusal to instruct the jury that sympathy and mercy were appropriate considerations.

The Nevada Supreme Court affirmed Howard's conviction and sentence. Howard v. State, 102 Nev. 572, 729 P.2d 1341 (1986) (hereinafter "Howard I"). The Supreme Court held that the relationship of two members of the Public Defender's Office with Monahan did not objectively justify Howard's distrust and there was no evidence that those attorneys had any involvement in his case. Therefore no actual conflict existed and the claim of ineffective assistance of counsel on this basis had no merit. The Court further concluded the district court did not abuse its discretion by refusing to sever the counts and by not granting an evidentiary hearing on the suppression motion. The Court noted that the record reflected proper Miranda warnings were given and the statements were admitted as rebuttal and impeachment after Howard testified. The Court also found that the district court did not error in rejecting the two accomplice instructions; the anti-sympathy language in one of the instructions was not err in light of the totality of the instructions and the record supported the district court's refusal to instruct on certain mitigating circumstances for lack of evidence. The Court concluded by stating it had considered Howard's other claims of error and found them to be without merit. Howard filed a petition for rehearing which was denied on March 24, 1987. Remitittur was stayed pending the filing of a petition for Writ of Certiorari to the United States Supreme Court on the anti-sympathy issues. John Graves, Jr. was appointed to represent Howard on the writ petition. The petition was denied on October 5, 1987 and remitittur issued on February 12, 1988.

On October 28, 1987, Howard filed his first State petition for post-conviction relief. John Graves Jr. and Carmine Colucci originally represented Howard on the petition. They withdrew and David Schieck was appointed. The petition raised the following claims for relief: 1) ineffective assistance of trial counsel – guilt phase - failure to present an insanity defense and Howard's history of mental illness and commitments; 2) ineffective assistance of trial counsel – penalty phase – failure to present mental health history and documents; failure to present expert psychiatric evidence that Howard was not a danger to jail population; failure to rebut future dangerousness evidence with jail records and personnel; failure to object to improper prosecutorial arguments involving statistics regarding deterrence, predictions of future victims, Howard's lack of rehabilitation, aligning the jury with "future victims," comparing victim's life with Howard's life, diluting jury's responsibility by suggesting it was shared with other entities, voicing personal opinions in support of the death penalty and its application to Howard, references to Charles Manson, voice of society arguments and referring to Howard as an animal; 3) ineffective assistance of appellate counsel – failure to raise prosecutorial misconduct issues.

An evidentiary hearing was held on August 25, 1988. George Franzen, Lizzie Hatcher, John Graves and Howard testified. Supplemental points and authorities were filed on October 3, 1988. The district court entered an oral decision denying the petition on February 14, 1989. The district court concluded that trial counsel performed admirably under difficult circumstances created by Howard himself. As to the failure to present an insanity defense and present mental health records, the court found that Howard was canvassed throughout the proceedings about his refusal to cooperate in obtaining those

records, particularly his refusal to sign releases. Howard knew what was going on, was competent and was trying to manipulate the proceedings and that there was no evidence to support an insanity defense, therefore counsel were not ineffective in this regard.

On the issue of failure to object to prosecutorial misconduct, the district court found that defense counsel did object where appropriate and the arguments that were not objected to did not amount to misconduct and were a fair comment on the evidence. Even if some of the comments were improper, the district court concluded that they would not have succeeded on appeal as they were harmless beyond a reasonable doubt. Formal findings of fact and conclusions of law were filed on July 5, 1989.[4]

The Nevada Supreme Court affirmed the district court's denial of Howard's first State petition for post-conviction relief. Howard v. State, 106 Nev. 713, 800 P.2d 175 (1990) (hereinafter "Howard II"). David Schieck represented Howard in that appeal. On appeal Howard raised ineffective assistance of trial and appellate counsel regarding the prosecutorial misconduct issues. The Supreme Court found three comments to be improper under Collier v. State, 101 Nev. 473, 705 P.2d 1126 (1985)[5]: 1) a personal opinion that Howard merited the death penalty, 2) a golden rule argument – asking the jury to put themselves in the shoes of a future victims and 3) an argument without support from evidence that Howard might escape. The Court found that counsel were ineffective for failing to object to these arguments but concluded there was no reasonable probability of a contrary result absent these remarks and therefore no prejudice. The Court rejected Howard's other contentions of improper argument.

With respect the mitigation evidence issues, the Nevada Supreme Court upheld the district court's findings that this was a result of Howard's own conduct and not ineffective assistance of counsel.[6]

Howard proceeded to file a second Federal habeas corpus petition on May 1, 1991. This proceeding was stayed for Howard to exhaust his state remedies on October 16, 1991.

Howard then filed a second State petition for post-conviction relief on December 16, 1991. Cal J. Potter, III and Fred Atcheson represented Howard in the second State petition. In that petition, Howard alleged denial of a fair trial based on prosecutorial misconduct, namely: 1) jury tampering based on the prosecutor's contact with the juror between the guilt and penalty phases; 2) expressions of personal belief and a personal endorsement of the death penalty; 3) reference to the improbability of rehabilitation, escape, future killings; 3) comparing Howard's life with Dr. Monahan's and 4) a statement that the community would benefit from Howard's death. The petition also asserted an ineffective assistance of trial counsel claim for failing to explain to Howard the nature of mitigating circumstances and their importance. Finally the petition raised a speedy trial violation and cumulative error.

The State moved to dismiss the second State petition as procedurally barred or governed by the law of the case on February 10, 1992. In his reply, Howard dropped his speedy trial claim as unsubstantiated and indicated if the other claims were barred, then they had been exhausted and Howard could

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[4]During the pendency of the first State petition for post-conviction relief, Howard filed his first Federal petition for habeas relief. That petition was dismissed without prejudice on June 23, 1988.

[5] Collier was decided two years after Howard's trial.

[6] The State filed a petition for rehearing with respect to sanctions imposed on the prosecutor because his remarks violated Collier. The State noted that Howard's trial occurred before Collier therefore the Court should not sanction counsel for conduct that occurred before the Court issued the Collier opinion. Rehearing was denied February 7, 1991.

proceed in Federal court.

The district court denied the petition on July 7, 1992. The district court found that the claims of prosecutorial misconduct and ineffective assistance of counsel relating thereto as well as the claims relating to mitigation evidence had been heard and found to be without merit or failed to demonstrate prejudice. Such claims were therefore barred by the law of the case. The district court further concluded that any claim of cumulative error and any issues not raised in previous proceedings were procedurally barred. Finally the district court found the speedy trial violation was a naked allegation, frivolous and procedurally barred.

Howard appealed the denial of his second State petition to the Nevada Supreme Court, which dismissed his appeal on March 19, 1993. The Order Dismissing Appeal found that Howard's second State petition was so lacking in merit that briefing and oral argument was not warranted. Howard filed a petition for Writ of Certiorari challenging the summary affirmance and the United States Supreme Court denied the request on October 4, 1993.

On December 8, 1993, Howard returned to federal court and filed a new pro se habeas petition rather than lifting the stay in the previous petition. After almost three years, on September 2, 1996, the federal district court dismissed the petition as inadequate and ordered Howard to file a second amended federal petition that contained more than conclusory allegations. Thereafter Howard, now represented by Patricia Erickson, filed a Second Amended Petition for Writ of Habeas Corpus on January 27, 1997. After almost five years, on September 23, 2002, the Second Amended Federal petition was stayed for Howard to again exhaust his federal claims in state court.

Howard filed his third State petition for post-conviction relief on December 20, 2002. Patricia Erickson represented him on this petition. The petition asserted the following claims, phrased generally as denial of a fundamentally fair trial or assistance of counsel under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution or as cruel and unusual punishment under the Eighth Amendment: 1) failure to sever Sears robbery count from Monahan robbery/murder counts; 2) failure to suppress Howard's statements to LVMPD and physical evidence derived therefrom; 3) speedy trial violation; 4) trial counsel actual conflict of interest – Jackson issue; 5) failure to give accomplice as a matter of law and accomplice testimony should be viewed with distrust instructions – Dwana Thomas; 6) improper jury instructions – diluting standard of proof - reasonable doubt, second degree murder as lesser included of first degree murder, premeditation, intent and malice instructions; 7) improper jury instructions – failure to clearly define first degree murder as specific intent crime requiring malice and premeditation; 8) improper premeditation instruction blurred distinction between first and second degree murder; 9) improper malice instruction; 10) improper anti-sympathy instruction; 11) failure to give influence of extreme mental or emotional disturbance mitigator instruction; 12) improper limitation of mitigation by giving only "any other mitigating circumstance" instruction; 13) failure to instruct that mitigating circumstances findings need not be unanimous; 14) prosecutorial misconduct – jury tampering, stating personal beliefs, personal endorsement of death penalty, improper argument regarding rehabilitation, escape and future killings; comparing Howard and victim's lives, comparing Howard to notorious murder (Charles Manson) and improper community benefit argument; 15) use of felony robbery as aggravator and basis for first degree murder; 16) improper reasonable doubt instruction; 17) ineffective assistance of trial counsel – inadequate contact, conflict of interest, failure to contact California counsel to obtain records, failure to obtain Patton and Atescadero hospital records, failure to obtain California trial transcripts, failure to review Clark County Detention Center medical records, failure to

challenge competency to stand trial, failure to obtain suppression hearing, failure to present legal insanity, failure to object to reasonable doubt instruction, failure to view visiting records and call witnesses based upon same, failure to call Pinkie Williams and Carol Walker in penalty phase, failure to investigate and call Benjamin Evans in penalty phase, failure to obtain San Bernardino medical records regarding suicide attempt, failure to obtain military records, failure to adequately explain concept of mitigation evidence, failure to object to prosecutorial misconduct in closing arguments, failure to refute future dangerousness argument, failure to object to trial court's limitation of mitigating circumstances and failure to object to instructions which allegedly required unanimous finding of mitigating circumstances; 18) ineffective assistance of appellate counsel – failed to raise claims 3, 4, 6-9, 12, 13, 15, 16, 20 and 21 on appeal; 19) ineffective assistance of post-conviction counsel – failure to adequately investigate and develop all trial and appeal claims; 20) cumulative error; 21) Nevada's death penalty is administered in an arbitrary, irrational and capricious fashion; 22) lethal injection constitutes cruel and unusual punishment and 23) the death penalty violates evolving standards of decency.

The State filed a motion to dismiss Howard's third State petition on March 4, 2001. The State argued that the entire petition was procedurally barred under NRS 34.726(1) (one year limit) and NRS 34.800 (five year laches) and that Howard had not shown good cause for delay in raising the claims to overcome the procedural bars. The State also analyzed each claim and noted what issues had already been raised and decided adversely to Howard or should have been raised and were waived under NRS 34.810.

Howard filed an amended third State petition. The amended petition expanded the factual matters under Claim 17 regarding Howard's family background that Howard asserted should have been presented in mitigation.

On August 20, 2003, Howard filed his opposition to the State's motion to dismiss his third State petition. As good cause for delay, Howard alleged Nevada's successive petition and waiver bar (NRS 34.810) is inconsistently applied and Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) is not controlling. Howard contended NRS 34.726 did not apply because any delay was the fault of counsel not Howard and NRS 34.726 is unconstitutional and cannot be applied to successive petitions Pellegrini notwithstanding. Howard argued the Due process and Equal Protection clauses of the Federal Constitution bar application of NRS 34.726, NRS 34.800 and NRS 34.810 to Howard. In addition, Howard asserted NRS 34.800 did not apply because the State had not shown prejudice and the presumption of prejudice was overcome by the allegations in the petition.

The State filed a reply to the opposition on September 24, 2003. The district court issued an oral decision on October 2, 2003 dismissing the third State petition as procedurally barred under NRS 34.726 and finding Howard had failed to overcome the bar by showing good cause for delay. The district court also independently dismissed the claims under NRS 34.810. Written findings were entered on October 23, 2003.

Howard appealed the dismissal to the Nevada Supreme Court, which affirmed the district court's dismissal of the third State petition on December 4, 2004. The High Court addressed Howard's assertions that he had either overcome the procedural bars or they could not constitutionally be applied to him and rejected them. Among its conclusions, the Court noted that the record reflected Howard was aware that all his claims challenging the conviction or imposition of sentence must be joined in a single petition and that Howard had no right to post-conviction counsel at the time of the filing of his first and

> second State petitions for post-conviction relief and hence ineffectiveness of post-conviction counsel could not be good cause for delay.[7]
>
> Howard then returned to Federal district court where he filed his Third Amended Petition for Writ of Habeas Corpus on October 23, 2005. Subsequently, without seeking approval from the Federal Court, the Federal Public Defender's Office filed, on Howard's behalf, the current Fourth State Post-Conviction Petition on October 27, 2007. The State filed a motion to dismiss the Fourth State Petition on April 8, 2008. The parties agreed to stay this case for several months while Howard sought permission from the Federal District Court to hold his federal petition for post-conviction habeas corpus in abeyance pending exhaustion of the claims already filed in the Fourth State Petition and of new claims he wished to file in State court as a result of the Ninth Circuit's decision in Polk v. Sandoval, 503 F.3d 903, 910 (9th Cir. 2007).
>
> The United States District Court denied Howards' motion for stay and abeyance on January 9, 2009. Thereafter, Howard filed an Opposition to the State's original motion to dismiss and an Amended Petition on February 24, 2009. The State responded to Howard's opposition to the original motion to dismiss and additionally moved to dismiss the Amended Fourth Petition on October 7, 2009.[8] Howard filed an Opposition to the Amended Motion to Dismiss on December 18, 2009. Howard filed supplemental authorities on January 5, 2010.
>
> Argument on the State's motion to dismiss was heard on February 4, 2010. The matter was taken under advisement so the district court could review the extensive record. A Minute Order Decision was issued on May 13, 2010 dismissing the Fourth State Petition as procedurally barred.

Findings of Fact, Conclusions of Law and Order, filed November 6, 2010, p. 1-12 (footnotes in original).

This Court denied Petitioner's fourth habeas petition. Findings of Fact, Conclusions of Law and Order, filed November 6, 2010, p. 26-33. Petitioner challenged this Court's decision before the Nevada Supreme Court. Notice of Appeal, filed on December 21, 2010. Prior to ruling on this Court's fourth denial of habeas relief, the Nevada Supreme Court issued an opinion in Howard v. State, __ Nev. __, 291 P.3d 137 (2012), addressing the sealing of documents. The Federal Public Defender (FPD) filed a motion in the Supreme Court to substitute counsel that included information that was potentially embarrassing to one or more current or former FPD attorneys as well as a prior private attorney who had represented Howard. Id. at __, 291 P.3d at 139. A cover sheet indicated that the motion was

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[7] See 1987 Nev. Stat., ch. 539, § 42 at 1230 (providing that appointment of counsel was discretionary not mandatory).

[8] Although both defense counsel and this Court received a copy of the Opposition and Amended Motion to Dismiss, for some reason it was not filed. This Court authorized the District Attorney's Office to file a Notice of Errata and attach a copy of the previously distributed Opposition and Amended Motion to Dismiss. This was filed on February 4, 2010. Subsequently, the missing document was located and the original Amended Motion to Dismiss was officially filed on May 11, 2010._____.

sealed but the FPD failed to file a separate motion to seal the pleading. Id. The Court concluded that the FPD had not properly moved to seal and that sealing was unjustified. Id. at __, 291 P.3d at 145. Ultimately, the Court affirmed this Court's denial of habeas relief. Order of Affirmance, filed July 30, 2014, attached to Clerk's Certificate, filed October 24, 2014. The United States Supreme Court denied certiorari. Howard v. Nevada, __ U.S. __, 135 S.Ct. 2908 (2015).

The instant Petition for Writ of Habeas Corpus (Post-Conviction) (Fifth Petition) was filed on October 5, 2016. Petition for Writ of Habeas Corpus (Post-Conviction), October 5, 2016.

ARGUMENT

Petitioner's Hurst v. Florida, 577 U.S. __, 136 S.Ct. 616 (2016), claim must be denied and/or dismissed as untimely, presumptively prejudicial, waived and abusive pursuant to NRS 34.726, NRS 34.800 and NRS 34.810.

I. *The Fifth Petition is Procedurally Barred*

A. *Application of Procedural Bars is Mandatory*

The one-year time bar of NRS 34.726 is strictly construed. Gonzales v. State, 118 Nev. 590, 593-596, 53 P.3d 901, 902-904 (rejected post-conviction petition filed two days late pursuant to the "clear and unambiguous" provisions of NRS 34.726(1)). Further, the district courts have a *duty* to consider whether post-conviction claims are procedurally barred. State v. Eighth Judicial District Court (Riker), 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005). The Nevada Supreme Court has found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," noting:

> Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.

Id., at 231, 112 P.3d at 1074. Additionally, the Court held that procedural bars "cannot be ignored when properly raised by the State." Id., at 233, 112 P.3d at 1075. The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the

statutory procedural bars.

B. *NRS 34.726(1)*

NRS 34.726(1) states that "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." The one-year time bar is strictly construed and enforced. Gonzales, 118 Nev. 590, 53 P.3d 901. The Nevada Supreme Court has held that the "clear and unambiguous" provisions of NRS 34.726(1) demonstrate an "intolerance toward perpetual filing of petitions for relief, which clogs the court system and undermines the finality of convictions." Pellegrini v. State, 117 Nev. 860, 875, 34 P.3d 519, 529 (2001). For cases that arose before NRS 34.726 took effect on January 1, 1993, the deadline for filing a petition extended to January 1, 1994. Id. at 869, 34 P.3d at 525.

Remittitur issued from Petitioner's direct appeal on February 12, 1988. Findings of Fact, Conclusions of Law and Order, filed November 6, 2010, p. 5. Therefore, Petitioner had until January 1, 1994, to file a timely habeas petition. Petitioner filed the Fifth Petition on October 5, 2016. As such, the Fifth Petition is time barred.

Even if the one-year rule did not begin to run until Petitioner's challenge to the Nevada Supreme Court's reweighing decision was indisputably available, the Fifth Petition is still time barred. Petitioner's contention is that a new penalty hearing is required due to the combination of the Nevada Supreme Court's invalidation of an aggravating circumstance on appeal of the Fourth Petition and Hurst. Fifth Petition, p. 7-8. It is undisputable that Hurst was published in 2016; however, Hurst was merely an application of Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002). Hurst, 577 U.S. at __, 136 S.Ct. at 621-22 ("[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's"). Ring was published on June 24, 2002. Remittitur issued from the Nevada Supreme Court's decision invalidating an aggravating circumstance and reweighing on October 20, 2014. Remittitur, dated October 20, 2014, attached to Clerk's Certificate, filed October 24, 2014. Under the most favorable analysis possible, Petitioner had until October

20, 2015, to bring a Ring challenge against the Nevada Supreme Court's reweighing decision.

C. *NRS 34.800*

NRS 34.800 recognizes that a post-conviction petition should be dismissed when delay in presenting issues would prejudice the State in responding to the petition or in retrial. NRS 34.800(1). 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 also, Groesbeck v. Warden, 100 Nev. 259, 260, 679 P.2d 1268, 1269 (1984), superseded by statute as recognized by, Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000) ("petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.").

To invoke the presumption, the statute requires that the State specifically plead presumptive prejudice. NRS 34.800(2). More than five years has passed since remittitur issued from Petitioner's direct appeal on February 12, 1988. Findings of Fact, Conclusions of Law and Order, filed November 6, 2010, p. 5. Indeed, almost twenty-nine years have passed since Petitioner's direct appeal was final. As such, the State pleads statutory laches under NRS 34.800(2) and prejudice under NRS 34.800(1) against the Fifth Petition. After such a passage of time, the State is prejudiced in its ability to answer the Fifth Petition and retry the penalty-phase. If Petitioner's fifth go around on state post-conviction review is not dismissed or denied on the procedural bars, the State will be forced to track down witnesses who may have died or retired in order to prove a case that is several decades old. Assuming witnesses are available, their memories have certainly faded and they will not present to a jury the same way they did in 1983.

D. *NRS 34.810*

Petitioner's fifth attempt at state habeas relief must be dismissed on waiver grounds

and as an abuse of the writ.

Claims that could have been raised on direct appeal or in a prior petition are barred under NRS 34.810(1)(b):

> The court *shall dismiss* a petition if the court determines that:
> …
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
> (1) Presented to the trial court;
> (2) *Raised in a direct appeal or a prior petition* for a writ of habeas corpus or post-conviction relief, *unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner*.

(Emphasis added). The failure to raise grounds for relief at the first opportunity is an abuse of the writ. NRS 34.810(2).

Nevada law dictates that all claims appropriate for direct appeal must be pursued on direct appeal or they will be "considered waived in subsequent proceedings." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds, Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). The Nevada Supreme Court has emphasized that: "[a] court *must* dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001) (emphasis added). Where a claim arises after direct appeal, a petitioner has one year in which to file a petition alleging the claim or it too is barred. Rippo v. State, 132 Nev. __, __, 368 P.3d 729, 734 (2016) ("[A] petition … has been filed within a reasonable time after the … claim became available so long as it is filed within one year after entry of the district court's order disposing of the prior petition or, if a timely appeal was taken from the district court's order, within one year after this court issues its remittitur.").

Petitioner's Hurst claim is barred by NRS 34.810(1)(b)(2) as waived and by NRS 34.810(2) as an abuse of the writ since it was not raised within a year of when it became

available to him. Petitioner's contention is that a new penalty hearing is required due to the combination of the Nevada Supreme Court's invalidation of an aggravating circumstance on appeal of the Fourth Petition and Hurst. Fifth Petition, p. 7-8. It is undisputable that Hurst was published in 2016; however, Hurst was merely an application of Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002). Hurst, 577 U.S. at __, 136 S.Ct. at 621-22 ("[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's"). Ring was published on June 24, 2002. Remittitur issued from the Nevada Supreme Court's decision invalidating an aggravating circumstance and reweighing on October 20, 2014. Remittitur, dated October 20, 2014, attached to Clerk's Certificate, filed October 24, 2014. Under the most favorable analysis possible, Petitioner had until October 20, 2015, to bring a Ring challenge against the Nevada Supreme Court's reweighing decision.

II. *Petitioner Fails to Justify Ignoring the Procedural Bars*

This Court cannot disregard the procedural bars because Petitioner has failed to prove good cause, prejudice and/or actual innocence.

To overcome the procedural bars, a petitioner must demonstrate: (1) good cause for delay in filing his petition or for bringing new claims or repeating claims in a successive petition; and (2) undue or actual prejudice. NRS 34.726(1); NRS 34.800(1); NRS 34.810(3). To establish prejudice "a petitioner must show that errors in the proceedings underlying the judgment worked to the petitioner's actual and substantial disadvantage." State v. Huebler, 128 Nev. __, __, 275 P.3d 91, 94-95 (2012), cert. denied, __ U.S. __, 133 S.Ct. 988 (2013).

"To establish good cause, petitioners must show that an impediment external to the defense prevented their compliance with the applicable procedural rule. A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of default." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003), rehearing denied, 120 Nev. 307, 91 P.3d 35 cert. denied, 543 U.S. 947, 125 S.Ct. 358 (2004); see also, Hathaway v. State, 119 Nev. 248, 251, 71 P.3d 503, 506 (2003) ("In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules"); Pellegrini,

117 Nev. at 887, 34 P.3d at 537 (neither ineffective assistance of counsel, nor a physician's declaration in support of a habeas petition were sufficient "good cause" to overcome a procedural default, whereas finding by Supreme Court that defendant was suffering from Multiple Personality Disorder was). An external impediment could be "that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable." Id. (quoting, Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645 (1986)); see also, Gonzalez, 118 Nev. at 595, 53 P.3d at 904 (citing Harris v. Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)).

The Nevada Supreme Court has held that, "appellants cannot attempt to manufacture good cause[.]" Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway, 119 Nev. at 251, 71 P.3d at 506; (quoting, Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989), superseded by statute as recognized by, Huebler, 128 Nev. at __, 275 P.3d at 95, footnote 2). Excuses such as the lack of assistance of counsel when preparing a petition as well as the failure of trial counsel to forward a copy of the file to a petitioner have been found not to constitute good cause. Phelps v. Dir. Nev. Dep't of Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988), superseded by statute as recognized by, Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

Even when a petitioner cannot show good cause sufficient to overcome the procedural bars, habeas relief may still be granted if he can demonstrate a fundamental miscarriage of justice. Pellegrini, 117 Nev. at 887, 34 P.3d at 537. In order to prove a fundamental miscarriage of justice, a petitioner must make "a colorable showing he is actually innocent of the crime or is ineligible for the death penalty." Id. (citation omitted). Actual innocence means factual innocence not mere legal insufficiency. Bousley v. United States, 523 U.S. 614, 623, 118 S.Ct. 1604, 1611 (1998); Sawyer v. Whitley, 505 U.S. 333, 338-39, 112 S.Ct. 2514, 2518-19 (1992). To establish actual innocence of a crime, a petitioner "must show that it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation." Pellegrini, 117 Nev. at 887, 34 P.3d at 537. However, "[w]ithout

any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of the barred claim." Schlup v. Delo, 513 U.S. 298, 316, 115 S. Ct. 851, 861 (1995) (emphasis added).

Actual innocence is a stringent standard designed to be applied only in the most extraordinary situations. Id.; Pellegrini, 117 Nev. at 876, 34 P.3d at 530. The Eighth Circuit Court of Appeals has "rejected free-standing claims of actual innocence as a basis for habeas review stating, '[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.'" Meadows v. Delo, 99 F.3d 280, 283 (8th Cir. 1996) (citing Herrera v. Collins, 506 U.S. 390, 400, 113 S. Ct. 853, 860 (1993)). A defendant claiming actual innocence must demonstrate that it is more likely than not that *no reasonable juror* would have convicted him absent a constitutional violation. Pellegrini, 117 Nev. at 887, 34 P.3d at 537. Once a defendant has made such a showing, he may then use the claim of actual innocence as a "gateway" to present his constitutional challenges to the court and require the court to decide them on the merits. Schlup, 513 U.S. at 315, 115 S. Ct. at 861. Furthermore, the newly discovered evidence suggesting the defendant's innocence must be "so strong that a court cannot have confidence in the outcome of the trial." Id. at 316, 115 S.Ct. at 861.

"Where the petitioner has argued that the procedural default should be ignored because he is actually ineligible for the death penalty, he must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him death eligible." Pellegrini, 117 Nev. at 887, 34 P.3d at 537. To establish innocence of capital punishment sufficient to waive a procedural default, a petitioner must eliminate every aggravating circumstance. Sawyer v. Whitley, 505 U.S. 333, 347, 112 S.Ct. 1514, 2523 (1992). In addition, any new evidence regarding mitigating factors is not considered in an "actual innocence" death eligibility determination. Sawyer, 505 U.S. at 345-346, 112 S.Ct. at 2522. Notably, the "actual innocence" requirement focuses exclusively on those elements

that render a defendant eligible for the death penalty; any additional mitigating evidence that was not presented at trial – even if it was the result of alleged constitutional errors – is irrelevant and will not be considered in an actual innocence determination. Id. at 347-48, at 2523-24.

A. *Petitioner concedes the Fifth Petition is Barred without Justification*

The failure of the Fifth Petition to address the procedural bars should be deemed an admission that Petitioner cannot demonstrate good cause, prejudice and/or actual innocence sufficient to ignore his procedural defaults.

It is beyond question that defense knew the procedural bars would be central to this Court's adjudication of the Fifth Petition. This is Petitioner's fifth attempt at post-conviction relief in Nevada. The Federal Public Defender (FPD), an agency that purports to have great expertise in capital habeas litigation, represents Petitioner. Even a cursory examination of the Nevada Supreme Court's affirmation of this Court's denial of the Fourth Petition, a document that is central to Petitioner's Hurst complaint, would have put defense on notice of the need to address the procedural bars. Indeed, the Procedural Allegations section of the Fifth Petition acknowledges that prior petitions have been disposed of based on the procedural bars, admits that the Fifth Petition was filed more than a year after direct appeal remittitur and alleges that this is the first opportunity to present Petitioner's Hurst claim. Fifth Petition, p. 2-7.

Clearly, Petitioner was aware that the Fifth Petition is procedurally barred. Yet the Fifth Petition is silent on good cause, prejudice and actual innocence. The State submits that this was a bad faith attempt to subvert the adversarial process. Petitioner sought to deny Respondent any meaningful opportunity to address his specific arguments by reserving them for his reply. The Nevada Supreme Court has strongly urged prosecutors to make a record of defense misconduct so that the Court can address it on appeal. Williams v. State, 103 Nev. 106, 111, 734 P.2d 700, 703-04 (1987).[9] Regardless, this Court should not aid and abet

[9] This misconduct seems to be a symptom of a larger problem. Unfortunately, the FPD's institutional culture evidences an almost religiously militant opposition to the death penalty, such that all other concerns are sacrificed for the cause.

such skullduggery. Instead, this Court should deem Petitioner's failure to address his procedural defaults as an admission that he cannot demonstrate good cause, prejudice and or actual innocence sufficient to justify ignoring the procedural bars. See, Polk v. State, 126 Nev. ___, ___, 233 P.3d 357, 360-61 (2010); District Court Rules 13(2); Eighth Judicial District Court Rules 3.20(b).

B. *No Good Cause*

Petitioner's failure to prosecute his Ring / Hurst complaint within one year of when it became available precludes a finding of good cause.

Petitioner's contention is that a new penalty hearing is required due to the combination of the Nevada Supreme Court's invalidation of an aggravating circumstance on appeal of the Fourth Petition and Hurst. Fifth Petition, p. 7-8. It is undisputable that Hurst was published in 2016; however, Hurst was merely an application of Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002). Hurst, 577 U.S. at __, 136 S.Ct. at 621-22 ("[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's"). Ring was published on June 24, 2002. Remittitur issued from the Nevada Supreme Court's decision invalidating an aggravating circumstance and reweighing on October 20, 2014. Remittitur, dated October 20, 2014, attached to Clerk's Certificate, filed October 24, 2014. As such, this complaint has been available to Petitioner at least since October 20, 2014. As such, Petitioner had until October 20, 2015, to file this claim. Rippo, 132 Nev. at __, 368 P.3d at 734 ("[A] petition … has been filed within a reasonable time after the … claim became available so long as it is filed within one year after entry of the district court's order disposing of the prior petition or, if a timely appeal was taken from the district court's order,

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See, Rhines v. Weber, 544 U.S. 269, 277-78, 125 S.Ct. 1528, 1535 (2005) ("capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death"); In re Reno, 55 Cal.4th 428, 515, 283 P.3d 1181, 1246 (Cal. 2012) ("death row inmates have an incentive to delay assertion of habeas corpus claims"); Commonwealth v. Spotz, 610 Pa. 17, 160-93, 18 A.3d 244, 329-49 (Pa. 2011) (concurrence of Chief Justice Castille criticizing FPD for intentional delay of capital habeas proceedings; describing FPD pleadings as prolific, abusive and offered in bad faith; and FPD strategies as ethically dubious); Debra Cassens Weiss, Federal PDs have 40 days to explain inmate's letter saying he didn't authorize SCOTUS appeal, ABA Journal (July 1, 2014) (available http://www.abajournal.com/news/article/federal_pds_have_40_days_to_explain_inmates_letter_saying_he_didnt_authoriz).

within one year after this court issues its remittitur.").

Petitioner cannot demonstrate an impediment external to the defense since both Ring and the Nevada Supreme Court's decision on appeal of the Fourth Petition are matters of public record. Petitioner will undoubtedly argue that his change in law impediment should be counted from Hurst and not Ring. "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 v. State, 122 Nev. 1066, 1073, 146 P.3d 265, 270 (2006). Here the factual impediment would be the date of remittitur from the Fourth Petition. The issue is when the legal basis arose for Petitioner's newest claim. Petitioner wants to count from Hurst because it resets the clock and makes his filing timely. However, Hurst was merely an application of Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002). Hurst, 577 U.S. at __, 136 S.Ct. at 621-22 ("[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's"). The entirety of the United States Court's discussion in Hurst focused on applying Ring to the case before it. Id. The Court ended by concluding:

> As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst's authorized punishment based on her own factfinding. In light of Ring, we hold that Hurst's sentence violates the Sixth Amendment.

Id. at __, 136 S.Ct. at 622. Petitioner cannot use Hurst to bootstrap himself into a timely Ring complaint. Crump v. State, 2016 Nev. Unpub. Lexis 374, p. 6-7, footnote 5 ("Riley would not provide good cause as it relies on Hern, which has been available for decades").[10]

Nor can Petitioner fall back on allegations of ineffectiveness of prior post-conviction counsel for failing to raise a Ring challenge in a timely fashion since the FPD has represented Petitioner since at least the appeal of the Fourth Petition. Remittitur, dated October 20, 2014, attached to Clerk's Certificate, filed October 24, 2014. Further, the

[10] Citation to the unpublished opinion in Crump as persuasive authority is permissible. NRAP 36(c)(3) ("A party may cite for its persuasive value, if any, an unpublished disposition issued by this court on or after January 1, 2016."); MB America Inc. v. Alaska Pacific Leasing Company, 123 Nev. Ad. Op. 8, 15, n.1 (Feb. 4, 2016) (allowing citation to unpublished orders, entered on or after January 1, 2016, for their persuasive value).

decision to litigate in federal court does not excuse Petitioner's failure to comply with Nevada's procedural default rules. Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989), abrogated on other grounds, Huebler, 128 Nev. at 197, footnote 2, 275 P.3d at 95, footnote 2.

C. *Insufficient Prejudice*

Petitioner cannot establish "that errors in the proceedings underlying the judgment worked to the petitioner's actual and substantial disadvantage." Huebler, 128 Nev. at __, 275 P.3d at 94-95. Hurst does not apply retroactively to Petitioner. Even if it did, Petitioner received the process he was due under Ring.

1. *Hurst Applies Prospectively Only*

Hurst is an application of Ring. As explained supra, Hurst ruled that "[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's." Hurst, 577 U.S. at __, 136 S.Ct. at 621-22. The entirety of this Court's discussion in Hurst focused on applying Ring to the case before it. Id. The Court ended by concluding:

> As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst's authorized punishment based on her own factfinding. In light of Ring, we hold that Hurst's sentence violates the Sixth Amendment.

Id. at __, 136 S.Ct. at 622.

The United States Supreme Court addressed the retroactivity of Ring in Schriro v. Summerlin, 542 U.S. 348, 351-59, 124 S.Ct. 2519, 2522-27 (2004). After an extensive analysis, Schriro concluded that "Ring announced a new procedural rule that does not apply retroactively to cases already final[.]" Id. at 358, 124 S.Ct. at 2526-27. Petitioner's conviction was final with the 1988 remittitur from his direct appeal. As such, even Petitioner's expansive reading of Ring and Hurst does not afford him relief since those precedents do not apply to his case.

2. *Reweighing is Appropriate after Invalidating an Aggravator*

The essence of Petitioner's complaint is that appellate reweighing or harmless error review amounts to judicial fact finding. Fifth Petition, p. 7. The fundamental flaw in

Petitioner's argument is that an appellate court does not make factual findings when it evaluates whether a jury would have imposed a death verdict absent an invalid aggravating circumstance. Rather, a court applying reweighing or harmless error analysis relies upon factual determinations made by a jury.

Ring applied Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), to Arizona's death penalty scheme, which allowed a judge to determine whether a statutory aggravating circumstance existed. The Ring Court determined that "[b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' … the Sixth Amendment requires that they be found by a jury." Ring, 536 U.S. at 609, 122 S. Ct. at 2443. Similarly, Hurst concluded:

> The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.

Hurst, 577 U.S. at __, 136 S.Ct. at 624.

Nevada capital penalty proceedings comply with the requirements of Apprendi, Ring and Hurst:

> At the penalty phase of a capital trial in Nevada, the jury determines whether any aggravating circumstances have been proven beyond a reasonable doubt and whether any mitigating circumstances exist. NRS 175.554(2), (4). If the jury unanimously finds that at least one statutory aggravating circumstance has been proven beyond a reasonable doubt, the jury must also determine whether there are mitigating circumstances 'sufficient to outweigh the aggravating circumstance or circumstances found.' NRS 175.554(3).

Nunnery v. State, 127 Nev. 749, 772, 263 P.3d 235, 251(2011).

In Clemons v. Mississippi, 494 U.S. 738, 110 S. Ct. 1441 (1990), the United States Supreme Court found it constitutionally permissible for an appellate court to uphold a death sentence imposed by a jury upon invalidation of an aggravating factor, if the court conducts a harmless error or a reweighing analysis. Id. at 744, 110 S. Ct. at 1446. While Court rejected the notion that "state appellate courts are required to or necessarily should engage in reweighing or harmless-error analysis when errors have occurred in a capital sentencing proceeding," such review was constitutionally permissible. Id. at 754, 110 S. Ct. at 1451.

The Nevada Supreme Court resolved the question left to it by the United States Supreme Court as follows:

> A death sentence based in part on an invalid aggravator may be upheld either by reweighing the aggravating and mitigating evidence or conducting a harmless-error review. If this Court cannot conclude beyond a reasonable doubt that the jury would have imposed death absent the erroneous aggravating circumstance, [the Nevada Supreme Court] must vacate the death sentence and remand the matter to the district court for a new penalty hearing.

Archanian v. State, 122 Nev. 1019, 1040, 145 P.3d 1008, 1023 (2006) (footnote omitted).

Petitioner's radical expansion of Ring and Hurst would require abandonment of Clemons. Such an outcome is contrary to the great weight of authority. Indeed, the United States Supreme Court has arguably already rejected Petitioner's contention. Ring specifically noted that Ring "does not question the Arizona Supreme Court's authority to reweigh the aggravating and mitigating circumstances after that court struck one aggravator." Ring, 536 U.S. at 597, footnote 4, 122 S.Ct. at 2437, footnote 4. Both Hurst and Ring noted the availability of harmless error review on remand. Hurst, 577 U.S. at ___, 136 S.Ct. at 624; Ring, 536 U.S. at 609, footnote.7, 122 S. Ct. at 2443, footnote 7. Further, in Brown v. Sanders, 546 U.S. 212, 217, 126 S. Ct. 884, 890 (2006), the United States Supreme Court acknowledged the ability of courts in weighing states to engage in harmless error review or reweighing upon invalidating an aggravator. Brown applied a similar analysis to California's non-weighing death penalty scheme, determining that "[a]n invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." Id. at 220, 126 S. Ct. at 892 (footnote omitted). The Court then determined that the invalidated aggravator "could not have 'skewed' the sentence, and no constitutional violation occurred." Id. at 223, 126 S. Ct. at 894.

The Nevada Supreme Court has relied upon Clemons to hold that reweighing in the face of an invalid aggravating circumstance was appropriate. Bridges v. State, 116 Nev.

752, 766, 6 P.3d 1000, 1010 (2000). Nevada is not alone among the states in approving of Clemons reweighing and/or harmless error review. State v. Abdullah, 158 Idaho 386, 470-71, 348 P.3d 1, 79 (2015); State v. Kirkland, 140 Ohio St. 3d 73, 86-87, 15 N.E.3d 818, 834 (2014); Gillett v. State, 148 So.3d 260, 267-69 (Miss. 2014); State v. Berger, 2014 SD 61 ¶ 31 n.8, 853 N.W.2d 45, 57 n.8 (2014); State v. Hausner, 230 Ariz. 60, 84, 280 P.3d 604, 628 (2012); State v. Sandoval, 280 Neb. 309, 357-58, 364, 788 N.W.2d 172, 214-15, 218 (2010); Billups v. State, 72 So. 3d 122, 134 (Ala. Crim. App. 2010); People v. Mungia, 44 Cal. 4th 1101, 1139, 189 P.3d 880, 907 (2008); State v. Rice, 184 S.W.3d 646, 677 (Tenn. 2006); Myers v. State, 2006 OK CR 12, ¶¶ 105-115, 133 P.3d 312, 336-37 (Okla. Crim. App. 2006); Lambert v. State, 825 N.E.2d 1261, 1263 (Ind. 2005); State v. Sapp, 105 Ohio St. 3d 104, 120, 822 N.E.2d 1239, 1257 (2004).

Similarly, federal appellate courts have endorsed the use of Clemons reweighing and/or harmless-error analysis post-Ring. Pensinger v. Chappell, 787 F.3d 1014, 1029 (9th Cir. 2015); Hanson v. Sherrod, 797 F.3d 810, 839 (10th Cir. 2015); Dixon v. Houk, 737 F.3d 1003, 1013 (6th Cir. 2013); Corcoran v. Levenhagen, 593 F.3d 547, 552 (7th Cir. 2010), vacated and remanded on other grounds, Wilson v. Corcoran, 562 U.S. 1, 131 S. Ct. 13 (2010); Jennings v. McDonough, 490 F.3d 1230, 1248-51 (11th Cir. 2007); United States v. Fields, 483 F.3d 313, 345-46 (5th Cir. 2007); Allen v. Lee, 366 F.3d 319, 344 (4th Cir. 2004).

The Oklahoma Court of Criminal Appeals specifically considered a challenge to appellate reweighing of aggravating and mitigating circumstances in light of Ring in Torres v. State, 2002 OK CR 35, 58 P.3d 214 (Okla. Crim. App. 2002), cert. denied, 538 U.S. 928, 123 S. Ct. 1580 (2003). The Court concluded:

> Oklahoma's provision that jurors make the factual finding of an aggravating circumstance beyond a reasonable doubt is all that Ring requires. Once that finding is made, the substantive elements of the capital crime are satisfied. Contrary to Torres's argument, this Court does not engage in fact-finding on a substantive element of a capital crime when reweighing evidence on appeal. The jury has already found the substantive facts - the existence of aggravating

> circumstances - and this Court does not substitute its judgment for that of the jury's regarding that finding when reweighing.

Id. at ¶ 7, 58 P.3d at 216.

Appellate reweighing or harmless error review after invalidation of an aggravating circumstance does not implicate factual findings. In Clemons, the High Court determined that, "[e]ven if under Mississippi law, the weighing of aggravating and mitigating circumstances were not an appellate, but a jury, function, it was open to the Mississippi Supreme Court to find that the error which occurred during the sentencing proceeding was harmless." Clemons, 494 U.S. at 752, 110 S. Ct. at 1450. Harmless error analysis is repeatedly and consistently applied in appellate review, and, while in Mississippi the jury was entrusted with the weighing determination, the appellate court was still entitled to review the verdict after invalidating a sentencing factor to determine whether it would remain the same. This holds true even after Ring.

That an appellate court merely utilizes the factual findings of a jury in conducting a reweighing or harmless error analysis fundamentally distinguishes this case from Ring and Hurst. This reality does not change merely because Clemons noted that previous precedent had not required a jury to make the factual findings necessary to impose a death sentence since nothing about appellate reweighing or harmless error analysis invades the province of the jury in determining the existence of statutory aggravators that make a defendant death eligible. A jury's factual determination of whether a defendant is death eligible is *all* Ring requires, and the jury in this case made that decision.

Nor is appellate reweighing or harmless error analysis suddenly taboo merely because Hurst overruled Hildwin v. Florida, 490 U.S. 638, 109 S. Ct. 2055 (1989), and Spaziano v. Florida, 468 U.S. 447, 104 S. Ct. 3154 (1984). Hildwin and Spaziano are no longer good law because "they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." Hurst, 577 U.S. at __, 136 S.Ct. at 624. While Clemons relied on those cases in part, appellate reweighing and harmless error review comports with Ring, because the jury still

finds the facts necessary to make a defendant death eligible (in Nevada, the existence of a statutory aggravator), and the appellate court does not serve to find new facts making a defendant eligible for the death penalty.

As the Oklahoma Court of Criminal Appeals said in Torres:

> this Court does not engage in fact-finding on a substantive element of a capital crime when reweighing evidence on appeal. The jury has already found the substantive facts - the existence of aggravating circumstances - and this Court does not substitute its judgment for that of the jury's regarding that finding when reweighing.

Torres, 2002 OK CR 35, ¶ 7, 58 P.3d 214, 216.

Because Clemons reweighing comports with the requirements of Ring and because Petitioner received all the protections required by Ring, the Fifth Petition must be dismissed and/or denied.

D. *Actually Death Eligible*[11]

Petitioner cannot show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him death eligible." Pellegrini, 117 Nev. at 887, 34 P.3d at 537. First, as noted supra, there has been no constitutional error since Hurst is not retroactive and appellate reweighing after striking an aggravating circumstance is permissible. Second, Petitioner has not met the minimum threshold of invalidating every aggravating circumstance. Sawyer, 505 U.S. at 347, 112 S.Ct. at 2523. Petitioner admits that the Nevada Supreme Court only invalidated one of the two aggravating circumstances. Fifth Petition, p. 7. As such, he remains death eligible.

CONCLUSION

Based on the foregoing, the Fifth Petition is untimely, presumptively prejudicial, waived and abusive without sufficient justification to ignore Petitioner's procedural defaults. As such, the Fifth Petition must be dismissed and/or denied.

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[11] To the extent that Petitioner may argue actual innocence, any such contention is derivative of his death ineligibility complaint and must fail because he is actually death eligible. Petitioner's complaint is that reweighing after invalidating an aggravating circumstance amounts to inappropriate judicial fact-finding. Fifth Petition, p. 7. Petitioner's reliance upon Hurst is a textbook example of a legal insufficiency argument that fails to prove actual innocence. Even if the Nevada Supreme Court erred in reweighing, the jury's guilt determination still stands.

DATED this 2nd day of November, 2016.

Respectfully submitted,

STEVEN WOLFSON
Clark County District Attorney
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BY */s/ Jonathan E. VanBoskerck*

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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of Opposition and Motion to Dismiss Fifth Petition for Writ of Habeas Corpus (Post-Conviction), was made this 2nd day of November, 2016, by Electronic Filing to:

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

SAMUEL HOWARD,

Petitioner,

vs.

TIMOTHY FILSON, Warden, and
ADAM PAUL LAXALT, Attorney General for the State of Nevada,

Respondents.

CASE NO. 81C053867
DEPT. XVII

ORDER GRANTING WAIVER OF ORIGINAL FEES AND ANNUAL RENEWAL FEE PURSUANT TO NEVADA SUPREME COURT RULE 42, SUBSECTION 3(e) AND 9

Having reviewed the "Application for Order Waiving Fees Pursuant to Nevada Supreme

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Court Rule 42(3)(e) and Renewal of Application Fees under Rule 42(2)", and good cause appearing:

IT IS HEREBY ORDERED that pursuant to Supreme Court Rule 42(3)(e) "Limited exceptions to original and annual fee," the Court finds applicants Jonah J. Horwitz, Esq., Assistant Federal Public Defender and Deborah Anne Czuba, Esq., Assistant Federal Public Defender, with the Office of the Federal Defender Services of Idaho, are providing *pro bono* services in Case No.: 81C053867, a death penalty habeas corpus case.

IT IS FURTHER ORDERED that, good cause appearing, the Court HEREBY waives the original fee required by SCR 42, subsection 3 and the annual renewal fees required by subsection 9 of the same rule.

Dated this 3 day of Nov, 2016.

MICHAEL P. VILLANI JB
DISTRICT COURT JUDGE
CASE NO.: 81C053867

Submitted by:

GENTILE CRISTALLI
MILLER ARMENI SAVARESE

By: _____
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DISTRICT COURT
CLARK COUNTY, NEVADA

SAMUEL HOWARD,

Petitioner,

vs.

TIMOTHY FILSON, Warden, and ADAM PAUL LAXALT, Attorney General for the State of Nevada,

Respondents.

Case No. 81C053867
Dept. No. XVII

Date of Hearing: 12/14/2016
Time of Hearing: 9:30AM

(Death Penalty Case)

AMENDED PETITION FOR WRIT OF HABEAS CORPUS [POST-CONVICTION]

Petitioner Samuel Howard hereby files this Amended Petition for Writ of Habeas Corpus pursuant to NRS 34.720 *et seq*. Mr. Howard alleges that his death sentence violates the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Sections 3 and 8 of the Nevada Constitution because the Nevada Supreme Court improperly reweighed the aggravating evidence against the mitigating evidence on a post-conviction appeal instead of remanding his case to the trial court for a new sentencing before a jury, and because the jury did not find beyond a reasonable doubt that the aggravation outweighed the mitigation.

PROCEDURAL ALLEGATIONS

Mr. Howard is currently in the custody of the State of Nevada at the Ely State Prison in Ely, Nevada, pursuant to a state court judgment of conviction and sentence of death. The conviction and sentence were entered on September 16, 1983, in the Eighth Judicial District Court, Clark County, Nevada, by the Honorable John F. Mendoza, Case No. 81C053867. 2 ROA 349.[1] No execution date is scheduled.

Respondent Timothy Filson is the Warden of Ely State Prison. As such, he has custody of Mr. Howard. Respondent Adam Paul Laxalt is the Nevada Attorney General. The Respondents are sued in their official capacities.

On May 21, 1981, a Clark County Grand Jury indicted Mr. Howard on two counts of robbery with the use of a deadly weapon, and one count of murder in the first degree with use of a deadly weapon. 1 ROA 1–6. Mr. Howard was arrested in California and extradited to Las Vegas, Nevada in November of 1981. He entered his plea of not guilty on November 30, 1982. 1 ROA 17.

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[1] References to the record on appeal ("ROA") are to the ROA in Nevada Supreme Court case number 23386. Using the citation above as an example, "2" signifies the volume number and "349" the page number. Wherever possible, this petition will cite to documents already filed in state court challenges to Mr. Howard's conviction and sentence. *See* NRS 34.730(3)(a) ("If a petition challenges the validity of a conviction or sentence, it must be . . . [f]iled with the record of the original proceeding to which it relates . . . ."); EDCR 2.27(e) ("Copies of pleadings or other documents filed in the pending matter . . . shall not be attached as exhibits or made part of an appendix.").

On May 4, 1983, the jury found Mr. Howard guilty of all charges. 2 ROA 293. Following the penalty hearing on May 2–4, 1983, the jury returned a sentence of death on the first-degree murder charge. 2 ROA 294. On September 20, 1983, Mr. Howard was sentenced to fifteen years with a consecutive fifteen years for two counts of robbery with use of a deadly weapon. 2 ROA 349.

Mr. Howard testified at his trial.

After he appealed from the judgment of conviction and sentence, the Nevada Supreme Court affirmed Mr. Howard's conviction and sentence on December 15, 1986. *See Howard v. State*, 102 Nev. 572, 729 P.2d 1341 (1986).[2] On March 24, 1987, rehearing was denied. The United States Supreme Court denied Mr. Howard's petition for writ of certiorari on October 5, 1987. *See Howard v. Nevada*, 484 U.S. 872, 108 S. Ct. 203 (1987).

On October 28, 1987, Mr. Howard filed a petition for post-conviction relief in Clark County District Court.[3] An evidentiary hearing was held on the petition on August 25 and 26,

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[2] On direct appeal, Mr. Howard raised the following issues:

1. Whether he received effective assistance of counsel at trial;
2. Whether the trial court erred when it refused to sever Count I from Counts II and III of the indictment;
3. Whether the trial court erred when it refused to grant an evidentiary hearing regarding the voluntariness of statements Mr. Howard made to law enforcement;
4. Whether the trial court erred when it failed to give an instruction to the jury that the testimony of an accomplice ought to be viewed with distrust;
5. Whether the trial court erred when it failed to give an instruction directing the jury to consider Dawana Thomas an accomplice as a matter of law;
6. Whether the trial court erred when it failed to prohibit the prosecution from using three aggravating circumstances to which objections were raised;
7. Whether the trial court erred when it failed to instruct the jury regarding sympathy and mercy.

The lists in this petition of claims raised in previous pleadings do not necessarily track the enumeration in earlier filings. Rather, the lists are intended to simplify and condense the claims for the convenience of the Court and of opposing counsel.

[3] In the petition, Mr. Howard raised the following ineffective-assistance-of-counsel claims:

1. Failure to present an insanity defense;
2. Failure to refute the State's evidence of Mr. Howard's future dangerousness;
3. Failure to object to prosecutorial misconduct;
4. Failure to argue the foregoing claims on direct appeal.

1988. *See* 3 ROA 491–568. The district court denied the petition on July 5, 1989, and on November 7, 1990, the Nevada Supreme Court affirmed. *Howard v. State*, 106 Nev. 713, 800 P.2d 175 (1990). While that proceeding was pending, Mr. Howard filed a federal petition for habeas relief in the United States District Court for the District of Nevada in case number CV-N-88-264.[4] On June 23, 1988, the federal case was dismissed without prejudice. No evidentiary hearing was held in the case.

On May 2, 1991, Mr. Howard filed another federal habeas corpus petition in the same court in case number CV-N-91-196.[5] Mr. Howard's petition contained claims that had been presented in state court as well as claims that had not, and on October 16, 1991, the district court granted Mr. Howard's request to stay the case so that he could return to state court for exhaustion purposes. *See* 4 ROA 792–94.

In accordance with that order, Mr. Howard filed, on December 16, 1991, an amended petition for post-conviction relief in Clark County District Court.[6] *See* 4 ROA 786–90. Without

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[4] In the petition, Mr. Howard raised the following claims:
1. Ineffective assistance of counsel;
2. Failure to sever Count I of the indictment from Counts II and III;
3. Failure to grant an evidentiary hearing on the voluntariness of statements made by Mr. Howard to law enforcement;
4. Failure to instruct the jury that the testimony of an accomplice ought to be viewed with distrust;
5. Failure to instruct the jury to consider Dawana Thomas an accomplice as a matter of law;
6. Failure to prohibit the prosecution from using three aggravating circumstances to which objections were raised;
7. Failure to instruct the jury on sympathy and mercy;
8. Mr. Howard was legally insane at the time of the offense.

[5] In the petition, Mr. Howard raised the following claims:
1. Ineffective assistance of counsel at trial;
2. Ineffective assistance of counsel on direct appeal;
3. Cumulative error.

[6] In his final amended petition, Mr. Howard raised the following issues:
1. Prosecutorial misconduct;
2. Ineffective assistance of counsel at trial;
3. Speedy trial violation;
4. Cumulative error.

holding an evidentiary hearing, the court denied the petition on July 7, 1992. *See* 5 ROA 867–71. On March 19, 1993, the Nevada Supreme Court dismissed Mr. Howard's appeal. The U.S. Supreme Court denied certiorari on October 4, 1993. *See Howard v. Nevada*, 510 U.S. 840, 114 S. Ct. 122 (1993).

On January 12, 1994, the federal district court docketed a pro se petition for writ of habeas corpus submitted by Mr. Howard in case number CV-S-93-1209. After various procedural motions were adjudicated, Mr. Howard filed a second amended petition for writ of habeas corpus on January 27, 1997. The court entered an order on September 13, 2002, staying the proceeding so that Mr. Howard could exhaust in state court his federal habeas claims.

On December 20, 2002, Mr. Howard filed his third state petition for post-conviction relief in Clark County District Court. The court did not hold an evidentiary hearing and dismissed the petition on procedural grounds on October 23, 2003. On December 1, 2004, the Nevada Supreme Court affirmed the lower court's dismissal. *See Howard v. State*, No. 42593, 120 Nev. 1249, 131 P.3d 609 (2004) (per curiam) (table) (unpublished disposition). The federal district court lifted its stay on February 23, 2005, directing the Clerk to file Mr. Howard's Third Amended Petition for Writ of Habeas Corpus.

On October 25, 2007, Mr. Howard filed in Clark County District Court his fourth state petition for post-conviction relief.[7] In an order dated November 5, 2010, the state trial court

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[7] In his final amended petition, Mr. Howard raised the following issues:

1. The use of the felony-murder aggravator constituted double counting;
2. The use of the prior-felony aggravator was unlawful because Mr. Howard was never convicted of the earlier offense;
3. Trial counsel was ineffective;
4. The premeditation instruction was erroneous;
5. The first-degree murder statute was vague;
6. Unanimity from the jury was required on whether mitigation existed;
7. Prosecutorial misconduct;
8. Direct-appeal counsel was ineffective;
9. Appellate review was inadequate;
10. The Nevada death penalty is arbitrary and capricious;
11. Cumulative error.

denied the petition without holding an evidentiary hearing. The Nevada Supreme Court affirmed on July 30, 2014, though in so doing it declared void one of Mr. Howard's two aggravating circumstances. *See Howard v. State*, No. 57469, 2014 WL 3784121 (Nev. July 30, 2014) (per curiam) (unpublished disposition). On April 27, 2015, the U.S. Supreme Court declined to take certiorari review. *See Howard v. Nevada*, 135 S. Ct. 1898 (2015).

In Mr. Howard's federal habeas case, the district court denied relief on December 28, 2009. On August 10, 2015, the Ninth Circuit remanded the case to the district court for further proceedings. Litigation in district court is ongoing and no evidentiary hearing has yet been held.[8] Aside from this petition, the federal district court proceeding is the only action now pending that targets Mr. Howard's conviction and sentence.

The grounds for relief raised herein have not been previously presented to this or any other court. Mr. Howard did not present the claims earlier because they were not available until recently, as the claims are based on *Hurst v. Florida*, 136 S. Ct. 616 (2016), which the U.S. Supreme Court handed down on January 12, 2016. By that date, Mr. Howard's prior state-court challenges to his conviction and sentence had already been fully disposed of. Consequently, the instant petition is the first opportunity that Mr. Howard has had to raise the claim.

This petition is being filed more than one year after the Nevada Supreme Court affirmed Mr. Howard's conviction and sentence on direct appeal. The delay was caused by the same factor noted above, i.e., the claims raised here rely on *Hurst*, and the *Hurst* opinion was not issued until January 12, 2016, more than twenty-nine years after the Nevada Supreme Court issued its opinion in Mr. Howard's direct appeal.

At trial, Mr. Howard was represented by Marcus Cooper and George Franzen. In his direct appeal, Mr. Howard was primarily represented by Lizzie R. Hatcher. Ms. Hatcher and

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[8] Mr. Howard's operative federal habeas petition raises twenty-five claims. *See* Ex. 1. Because of the volume of claims, Mr. Howard will not list each of them here and will instead refer to the recitation in the federal petition, which is attached as an exhibit, and incorporate that recitation by reference. *See id.* at 4–51; N.R.C.P. 10(c) ("Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."); NRS 34.780(1) ("The Nevada Rules of Civil Procedure, to the extent that they are not inconsistent with [post-conviction rules], apply to [post-conviction] proceedings . . . .").

John J. Graves both signed a motion to recall the remittitur that was filed with the Nevada Supreme Court in the direct appeal. A motion to extend the stay of the issuance of the remittitur was filed by Mr. Graves and Carmine J. Colucci. Messrs. Graves and Colucci submitted a petition for writ of certiorari to the U.S. Supreme Court in an effort to have that Court review the Nevada Supreme Court's decision in the direct appeal.

Mr. Howard has no sentences to serve after he completes the sentence imposed by the judgment under attack.

CLAIM ONE:

Mr. Howard's death sentence is invalid under the state and federal constitutional provisions guaranteeing an accused the right to a trial by jury and to have every fact exposing him to a harsher sentence proved by the State beyond a reasonable doubt. *See* U.S. Const. amends. V, VI & XIV; Nevada Const. art. I, secs. 3 & 8. In violation of these constitutional provisions, the Nevada Supreme Court in its July 30, 2014 decision struck one of Mr. Howard's two aggravating circumstances, reweighed the aggravating evidence against the mitigating evidence, and re-imposed a death sentence. Pursuant to U.S. Supreme Court precedent interpreting the Sixth Amendment, as incorporated against the States through the Fourteenth Amendment, only a jury—and not a judge or judges—can find the facts permitting the imposition of a death sentence, and it must do so under a reasonable-doubt standard. *See Hurst*, 136 S. Ct. at 621–24. Such fact-finding includes the process of measuring mitigation against aggravation and determining whether a death sentence is warranted. Nevada's state constitutional protections for a jury-trial right and for due process should be interpreted consistently with this federal caselaw. *See* Nevada Const. art. I, secs. 3 & 8. The Nevada Supreme Court therefore usurped the jury's constitutional role by reweighing the evidence and affirming Mr. Howard's death sentence without applying a reasonable-doubt standard. Now that one of two aggravators has been nullified by Nevada's highest court, Mr. Howard's death sentence is unlawful and he is entitled to a new penalty-phase proceeding before a jury of his peers.

The *Hurst* error identified above is structural, because stripping a capital jury of its constitutional fact-finding role at the penalty phase represents a defect affecting the framework within which the trial proceeds, and thus infects the entire trial process. Harmless error analysis is as a result inappropriate. If harmless error analysis is applied, the violation is prejudicial. Had the Nevada Supreme Court not engaged in its unlawful reweighing of the mitigation against the aggravation, the court would instead have remanded for resentencing. Consequently, in the absence of the error, the result would have been different, and prejudice is apparent.

SUPPORTING FACTS:

The jury that sentenced Mr. Howard to death based its determination on two aggravating circumstances: (1) that Mr. Howard had previously been convicted of a violent felony; and (2) that he committed the murder while robbing the victim. *See* 2 ROA 294. In 2014, on a post-conviction appeal, the Nevada Supreme Court nullified the second aggravating circumstance. *See Howard*, 2014 WL 3784121, at *6. However, the court upheld the remaining aggravator, which alleged a prior violent felony. *See id.* at *5. Having struck one aggravator and affirmed the other, the court reweighed the aggravating evidence against the mitigating evidence and determined that a death sentence was still appropriate, without employing a reasonable-doubt standard. *See id.* at *6. Accordingly, the Nevada Supreme Court affirmed the denial of post-conviction relief without remanding the case for a new penalty hearing. *See id.*

CLAIM TWO:

Mr. Howard's death sentence is invalid under the state and federal constitutional provisions guaranteeing an accused the right to have every fact exposing him to a harsher sentence proved to a jury beyond a reasonable doubt. *See* U.S. Const. amends. V, VI & XIV; Nevada Const. art. I, secs. 3 & 8. Such facts include those found by a jury when it weighs the aggravation against the mitigation and concludes that a death sentence is appropriate. Pursuant to *Hurst*, 136 S. Ct. at 621–24, the jury must find beyond a reasonable doubt that the aggravation outweighs the mitigation. Nevada's state constitutional protections for a jury-trial right and for due process should be interpreted consistently with this federal caselaw. *See* Nevada Const. art.

I, secs. 3 & 8. At Mr. Howard's trial, the jury did not determine beyond a reasonable doubt that the aggravation outweighed the mitigation, rendering the death sentence unconstitutional.

The *Hurst* error identified above is structural, because depriving a defendant of a reasonable-doubt standard affects the framework within which the trial proceeds, and thus infects the entire trial process. Harmless error analysis is as a result inappropriate. If harmless error analysis is applied, the violation is prejudicial. Had the jury been given the proper reasonable-doubt instruction, it would not have voted for death in light of the mitigating evidence presented at sentencing and the relative weakness of the aggravating evidence. Consequently, in the absence of the error, the result would have been different, and prejudice is apparent.

SUPPORTING FACTS:

The jury that sentenced Mr. Howard to death was instructed that it could "impose a sentence of death only if it [found] . . . that there [were] no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." 2 ROA 281; *accord* NRS 175.554(3). For that weighing process, the jury was not given any standard of proof to apply. Therefore, when the jury selected a death sentence, it did not find that the State had proved beyond a reasonable doubt that the aggravation outweighed the mitigation.

PRAYER FOR RELIEF

WHEREFORE, Petitioner Samuel Howard prays that the court issue a writ of habeas corpus and vacate his death sentence.

DATED this 1st day of December 2016.

Respectfully submitted,

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720 West Idaho Street, Suite 900
Boise, Idaho 83702

VERIFICATION

I, Jonah J. Horwitz, declare as follows:

1. I am an Assistant Federal Public Defender in the Capital Habeas Unit for the Federal Defender Services of Idaho. I represent Samuel Howard in his federal habeas corpus proceeding, *Howard v. Baker*, D. Nev., No. 2:93-cv-1209. On October 24, 2016, this Court filed an order admitting me to practice *pro hac vice* in Nevada in the instant case.
2. Petitioner is confined and restrained of his liberty at Ely State Prison in Ely, Nevada. I make this verification on Mr. Howard's behalf because these matters are more within my knowledge than his, and because he is incarcerated in a state different from where my office is located. I have read this Amended Petition and know the contents to be true except as to those matters stated on information and belief and as to such matters I believe them to be true.
3. I verify that Mr. Howard personally authorized me to commence this action.

/s/ Jonah J. Horwitz
Jonah J. Horwitz
Assistant Federal Public Defender
Federal Defender Services of Idaho

CERTIFICATE OF SERVICE

I hereby certify that service of this Amended Petition for Writ of Habeas Corpus was made this 1st day of December 2016, by Electronic Filing to:

Jonathan E. VanBoskerck
Chief Deputy District Attorney
Office of the Clark County District Attorney
Jonathan.VanBoskerck@clarkcountyda.com

/s/ Joy Fish
Joy Fish
Paralegal
Federal Defender Services of Idaho

SAO
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Attorneys for Petitioner Samuel Howard

DISTRICT COURT
CLARK COUNTY, NEVADA

SAMUEL HOWARD,

Petitioner,

vs.

TIMOTHY FILSON, Warden, and ADAM PAUL LAXALT, Attorney General for the State of Nevada,

Respondents.

Case No. 81C053867
Dept. No. XVII

Date of Hearing: 3-17-17
Time of Hearing: 9:30 AM

(Death Penalty Case)

STIPULATION AND ORDER

On December 1, 2016, Petitioner Samuel Howard filed an amended petition for post-conviction relief. In light of that submission, the parties hereby stipulate to the following:

- The oral argument currently scheduled for December 14, 2016, should be vacated;
- Respondents shall file a motion to strike the amended petition for post-conviction relief by January 3, 2017;
- Petitioner shall file an opposition to the motion to strike by February 3, 2017;
- Respondents shall file a reply in support of the motion to strike by February 17, 2017.
- Oral argument on the motion to strike will be held on March 17, 2017, at 9:30 AM, or at another time that week that is convenient for the Court.

In the event the Court grants the motion to strike, it will adjudicate the original petition for post-conviction relief, filed October 5, 2016, after Petitioner files a response to the State's motion to dismiss the original petition, filed November 2, 2016, and after oral argument on the original petition. If the Court denies the motion to strike, it will adjudicate the amended petition for post-conviction relief, after Respondents file a motion to dismiss the amended petition, after Petitioner files an opposition to the motion to dismiss, and after oral argument on the amended petition. Deadlines for further pleadings will be set after the Court rules on Respondents' motion to strike.

DATED this 5th day of December 2016.

GENTILE CRISTALLI
MILLER ARMENI SAVARESE

PAOLA M. ARMENI, ESQ.
Nevada Bar No. 8357
410 South Rampart Blvd., Ste. 420
Las Vegas, Nevada 89145

OFFICE OF THE CLARK COUNTY
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Attorneys for Petitioner

ORDER

Good cause appearing, it is hereby ordered that the oral argument currently scheduled for December 14, 2016, is vacated. Respondents shall file a motion to strike the amended petition for post-conviction relief by January 3, 2017. Petitioner shall file an opposition to the motion to strike by February 3, 2017. Respondents shall file a reply in support of the motion to strike by February 17, 2017. Oral argument on the motion to strike is scheduled for hearing on March 6, 2017, at 9:30 AM.

Dated this 8 day of Dec, 2016.

MICHAEL P. VILLANI
DISTRICT COURT JUDGE
CASE NO.: 81C053867 JB

Submitted By:

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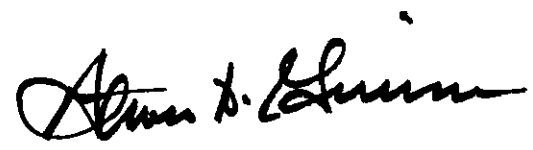

MSTR
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DISTRICT COURT

CLARK COUNTY, NEVADA

DEPARTMENT XVII
NOTICE OF HEARING
DATE 3-17-17 TIME 9:30 Am
APPROVED BY JB

SAMUEL HOWARD,

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: 81C053867

DEPT NO: XVII

MOTION TO STRIKE AMENDED FIFTH PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: March 17, 2017
TIME OF HEARING: 9:30 a.m.

COMES NOW, the State of Nevada, by STEVEN WOLFSON, District Attorney, through JONATHAN E. VANBOSKERCK, Chief Deputy District Attorney, and hereby submits this Motion to Strike Amended Fifth Petition for Writ of Habeas Corpus (Post-Conviction).

This motion 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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NOTICE OF MOTION

TO: SAMUEL HOWARD, Defendant / Petitioner, and

TO: PAOLA M. ARMENI, JONAH J. HORWITZ, and DEBORAH A, CZUBA, Attorney of Record

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned counsel will bring the above and foregoing state's MOTION TO STRIKE AMENDED FIFTH PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) on for hearing in Dept. XVII of the above-captioned court on the 17th day of March, 2017, at the hour of 9:30 a.m., or as soon thereafter as counsel may be heard.

DATED this 12th day of December, 2016.

STEVEN B. WOLFSON
DISTRICT ATTORNEY

By: */s/ Jonathan E. VanBoskerck*
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney

POINTS AND AUTHORITIES

STATEMENT OF FACTS

This Court summarized the facts of this case in the Findings of Fact, Conclusions of Law and Order denying Petitioner's fourth demand for habeas relief:

On March 26, 1980, around noon, a Sears' security officer, Keith Kinsey, observed Howard take a sander from a shelf, remove the packing and then claim a fraudulent refund slip from a cashier. Kinsey approached Howard and asked him to accompany Kinsey to a security office. Kinsey enlisted the aid of two other store employees. Howard was cooperative, alert and indicated there must be some mistake. In the security office, Kinsey observed Howard had a gun under his jacket and attempted to handcuff Howard for safety reasons. A struggle broke out and Howard drew a .357 revolver and pointed it at the three men. Howard had the men lay face down on the floor and took Kinsey's security badge, ID and a portable radio (walkie-talkie). Howard threatened to kill the three men if they followed him and he fled to his car in

the parking lot. A yellow gold jewelry ID bracelet was found at the scene and impounded. It was later identified as Howard's. The Sears in question was located at the corner of Desert Inn Road and Maryland Parkway at the Boulevard Mall in Las Vegas, Nevada.

Dawana Thomas, Howard's girlfriend, was waiting for him in the car. Howard had told her to wait for him and she was unaware of his intentions to obtain money through a false refund transaction. Fleeing from the robbery, Howard hopped into the car, a 1980 black Oldsmobile Cutlass with New York plates 614 ZHQ and sped away from the mall. While escaping, Howard rear-ended a white corvette driven by Stephen Houchin. Houchin followed Howard when Howard left the scene of the accident. Howard pointed the .357 revolver out the window of the Olds and at Houchin's face, telling Houchin to mind his own business.

Howard drove to the Castaways Motel on Las Vegas Boulevard South and parked the car for a few hours. Thomas and Howard walked about and Howard made some phone calls. Later that evening Howard left for a couple of hours. When he returned he told Thomas that he had met up with a pimp, but the pimps' girls were with him so he couldn't rob him. Howard indicated he had arranged to meet with the "pimp" the next morning and would rob him then.

Howard and Thomas drove to the Western Six motel located on the Boulder Highway near the intersection of Desert Inn Road. The couple had stayed at this motel before and Howard instructed Thomas to register under an assumed name, Barbara Jackson. The motel registration card under that name was admitted into evidence and a documents' examiner compared handwriting on the card with Thomas' and indicated they matched.

Around 6:00 a.m. on March 27, 1980, Thomas and Howard left the motel and went to breakfast. After breakfast, Thomas dropped Howard off in the alley behind Dr. George Monahan's office. This was at approximately 7:00 a.m. Thomas went back to the motel room. Approximately an hour later, Howard returned to the motel. Howard had a CB radio with him that had loose wires and a gold watch she had never seen before. Howard told Thompson that he was tired of Las Vegas and to pack up their things as they were leaving for California.

Dr. Monahan was a dentist with a practice located on Desert Inn Road within walking distance of the Boulevard Mall. He was attempting to sell a uniquely painted van and would park the van in the parking lot of the mall, at the Desert Inn and Maryland intersection and near the Sears store, then walk to his office. The van had a sign in it listing Dr. Monahan's home and business phone numbers and the business address.

About 4:00 p.m. on March 26, 1980, the afternoon of the Sears robbery, Dr. Monahan's wife, Mary Lou Monahan, received a phone call at her home inquiring about the van. The caller was a male who identified himself as "Keith" and stated he was a security guard at Caesar's Palace. He indicated he

was interested in purchasing the van and wanted to know if someone could meet him at Caesar's during his break time at 8:00 p.m. Mrs. Monahan indicated the caller would have to talk to her husband who was expected home shortly. A second call was made around 4:30 p.m. and Dr. Monahan made arrangements to meet "Keith" at Caesar's later that night.

The Monahans and two relatives, Barbara Zemen and Mary Catherine Monahan, met "Keith" that evening at the appointed time and place. Howard was identified as the man who called himself "Keith". Howard was carrying a walkie-talkie radio at the time. Howard talked to Dr. Monahan for about ten minutes about purchasing the van and looked inside the van but did not touch the door handle while doing so. Howard arranged to meet Dr. Monahan the next morning to take a test drive. The Monahan's left Caesar's and parked the van at Dr. Monahan's office before returning home in another vehicle.

The next day, March 27, 1980, Dr. Monahan left his home at about 6:50 a.m. He took with him his wallet, a gold Seiko watch, daily receipts and the van title. When Mrs. Monahan arrived at the office at about 8:00 a.m. Dr. Monahan was not there and a patient was waiting for him. Dr. Monahan's truck was in the parking lot to the rear of the office. Dr. Monahan had not entered the office. A black man wearing a radio or walkie-talkie on his belt came into the office at about 7:00 a.m. that morning looking for Dr. Monahan and stating that he had an appointment with the doctor.

Mrs. Monahan called Caesar's Palace and learned no "Keith" fitting the description she gave worked security. After obtaining this information, Mrs. Monahan called the police to report her husband as a missing person. This occurred at about 9:00 a.m.

Charles Marino owned the Dew Drop Inn located near the corner of Desert Inn and Boulder Highway, just a few blocks from Dr. Monahan's office and almost across the road from the Western Six motel. Early on the morning of March 27, 1980, as he approached his business, he observed the Monahan van backing into the rear of the bar. When he arrived at the Inn, he looked in the driver's side and saw no one. He asked patrons if they knew anything about the van and no one spoke up. Marino remained at the business until the early afternoon. The van was still there and had not been moved. Later that day, at around 7:00 p.m. he received a call to return to the bar as a dead body had been found in the van.

In response to television coverage, the police learned the Monahan van was behind the Dew Drop Inn around 6:45 p.m. Dr. Monahan's body was found in the van under an overturned table and some coverings. He had been shot once in the head. The bullet went through Dr. Monahan's head and a projectile was recovered on the floor of the van. The projectile was compared to Howard's .357 revolver. Because the bullet was so badly damaged; forensic analysis could not establish an exact match. It was determined that the bullet could have come from certain makes and models of revolvers, Howard's included. The van's CB radio and a tape deck had been removed. Dr.

Monahan's watch and wallet were missing. A fingerprint recovered from one of the van's doors matched Howard's.

Homicide detectives were aware of the Sears robbery that had occurred on March 26th. The description of the Sears suspect matched that given by Mrs. Monahan of the man calling himself Keith at Caesar's Palace. Based upon that, the use of the name Keith, the walkie-talkie in possession of the suspect, the close proximity of the dental office to the Sears and the fact that the van had been parked in the Sears' parking lot, the police issued a bulletin to state and out-of-state law enforcement agencies describing the suspect and the car used in the Sears' robbery.

On March 27, 1980, while the police were searching for Dr. Monahan, Howard and Thompson drove to California. They left the motel between 8:00 a.m. and 9:00 a.m. and on the way they stopped for gas. At that time Howard had a brown or black wallet that had credit cards and photos in it. Howard went to the gas station rest room and when he returned he no longer had the wallet.

On March 28, 1980, Howard and Thompson went to a Sears in San Bernadino, California. Once again Howard left Thompson in the car while he entered the Sears, picked up merchandize and tried to obtain a refund on it. This time he used the stolen Kinsey Sears security badge in the attempt. The Sears personal were suspicious and left Howard at the register while they called Las Vegas. When they returned Howard had left. Howard had returned to the car and Thompson and Howard ducked down when the people from Sears stepped outside to view the parking lot.

On or about April 1, 1980, at around noon, Howard went to the Stonewood Shopping Center in Downey, California. He entered a jewelry store and talked to a security agent, Manny Velasquez. Another agent in the store, Robert Slater, who also worked as a police officer in Downey, saw Howard and noticed the grip of a gun under Howard's jacket. Slater talked to Velasquez and decided to call the Downey Police. Howard left the jewelry store went to the west end of the mall near a Thrifty drugstore. Downey Police officers observed Howard walking up and down the aisles of the drugstore, picking items up and replacing them on shelves. Howard was stopped on suspicion of carrying a concealed weapon. No gun was found on him nor was he carrying the walkie-talkie. A search of the aisles he had been in revealed a .357 magnum revolver and the walkie-talkie and Sears' security badge stolen from Kinsey.

Howard was arrested for carrying a concealed weapon and then identified and booked for a San Bernadino robbery. Howard was given his Miranda rights by Downey Police officers. Disputed evidence was presented regarding his response and whether he invoked his right to silence. Based on information in the all-points bulletin, the California authorities contacted the Las Vegas Metropolitan Police Department about Howard. On April 2, 1980, LVMPD Detective Alfred Leavitt went to California and, after reading

Howard his Miranda rights, which Howard indicated he understood, interviewed Howard regarding the Sears robbery and Dr. Monahan's murder. Howard did not invoke his right to remain silent or to counsel at this time.

Howard told Detective Leavitt he recalled being at the Sears department store but no details about what happened and that he did not remember anything about March 27, 1980. He stated he could have killed Dr. Monahan but he didn't know.

Ed Schwartz was working as a car salesman in New York on October 5, 1979. When he arrived at work at approximately 9:00 a.m. Howard entered the agency and was looking at an Oldsmobile car. Howard showed Schwartz a New York driver's license and checkbook and told Schwartz that he worked for a security firm in New York. Howard asked if they could take a demonstration ride and Schwartz drove the car for a few blocks while Howard was the passenger. Howard asked if he could drive the car and the men switched seats. After driving for a short time, Howard pulled over and pointed an automatic pistol at Schwartz. Schwartz was told to get down on the floor of the car and remove his shoes and pants. Schwartz complied and Howard took Schwartz' watch, ring and wallet. Schwartz got out of the car when ordered to do so and Howard drove off. The car was later found abandoned.[1]

Howard called witnesses who testified they saw the Monahan van being driven by a black man who did not match Howard's description, in particular the man had a large afro and Howard had short hair. John McBride state that he saw the van around 8:30 to 8:45 a.m. in his apartment complex which is located about five miles from Desert Inn and Boulder Highway. Lora Mallek was employed at a Mobile gas station at the corner of DI and Boulder Highway and she stated serviced the van when it pulled into the station between 3:00 p.m. and 4:00 p.m. Mallek testified that a black man with a large afro was driving, a black woman who did not match Thomas' description was in the passenger seat and a white man was sitting in the back.

Howard testified over the objection of counsel. He indicated he did not recall much about March 26, 1980. He remembered being in Las Vegas in general on and off and that at one point Dwana Thomas' brother, who was about Howard's height, age and weight, and had a large afro, visited them. Howard said he remembers incidents, not dates and Kinsey could have been telling the truth about the Sears store. Howard indicated he wasn't sure because when the Sears people gathered around him, it reminded him of Vietnam and he kind of had a flashback. Howard said he thinks he left Las Vegas immediately after the Sears incident. Howard also stated that he did not meet Dr. Monahan, rob or kill him as he couldn't be that callous.

On cross-examination, Howard admitted he left New York in the middle of his robbery trial and was asked about statements he made to Detective Leavitt. Howard also acknowledged he has used a number of aliases including

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[1] This evidence was admitted to show identity and motive for the Monahan murder.

Harold Stanback. Howard indicated he was taking the blame for Dawana and her brother Lonnie.

Dawana Thomas was called in rebuttal and indicated her brother Lonnie had not been in Las Vegas in March of 1980.

In the penalty phase, the State presented evidence on the details of Howard's 1979 New York conviction for robbery. A college nurse who knew Howard, Dorothy Weisband, testified that Howard robbed her at gunpoint taking her wallet and car. He forced her into a closet and demanded she removed her clothes. She refused and he left. After the robbery, Howard called Weisband trying to get more cash from her in return for her car and threatened her.

Howard testified regarding his military, family and mental health histories. Howard discussed his military service and stated he had suffered a concussion and received a purple heart.[2] Howard also stated he was on veteran's disability in New York.[3] He said he was in various mental health facilities in California including being housed in the same facility as Charlie Manson. He testified he had been diagnosed as a schizophrenic, but that some of the doctors thought he was malingering. When asked about his childhood, Howard became upset. He indicated he didn't want to talk about the death of his mother and sister. Howard indicated he was not mentally ill and knew what he was doing at all times.

(Findings of Fact, Conclusions of Law and Order, filed November 6, 2010, p. 12-19 (footnotes in original)).

STATEMENT OF THE CASE

This Court also set forth the vast majority of the procedural history of this case in the 2010 Findings of Fact, Conclusions of Law and Order denying Petitioner's fourth habeas petition:

> On May 20, 1981 defendant Samuel Howard was indicted on one count of robbery with use of a deadly weapon involving a Sears security officer named Keith Kinsey on March 26, 1980; one count of robbery with use of a deadly weapon involving Dr. George Monahan and one count of murder with use of a deadly weapon involving Dr. Monahan, both committed on March 27, 1980. With respect to the murder count, the State alleged two theories: willful,

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[2] The military records attached to the current Fourth Petition do not reflect any such injury or award.

[3] Howard's military records do not support this and there is nothing in the record substantiating any admission to a veteran's hospital. The record reflects Howard was never actually admitted to a hospital in New York because it required identification and he could not identify himself due to existing warrants for his arrest.

premeditated and deliberate murder or murder in the commission of a robbery.

Howard was arrested in California where he was serving time for a robbery committed on or about April 1, 1980. He was extradited in November of 1982 and an initial appearance was set for November 23, 1982. At that time the matter was continued for appointment of counsel, the Clark County Public Defender's Office.

On November 30, 1982, Terry Jackson of the Public Defender's Office represented to the district court that Howard qualified for the Public Defender's services; however, Mr. Jackson indicated he had a personal conflict as he was a friend of the victim. The district judge determined that the relationship did not create a conflict for the Public Defender's Office, barred Mr. Jackson from involvement with the case and appointed another deputy public defender to Howard's case.

Howard's counsel requested a one week continuance to consult with Howard about the case. Howard objected, insisted on being arraigned and demanded a speedy trial. After discussion, the district court accepted a plea of not guilty and set a trial date of January 10, 1983.

Howard filed a motion in late in December asking for his counsel to be removed and substitute counsel appointed. Counsel filed a response addressing issues raised in the motion. After a hearing, the district court determined there were no grounds for removing the Clark County Public Defender's Office.

A motion for a psychiatric expert was filed. At a hearing, the district court inquired if this was for competency and Howard's counsel indicated it was not, but it was to help evaluate Howard's mental status at the time of the events. The district court granted the motion and appointed Dr. O'Gorman to assist the defense.

At a status check on January 4, 1983, defense counsel indicated the defense could not be ready for the January 10th trial date due to the need to conduct additional investigation and discovery. In addition, counsel noted Howard was refusing to cooperate with counsel. Howard objected to any continuance with knowledge that his attorneys' could not complete the investigations by that date. Given Howard's objections, the district court stated the trial would go forward as scheduled.

On the day of trial, defense counsel moved to withdraw stating that Mr. Jackson's conflict created mistrust in Howard and he therefore refused to cooperate. This motion was denied. Defense counsel then moved for a continuance as they did not feel comfortable proceeding to trial in this case, given the issues involved, with only six weeks to prepare. After extensive argument and a recess so that counsel could discuss the issue with Howard, the district court granted the continuance over Howard's objections.

The guilt phase of the trial began on April 11, 1983 and concluded on April 22, 1983. The jury returned a verdict of guilty on all three counts. The penalty phase was set to begin on May 2, 1983. In the interim, one of the

jurors tried to contact the trial judge about a scheduling problem. Because the district judge was on vacation, someone referred the juror to the District Attorney's Office. That Office referred the juror to the jury commissioner. Howard moved for a mistrial or elimination of the death penalty as a sentencing option based upon this contact. After conducting an evidentiary hearing, the district court denied Howard's motions.

Defense counsel made an oral motion to withdraw indicating they had irreconcilable differences with Howard over the conduct of the penalty phase. Counsel indicated they had documents and witnesses in mitigation, but that Howard had instructed them not to present any mitigation evidence. Howard also instructed them not to argue mitigation and they would not follow that directive, but would argue mitigation. Counsel also indicated that Howard told them he wished to testify, but would not tell them the substance of his testimony. Finally counsel indicated they had attempted to get military and mental health records but were unsuccessful because the agencies possessing the records would not send copes without a release signed by Howard and Howard refused to sign the releases. The district court canvassed Howard if this was correct and Howard confirmed it was true and that he did not want any mitigation presented. The district court found Howard understood the consequences of his decision and denied the motion to withdraw concluding defense counsel's disagreement with Howard's decision was not a valid basis to withdraw.

The penalty phase began on May 2, 1983 and concluded on May 4, 1983. The State originally alleged three aggravating circumstances: 1) the murder was committed by a person who had previously been convicted of a felony involving the use of violence - namely robbery with use of a deadly weapon in California, 2) prior violent felongy - a 1978 New York conviction in absentia for robbery with use of a deadly weapon; and 3) the murder occurred in the commission of a robbery. Howard moved to strike the California conviction because the conviction occurred after the Monahan murder and the New York conviction because it was not supported by a judgment of conviction. The district court struck the California conviction but denied the motion as to the New York conviction, noting that the records reflected a jury had convicted Howard and the lack of a formal judgment was the result of Howard's absconding in the middle of trial.

The State presented evidence of the aggravating circumstances and Howard took the stand and related information on his background. During a break in the testimony, Howard suddenly stated he didn't understand what mitigation meant and that he would leave it up to his attorneys to decide what to do. The district court asked Howard if he was now instructing his attorneys to present mitigation and he refused to answer the question. Howard did indicate that he wanted his attorney's to argue mitigation and defense counsel asked for time to prepare which was granted. The jury found both aggravating circumstances existed and that no mitigating circumstances outweighed the

aggravating circumstances. The jury returned a sentence of death.

Howard appealed to the Nevada Supreme Court. Elizabeth Hatcher represented Howard on Direct Appeal. Howard raised the following issues on direct appeal: 1) ineffective assistance of counsel based on actual conflict arising out of Jackson's relationship with Dr. Monahan; 2) denial of a motion to sever the Sears' count from the Monahan counts; 3) denial of an evidentiary hearing on a motion to suppress Howard's statements and evidence derived therefrom; 4) refusal to instruct the jury that accomplice testimony should be viewed with mistrust; 5) refusal to instruct the jury that Dawana Thomas was an accomplice as a matter of law; 6) denial of a motion to strike the felony robbery and New York prior violent felony aggravators; and 7) the giving of a anti-sympathy instruction and refusal to instruct the jury that sympathy and mercy were appropriate considerations.

The Nevada Supreme Court affirmed Howard's conviction and sentence. Howard v. State, 102 Nev. 572, 729 P.2d 1341 (1986) (hereinafter "Howard I"). The Supreme Court held that the relationship of two members of the Public Defender's Office with Monahan did not objectively justify Howard's distrust and there was no evidence that those attorneys had any involvement in his case. Therefore no actual conflict existed and the claim of ineffective assistance of counsel on this basis had no merit. The Court further concluded the district court did not abuse its discretion by refusing to sever the counts and by not granting an evidentiary hearing on the suppression motion. The Court noted that the record reflected proper Miranda warnings were given and the statements were admitted as rebuttal and impeachment after Howard testified. The Court also found that the district court did not error in rejecting the two accomplice instructions; the anti-sympathy language in one of the instructions was not err in light of the totality of the instructions and the record supported the district court's refusal to instruct on certain mitigating circumstances for lack of evidence. The Court concluded by stating it had considered Howard's other claims of error and found them to be without merit. Howard filed a petition for rehearing which was denied on March 24, 1987. Remittitur was stayed pending the filing of a petition for Writ of Certiorari to the United States Supreme Court on the anti-sympathy issues. John Graves, Jr. was appointed to represent Howard on the writ petition. The petition was denied on October 5, 1987 and remittitur issued on February 12, 1988.

On October 28, 1987, Howard filed his first State petition for post-conviction relief. John Graves Jr. and Carmine Colucci originally represented Howard on the petition. They withdrew and David Schieck was appointed. The petition raised the following claims for relief: 1) ineffective assistance of trial counsel – guilt phase - failure to present an insanity defense and Howard's history of mental illness and commitments; 2) ineffective assistance of trial counsel – penalty phase – failure to present mental health history and documents; failure to present expert psychiatric evidence that Howard was not a danger to jail population; failure to rebut future dangerousness evidence with

jail records and personnel; failure to object to improper prosecutorial arguments involving statistics regarding deterrence, predictions of future victims, Howard's lack of rehabilitation, aligning the jury with "future victims," comparing victim's life with Howard's life, diluting jury's responsibility by suggesting it was shared with other entities, voicing personal opinions in support of the death penalty and its application to Howard, references to Charles Manson, voice of society arguments and referring to Howard as an animal; 3) ineffective assistance of appellate counsel – failure to raise prosecutorial misconduct issues.

An evidentiary hearing was held on August 25, 1988. George Franzen, Lizzie Hatcher, John Graves and Howard testified. Supplemental points and authorities were filed on October 3, 1988. The district court entered an oral decision denying the petition on February 14, 1989. The district court concluded that trial counsel performed admirably under difficult circumstances created by Howard himself. As to the failure to present an insanity defense and present mental health records, the court found that Howard was canvassed throughout the proceedings about his refusal to cooperate in obtaining those records, particularly his refusal to sign releases. Howard knew what was going on, was competent and was trying to manipulate the proceedings and that there was no evidence to support an insanity defense, therefore counsel were not ineffective in this regard.

On the issue of failure to object to prosecutorial misconduct, the district court found that defense counsel did object where appropriate and the arguments that were not objected to did not amount to misconduct and were a fair comment on the evidence. Even if some of the comments were improper, the district court concluded that they would not have succeeded on appeal as they were harmless beyond a reasonable doubt. Formal findings of fact and conclusions of law were filed on July 5, 1989.[4]

The Nevada Supreme Court affirmed the district court's denial of Howard's first State petition for post-conviction relief. Howard v. State, 106 Nev. 713, 800 P.2d 175 (1990) (hereinafter "Howard II"). David Schieck represented Howard in that appeal. On appeal Howard raised ineffective assistance of trial and appellate counsel regarding the prosecutorial misconduct issues. The Supreme Court found three comments to be improper under Collier v. State, 101 Nev. 473, 705 P.2d 1126 (1985)[5]: 1) a personal opinion that Howard merited the death penalty, 2) a golden rule argument – asking the jury to put themselves in the shoes of a future victims and 3) an argument without support from evidence that Howard might escape. The Court found that counsel were ineffective for failing to object to these arguments but concluded there was no reasonable probability of a contrary result absent these

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[4]During the pendency of the first State petition for post-conviction relief, Howard filed his first Federal petition for habeas relief. That petition was dismissed without prejudice on June 23, 1988.

[5] Collier was decided two years after Howard's trial.

remarks and therefore no prejudice. The Court rejected Howard's other contentions of improper argument.

With respect the mitigation evidence issues, the Nevada Supreme Court upheld the district court's findings that this was a result of Howard's own conduct and not ineffective assistance of counsel.[6]

Howard proceeded to file a second Federal habeas corpus petition on May 1, 1991. This proceeding was stayed for Howard to exhaust his state remedies on October 16, 1991.

Howard then filed a second State petition for post-conviction relief on December 16, 1991. Cal J. Potter, III and Fred Atcheson represented Howard in the second State petition. In that petition, Howard alleged denial of a fair trial based on prosecutorial misconduct, namely: 1) jury tampering based on the prosecutor's contact with the juror between the guilt and penalty phases; 2) expressions of personal belief and a personal endorsement of the death penalty; 3) reference to the improbability of rehabilitation, escape, future killings; 3) comparing Howard's life with Dr. Monahan's and 4) a statement that the community would benefit from Howard's death. The petition also asserted an ineffective assistance of trial counsel claim for failing to explain to Howard the nature of mitigating circumstances and their importance. Finally the petition raised a speedy trial violation and cumulative error.

The State moved to dismiss the second State petition as procedurally barred or governed by the law of the case on February 10, 1992. In his reply, Howard dropped his speedy trial claim as unsubstantiated and indicated if the other claims were barred, then they had been exhausted and Howard could proceed in Federal court.

The district court denied the petition on July 7, 1992. The district court found that the claims of prosecutorial misconduct and ineffective assistance of counsel relating thereto as well as the claims relating to mitigation evidence had been heard and found to be without merit or failed to demonstrate prejudice. Such claims were therefore barred by the law of the case. The district court further concluded that any claim of cumulative error and any issues not raised in previous proceedings were procedurally barred. Finally the district court found the speedy trial violation was a naked allegation, frivolous and procedurally barred.

Howard appealed the denial of his second State petition to the Nevada Supreme Court, which dismissed his appeal on March 19, 1993. The Order Dismissing Appeal found that Howard's second State petition was so lacking in merit that briefing and oral argument was not warranted. Howard filed a petition for Writ of Certiorari challenging the summary affirmance and the

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[6] The State filed a petition for rehearing with respect to sanctions imposed on the prosecutor because his remarks violated Collier. The State noted that Howard's trial occurred before Collier therefore the Court should not sanction counsel for conduct that occurred before the Court issued the Collier opinion. Rehearing was denied February 7, 1991.

United States Supreme Court denied the request on October 4, 1993.

On December 8, 1993, Howard returned to federal court and filed a new pro se habeas petition rather than lifting the stay in the previous petition. After almost three years, on September 2, 1996, the federal district court dismissed the petition as inadequate and ordered Howard to file a second amended federal petition that contained more than conclusory allegations. Thereafter Howard, now represented by Patricia Erickson, filed a Second Amended Petition for Writ of Habeas Corpus on January 27, 1997. After almost five years, on September 23, 2002, the Second Amended Federal petition was stayed for Howard to again exhaust his federal claims in state court.

Howard filed his third State petition for post-conviction relief on December 20, 2002. Patricia Erickson represented him on this petition. The petition asserted the following claims, phrased generally as denial of a fundamentally fair trial or assistance of counsel under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution or as cruel and unusual punishment under the Eighth Amendment: 1) failure to sever Sears robbery count from Monahan robbery/murder counts; 2) failure to suppress Howard's statements to LVMPD and physical evidence derived therefrom; 3) speedy trial violation; 4) trial counsel actual conflict of interest – Jackson issue; 5) failure to give accomplice as a matter of law and accomplice testimony should be viewed with distrust instructions – Dwana Thomas; 6) improper jury instructions – diluting standard of proof - reasonable doubt, second degree murder as lesser included of first degree murder, premeditation, intent and malice instructions; 7) improper jury instructions – failure to clearly define first degree murder as specific intent crime requiring malice and premeditation; 8) improper premeditation instruction blurred distinction between first and second degree murder; 9) improper malice instruction; 10) improper anti-sympathy instruction; 11) failure to give influence of extreme mental or emotional disturbance mitigator instruction; 12) improper limitation of mitigation by giving only "any other mitigating circumstance" instruction; 13) failure to instruct that mitigating circumstances findings need not be unanimous; 14) prosecutorial misconduct – jury tampering, stating personal beliefs, personal endorsement of death penalty, improper argument regarding rehabilitation, escape and future killings; comparing Howard and victim's lives, comparing Howard to notorious murder (Charles Manson) and improper community benefit argument; 15) use of felony robbery as aggravator and basis for first degree murder; 16) improper reasonable doubt instruction; 17) ineffective assistance of trial counsel – inadequate contact, conflict of interest, failure to contact California counsel to obtain records, failure to obtain Patton and Atescadero hospital records, failure to obtain California trial transcripts, failure to review Clark County Detention Center medical records, failure to challenge competency to stand trial, failure to obtain suppression hearing, failure to present legal insanity, failure to object to reasonable doubt instruction, failure to view visiting records and call witnesses based upon

same, failure to call Pinkie Williams and Carol Walker in penalty phase, failure to investigate and call Benjamin Evans in penalty phase, failure to obtain San Bernardino medical records regarding suicide attempt, failure to obtain military records, failure to adequately explain concept of mitigation evidence, failure to object to prosecutorial misconduct in closing arguments, failure to refute future dangerousness argument, failure to object to trial court's limitation of mitigating circumstances and failure to object to instructions which allegedly required unanimous finding of mitigating circumstances; 18) ineffective assistance of appellate counsel – failed to raise claims 3, 4, 6-9, 12, 13, 15, 16, 20 and 21 on appeal; 19) ineffective assistance of post-conviction counsel – failure to adequately investigate and develop all trial and appeal claims; 20) cumulative error; 21) Nevada's death penalty is administered in an arbitrary, irrational and capricious fashion; 22) lethal injection constitutes cruel and unusual punishment and 23) the death penalty violates evolving standards of decency.

The State filed a motion to dismiss Howard's third State petition on March 4, 2001. The State argued that the entire petition was procedurally barred under NRS 34.726(1) (one year limit) and NRS 34.800 (five year laches) and that Howard had not shown good cause for delay in raising the claims to overcome the procedural bars. The State also analyzed each claim and noted what issues had already been raised and decided adversely to Howard or should have been raised and were waived under NRS 34.810.

Howard filed an amended third State petition. The amended petition expanded the factual matters under Claim 17 regarding Howard's family background that Howard asserted should have been presented in mitigation.

On August 20, 2003, Howard filed his opposition to the State's motion to dismiss his third State petition. As good cause for delay, Howard alleged Nevada's successive petition and waiver bar (NRS 34.810) is inconsistently applied and Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) is not controlling. Howard contended NRS 34.726 did not apply because any delay was the fault of counsel not Howard and NRS 34.726 is unconstitutional and cannot be applied to successive petitions Pellegrini notwithstanding. Howard argued the Due process and Equal Protection clauses of the Federal Constitution bar application of NRS 34.726, NRS 34.800 and NRS 34.810 to Howard. In addition, Howard asserted NRS 34.800 did not apply because the State had not shown prejudice and the presumption of prejudice was overcome by the allegations in the petition.

The State filed a reply to the opposition on September 24, 2003. The district court issued an oral decision on October 2, 2003 dismissing the third State petition as procedurally barred under NRS 34.726 and finding Howard had failed to overcome the bar by showing good cause for delay. The district court also independently dismissed the claims under NRS 34.810. Written findings were entered on October 23, 2003.

Howard appealed the dismissal to the Nevada Supreme Court, which

affirmed the district court's dismissal of the third State petition on December 4, 2004. The High Court addressed Howard's assertions that he had either overcome the procedural bars or they could not constitutionally be applied to him and rejected them. Among its conclusions, the Court noted that the record reflected Howard was aware that all his claims challenging the conviction or imposition of sentence must be joined in a single petition and that Howard had no right to post-conviction counsel at the time of the filing of his first and second State petitions for post-conviction relief and hence ineffectiveness of post-conviction counsel could not be good cause for delay.[7]

Howard then returned to Federal district court where he filed his Third Amended Petition for Writ of Habeas Corpus on October 23, 2005. Subsequently, without seeking approval from the Federal Court, the Federal Public Defender's Office filed, on Howard's behalf, the current Fourth State Post-Conviction Petition on October 27, 2007. The State filed a motion to dismiss the Fourth State Petition on April 8, 2008. The parties agreed to stay this case for several months while Howard sought permission from the Federal District Court to hold his federal petition for post-conviction habeas corpus in abeyance pending exhaustion of the claims already filed in the Fourth State Petition and of new claims he wished to file in State court as a result of the Ninth Circuit's decision in Polk v. Sandoval, 503 F.3d 903, 910 (9th Cir. 2007).

The United States District Court denied Howards' motion for stay and abeyance on January 9, 2009. Thereafter, Howard filed an Opposition to the State's original motion to dismiss and an Amended Petition on February 24, 2009. The State responded to Howard's opposition to the original motion to dismiss and additionally moved to dismiss the Amended Fourth Petition on October 7, 2009.[8] Howard filed an Opposition to the Amended Motion to Dismiss on December 18, 2009. Howard filed supplemental authorities on January 5, 2010.

Argument on the State's motion to dismiss was heard on February 4, 2010. The matter was taken under advisement so the district court could review the extensive record. A Minute Order Decision was issued on May 13, 2010 dismissing the Fourth State Petition as procedurally barred.

(Findings of Fact, Conclusions of Law and Order, filed November 6, 2010, p. 1-12 (footnotes in original)).

This Court denied Petitioner's fourth habeas petition. (Findings of Fact, Conclusions

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[7] See 1987 Nev. Stat., ch. 539, § 42 at 1230 (providing that appointment of counsel was discretionary not mandatory).

[8] Although both defense counsel and this Court received a copy of the Opposition and Amended Motion to Dismiss, for some reason it was not filed. This Court authorized the District Attorney's Office to file a Notice of Errata and attach a copy of the previously distributed Opposition and Amended Motion to Dismiss. This was filed on February 4, 2010. Subsequently, the missing document was located and the original Amended Motion to Dismiss was officially filed on May 11, 2010._____.

of Law and Order, filed November 6, 2010, p. 26-33). Petitioner challenged this Court's decision before the Nevada Supreme Court. (Notice of Appeal, filed on December 21, 2010). Prior to ruling on this Court's fourth denial of habeas relief, the Nevada Supreme Court issued an opinion in Howard v. State, __ Nev. __, 291 P.3d 137 (2012), addressing the sealing of documents. The Federal Public Defender (FPD) filed a motion in the Supreme Court to substitute counsel that included information that was potentially embarrassing to one or more current or former FPD attorneys as well as a prior private attorney who had represented Howard. Id. at __, 291 P.3d at 139. A cover sheet indicated that the motion was sealed but the FPD failed to file a separate motion to seal the pleading. Id. The Court concluded that the FPD had not properly moved to seal and that sealing was unjustified. Id. at __, 291 P.3d at 145. Ultimately, the Court affirmed this Court's denial of habeas relief. Order of Affirmance, filed July 30, 2014, attached to Clerk's Certificate, filed October 24, 2014. The United States Supreme Court denied certiorari. Howard v. Nevada, __ U.S. __, 135 S.Ct. 2908 (2015).

Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction) (Fifth Petition) on October 5, 2016. (Petition for Writ of Habeas Corpus (Post-Conviction), filed October 5, 2016). Respondent filed an opposition and motion to dismiss on November 2, 2016. (Opposition and Motion to Dismiss Fifth Petition for Writ of Habeas Corpus (Post-Conviction) (Opposition and Motion to Dismiss), filed November 2, 2016).

On December 1, 2016, Petitioner filed an amended fifth state habeas petition. (Amended Petition for Writ of Habeas Corpus (Post-Conviction) (Amended Fifth Petition), filed December 1, 2016).

ARGUMENT

This Court should strike the Amended Fifth Petition because Petitioner failed to seek leave of court to file a supplemental pleading and ignored his obligation to allege good cause to amend. Petitioner's choice to disregard his statutory obligations has resulted in further unnecessary delay in a case where sentence was imposed in 1983. Ultimately, the Amended

Fifth Petition must be struck because Petitioner cannot establish good cause to warrant amendment.

Chapter 34 allows a habeas petitioner to file a pro per petition without the assistance of a lawyer. NRS 34.724(1). A court may appoint an attorney for an indigent petitioner under the appropriate circumstances. NRS 34.750(1). Appointment of counsel is mandatory where a first petition challenges a sentence of death. NRS 34.820(1). Appointed counsel may supplement the pro per petition once within thirty days of appointment. NRS 34.750(3). After that, "[n]o further pleadings may be filed except as ordered by the court." NRS 34.750(5). Such leave should only be granted where "there is good cause to allow a petitioner to expand the issues previously pleaded[.]" Barnhart v. State, 122 Nev. 301, 303, 130 P.3d 650, 652 (2006). The strict nature of this process is justified by the Nevada Legislature's policy favoring the finality of convictions and the rapid resolution of habeas litigation. NRS 34.740 (requiring expeditious examination of habeas petitions by the judiciary); NRS 34.820(7) (requiring in capital habeas cases that judicial officers "render a decision within 60 days after submission of the matter for decision."); Pellegrini v. State, 117 Nev. 860, 875, 34 P.3d 519, 529 (2001) (the "clear and unambiguous" provisions of NRS 34.726(1) demonstrate an "intolerance toward perpetual filing of petitions for relief, which clogs the court system and undermines the finality of convictions."); Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995) ("[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition").

The Federal Public Defender (FPD) volunteered as counsel for Petitioner by filing the Fifth Petition without appointment by this Court. As such, Petitioner has received the benefit of the single attorney pleading authorized by NRS 34.750(3). Regardless, the Amended Fifth Petition was filed on December 1, 2016, more than 30 days after any event equivalent to the appointment of counsel. (See, Notice of Appearance, filed September 29, 2016; Fifth Petition, filed October 5, 2016; Order Admitting to Practice Attorneys Deborah Anne Czuba, Esq., and Jonah J. Horwitz, Esq., filed October 24, 2016). If counsel felt it was

necessary to add a complaint to the Fifth Petition, defense should have sought leave from this Court and alleged good cause for adding the claim. The failure to comply with this process has added needless delay to this proceeding. The Fifth Petition was set for argument on December 14, 2016, but now any decision will be delayed at least until the March 17, 2017, hearing, and possibly longer.

Such needless delay is of concern because a habeas petitioner subject to a death sentence has an incentive to create unwarranted delay in order to frustrate imposition of sentence. Rhines v. Weber, 544 U.S. 269, 277-78, 125 S.Ct. 1528, 1535 (2005) ("In particular, capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death."); In re Reno, 55 Cal.4th 428, 515, 283 P.3d 1181, 1246 (Cal. 2012) ("death row inmates have an incentive to delay assertion of habeas corpus claims"). The possibility that such abusive litigation practices are at play in this case is of heightened concern because the FPD represents Petitioner. The institutional culture of the FPD evidences an almost religiously militant opposition to the death penalty such that all other obligations are sacrificed for the cause. See, Commonwealth v. Spotz, 610 Pa. 17, 160-93, 18 A.3d 244, 329-49 (Pa. 2011) (concurrence of Chief Justice Castille, criticizing FPD for intentional delay of capital habeas proceedings; describing pleadings as prolific, abusive and offered in bad faith; and indicating that FPD strategies were ethically dubious); Debra Cassens Weiss, Federal PDs have 40 days to explain inmate's letter saying he didn't authorize SCOTUS appeal, ABA Journal (July 1, 2014)(http://www.abajournal.com/news/article/federal_pds_have_40_days_to_explain_inmates_letter_saying_he_didnt_authoriz).

The Nevada Supreme Court has directed prosecutors to make a record of possible instances of defense misconduct:

> Before leaving the issues of misconduct, we desire to dispel any notion that this court views the subject exclusively as a prosecutor's problem. We are not unaware that defense counsel may perceive some incentive for trial misbehavior. If misconduct by defense counsel produces an acquittal, there is no right of appeal by the State; if the misconduct precipitates a basis for review

> and reversal, defense counsel may still assess the result as positive. In those instances *where the prosecutor is convinced that such misconduct is occurring, we strongly urge a timely objection and the making of a specific record* outside the presence of the jury. If an appeal is taken in the case, the State may appropriately direct this court's attention to the misconduct by defense counsel for our consideration. Where appeals are not taken, and the magnitude of misconduct by the defense is sufficiently serious, reference should be made to the appropriate disciplinary authority of the state bar with evidentiary support from the record. In brief, the objective is to free Nevada criminal trials from the taint of misconduct, irrespective of the source.

Williams v. State, 103 Nev. 106, 111, 734 P.2d 700, 703-04 (1987) (emphasis added). Standing alone, the FPD's failure to seek leave and proffer good cause in violation of NRS 34.750(5) and Barnhart may be insufficient to conclusive prove misconduct. However, when defense ignores basic rules of habeas procedure guaranteed to cause delay in the context of a sentence imposed in 1983, there is a powerful inference that execution of Petitioner's sentence is being intentionally and unreasonably delayed.

Regardless of the intent motivating Petitioner's decision to ignore NRS 34.750(5) and Barnhart, Petitioner cannot establish good cause to file the Amended Fifth Petition. All of the law and facts cited in Claim Two of the Amended Fifth Petition were available at the time the Fifth Petition was filed. Thus, Claim Two should have been alleged in the Fifth Petition. Petitioner must offer more than an epiphany by counsel to justify the delay inherent in adding another argument to the Fifth Petition.

Nor can Petitioner ask this Court to engage in the circular reasoning that there is good cause to amend based upon the allegedly meritorious nature of his claim. This is because the underlying claim is meritless and cannot support a finding of good cause and prejudice to waive Petitioner's prejudicial defaults.[9] Claim Two complains that Petitioner's sentence is

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[9] The State does not address Petitioner's multiple procedural defaults in this motion since such a discussion is appropriate for an opposition and a motion to dismiss. Respondent need not address arguments that are not appropriately before this Court due to Petitioner's failure to seek leave and prove good cause. Chapter 34 protects the prosecution from such a waste of limited resources by making a responsive pleading dependent upon an order from this Court. NRS 34.745(1)(a)(1). Ultimately, if Petitioner's decision to ignore NRS 34.750(5) and Barnhart is permitted to stand, the State will request leave of court to file an amended opposition and motion to dismiss that offers procedural default arguments similar to those in the Opposition and Motion to Dismiss. (Opposition and Motion to Dismiss, filed November 2, 2016, p. 13-28).

invalid under Hurst v. Florida, 577 U.S. __, 136 S.Ct. 616 (2016), because jurors were not instructed that to impose a sentence of death they "must find beyond a reasonable doubt [that] the aggravation outweighs the mitigation." (Amended Fifth Petition, p. 8). Petitioner contends that Hurst requires such an instruction because he believes that the weighing of mitigation against aggravation is a factual determination. Id. Petition is wrong on both counts.

At a capital sentencing proceeding:

> [T]he jury determines whether any aggravating circumstances have been proven beyond a reasonable doubt and whether any mitigating circumstances exist. ... If the jury unanimously finds that at least one statutory aggravating circumstance has been proven beyond a reasonable doubt, the jury must also determine whether there are mitigating circumstances "sufficient to outweigh the aggravating circumstance or circumstances found."

Nunnery v. State, 127 Nev. 749, 772, 263 P.3d 235, 251 (2011), cert. denied, __ U.S. __, 132 S.Ct. 2774 (2012) (quoting NRS 175.554(2)-(4)). Further, the weighing of mitigation against aggravation "is not part of the narrowing aspect of the capital sentencing process. Rather, ... [it is] part of the individualized consideration that is the hallmark of ... the selection phase of the capital sentencing process." Lisle v. State, 131 Nev. __, __, 351 P.3d 725, 732 (2015), cert. denied, __ U.S. __, 136 S.Ct. 2019 (2016).

The Nevada Supreme Court has specifically held that the weighing of mitigation against aggravation is *not* a factual determination and is not subject to the beyond-a-reasonable-doubt standard. Nunnery, 127 Nev. at 770-76, 263 P.3d at 250-53. Petitioner's reliance upon Hurst without addressing Nunnery demonstrates the folly of his underlying complaint and is the strongest evidence that he cannot demonstrate good cause to amend under NRS 45.750(5). Hurst was merely an application of Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002). Hurst, 577 U.S. at __, 136 S.Ct. at 621-22 ("[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's"). Nunnery specifically addressed the application of Ring to Nevada's weighing equation and rejected

both of Petitioner's arguments. The Court held that "the weighing of aggravating and mitigating circumstances is not a fact-finding[.]" Nunnery, 127 Nev. at 775, 263 P.3d 253. The Court also ruled that "even if the result of the weighing determination increases the maximum sentence for first-degree murder beyond the prescribed statutory maximum, it is not a factual finding that is susceptible to the beyond-a-reasonable-doubt standard." Id. at 772, 263 P.3d at 250.

Nevada has long rejected any attempt to apply the beyond-a-reasonable-doubt standard to the weighing process. DePasquale v. State, 106 Nev. 843, 852, 803 P.2d 218, 223 (1990); Gallego v. State, 101 Nev. 782, 711 P.2d 856 (1985); Ybarra v. State, 100 Nev. 167, 679 P.2d 797 (1984). In Nevada, the weighing process is mandatory and must be conducted by a jury, but the beyond-a-reasonable-doubt standard does not apply to the weighing of mitigation against aggravation by individual jurors. "Nothing in the plain language of these provisions [NRS 200.030(4)(a) and NRS 175.554(3)] requires a jury to find, or the State to prove, beyond a reasonable doubt that no mitigating circumstances outweighed the aggravating circumstances in order to impose the death penalty." McConnell v. State, 125 Nev. 243, 254, 212 P.3d 307, 314-15 (2009).

Instead, Nevada's weighing process is "a moral decision that is not susceptible to proof." Id. (citing Penry v. Lynaugh, 492 U.S. 302, 319, 109 S.Ct. 2934 (1989)); Caldwell v. Mississippi, 472 U.S. 320, 340 n. 7, 105 S.Ct. 2633 (1985) (weighing is a "highly subjective," "largely moral judgment" "regarding the punishment that a particular person deserves ...."). Exempting this moral judgment from the beyond-a-reasonable-doubt standard is permissible because the states enjoy a broad range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are weighed:

> In aggregate, our precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence. The thrust of our mitigation jurisprudence ends here. "[W]e have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required."

Kansas v. Marsh, 548 U.S. 163, 175, 126 S.Ct. 2516, 2525 (2006) (citing Franklin v. Lynaugh, 487 U.S. 164, 179, 108 S.Ct. 2320 (1988)). "Weighing is not an end, but a means to reaching a decision." Id. Further, a state death penalty statute may place the burden on the defendant to prove that the mitigating circumstances outweigh aggravating circumstances. Walton v. Arizona, 497 U.S. 639, 650, 110 S.Ct. 3047 (1990). Accordingly, federal law imposes no burden on the states as to a jury's individualized and highly subjective weighing of aggravating and mitigating circumstances in a death penalty determination.

Nunnery is fatal to every aspect of Claim Two. The Nevada Supreme Court's decision precludes a finding of good cause to amend as well as a finding of good cause and prejudice sufficient to excuse Petitioner's procedural defaults. Indeed, Petitioner's failure to address Nunnery in Claim Two should be treated as an admission that he cannot justify amendment under NRS 34.750(5) and Barnhart and that he cannot demonstrate good cause and prejudice to waive his procedural defaults. See, Polk v. State, 126 Nev. ___, ___, 233 P.3d 357, 360-61 (2010); District Court Rules 13(2); Eighth Judicial District Court Rules 3.20(b).

CONCLUSION

The Nevada Supreme Court has warned that rules exist for a reason and that violating them comes with a price:

In the words of Justice Cardozo,

> Every system of laws has within it artificial devices which are deemed to promote … forms of public good. These devices take the shape of rules or standards to which the individual though he be careless or ignorant, must at his peril conform. If they were to be abandoned by the law whenever they had been disregarded by the litigants affected, there would be no sense in making them.

Benjamin N. Cardozo, The Paradoxes of Legal Science 68 (1928). The district court should have upheld the requirements mandated in Hill and therefore should have dismissed the case against Scott.

Scott E. v. State, 113 Nev. 234, 239, 931 P.2d 1370, 1373 (1997).

Based on the foregoing, the Amended Fifth Petition should be struck as filed in violation of NRS 34.750(5) and offered without a showing of good cause as required by Barnhart.

DATED this 12th day of December, 2016.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of Motion To Strike Amended Fifth Petition for Writ of Habeas Corpus (Post-Conviction), was made this 12th day of December, 2016, by Electronic Filing to:

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Employee for the District Attorney's Office

JEV//ed

Eileen Davis

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Cc: Jonathan VanBoskerck; Eileen Davis
Subject: Samuel Howard, 81C053867.
Attachments: Howard, Samuel, 81C053867- Motion to Strike Amended Fifth PWHC.pdf

Attached please find State's Motion to Strike Amended Fifth Petition for Writ of Habeas Corpus (Post-Conviction).

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DISTRICT COURT
CLARK COUNTY, NEVADA

SAMUEL HOWARD,

Petitioner,

vs.

TIMOTHY FILSON, Warden, and ADAM PAUL LAXALT, Attorney General for the State of Nevada,

Respondents.

Case No. 81C053867
Dept. No. XVII

Date of Hearing: March 17, 2017
Time of Hearing: 9:30 AM

(Death Penalty Case)

OPPOSITION TO MOTION TO STRIKE

Creating needless and vexatious litigation, the State has filed a motion to strike that has no foundation in the law, or in the State's own practices or the Court's. For the reasons set forth in the attached memorandum of points and authorities, the State's motion is thoroughly unpersuasive, and should be summarily denied.

DATED this 3rd day of February 2017.

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MEMORANDUM OF POINTS AND AUTHORITIES

Rather than engaging with the substantial constitutional challenges that Mr. Howard has raised to his death sentence in his amended petition, the State instead seeks to avoid the actual issues by inventing a brand-new legal procedure that lacks any basis in statute, rule, or precedent. To avoid any further delay occasioned by the State's motion, it can be—and ought to be—rejected out of hand.

Mr. Howard will first outline why the State is wrong to assert that he was required to obtain leave of court before filing his amended petition when the law imposes upon him no such responsibility and when no one else is doing so. Then, he will describe why, even if the State were correct that he needs permission, he is entitled to it.

I. Mr. Howard had no obligation to seek leave of court

To begin, there is no support for the State's belief that Mr. Howard could not file his amended petition until he had the Court's approval.

First, the State erroneously relies upon NRS 34.750. *See* Mot. to Strike, filed Dec. 12, 2016 (hereinafter "MTS"), at 17. By its clear terms, that provision deals with the situation in which a pro se petition is filed by the inmate, who is then appointed counsel by the state district court. *See generally* NRS 34.750. In the clause with the deadline that the State mistakenly relies upon here, the statute provides: "*After appointment by the court*, counsel for the petitioner may file and serve supplemental pleadings, exhibits, transcripts and documents within 30 days" from the date on which the Court has ordered an answer or appointed counsel. NRS 34.750(3) (emphasis added). Unlike the scenario contemplated by the straightforward language of this subsection, Mr. Howard did not file a pro se petition, and undersigned counsel were not appointed by this Court. It follows that the deadline does not control here.

Indeed, the State acknowledges the irrelevance of NRS 34.750 when it asserts that the amended petition was filed "more than 30 days after any event equivalent to the appointment of counsel." MTS, at 17. Unfortunately for the State, the statute does not address "events equivalent to the appointment of counsel." It addresses the appointment of counsel. Counsel were not appointed here, and the thirty-day rule does not apply.

Finding no refuge in statute for its motion, the State looks to caselaw, but it does no better there. The State's sole citation for the proposition that Mr. Howard was required to obtain leave of court before filing his amended petition is *Barnhart v. State*, 122 Nev. 301, 130 P.3d 650 (2006) (per curiam). It is a peculiar citation, since *Barnhart* directly contradicts the State's point of view. The prisoner in that case filed a petition and following that a supplemental petition. *See id.*, 122 Nev. at 303, 130 P.3d at 651. After a motion for partial dismissal was filed by the State, the district court held an evidentiary hearing. *See id.* It was only after all of that time, and all of those proceedings, that the petitioner's attorney tried to raise a claim for the first time *at the evidentiary hearing*. *See id.* A cursory reading of the relevant passage from *Barnhart* is enough to refute the State's dubious view that it has anything to say about Mr. Howard's case:

> In the order resolving Barnhart's petition, the district court specifically noted that the claim regarding the coercion defense was not properly before the court *because it had not been pleaded in the petitions filed by Barnhart or her counsel*. We agree. Generally, the only issues that should be considered by the district court at an evidentiary hearing on a post-conviction habeas petition *are those which have been pleaded in the petition or a supplemental petition and those to which the State has had an opportunity to respond*. We further conclude, however, that the district court may exercise its discretion under certain circumstances to permit a petitioner *to assert claims not previously pleaded*.

Id. (emphases added). As the italicized text indicates, *Barnhart* was entirely about whether and when a petitioner can raise claims at an evidentiary hearing that were not in *any* petition, and to which the State had no opportunity to respond. Needless to say, that is not the case here. The claim the State is so strenuously protesting—Claim 2—is in the amended petition, drafted simply and to the point. *See* Am. Pet. for Habeas Corpus, filed Dec. 1, 2016 (hereinafter "Am. Pet."), at 8–9. It would be an eminently easy thing for the State to respond to the claim. In fact, the State *has* responded at length to much of the law underpinning Claim 2. Like Claim 1, Claim 2 flows from *Hurst v. Florida*, 136 S. Ct. 616 (2016), and relates to what facts must be found by a capital jury before a defendant can be sentenced to death. *See* Am. Pet., at 8–9. And in its motion to dismiss the original petition, the State explored in great detail the law on that issue. *See* Oppo. & Mot. to Dismiss Fifth Pet. for Habeas Corpus, filed Nov. 2, 2016 (hereinafter "MTD"), at 12–28.

Even in the pending motion to strike, the State continues to examine that law. *See* MTS, at 19–22. It is most curious that the State would depend upon a case about the State's inability to respond to a claim in the very motion where it is responding to the claim. Far from helping the State, *Barnhart* cuts strongly against its position.

With no authority other than a statute that concerns counsel appointed by the post-conviction court and a case that concerns claims raised at evidentiary hearings, the State's motion has no law that is even remotely germane to this proceeding. It should be denied for that reason alone.

Aside from being entirely unsupported by law, the motion to strike has no foothold in the State's own past practice, or in the practice of this Court.

From undersigned counsel's research, the State's motion to strike appears virtually unprecedented. Undersigned counsel located a random sampling of ten Clark County district court dockets in capital matters that involved amended petitions for post-conviction relief.[1] Not a single docket reflects the filing of a motion for leave to amend or a motion by the State to strike.[2] In every single one of them, the amended petition was simply filed, litigated by the State, and adjudicated by the court. The cases cover a wide variety of circumstances. They stretch from 1997 to 2013 and involve petitions filed on nine different years during that period. Nine different judges presided.[3] At least six different prosecutors from the Clark County District Attorney's Office were assigned to these cases, including the lawyer representing the State in the

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[1] Undersigned counsel's methodology is described in the declaration attached to this opposition. *See* Ex. 1, at 2.

[2] The ten cases are *State v. Byford*, 92C108502-1, *State v. Weber*, 02C183846, *State v. Crump*, 83C064243, *State v. Lisle*, 94C124090-2, *State v. Walker*, 03C196420-1, *State v. Hernandez*, 99C162952, *State v. Domingues*, 94C117787, *State v. Moore*, 85C069269-2, *State v. McNelton*, 89C089263, and *State v. Homick*, 86C074385.

[3] The judges are the Honorable Villani, Smith, Delaney, Adair, Miley, Leavitt, Mosley, and Cadish. To get these names, Mr. Howard used the Nevada Supreme Court opinions on Westlaw, *see* Ex. 1, at 2, so the listed judges may not all have been handling the cases at the time the amended petitions were filed.

present case, Jonathan E. VanBoskerck.[4] Finally, the cases encompass a great many different procedural postures. One amended petition was filed twenty-two days from the filing of the original. Another was filed six months from that date. Some were filed before the State moved to dismiss the original, some after. Several petitions were filed by attorneys who this Court appointed. Others were not. Basically, the sample covers every possible procedural permutation, and amendment was not requested, opposed, or denied in a single instance.

Mr. Howard's own case, which he left out of the sample above, is especially instructive. In his third post-conviction action, he filed his petition on December 20, 2002, the State moved to dismiss on March 4, 2003, and Mr. Howard amended the petition on August 20, 2003, exactly eight months after the original petition was filed. No motion for leave to amend was filed, no motion to strike was filed, and the amended petition was resolved without difficulty by the courts. In Mr. Howard's fourth post-conviction action, he filed his petition on October 25, 2007, the State moved to dismiss it on April 8, 2008, and Mr. Howard amended the petition on February 24, 2009, almost exactly four months after the original petition was filed. Again, no motion for leave to amend was filed, no motion to strike was filed, and the amended petition was resolved without difficulty by the courts.

Simply put, the State is invoking a procedure that is entirely inconsistent with many years of history, as well as with the protocol that was followed in Mr. Howard's previous post-conviction actions. When a new claim arises, so long as the evidentiary hearing is not yet in progress, *see supra* at 4–5, the course taken by Nevada death row inmates, by the Clark County District Attorney's Office, and by this Court has been to submit an amended petition and litigate the petition. That system has been working well. The State does not even recognize how amended petitions are actually being dealt with on the ground, let alone suggest a justification for changing the status quo.

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[4] In addition to Mr. VanBoskerck, the Deputy District Attorneys were Owen, Becker, Peterson, Ponticello, and Fleck. To generate this list of prosecutors, undersigned counsel clicked on the "parties present" link that was closest to the docket entry for the amended post-conviction petition that they were using in their sample. *See* Ex. 1, at 3. Thus, the list does not necessarily include other prosecutors who were associated with these cases at other points in time.

Assuming for the sake of argument that the State had bothered to explain its newfangled post-conviction procedure—which it did not—and that it did so convincingly, the fact remains that it could not be used against Mr. Howard. In filing an amended petition without seeking leave, Mr. Howard was staying true to decades of historical practice by petitioners, prosecutors, and judges in Clark County, a practice that he himself had followed without incident in his previous post-conviction cases. The State has offered nothing that would have given him notice that he could not do the same thing that everyone else has always done in the past. In light of that vacuum, it would run afoul of basic constitutional protections if the Court were to accept the State's novel understanding of post-conviction law and strike Mr. Howard's amended petition. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073, 1074 (2000) ("Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."); *Pennsylvania v. Finley*, 481 U.S. 551, 557, 107 S. Ct. 1990, 1994 (1987) (observing that when states provide mechanisms for post-conviction relief, they must do so in a fundamentally fair manner); *Evitts v. Lucey*, 469 U.S. 387, 401, 105 S. Ct. 830, 838–39 (1985) (similar); *Bounds v. Smith*, 430 U.S. 817, 822, 97 S. Ct. 1491, 1495 (1977) (remarking that states have a constitutional duty to provide "adequate, effective, and meaningful" access to the courts, including in post-conviction matters); *Bouie v. City of Columbia*, 378 U.S. 347, 354, 84 S. Ct. 1697, 1703 (1964) ("When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law in its primary sense of an opportunity to be heard and to defend (his) substantive right" (internal quotation marks omitted)). Striking the petition would create a real risk of reversal by the Nevada Supreme Court and a remand for proceedings on Mr. Howard's second claim. There is no need to run that risk when the Court can simply move on to the substance of the claims and resolve them.

Along the same lines, if the Nevada courts refuse to entertain Claim Two on account of the fictional procedural deficiency dreamed up by the State, Mr. Howard will seek relief on the claim in a federal habeas action. At that time, the habeas judge will ask whether the state courts

barred the claim on an "independent and adequate state ground." *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S. Ct. 2546, 2554 (1991). A doctrine like that lobbied for by the State here, almost unheard of in this Court and nonexistent in the published cases, is guaranteed to fail that test. *See Valerio v. Crawford*, 306 F.3d 742, 776 (9th Cir. 2002) ("In order to constitute adequate and independent grounds sufficient to support a finding of procedural default, a state rule must be clear, consistently applied, and well-established *at the time of petitioner's purported default*." (emphasis in original) (internal quotation marks omitted)). By urging a procedural rule without supplying a single example of it being followed, the State is doing its best to bring about a federal decision that denigrates Nevada's court system for arbitrary and capricious conduct in a capital case. Mr. Howard, by contrast, is respecting the comity values embodied in post-conviction jurisprudence and is giving the state courts the first opportunity to pass upon his claims.

The State closes its motion with a rousing quotation from Justice Cardozo on the virtue of rule-based societies. *See* MTS, at 22. Mr. Howard shares the State's veneration for rules. He does not share the State's philosophy of how to enforce them. In Mr. Howard's view, the benefit of rules is that they foster consistency, predictability, and uniformity in the law. Those purposes are not advanced when the State invents a new procedure that is not authorized by statute, precedent, or practice, and at the same time asks a court to use that procedure against a death row inmate. That is a recipe not for a consistent and uniform legal universe, but one of arbitrariness and caprice, in which an individual prosecutor's whims outweigh the legitimate expectations of litigants. Mr. Howard encourages the Court to take the path it has always taken, rather than the new path carved out for it by the State, and to deny the State's motion to strike.

II. If Mr. Howard needs permission, he should be given it

Even if the State had any basis in law or in reality for its insistence that Mr. Howard had to get permission to file his amended petition, which it patently does not, the amended petition should still be accepted because he is entitled to such permission.

As an initial matter, it is notable that despite feeling so strongly that Mr. Howard required leave of court, the State does not articulate how exactly he was supposed to pursue it. That is,

the State does not outline the factors by which a request for leave would be measured. It is a telling omission, for it stems from the State's total lack of relevant authority.

Because the State proposes no test, Mr. Howard and the Court are left to guess at the factors it has in mind from its motion. The first of those factors would seem to be that "the law and facts cited in Claim Two of the Amended Fifth Petition were available at the time the Fifth Petition was filed." MTS, at 19. It is uncertain from where the State is deriving such a factor, as there are no cases or statutes cited. If the State had searched for an amendment test that actually has a purchase in the law, it might have considered NRCP 15(a), which applies to civil suits. To be clear, Mr. Howard does not concede that NRCP 15(a) has any bearing here. The provision has seemingly never been cited by the Nevada Supreme Court in a post-conviction case. That in itself is a signal that the State's amendment requirement is imaginary. Nevertheless, if there is a requirement, NRCP 15(a) would at least provide a template for assessing motions to amend. Using that template, the State's first proposed factor is inappropriate. As it relates to timing, NRCP 15(a) amendments turn in part on whether the movant has engaged in "undue delay," not whether the facts and law were previously available. *Kantor v. Kantor*, 116 Nev. 886, 891, 8 P.3d 825, 828 (2000).[5] Mr. Howard filed his amendment less than two months after the petition, before there had been an oral argument or any action by the Court on the claims. By any reasonable standards, that is not an undue delay.

A brief glance at the federal cases proves the point. Those cases are highly persuasive, for Nevada law has incorporated the U.S. Supreme Court's precedents on the amendment of civil pleadings. *See, e.g.*, *Nutton v. Sunset Station, Inc.*, 131 Nev. Adv. Op. 34, __, 357 P.3d 966, 975 (2015) (relying on U.S. Supreme Court law while interpreting NRCP 15(a); *Stephens v. S. Nev. Music Co.*, 89 Nev. 104, 105–06, 507 P.2d 138, 139 (1973) (per curiam) (same). Federal amendments are governed by Federal Rule of Civil Procedure 15. That rule applies to federal habeas cases as well. *See Mayle v. Felix*, 545 U.S. 644, 655, 125 S. Ct. 2562, 2569 (2005). And under that rule, "undue delay" is a factor courts must consider when disposing of a motion to

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[5] Because the State had the burden to show the merits of its own motion, it waived any reliance on the NRCP 15(a) factors by ignoring them in its pleading, and it cannot belatedly invoke those factors in its reply.

amend. *See Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 229 (1962) (stating that "undue delay" is a factor courts must consider under Rule 15); *Anthony v. Cambra*, 236 F.3d 568, 577 (9th Cir. 2000) (including undue delay in a list of amendment factors in a habeas case). Utilizing the Rule 15 framework, district court judges in Nevada have routinely granted leave to amend years after the initial petition was filed. *See Browning v. Baker*, D. Nev., No. 3:05-cv-087, ECF No. 116, at 1 (granting leave to a death row inmate to amend a habeas petition that was originally filed more than six years earlier); *Hogan v. Baker*, D. Nev., No. 2:97-cv-927, ECF No. 130, at 2 (eleven years); *Petrocelli v. Angeloni*, D. Nev., No. 3:94-cv-459, ECF No. 147, at 2 (thirteen years). In so ruling, these judges have found periods of thirteen, eleven, and six years to not constitute undue delay. With that in mind, it would be untenable to find that the time between the initial petition and the amendment here—less than two months—was an undue delay.

The State's next factor, strangely, rebuts a theory that Mr. Howard has not advanced. Mr. Howard may not contend, says the State, "that there is good cause to amend based upon the allegedly meritorious nature of his claim." MTS, at 19. Mr. Howard is not sure why the State would anticipate him making an argument that gets the law exactly backwards. If Mr. Howard must seek leave to amend, it is not his burden to show that any new claims are meritorious. That would result in a merits ruling, and would nullify the whole point of a threshold amendment determination. Rather, the question would be whether the claim is *futile*. *Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. Adv. Op. 42, __, 302 P.3d 1148, 1152 (2013). The State does not even pretend to have made any such showing. Its examination of the substance of Claim Two is limited to a recitation of cases, every single one of which predated *Hurst*. *See* MTS, at 19–22. Mr. Howard's claim is predicated on the notion that *Hurst* changed the law. *See* Am. Pet., at 8–9. The idea that pre-*Hurst* cases could demonstrate that such a claim is futile is irrational in the extreme. Essentially, the State's viewpoint is: you are wrong that *Hurst* changed the law in a way that favors you because the law before *Hurst* disfavored you. Needless to say, that widely misses the mark.

Of the numerous pre-*Hurst* decisions dredged up by the State for this non-sequitur of an argument, it spills the most ink on *Nunnery v. State*, 127 Nev. 749, 263 P.3d 235 (2011). *See*

generally MTS, at 20–22. On that case, the State makes the claim—outlandish even by its own standards—that Mr. Howard's "failure to address" the opinion "should be treated as an admission that he cannot justify amendment" or "demonstrate good cause and prejudice to waive his prejudicial [sic] defaults." MTS, at 22. The concept that Mr. Howard had a duty to go through every old case that is based on the obsolete rule of law he is attacking, in his petition no less, is nonsensical, and there is nothing cited in the motion that comes remotely close to establishing that extravagant proposition. It is the State's job to invoke the authority it wishes to rely upon in opposing the petition, and Mr. Howard will then respond. That is how the adversarial system works. As for the State's skeletal reference to procedural default, it is neither here nor there, for by the State's own admission procedural default has nothing to do with the motion to strike and is instead "appropriate for an opposition and a motion to dismiss." *Id.* at 19 n.9.

It takes little effort to see how non-futile Claim Two is. For present purposes, it suffices to say that two state high courts have now interpreted *Hurst* as extending to the jury's weighing process, one of the main preconditions upon which Claim Two rests. *See Rauf v. State*, 145 A.3d 430, 435–79 (Del. 2016) (per curiam) (Strine, C.J., concurring)[6]; *Hurst v. State*, 202 So. 3d 40, 53 (Fla. 2016). One of those high courts has also explicitly endorsed another main precondition of Claim Two, that *Hurst* compels juries to use a reasonable doubt standard at the weighing stage. *See Rauf*, 145 A.3d at 433, 437. And both of the high courts have given their *Hurst* interpretations retroactive effect, dealing with yet another potential hurdle to relief. *See Mosley v. State*, ___ So. 3d ____, 2016 WL 7406506, at *18–25 (Fla. 2016); *Powell v. State*, ___ A.3d ____, 2016 WL 7243546, at *3–5 (Del. 2016) (per curiam). Given this body of highly germane law that adopts the exact same legal principles that are behind Mr. Howard's claim, all of which is ignored by the State in its motion, the claim is not futile.

The two remaining factors are bad faith and dilatory motives. *See Kantor*, 116 Nev. at 891, 8 P.3d at 828. Although the State does not expressly assert these factors, opposing counsel

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[6] Chief Justice Strine wrote for himself and two other justices. Because five justices participated in *Rauf*, Chief Justice Strine's opinion represented the views of a three-judge majority of the court.

Jonathan E. VanBoskerck implies them by continuing his unfortunate tendency to accuse his adversaries of misconduct whenever he happens to disagree with their legal arguments, or perhaps simply when his adversaries happen to be capital inmates seeking relief from their death sentences. Mr. VanBoskerck has submitted two substantive pleadings in the brief amount of time that has elapsed since the fifth post-conviction petition was filed. Remarkably, he has castigated undersigned counsel for misconduct in both of them. In the first, the motion to dismiss, Mr. VanBoskerck detected misconduct—and "skullduggery" to boot—in undersigned counsel's failure to address the State's own procedural default defenses in as much detail as Mr. VanBoskerck would have liked. *See* MTD, at 20–21. Because that motion to dismiss is not before the Court presently, Mr. Howard will not respond to it at length. That said, Mr. VanBoskerck has made his definition of misconduct pertinent to the litigation over his motion to strike, so it is worth pointing out that Mr. Howard did in fact state—unambiguously—his reason for not raising the claim in an earlier petition: because it was not available until *Hurst* was decided. *See* Pet. for Writ of Habeas Corpus, filed Oct. 5, 2016, at 6. In so doing, he complied with the statute that contains Mr. Howard's pleading requirements, a statute the State did not even allude to when it chided undersigned counsel for misconduct in supposedly not complying with those requirements. *See* NRS 34.735 (requiring inmates to "list briefly what grounds" for relief were not presented earlier and to supply the reasons they were not presented). If the State persists in in its reckless allegation of misconduct in the motion to dismiss that is ultimately adjudicated, Mr. Howard will elaborate on his response to the rather incredible suggestion that his attorneys were unethical for not going beyond the language of the controlling statute and elucidating the State's own procedural defense arguments for it.

Now, just a few weeks later and in his very next pleading, Mr. VanBoskerck's misconduct alarm is again sounding. This time it is because he is offended by the very notion that a prisoner would file an amended petition for post-conviction relief without first seeking leave. *See* MTS, at 18–19. It is surprising that Mr. VanBoskerck would take such vehement exception to a practice that is routine in this Court, and not prohibited by any governing statute or case. *See supra* at 3–8.

Mr. Howard also struggles to comprehend the State's rationale. The State alleges misconduct based on delay in a totally unnecessary motion that is itself causing quite a bit more delay than the amendment itself would ever have caused. While the addition of a claim certainly postpones the case to some extent, the filing of a motion to strike postpones the case far longer. The State could easily have filed an opposition and motion to dismiss the amended petition, a task made even more manageable by the fact that it has already done most of the necessary work by filing such a motion in connection with the original petition. As it happens, a schedule setting forth deadlines for litigation over an opposition to the amended petition is exactly what undersigned counsel proposed to the State. *See* Ex. 2. They also gave the State the alternative of filing a motion to dismiss the amended petition together with its motion to strike, which would also have sped things along and gotten the Court closer to a final resolution of the case. Mr. VanBoskerck refused both options, stating resolutely that "[i]f the Court does not strike then and only then should I be required to file an opposition and motion to dismiss." *See id.* It is *that* decision, more than any other, that is now engendering delay. Had the State simply filed a motion to dismiss the amended petition, as it could have done without any difficulty and as it does in nearly every other case, Mr. Howard would respond, oral argument would occur, and the proceeding would be well on its way to resolution. Instead, the matter is now bogged down by a motion to strike, a response, a reply, and an oral argument on *that* motion, none of which was called for. If Mr. Howard had his druthers, this case would be moving swiftly to an argument on the substance of his petition, rather than on the academic and legalistic exercise the State has now conjured up. It is the State's prerogative to pursue a motion to strike, no matter how unfounded it may be, but it cannot credibly shout misconduct for delay at the very same time that it substantially and baselessly prolongs the life of this case.

In truth, the State's reasoning is even more mystifying than that. As the State acknowledges, undersigned counsel's alternative to filing an amended petition was to file a motion for leave to amend. *See* MTS, at 18 ("[D]efense [counsel] should have sought leave from the Court and alleged good cause for adding the claim."). That is the very course the State repeatedly faults Mr. Howard for not taking. *See id.* at 17–25. But how would that have avoided

delay? Presumably, the State would have opposed the motion, considering the fact that it has now concocted out of thin air an entire dispute over whether the amendment should be allowed. Mr. Howard would have replied, and a decision would have to be made. In other words, the process that the State proposes for Mr. Howard is one that would have slowed the case down much more than the process he followed, which was to simply file an amended petition, expecting the State to do what it had always done before and litigate the new petition. Not only is the State finding misconduct in delay while creating delay—it is scolding undersigned counsel for delay while suggesting they should have delayed things *more*.

It must also be asked what exactly the State regards undersigned counsel's nefarious motives to be. What reasons could they possibly have for not filing a motion for leave to amend, if they thought one was required? As set forth in this opposition, the argument for why leave is warranted, if necessary, is not complex at all, and weighs heavily in favor of amendment being granted. Undersigned counsel would have been happy to submit such a motion. *See* Ex. 1, at 3. They researched whether one was mandated by reading dozens of dockets in post-conviction cases, discovering that the practice was almost unheard of in Clark County. *See id.* at 2. And they contacted several Nevada attorneys who had experience in post-conviction litigation. *See id.* One of those attorneys called back, and reported that based on the numerous Clark County post-conviction cases he had handled, he could confidently assure undersigned counsel that a motion for leave to amend was unnecessary. *See id.*

Had undersigned counsel discovered an obligation to seek leave, they would have had no problem filing a motion. *See id.* at 3. In federal court, such a requirement *is* established, *see Mayle*, 545 U.S. at 655, 125 S. Ct. at 2569, and undersigned counsel regularly file motions for leave to amend federal habeas petitions, as they did not long ago in Mr. Howard's own federal habeas proceeding. *See Howard v. Baker*, D. Nev., No. 2:93-cv-1209, ECF No. 316. Like all attorneys, undersigned counsel file motions for leave to amend when the law and local practices so direct. If the law and local practices so directed in Clark County, they would have done so without hesitation. Intending no disrespect to the State, undersigned counsel find Mr.

VanBoskerck's intimation that there is some sinister objective in not filing a motion for leave to amend frankly baffling.

One aspect of the State's hostility to the amended petition is less opaque, but still in error. The State worries that "a habeas petitioner subject to a death sentence has an incentive to create unwarranted delay in order to frustrate imposition of sentence." MTS, at 18. Whatever relevance that dynamic might have elsewhere, it has none here. The first case cited by the State for its worry is *Rhines v. Weber*, 544 U.S. 269, 125 S. Ct. 1528 (2005). *See* MTS, at 18. That case spells out the circumstances in which federal habeas proceedings should be stayed to allow for the exhaustion of claims in state court. *See Rhines*, 544 U.S. at 273–79, 125 S. Ct. at 1532–36. Mr. Howard has not requested a stay in his federal habeas case. On the contrary, he is actively litigating that case simultaneously with the present one. That overlapping litigation has created a considerable amount of additional labor for undersigned counsel—labor that does not affect Mr. VanBoskerck, since he is not representing the State in the federal case—but they have no qualms in taking on the extra work because they would like for Mr. Howard's constitutional rights to be vindicated as expeditiously as possible. It is extraordinary that Mr. VanBoskerck would charge undersigned counsel with dilatory tactics when they are energetically proceeding on two separate fronts, and even more so for the State to do so in the same breath that it uses to delay a final ruling in this very case.

The fervor of the State's comments on the delay that it falsely attributes to undersigned counsel arises in part from Mr. VanBoskerck's personal opinion about the Federal Public Defender offices as a whole. Mr. VanBoskerck has now gone out of his way twice to lambast those offices in strikingly intemperate terms, characterizing them as an institution with "an almost militant opposition to the death penalty." MTS, at 18; *accord* MTD, at 20 n.9. Mr. VanBoskerck's broadsides against public defense are startling. One wonders whether it would ever be appropriate for a senior prosecutor, speaking for the State of Nevada, to denigrate dozens of capital defense attorneys around the country for doing their jobs and trying to keep their clients alive. Those attorneys have a constitutional and statutory duty to challenge death sentences. They are as integral to the justice system as Mr. VanBoskerck and his colleagues.

Undersigned counsel understand and respect the fact that Mr. VanBoskerck has a responsibility to defend death sentences, insofar as he believes the sentences are lawful. They have never criticized him for carrying out that responsibility, and they would expect the same basic professional courtesy in return.

Responding more specifically to Mr. VanBoskerck's unfortunate lapse into polemic, undersigned counsel would rejoin, first, that the Federal Defender Services of Idaho do not work in concert with any other Federal Defender offices. Their sole loyalty is to their clients. They are not accountable for litigation decisions made by any other Federal Defender attorneys, just as Mr. VanBoskerck is not accountable for litigation decisions made by lawyers in every other prosecutor's office in the country. If he were, one could of course provide numerous examples of prosecutorial misconduct elsewhere, but undersigned counsel do not share the State's theory of guilt-by-job-title.

Second, even if every action taken by every Federal Defender attorney were attributable to every other Federal Defender attorney, despite the complete independence of each office, Mr. VanBoskerck's diatribe says nothing at all about Federal Defenders, nor about unethical defense behavior. The first two cases in the State's paragraph did not involve Federal Defenders, and merely recognize the obvious truth that death row inmates have an interest in not being executed. *See* MTS, at 18. If that is the State's grievance, it is offended not by unscrupulous litigation, but by the very idea that a defendant might resist the State's plan to kill him.

The final two sources in the State's paragraph both refer to situations involving disagreements between former Chief Justice Castille of the Pennsylvania Supreme Court and the Capital Habeas Unit for the Federal Community Defender Office in Philadelphia. *See id.* Many of those disagreements stemmed from Chief Justice Castille's view that Federal Defenders should "be precluded from participation in state collateral proceedings." What the State neglects to point out is that Chief Justice Castille's view was firmly rebuffed by the Third Circuit. *See In re Commw.'s Mot. to Appt. Counsel Against or Directed to Defender Ass'n of Phi.*, 790 F.3d 457, 475–77 (3d Cir. 2015), *cert. denied*, 136 S. Ct. 994 (2016); *see also id.* at 479, 481–82 (McKee, C.J., concurring) (chalking the conflict up to an "objection . . . that the Federal

Community Defender is providing too much defense," and wondering why Chief Judge Castille appeared to think that purely financial disputes deserve more attention than capital cases). In another recent decision omitted by the State, the United States Supreme Court found that Chief Justice Castille violated the due process rights of a death row inmate by refusing to recuse himself from an appeal even though Chief Justice Castille had personally approved of the decision to seek death against the inmate. *See Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905–10 (2016). At the very least, Chief Justice Castille is not the most credible spokesman for the State to look to on this issue.

Interestingly, while blaming undersigned counsel for supposed misbehavior in other cases, engaged in by totally difference offices, Mr. VanBoskerck minimizes misbehavior committed by his own office in this very case. In its background section, which comprises more than half of its motion, the State acknowledges that one of the Clark County prosecutors who handled the Howard trial—Dan Seaton—was found by the Nevada Supreme Court to have committed misconduct. *See* MTS, at 11.[7] Sixteen years later, the State explains away Mr. Seaton's egregious remarks at sentencing as acceptable on the basis that they were only rendered unlawful by subsequent authority. *See id.* at 11–12, nn.5–6. That explanation is tenuous, given that the rule of law transgressed by Mr. Seaton—that prosecutors are not to interject their "personal beliefs into the argument"—dates back a hundred years. *See Collier v. State*, 101 Nev. 473, 479, 705 P.2d 1126, 1130 (1985) (sampling the enormous body of precedent behind the rule). Incidentally, when Mr. Seaton was referred to the Bar for potential disciplinary action by the Nevada Supreme Court, it was not just for his inflammatory speeches in *Howard*, but as a result of his "persistent disregard for established rules of professional conduct," for which he had been repeatedly admonished by the court, *see Howard v. State*, 106 Nev. 713, 722 n.1, 800 P.2d 175, 180 n.1 (1990), *abrogated on other grounds by Harte v. State*, 116 Nev. 1054, 1072, 13 P.3d 420, 432 (2000), another fact that goes unmentioned by the State.

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[7] In its motion to strike, the State quotes the language at issue above from a prior ruling by this Court. *See* MTS, at 15. However, the language first appeared in a previous pleading by the State. *See* State's Mot. to Dismiss, filed June 5, 2008, at 11 n.7–8.

In overview, Mr. VanBoskerck blithely levels a very serious allegation of professional misconduct at undersigned counsel for following a universally accepted local practice. At the same time, Mr. VanBoskerck absolves his former colleague for expressing a personal conviction at a capital trial that the defendant deserved to die, even though the prosecutor had been reprimanded in at least five published cases by the Nevada Supreme Court, which referred to his conduct as "outrageous" and lamented that he "knows very well that these remarks were improper." *Howard*, 106 Nev. at 722 & n.1, 800 P.2d at 180 & n.1. It is troubling that Mr. VanBoskerck, a senior member of the Clark County District Attorney's Office, would so readily resort to incendiary allegations over a relatively minor disagreement on post-conviction procedural practice while glossing over extreme prosecutorial misconduct in his own agency's attempt to secure a death sentence against Mr. Howard.

In short, the State's distracting and misleading jeremiad about capital defense practices has no bearing here. Mr. Howard has not engaged in bad faith, nor has he engaged in dilatory tactics. Quite to the contrary, he stands ready to resolve the merits of his claims as soon as the State is done throwing up frivolous procedural obstacles.

The final 15(a) factor is "prejudice to the opponent." *Nutton*, 357 P.3d at 970. Here, the State does not claim any prejudice. Nor could it. There can be no doubt that the State is fully capable of addressing Claim Two, as it has already begun doing so. *See* MTS, at 19–22. The only potential prejudice that has accrued to either party in connection with the amendment has been the delay generated by the State's own motion to strike, which it certainly cannot complain about with any legitimacy.

To summarize, if leave to amend were necessary, the most apt test would be NRCP 15(c)'s, and under that test—which "contemplates the liberal amendment of pleadings," *Nutton*, 357 P.3d at 969—Mr. Howard is plainly entitled to amend.

As one final consideration, the State's advocated remedy would lead to a severely inequitable result. Undersigned counsel have acted diligently in presenting the constitutional claims raised in his post-conviction petition, and raised them as soon as they discovered them and obtained approval from the federal habeas judge to appear in this Court. The body of law

that is springing up around *Hurst* is complex and evolving quickly, as exemplified by the state high courts cited above that first interpreted the decision as extending to the weighing process and then shortly thereafter gave it retroactive effect. *See supra* at 11. It is a body of law that is casting substantial doubt on some of the most deep-seated rules of capital jurisprudence, and in the process calling numerous death sentences into question. Undersigned counsel were careful to raise their *Hurst* claims within one year of the decision, lest a later filing be deemed untimely. *See Rippo v. State*, 132 Nev. Adv. Op. 11, __, 368 P.3d 729, 734 (2016), *pet. for cert. filed* (16-6316) (Oct. 5, 2016). And when they filed their amended petition, they did so after extensive research and consultation indicated that a request for leave would have been inconsistent with local practices.

If the State's motion to strike is granted, there is a risk that Claim Two will be found barred by the statute of limitations. *See id.* It is likely that such is the State's real intention, as it is hard to imagine any other benefit that it can gain from taking the time to file such a groundless motion. If that were to happen, elemental notions of fairness would be grossly offended. Undersigned counsel have done everything within their power to bring important constitutional claims to the attention of the Court and have them ruled upon. Were the State to succeed in its gambit and circumvent any adjudication of the claims on a technicality, it is not only Mr. Howard that would suffer. It is also society, which has an equal interest in ensuring that death sentences are constitutional before they are carried out. The State ostensibly represents those interests too, *see Brady v. Maryland*, 83 S. Ct. 1194, 1197, 373 U.S. 83, 88 (1963) (reminding the prosecution that it "wins its point whenever justice is done its citizens in the courts" (internal quotation marks omitted)), though some of its employees may not always remember that.

III. Conclusion

It is an odd motion before the Court. A motion that bewails delay while creating it. A motion that praises established rules while inventing its own. A motion that condemns vexatious litigation while engaging in it. And a motion that wildly alleges misconduct while trivializing a very real example of it. Although the inspiration for such a motion is unclear, its meritlessness is not. The motion is devoid of any basis in law, practice, fairness, or reality. It should be denied.

DATED this 3rd day of February 2017.

Respectfully submitted,

GENTILE CRISTALLI
MILLER ARMENI SAVARESE

/s/ Paola M. Armeni

PAOLA M. ARMENI, ESQ.
Nevada Bar No. 8357
410 South Rampart Boulevard, Suite 420
Las Vegas, Nevada 89145

FEDERAL DEFENDER
SERVICES OF IDAHO

/s/ Deborah A. Czuba

DEBORAH A. CZUBA, ESQ. (admitted *pro hac vice)*
Idaho Bar No. 9648
720 West Idaho Street, Suite 900
Boise, Idaho 83702

/s/ Jonah J. Horwitz

JONAH J. HORWITZ, ESQ. (admitted *pro hac vice)*
Wisconsin Bar No. 1090065
720 West Idaho Street, Suite 900
Boise, Idaho 83702

Exhibit 1

(Declaration of Jonah Horwitz in Support of Opposition to Motion to Strike)

DECL
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Attorneys for Petitioner Samuel Howard

DISTRICT COURT
CLARK COUNTY, NEVADA

SAMUEL HOWARD, Petitioner, vs. TIMOTHY FILSON, Warden, and ADAM PAUL LAXALT, Attorney General for the State of Nevada, Respondents.	Case No. 81C053867 Dept. No. XVII Date of Hearing: March 17, 2017 Time of Hearing: 9:30 AM (Death Penalty Case)

DECLARATION IN SUPPORT OF OPPOSITION TO MOTION TO STRIKE

Jonah J. Horwitz declares as follows under the penalty of perjury:

1. I am counsel for Petitioner Samuel Howard, along with Deborah Anne Czuba and Paola M. Armeni.
2. Before filing the amended petition, I researched whether it would be necessary to seek leave first.
3. To that end, I reviewed dozens of dockets in Clark County post-conviction cases to find motions for leave to amend petitions, and found almost none.
4. As part of the same inquiry, I called several Nevada attorneys who had experience in post-conviction litigation. I was able to eventually speak with one of those attorneys.
5. In my phone call, I described to the attorney the procedural posture of Mr. Howard's case at that time. I told him that I wished to amend the petition and asked him whether he thought I needed to seek leave first. He told me that no such leave was necessary, and advised me to simply file the amended petition.
6. To ascertain how amended petitions had been dealt with in Clark County District Court in the past, I used the following research methodology.
7. First, I searched Westlaw for Nevada Supreme Court opinions in which "death" and some variation of the word "sentence" appeared in the same sentence. After sorting the opinions in reverse chronological order, I went through each one. For opinions arising from Clark County that involved death-sentenced inmates, either on direct appeal or in post-conviction, I then looked up the docket of the capital case on Clark County's online Register of Actions. On the docket, I conducted a word search for "amend." If I was able to find a pleading that appeared to be designated as an amended petition in the sense at issue in the motion-to-strike proceedings, I included the case in my sample. Because the issue in this matter concerns current practices, I focused on the latest post-conviction action in each case that I surveyed.
8. To compile the list of judges provided in footnote 3 of the opposition to the motion to strike, filed on today's date in this case, I used the Nevada Supreme Court opinions on Westlaw.

9. To compile the list of Deputy District Attorneys provided in footnote 4 of the opposition to the motion to strike, filed on today's date in this case, I clicked on the "parties present" link that was closest to the docket entry for the amended post-conviction petition that I was using for the sample.

10. I would have been happy to prepare submit a motion for leave to amend the post-conviction petition if my research had indicated that one was necessary and appropriate.

DATED this 3rd day of February 2017.

/s/ Jonah J. Horwitz

JONAH J. HORWITZ, ESQ. (*pro hac vice)*
Wisconsin Bar No. 1090065
720 West Idaho Street, Suite 900
Boise, Idaho 83702

Exhibit 2

(Email Exchange Regarding Filing of Motion to Strike)

From: Jonathan VanBoskerck
To: Jonah Horwitz
Cc: Deborah A Czuba; Paola Armeni
Subject: RE: Howard v. Filson, No. 81C053867
Date: 12/01/2016 02:47 PM

I'm going to ask the Court to strike it. If the Court does not strike then and only then should I be required to file an opposition and motion to dismiss.

From: Jonah Horwitz [mailto:Jonah_Horwitz@fd.org]
Sent: Thursday, December 01, 2016 1:36 PM
To: Jonathan VanBoskerck <Jonathan.VanBoskerck@clarkcountyda.com>
Cc: Deborah A Czuba <Deborah_A_Czuba@fd.org>; Paola Armeni <parmeni@gcmaslaw.com>
Subject: RE: Howard v. Filson, No. 81C053867

Thanks for the prompt response. Were you planning on filing a motion to strike the amended petition separately from a motion to dismiss the amended petition? If so, do you want to have the motion to strike adjudicated before we litigate a motion to dismiss? Or would you rather do it all at once? We're pretty flexible on dates as well. Here's one possible blueprint for a schedule, assuming that we're combining the motion to strike and motion to dismiss:

- Jan. 3: State's motion to strike/motion to dismiss
- Feb. 3: Petitioner's opposition
- Feb. 17: State's reply in support of motion to strike/motion to dismiss
- Oral argument the week of March 6 (we could do any day that week, though Mondays and Fridays are best for us)

If we're not combining the two motions, please let us know what sort of stipulation you had in mind. And if there are dates that suit your calendar better, please let us know that too. Thanks,

Jonah

Jonathan VanBoskerck ---12/01/2016 02:08:24 PM---I have no objection changing the 12/14 date but we will need to build in dates for my motion to stri

Jonathan VanBoskerck ---12/01/2016 02:08:24 PM---I have no objection changing the 12/14 date but we will need to build in dates for my motion to stri

From: Jonathan VanBoskerck <Jonathan.VanBoskerck@clarkcountyda.com>
To: Jonah Horwitz <Jonah_Horwitz@fd.org>
Cc: Deborah A Czuba <Deborah_A_Czuba@fd.org>, Paola Armeni <parmeni@gcmaslaw.com>
Date: 12/01/2016 02:08 PM
Subject: RE: Howard v. Filson, No. 81C053867

I have no objection changing the 12/14 date but we will need to build in dates for my motion to strike, your opposition and my reply. As to dates, I can be flexible so let me know what works best for you.

From: Jonah Horwitz [mailto:Jonah_Horwitz@fd.org]
Sent: Thursday, December 01, 2016 1:01 PM
To: Jonathan VanBoskerck <Jonathan.VanBoskerck@clarkcountyda.com>
Cc: Deborah A Czuba <Deborah_A_Czuba@fd.org>; Paola Armeni <parmeni@gcmaslaw.com>
Subject: Howard v. Filson, No. 81C053867

Mr. VanBoskerck,

In the Howard post-conviction case, we filed an amended petition today, adding one new claim. The amended petition is attached. In light of the amendment, we would like to enter into a stipulation with you whereby the oral argument currently scheduled for December 14 is vacated, a deadline is set for the State's opposition and motion to dismiss the amended petition, a deadline is set for our response to the motion to dismiss the amended petition and reply in support of the petition, and a date or range of dates is proposed for a new oral argument. Does such a stipulation sound reasonable to you? If so, do you have any preferences on the deadlines and the new oral argument date? We're happy to draft and file the stipulation if we can find terms that are agreeable to both sides. Please let us know your thoughts. Thank you.

Jonah

Jonah Horwitz
Assistant Federal Public Defender
Capital Habeas Unit
Federal Defender Services of Idaho
702 W. Idaho St., Ste. 900
Boise, ID 83702
Tel.: (208) 331-5541
Fax: (208) 331-5559
Jonah_Horwitz@fd.org

(See attached file: 2016_12_01 Amended Petition for Post Conviction Relief.pdf)

CERTIFICATE OF SERVICE

I hereby certify that service of this Opposition to Motion to Strike was made this 3rd day of February 2017, by Electronic Filing and by email to:

Jonathan E. VanBoskerck
Chief Deputy District Attorney
Office of the Clark County District Attorney
Jonathan.VanBoskerck@clarkcountyda.com

/s/ Joy Fish
Joy Fish
Paralegal
Federal Defender Services of Idaho

IN THE SUPREME COURT OF THE STATE OF NEVADA

PAOLA M. ARMENI, JONAH J. HORWITZ, and DEBORAH A. CZUBA,

Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT COURT of the STATE of NEVADA, IN AND FOR the COUNTY of CLARK; and THE HONORABLE MICHAEL P. VILLANI,

Respondents,

and

TIMOTHY FILSON, Warden, ADAM PAUL LAXALT, Attorney General for the State of Nevada, and THE STATE OF NEVADA,

Real Parties in Interest.

Supreme Court Case No.

Underlying Case: Clark County Dist. Ct. No. 81C053867

APPELLANT'S APPENDIX

Appeal from Order Denying Petition
for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County

VOLUME 1 OF 3

GENTILE CRISTALLI
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FEDERAL DEFENDER
SERVICES OF IDAHO
JONAH J. HORWITZ (admitted *pro hac vice*)
Wisconsin Bar No. 1090065
E-mail: Jonah_Horwitz@fd.org

INDEX

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this document on July 13, 2017. I have also emailed and/or mailed this document by Federal Express, postage prepaid, for delivery within three calendar days to the following people:

Steven Wolfson
Clark County District Attorney
Jonathan E. VanBoskerck
Chief Deputy District Attorney
200 East Lewis Avenue
Las Vegas, Nevada 89101
Jonathan.VanBoskerck@clarkcountyda.com

Adam Paul Laxalt
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701
aplaxalt@ag.nv.gov

Michael P. Villani
Eighth Judicial District Court Judge
Regional Justice Center
200 Lewis Ave., Las Vegas, NV 89155

Timothy Filson
Warden, Ely State Prison
P.O. Box 1989
4569 North State Route
Ely, Nevada 89301

/s/ Joy L. Fish
Joy L. Fish

APPL
Jonah J. Horwitz (*pro hac vice pending*)
Wisconsin Bar No. 1090065
Jonah_Horwitz@fd.org
Federal Defender Services of Idaho
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Telephone: (208) 331-5530
Facsimile: (208) 331-5559

Attorneys for Petitioner Samuel Howard

DISTRICT COURT
CLARK COUNTY, NEVADA

SAMUEL HOWARD,

Petitioner,

vs.

TIMOTHY FILSON, Warden, and ADAM PAUL LAXALT, Attorney General for the State of Nevada,

Respondents.

Case No. 81C053867
Dept. No. XVII

(Death Penalty Case)

APPLICATION FOR ORDER WAIVING FEES PURSUANT TO NEVADA SUPREME COURT RULE 42(3)(E) AND RENEWAL OF APPLICATION FEES UNDER RULE 42(9); EXHIBIT A

Undersigned counsel respectfully requests that, pursuant to Nevada Supreme Court Rule 42 subsection 3(e), the Court waive the original fee required by SCR 42 subsection 3(a), application fees, and the annual renewal fee required by subsection 9 of the same rule.

Undersigned counsel makes this request because he is providing *pro bono* services in a death penalty habeas case, as counsel attests in the affidavit signed and notarized on October 4, 2016, and attached to this application as Exhibit A.

Respectfully submitted this 4th day of October 2016.

/s/ Jonah J. Horwitz
Jonah J. Horwitz
Assistant Federal Public Defender
Federal Defender Services of Idaho

Counsel for Petitioner
SAMUEL HOWARD

AFFIDAVIT OF JONAH J. HORWITZ

Jonah J. Horwitz, Affiant, respectfully requests that, pursuant to SCR 42(3)(e), the Court waive the application fee because Affiant is providing *pro bono* services in a death penalty habeas corpus case.

The facts which support this request are as follows. Affiant is an Assistant Federal Public Defender employed by the Capital Habeas Unit of the Federal Defender Services of Idaho ("CHU"). Samuel Howard, an indigent inmate currently seeking federal habeas relief from a state death sentence, was previously represented by the Office of the Federal Public Defender for the District of Nevada ("FPD-NV"). The FPD-NV discovered it suffered from a conflict of interest necessitating its withdrawal as counsel for Mr. Howard, and the CHU agreed to accept an appointment in the case. The CHU has been appointed in the United States Court of Appeals for the Ninth Circuit as counsel for Mr. Howard in his federal habeas case, and it is representing his interests in the U.S. District Court for the District of Nevada in the ongoing litigation there. The District Court authorized Affiant to litigate the contemplated post-conviction action in state court.

After being appointed in federal court, it is the practice of the FPD-NV to represent their indigent death row clients in state court post-conviction litigation when such litigation is necessary. In order to ensure continuity of counsel and effective representation of Mr. Howard, the CHU has agreed to assist him at the state level. Given the overlap between the federal case and the contemplated state post-conviction litigation, it will serve judicial economy for Affiant to continue his representation of Mr. Howard in the Nevada state courts.

The CHU exclusively represents indigent prisoners under sentence of death. It regularly requests and is granted fee waivers based on the poverty of its clients. As a quasi-governmental non-profit, the CHU will be absorbing significant costs to represent Mr. Howard in both state and federal court. The CHU is not equipped to shoulder the costs of the pro hac vice fees that Affiant would be required to pay to represent Mr. Howard in Nevada state court.

In light of the above, Affiant respectfully request that the pro hac vice fees be waived as to his representation of Mr. Howard.

Affiant Jonah J. Horwitz does hereby swear/affirm under penalty of perjury that he has read the foregoing Application for Waiver of Fees and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein state on information and belief, and as to those matters he believes them to be true.

Dated this 4th day of October 2016

Affiant Jonah J. Horwitz

STATE OF Idaho)
) SS
COUNTY OF Ada)

Subscribed and sworn to before me
this 4th day of October, 2016

BRUCE LIVINGSTON NOTARY PUBLIC STATE OF IDAHO

Bruce Livingston

Notary Public

My commission expires: 2/4/13

CERTIFICATE OF SERVICE BY MAIL

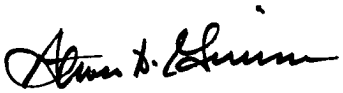
I, Joy Fish, hereby certify, pursuant to EDCR 7.26(a)(1), that on this 4th day of the month of October of the year 2016, I mailed a true and correct copy of the foregoing APPLICATION FOR WAIVER OF FEES addressed to:

Steve Wolfson
Clark County District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101

Adam Paul Laxalt
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701

/s/ Joy Fish
Joy Fish
Paralegal
Federal Defender Services of Idaho

Electronically Filed
10/03/2016 03:53:12 PM



CLERK OF THE COURT

MASS
GENTILE CRISTALLI
MILLER ARMENI SAVARESE
PAOLA M. ARMENI
Nevada Bar No. 8357
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Las Vegas, Nevada 89145
Tel: (702) 880-0000
Fax: (702) 778-9709

Attorney for Petitioner, Samuel Howard

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

SAMUEL HOWARD, Petitioner, vs. TIMOTHY FILSON, Warden, and ADAM PAUL LAXALT, Attorney General for the State of Nevada, Respondents.	Case No. 81C053867 Dept. No. XVII (Death Penalty Case)

PETITIONER SAMUEL HOWARD'S MOTION TO ASSOCIATE COUNSEL

Date of Hearing: _____
Time of Hearing: _____

Petitioner, Samuel Howard hereby moves this Honorable Court for an order permitting Jonah J. Horwitz, Esq. to practice in Nevada, for the purpose of this case only, pursuant to Nevada Supreme Court Rule 42 (SCR 42).

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///

Mr. Horwitz, having complied with the requirements set forth by SCR 42, hereby submits a Verified Application for Association of Counsel (attached hereto as Exhibit 1); a Certificate of Good Standing from the Wisconsin Supreme Court (attached hereto as Exhibit 2); and the State Bar of Nevada Statement (attached hereto as Exhibit 3).

Dated this 3rd day of October, 2016.

GENTILE CRISTALLI
MILLER ARMENI SAVARESE

PAOLA M. ARMENI, ESQ.
Nevada Bar No. 8357
410 South Rampart Boulevard, Suite 420
Las Vegas, Nevada 89145

NOTICE OF MOTION

TO: All Interested Parties; and

TO: All Counsel of Record

PLEASE TAKE NOTICE that Petitioner, Samuel Howard will bring the foregoing **PETITIONER SAMUEL HOWARD'S MOTION TO ASSOCIATE COUNSEL** on for the decision on the 18th day of October, 2016 in Department XVII of the above entitled Court. at 8:30 AM

Dated this 3rd day of October, 2016.

GENTILE CRISTALLI
MILLER ARMENI SAVARESE

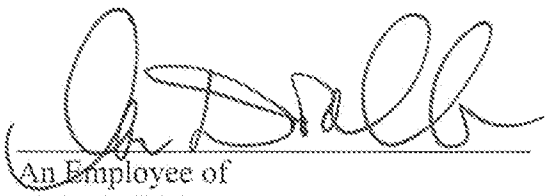
PAOLA M. ARMENI, ESQ.
Nevada Bar No. 8357
410 South Rampart Boulevard, Suite 420
Las Vegas, Nevada 89145

CERTIFICATE OF SERVICE BY MAIL

I, ANNA DIALLO, hereby certify, pursuant to N.R.C.P. 5(b), that on this 3rd day of the month of October, of the year 2016, I mailed a true and correct copy of the foregoing **PETITIONER SAMUEL HOWARD'S MOTION TO ASSOCIATE COUNSEL** addressed to:

Steve Wolfson
Clark County District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101

Adam Paul Laxalt
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701



An Employee of
GENTILE CRISTALLI
MILLER ARMENI SAVARESE

EXHIBIT 1

EXHIBIT 1

VAPP

ORIGINAL

DISTRICT COURT
CLARK COUNTY, NEVADA

SAMUEL HOWARD,

Petitioner,

vs.

RENEE BAKER, Warden, and PAUL LAXALT, Attorney General For the State of Nevada,

Respondents

Case No. 81C53867
Dept. No.

VERIFIED APPLICATION FOR ASSOCIATION OF COUNSEL UNDER NEVADA SUPREME COURT RULE 42

Jonah (First) Joshua (Middle Name) Horwitz (Last), Petitioner, respectfully represents:

1. Petitioner resides at 1161 W. Main St., Apt. 412 (Street Address)

Boise (City), Ada (County), ID (State), 83702 (Zip Code)

(773) 710-1793 (Telephone)

2. Petitioner is an attorney at law and a member of the law firm of: Federal Defender Services of Idaho

with offices at 702 W. Idaho St., Ste. 900 (Street Address)

Boise (City), Ada (County), ID (State), 83702 (Zip Code)

(208) 331-5530 (Telephone), jonah_horwitz@fd.org (Email)

3. Petitioner has been retained personally or as a member of the above named law firm by Samuel Howard, Jr. to provide legal representation in connection with the above-entitled matter now pending before the above referenced court.

4. Since September of 2012, petitioner has been, and presently is, a member of good standing of the bar of the highest court of the State of Wisconsin.

5. Petitioner was admitted to practice before the following United States District Courts, United States Circuit Courts of Appeal, the Supreme Court of the United States, and/or courts of other states on the dates indicated for each, and is presently a member in good standing of the bars of said Courts:

	DATE ADMITTED
United States Supreme Court	November 2, 2015
United States Court of Appeals for the Tenth Circuit	September 24, 2013

6. Is Petitioner currently suspended or disbarred in any court? You must answer yes or no. If yes, give particulars; e.g., court, jurisdiction, date: No

7. Is Petitioner currently subject to any disciplinary proceedings by any organization with authority at law? You must answer yes or no. If yes, give particulars, e.g. court, discipline authority, date, status: No

8. Has Petitioner ever received public discipline including, but not limited to, suspension or disbarment, by any organization with authority to discipline attorneys at law? You must answer yes or no. If yes, give

particulars, e.g. court, discipline authority, date, status: No

9. Has Petitioner ever had any certificate or privilege to appear and practice before any regulatory administrative body suspended or revoked? You must answer yes or no. If yes, give particulars, e.g. date, administrative body, date of suspension or reinstatement: No

10. Has Petitioner, either by resignation, withdrawal, or otherwise, ever terminated or attempted to terminate Petitioner's office as an attorney in order to avoid administrative, disciplinary, disbarment, or suspension proceedings? You must answer yes or no. If yes, give particulars: No

11. Petitioner has filed the following application(s) to appear as counsel under Nevada Supreme Court Rule 42 during the past three (3) years in the following matters, if none, indicate so: *(do not include Federal Pro Hacs)*

Date of Application	Cause	Title of Court Administrative Body or Arbitrator	Was Application Granted or Denied?
None			

(If necessary, please attach a statement of additional applications)

12. Nevada Counsel of Record for Petition in this matter is:
(must be the same as the signature on the Nevada Counsel consent page)

Paola	Monique	Armeni	8357,
First Name	Middle Name	Last Name	NV Bar #

who has offices at Gentile, Cristalli, Miller, Armeni, Savarese,
Firm Name/Company

410 S. Rampart, Ste 420, Las Vegas, Clark,
Street Address City County

89145, (702) 880-0000.
Zip Code Phone Number

13. The following accurately represents the names and addresses of each party in this matter, WHETHER OR NOT REPRESENTED BY COUNSEL, and the names and addresses of each counsel of record who appeared for said parties: (You may attach as an Exhibit if necessary.)

NAME	MAILING ADDRESSS
The State of Nevada,	Steven B. Wolfson, Clark County District Attorney, 200 Lewis Ave. Las Vegas, NV 89155-2212

14. Petitioner agrees to comply with the provisions of Nevada Supreme Court Rule 42(3) and (13) and Petitioner consents to the jurisdiction of the courts and disciplinary boards of the State of Nevada in accordance with provisions as set forth in SCR 42(3) and (13). Petitioner respectfully requests that Petitioner be admitted to practice in the above-entitled court FOR THE PURPOSES OF THIS MATTER ONLY.

15. Petitioner has disclosed in writing to the client that the applicant is not admitted to practice in this jurisdiction and that the client has consented to such representation.

I, Jonah Horwitz, do hereby swear/affirm under penalty of perjury that the assertions
Print Petitioner Name
of this application and the following statements are true:

1) That I am the Petitioner in the above entitled matter.

2) That I have read Supreme Court Rule (SCR) 42 and meet all requirements contained therein, including, without limitation, the requirements set forth in SCR 42(2), as follows:

(A) I am not a member of the State Bar of Nevada;

(B) I am not a resident of the State of Nevada;

(C) I am not regularly employed as a lawyer in the State of Nevada;

(D) I am not engaged in substantial business, professional, or other activities in the State of Nevada;

(E) I am a member in good standing and eligible to practice before the bar of any jurisdiction of the United States; and

(F) I have associated a lawyer who is an active member in good standing of the State Bar of Nevada as counsel of record in this action or proceeding.

2) That I have read the foregoing application and know the contents thereof; that the same is true of my own knowledge except as to those matters therein stated on information and belief, and as to the matter I believe them to be true.

That I further certify that I am subject to the jurisdiction of the Courts and disciplinary boards of this state with respect to the law of this state governing the conduct of attorneys to the same extent as a member of the State Bar of Nevada; that I understand and shall comply with the standards of professional conduct required by members of the State Bar of Nevada; and that I am subject to the disciplinary jurisdiction to the State Bar of Nevada with respect to any of my actions occurring in the course of such appearance.

DATED this 20th day of September, 2016

Petitioner/Affiant (blue ink)
Jonah Holwitz

STATE OF Idaho)
) ss
COUNTY OF Ada)

GREG WORTHEN NOTARY PUBLIC STATE OF IDAHO

Subscribed and sworn to before me
this 20th day of September, 20 16

Notary Public

DESIGNATION, CERTIFICATION AND CONSENT OF NEVADA COUNSEL

SCR 42(14) Responsibilities of Nevada attorney of record.

(a) The Nevada attorney of record shall be responsible for and actively participate in the representation of a client in any proceeding that is subject to this rule.

(b) The Nevada attorney of record shall be present at all motions, pre-trials, or any matters in open court unless otherwise ordered by the court.

(c) The Nevada attorney of record shall be responsible to the court, arbitrator, mediator, or administrative agency or governmental body for the administration of any proceeding that is subject to this rule and for compliance with all state and local rules of practice. It is the responsibility of Nevada counsel to ensure that the proceeding is tried and managed in accordance with all applicable Nevada procedural and ethical rules.

I Paola Monique Armeni hereby agree to associate with Petitioner referenced hereinabove

Print Nevada Counsel Name

and further agree to perform all of the duties and responsibilities as required by Nevada Supreme Court Rule 42.

DATED this 22nd day of September, 20 2016

Paola Monique Armeni

Nevada Counsel of Record (blue ink)

STATE OF Nevada)
) ss
COUNTY OF Clark)

Subscribed and sworn to before me

this 22nd day of September, 2016

Notary Public

S. CONCEPCION
Notary Public State of Nevada
No. 99-54067-1
My Appt. Exp. March 24, 2019

EXHIBIT 2

EXHIBIT 2

Diane M. Fremgen
Clerk

WISCONSIN SUPREME COURT
OFFICE OF THE CLERK
110 E. Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688

Telephone: 608-266-1880
TTY: 800-947-3529
Fax: 608-267-0640
http://www.wicourts.gov

CERTIFICATE OF GOOD STANDING

I, Diane M. Fremgen, Clerk of the Supreme Court of Wisconsin certify that the records of this office show that:

JONAH HORWITZ

was admitted to practice as an attorney within this state on September 20, 2012 and is presently in good standing in this court.

Dated: September 15, 2016

DIANE M. FREMGEN
Clerk of Supreme Court

EXHIBIT 3

EXHIBIT 3

STAT

DISTRICT COURT
CLARK COUNTY, NEVADA

Case No. 81C53867

Samuel Howard

vs.

Renee Baker

_____/

STATE BAR OF NEVADA STATEMENT PURSUANT TO SUPREME COURT RULE 42(3)(b)

THE STATE BAR OF NEVADA, in response to the application of Petitioner, submits the following statement pursuant to SCR42(3):

SCR42(6)**Discretion.** The granting or denial of a motion to associate counsel pursuant to this rule by the court is discretionary. The court, arbitrator, mediator, or administrative or governmental hearing officer may revoke the authority of the person permitted to appear under this rule. Absent special circumstances, repeated appearances by any person or firm of attorneys pursuant to this rule shall be cause for denial of the motion to associate such person.

(a) **Limitation.** It shall be presumed, absent special circumstances, and only upon showing of good cause, that more than 5 appearances by any attorney granted under this rule in a 3-year period is excessive use of this rule.

(b) **Burden on applicant.** The applicant shall have the burden to establish special circumstances and good cause for an appearance in excess of the limitation set forth in subsection 6(a) of this rule. The applicant shall set forth the special circumstances and good cause in an affidavit attached to the original verified application.

1. DATE OF APPLICATION: September 23, 2016

2. APPLYING ATTORNEY: Jonah Joshua Horwitz, Esq.

3. FIRM NAME AND ADDRESS: Federal Defender Services of Idaho, 702 W. Idaho Street, Suite 900, Boise, ID 83702

4. NEVADA COUNSEL OF RECORD: Paola M. Armeni, Esq., Gentile, Cristalli, Miller, Armeni & Saverese, 410 S. Rampart Blvd., #420, Las Vegas, NV 89145

5. There is no record of previous applications for appearance by petitioner within the past three (3) years.

DATED this September 23, 2016

M Jorgensen

Mary Jorgensen
Member Services Manager
Pro Hac Vice Processor
STATE BAR OF NEVADA

PET
GENTILE CRISTALLI
MILLER ARMENI SAVARESE
PAOLA M. ARMENI
Nevada Bar No. 8357
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FEDERAL DEFENDER
SERVICES OF IDAHO
JONAH J. HORWITZ (*pro hac vice pending*)
Wisconsin Bar No. 1090065
E-mail: jonah_horwitz@fd.org
702 West Idaho Street, Suite 900
Boise, ID 83702
Tel: (208) 331-5530
Fax: (208) 331-5559

Attorneys for Petitioner Samuel Howard

DISTRICT COURT
CLARK COUNTY, NEVADA

SAMUEL HOWARD,

Petitioner,

vs.

TIMOTHY FILSON, Warden, and ADAM PAUL LAXALT, Attorney General for the State of Nevada,

Respondents.

Case No. 81C053867
Dept. No. XVII

Date of Hearing: 11/22/16
Time of Hearing: 8:30 AM

(Death Penalty Case)

PETITION FOR WRIT OF HABEAS CORPUS [POST-CONVICTION]

Petitioner Samuel Howard hereby files this Petition for Writ of Habeas Corpus pursuant to Nev. Rev. Stat. § 34.720 *et seq*. Mr. Howard alleges that his death sentence violates the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Sections 3 and 8 of

the Nevada Constitution because the Nevada Supreme Court improperly reweighed the aggravating evidence against the mitigating evidence on a post-conviction appeal instead of remanding his case to the trial court for a new sentencing before a jury.

PROCEDURAL ALLEGATIONS

Mr. Howard is currently in the custody of the State of Nevada at the Ely State Prison in Ely, Nevada, pursuant to a state court judgment of conviction and sentence of death. The conviction and sentence were entered on September 16, 1983, in the Eighth Judicial District Court, Clark County, Nevada, by the Honorable John F. Mendoza, Case No. 81C053867. 2 ROA 349.[1] No execution date is scheduled.

Respondent Timothy Filson is the Warden of Ely State Prison. As such, he has custody of Mr. Howard. Respondent Adam Paul Laxalt is the Nevada Attorney General. The Respondents are sued in their official capacities.

On May 21, 1981, a Clark County Grand Jury indicted Mr. Howard on two counts of robbery with the use of a deadly weapon, and one count of murder in the first degree with use of a deadly weapon. 1 ROA 1–6. Mr. Howard was arrested in California and extradited to Las Vegas, Nevada in November of 1981. He entered his plea of not guilty on November 30, 1982. 1 ROA 17.

On May 4, 1983, the jury found Mr. Howard guilty of all charges. 2 ROA 293. Following the penalty hearing on May 2–4, 1983, the jury returned a sentence of death on the first-degree murder charge. 2 ROA 294. On September 20, 1983, Mr. Howard was sentenced to fifteen years with a consecutive fifteen years for two counts of robbery with use of a deadly weapon. 2 ROA 349.

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[1] References to the record on appeal ("ROA") are to the ROA in Nevada Supreme Court case number 23386. Using the citation above as an example, "2" signifies the volume number and "349" the page number. Wherever possible, this petition will cite to documents already filed in state court challenges to Mr. Howard's conviction and sentence. *See* Nev. Rev. Stat. § 34.730(3)(a) ("If a petition challenges the validity of a conviction or sentence, it must be . . . [f]iled with the record of the original proceeding to which it relates . . . ."); EDCR 2.27(e) ("Copies of pleadings or other documents filed in the pending matter . . . shall not be attached as exhibits or made part of an appendix.").

Mr. Howard testified at his trial.

After he appealed from the judgment of conviction and sentence, the Nevada Supreme Court affirmed Mr. Howard's conviction and sentence on December 15, 1986. *See Howard v. State*, 102 Nev. 572, 729 P.2d 1341 (Nev. 1986).[2] On March 24, 1987, rehearing was denied. The United States Supreme Court denied Mr. Howard's petition for writ of certiorari on October 5, 1987. *See Howard v. Nevada*, 484 U.S. 872, 108 S. Ct. 203 (1987).

On October 28, 1987, Mr. Howard filed a petition for post-conviction relief in Clark County District Court.[3] An evidentiary hearing was held on the petition on August 25 and 26, 1988. *See* 3 ROA 491–568. The district court denied the petition on July 5, 1989, and on November 7, 1990, the Nevada Supreme Court affirmed. *Howard v. State*, 106 Nev. 713, 800 P.2d 175 (Nev. 1990). While that proceeding was pending, Mr. Howard filed a federal petition for habeas relief in the United States District Court for the District of Nevada in case number

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[2] On direct appeal, Mr. Howard raised the following issues:

1. Whether he received effective assistance of counsel at trial;
2. Whether the trial court erred when it refused to sever Count I from Counts II and III of the indictment;
3. Whether the trial court erred when it refused to grant an evidentiary hearing regarding the voluntariness of statements Mr. Howard made to law enforcement;
4. Whether the trial court erred when it failed to give an instruction to the jury that the testimony of an accomplice ought to be viewed with distrust;
5. Whether the trial court erred when it failed to give an instruction directing the jury to consider Dawana Thomas an accomplice as a matter of law;
6. Whether the trial court erred when it failed to prohibit the prosecution from using three aggravating circumstances to which objections were raised;
7. Whether the trial court erred when it failed to instruct the jury regarding sympathy and mercy.

The lists in this petition of claims raised in previous pleadings do not necessarily track the enumeration in earlier filings. Rather, the lists are intended to simplify and condense the claims for the convenience of the Court and of opposing counsel.

[3] In the petition, Mr. Howard raised the following ineffective-assistance-of-counsel claims:

1. Failure to present an insanity defense;
2. Failure to refute the State's evidence of Mr. Howard's future dangerousness;
3. Failure to object to prosecutorial misconduct;
4. Failure to argue the foregoing claims on direct appeal.

CV-N-88-264.[4] On June 23, 1988, the federal case was dismissed without prejudice. No evidentiary hearing was held in the case.

On May 2, 1991, Mr. Howard filed another federal habeas corpus petition in the same court in case number CV-N-91-196.[5] Mr. Howard's petition contained claims that had been presented in state court as well as claims that had not, and on October 16, 1991, the district court granted Mr. Howard's request to stay the case so that he could return to state court for exhaustion purposes. *See* 4 ROA 792–94.

In accordance with that order, Mr. Howard filed, on December 16, 1991, an amended petition for post-conviction relief in Clark County District Court.[6] *See* 4 ROA 786–90. Without holding an evidentiary hearing, the court denied the petition on July 7, 1992. *See* 5 ROA 867–71. On March 19, 1993, the Nevada Supreme Court dismissed Mr. Howard's appeal. The U.S.

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[4] In the petition, Mr. Howard raised the following claims:

1. Ineffective assistance of counsel;
2. Failure to sever Count I of the indictment from Counts II and III;
3. Failure to grant an evidentiary hearing on the voluntariness of statements made by Mr. Howard to law enforcement;
4. Failure to instruct the jury that the testimony of an accomplice ought to be viewed with distrust;
5. Failure to instruct the jury to consider Dawana Thomas an accomplice as a matter of law;
6. Failure to prohibit the prosecution from using three aggravating circumstances to which objections were raised;
7. Failure to instruct the jury on sympathy and mercy;
8. Mr. Howard was legally insane at the time of the offense.

[5] In the petition, Mr. Howard raised the following claims:

1. Ineffective assistance of counsel at trial;
2. Ineffective assistance of counsel on direct appeal;
3. Cumulative error.

[6] In his final amended petition, Mr. Howard raised the following issues:

1. Prosecutorial misconduct;
2. Ineffective assistance of counsel at trial;
3. Speedy trial violation;
4. Cumulative error.

Supreme Court denied certiorari on October 4, 1993. *See Howard v. Nevada*, 510 U.S. 840, 114 S. Ct. 122 (1993).

On January 12, 1994, the federal district court docketed a pro se petition for writ of habeas corpus submitted by Mr. Howard in case number CV-S-93-1209. After various procedural motions were adjudicated, Mr. Howard filed a second amended petition for writ of habeas corpus on January 27, 1997. The court entered an order on September 13, 2002, staying the proceeding so that Mr. Howard could exhaust in state court his federal habeas claims.

On December 20, 2002, Mr. Howard filed his third state petition for post-conviction relief in Clark County District Court. The court did not hold an evidentiary hearing and dismissed the petition on procedural grounds on October 23, 2003. On December 1, 2004, the Nevada Supreme Court affirmed the lower court's dismissal. *See Howard v. State*, No. 42593, 120 Nev. 1249, 131 P.3d 609 (Nev. 2004) (per curiam) (table). The federal district court lifted its stay on February 23, 2005, directing the Clerk to file Mr. Howard's Third Amended Petition for Writ of Habeas Corpus.

On October 25, 2007, Mr. Howard filed in Clark County District Court his fourth state petition for post-conviction relief.[7] In an order dated November 5, 2010, the state trial court denied the petition without holding an evidentiary hearing. The Nevada Supreme Court affirmed on July 30, 2014, though in so doing it declared void one of Mr. Howard's two aggravating circumstances. *See Howard v. State*, No. 57469, 2014 WL 3784121 (Nev. July 30, 2014) (per

---

[7] In his final amended petition, Mr. Howard raised the following issues:

1. The use of the felony-murder aggravator constituted double counting;
2. The use of the prior-felony aggravator was unlawful because Mr. Howard was never convicted of the earlier offense;
3. Trial counsel was ineffective;
4. The premeditation instruction was erroneous;
5. The first-degree murder statute was vague;
6. Unanimity from the jury was required on whether mitigation existed;
7. Prosecutorial misconduct;
8. Direct-appeal counsel was ineffective;
9. Appellate review was inadequate;
10. The Nevada death penalty is arbitrary and capricious;
11. Cumulative error.

curiam). On April 27, 2015, the U.S. Supreme Court declined to take certiorari review. *See Howard v. Nevada*, 135 S. Ct. 1898 (2015).

In Mr. Howard's federal habeas case, the district court denied relief on December 28, 2009. On August 10, 2015, the Ninth Circuit remanded the case to the district court for further proceedings. Litigation in district court is ongoing and no evidentiary hearing has yet been held.[8] Aside from this petition, the federal district court proceeding is the only action now pending that targets Mr. Howard's conviction and sentence.

The ground for relief raised herein has not been previously presented to this or any other court. Mr. Howard did not present the claim earlier because it was not available until recently, as the claim is based on *Hurst v. Florida*, 136 S. Ct. 616 (2016), which the U.S. Supreme Court handed down on January 12, 2016. By that date, Mr. Howard's prior state-court challenges to his conviction and sentence had already been fully disposed of. Consequently, the instant petition is the first opportunity that Mr. Howard has had to raise the claim.

This petition is being filed more than one year after the Nevada Supreme Court affirmed Mr. Howard's conviction and sentence on direct appeal. The delay was caused by the same factor noted above, i.e., the claim raised here relies on *Hurst*, and the *Hurst* opinion was not issued until January 12, 2016, more than twenty-nine years after the Nevada Supreme Court issued its opinion in Mr. Howard's direct appeal.

At trial, Mr. Howard was represented by Marcus Cooper and George Franzen. In his direct appeal, Mr. Howard was primarily represented by Lizzie R. Hatcher. Ms. Hatcher and John J. Graves both signed a motion to recall the remittitur with the Nevada Supreme Court in the direct appeal. A motion to extend the stay of the issuance of the remittitur was filed by Mr.

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[8] Mr. Howard's operative federal habeas petition raises twenty-five claims. *See* Ex. 1. Because of the volume of claims, Mr. Howard will not list each of them here and will instead refer to the recitation in the federal petition, which is attached as an exhibit, and incorporate that recitation by reference. *See id.* at 4–51; N.R.C.P. 10(c) ("Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."); Nev. Rev. Stat. § 34.780(1) ("The Nevada Rules of Civil Procedure, to the extent that they are not inconsistent with [post-conviction rules], apply to [post-conviction] proceedings . . . .").

Graves and Carmine J. Colucci. Messrs. Graves and Colucci submitted a petition for writ of certiorari to the U.S. Supreme Court in an effort to have that Court review the Nevada Supreme Court's decision in the direct appeal.

Mr. Howard has no sentences to serve after he completes the sentence imposed by the judgment under attack.

CLAIM ONE:

Mr. Howard's death sentence is invalid under the state and federal constitutional provisions guaranteeing an accused the right to a trial by jury. *See* U.S. Const. amends. VI & XIV; Nevada Const. art. I, secs. 3 & 8. In violation of these constitutional provisions, the Nevada Supreme Court in its July 30, 2014 decision struck one of Mr. Howard's two aggravating circumstances, reweighed the aggravating evidence against the mitigating evidence, and re-imposed a death sentence. Pursuant to U.S. Supreme Court precedent interpreting the Sixth Amendment, as incorporated against the States through the Fourteenth Amendment, only a jury—and not a judge or judges—can find the facts permitting the imposition of a death sentence. *See Hurst*, 136 S. Ct. at 621–24. Such fact-finding includes the process of measuring mitigation against aggravation and determining whether a death sentence is warranted. Nevada's state constitutional protections for a jury-trial right and for due process should be interpreted consistently with this federal caselaw. *See* Nevada Const. art. I, secs. 3 & 8. The Nevada Supreme Court therefore usurped the jury's constitutional role by reweighing the evidence and affirming Mr. Howard's death sentence. Now that one of two aggravators has been nullified by Nevada's highest court, Mr. Howard's death sentence is unlawful and he is entitled to a new penalty-phase proceeding before a jury of his peers.

The *Hurst* error identified above is structural, because stripping a capital jury of its constitutional fact-finding role at the penalty phase represents a defect affecting the framework within which the trial proceeds, and thus infects the entire trial process. Harmless error analysis is as a result inappropriate. If harmless error analysis is applied, the violation is prejudicial. Had the Nevada Supreme Court not engaged in its unlawful reweighing of the mitigation against the

aggravation, the court would instead have remanded for resentencing. Consequently, in the absence of the error, the result would have been different, and prejudice is apparent.

SUPPORTING FACTS:

The jury that sentenced Mr. Howard to death based its determination on two aggravating circumstances: (1) that Mr. Howard had previously been convicted of a violent felony; and (2) that he committed the murder while robbing the victim. *See* 2 ROA 294. In 2014, on a post-conviction appeal, the Nevada Supreme Court nullified the second aggravating circumstance. *See Howard*, 2014 WL 3784121, at *6. However, the court upheld the remaining aggravator, which alleged a prior violent felony. *See id.* at *5. Having struck one aggravator and affirmed the other, the court reweighed the aggravating evidence against the mitigating evidence and determined that a death sentence was still appropriate. *See id.* at *6. Accordingly, the Nevada Supreme Court affirmed the denial of post-conviction relief without remanding the case for a new penalty hearing. *See id.*

PRAYER FOR RELIEF

WHEREFORE, Petitioner Samuel Howard prays that the court issue a writ of habeas corpus and vacate his death sentence.

DATED this 5th day of October 2016.

Respectfully submitted,

GENTILE CRISTALLI
MILLER ARMENI SAVARESE

/s/ Paola M. Armeni

PAOLA M. ARMENI, ESQ.
Nevada Bar No. 8357
410 South Rampart Boulevard, Suite 420
Las Vegas, Nevada 89145

FEDERAL DEFENDER
SERVICES OF IDAHO

/s/ Jonah J. Horwitz

JONAH J. HORWITZ, ESQ. (*pro hac vice pending)*
Wisconsin Bar No. 1090065
720 West Idaho Street, Suite 900
Boise, Idaho 83702

VERIFICATION

I, Jonah J. Horwitz, declare as follows:

1. I am an Assistant Federal Public Defender in the Capital Habeas Unit for the Federal Defender Services of Idaho. I represent Samuel Howard in his federal habeas corpus proceeding, *Howard v. Baker*, D. Nev., No. 2:93-cv-1209. On October 3, 2016, Nevada counsel Paola Armeni submitted an application for me to appear before this Court *pro hac vice* on behalf of Mr. Howard.
2. Petitioner is confined and restrained of his liberty at Ely State Prison in Ely, Nevada. I make this verification on Mr. Howard's behalf because these matters are more within my knowledge than his, and because he is incarcerated in a state different from where my office is located. I have read this Petition and know the contents to be true except as to those matters stated on information and belief and as to such matters I believe them to be true.
3. I verify that Mr. Howard personally authorized me to commence this action.

/s/ Jonah J. Horwitz

Jonah J. Horwitz
Assistant Federal Public Defender
Federal Defender Services of Idaho

CERTIFICATE OF SERVICE BY MAIL

I, Joy Fish, hereby certify, pursuant to EDCR 7.26(a)(1), that on this 5th day of October 2016, I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS addressed to:

Timothy Filson
Warden, Ely State Prison
4569 North State Rt.
Ely, Nevada 89301

Steve Wolfson
Clark County District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101

Adam Paul Laxalt
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701

/s/ Joy Fish
Joy Fish
Paralegal
Federal Defender Services of Idaho

CSERV
GENTILE CRISTALLI
MILLER ARMENI SAVARESE
PAOLA M. ARMENI
Nevada Bar No. 8357
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FEDERAL DEFENDER
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JONAH J. HORWITZ *(pro have vice pending)*
Wisconsin Bar no. 1090065
Email: jonah_horwitz@fd.org
702 West Idaho Street, Suite 900
Boise, ID 83702
Tel: (208) 331-5530
Fax: (208) 311-5559

Attorneys for Petitioner Samuel Howard

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

SAMUEL HOWARD, Petitioner, vs. TIMOTHY FILSON, Warden, and ADAM PAUL LAXALT, Attorney General for the State of Nevada, Respondents.	CASE NO. 81C053867 DEPT. XVII

CERTIFICATE OF SERVICE

The undersigned, an employee of Gentile Cristalli Miller Armeni Savarese hereby certifies that on the 6th day of October, 2016, I served a copy of the **PETITION FOR WRIT OF HABEAS CORPUS [POST-CONVICTION] and NOTICE OF HEARING**, by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said

...

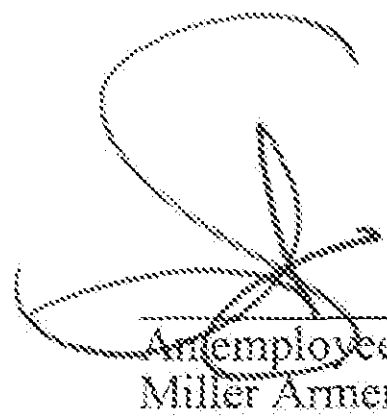
...

envelope addressed to:

CLARK COUNTY DISTRICT ATTORNEY
CRIMINAL DIVISION
STEVEN B. WOLFSON
District Attorney
HILARY HEAP
Deputy District Attorney
200 East Lewis Avenue
Las Vegas, Nevada 89101

ADAM PAUL LAXALT
Nevada Attorney General
100 North Carson Street
Carson, City, Nevada 89701

Timothy Filson
Warden, Ely State Prison
4569 North State Rt.
Ely, Nevada 89301



An employee of Gentile Cristalli
Miller Armeni Savarese

PET
GENTILE CRISTALLI
MILLER ARMENI SAVARESE
PAOLA M. ARMENI
Nevada Bar No. 8357
E-mail: parmeni@gcmaslaw.com
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702 West Idaho Street, Suite 900
Boise, ID 83702
Tel: (208) 331-5530
Fax: (208) 331-5559

Attorneys for Petitioner Samuel Howard

DISTRICT COURT
CLARK COUNTY, NEVADA

SAMUEL HOWARD,

Petitioner,

vs.

TIMOTHY FILSON, Warden, and ADAM PAUL LAXALT, Attorney General for the State of Nevada,

Respondents.

Case No. 81C053867
Dept. No. XVII

Date of Hearing: 11/22/16
Time of Hearing: 8:30 AM

(Death Penalty Case)

PETITION FOR WRIT OF HABEAS CORPUS [POST-CONVICTION]

Petitioner Samuel Howard hereby files this Petition for Writ of Habeas Corpus pursuant to Nev. Rev. Stat. § 34.720 *et seq.* Mr. Howard alleges that his death sentence violates the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Sections 3 and 8 of

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Respondent Timothy Filson is the Warden of Ely State Prison. As such, he has custody of Mr. Howard. Respondent Adam Paul Laxalt is the Nevada Attorney General. The Respondents are sued in their official capacities.

On May 21, 1981, a Clark County Grand Jury indicted Mr. Howard on two counts of robbery with the use of a deadly weapon, and one count of murder in the first degree with use of a deadly weapon. 1 ROA 1–6. Mr. Howard was arrested in California and extradited to Las Vegas, Nevada in November of 1981. He entered his plea of not guilty on November 30, 1982. 1 ROA 17.

On May 4, 1983, the jury found Mr. Howard guilty of all charges. 2 ROA 293. Following the penalty hearing on May 2–4, 1983, the jury returned a sentence of death on the first-degree murder charge. 2 ROA 294. On September 20, 1983, Mr. Howard was sentenced to fifteen years with a consecutive fifteen years for two counts of robbery with use of a deadly weapon. 2 ROA 349.

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[1] References to the record on appeal ("ROA") are to the ROA in Nevada Supreme Court case number 23386. Using the citation above as an example, "2" signifies the volume number and "349" the page number. Wherever possible, this petition will cite to documents already filed in state court challenges to Mr. Howard's conviction and sentence. *See* Nev. Rev. Stat. § 34.730(3)(a) ("If a petition challenges the validity of a conviction or sentence, it must be . . . [f]iled with the record of the original proceeding to which it relates . . . ."); EDCR 2.27(c) ("Copies of pleadings or other documents filed in the pending matter . . . shall not be attached as exhibits or made part of an appendix.").

Mr. Howard testified at his trial.

After he appealed from the judgment of conviction and sentence, the Nevada Supreme Court affirmed Mr. Howard's conviction and sentence on December 15, 1986. *See Howard v. State*, 102 Nev. 572, 729 P.2d 1341 (Nev. 1986).[2] On March 24, 1987, rehearing was denied. The United States Supreme Court denied Mr. Howard's petition for writ of certiorari on October 5, 1987. *See Howard v. Nevada*, 484 U.S. 872, 108 S. Ct. 203 (1987).

On October 28, 1987, Mr. Howard filed a petition for post-conviction relief in Clark County District Court.[3] An evidentiary hearing was held on the petition on August 25 and 26, 1988. *See* 3 ROA 491–568. The district court denied the petition on July 5, 1989, and on November 7, 1990, the Nevada Supreme Court affirmed. *Howard v. State*, 106 Nev. 713, 800 P.2d 175 (Nev. 1990). While that proceeding was pending, Mr. Howard filed a federal petition for habeas relief in the United States District Court for the District of Nevada in case number

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[2] On direct appeal, Mr. Howard raised the following issues:

1. Whether he received effective assistance of counsel at trial;
2. Whether the trial court erred when it refused to sever Count I from Counts II and III of the indictment;
3. Whether the trial court erred when it refused to grant an evidentiary hearing regarding the voluntariness of statements Mr. Howard made to law enforcement;
4. Whether the trial court erred when it failed to give an instruction to the jury that the testimony of an accomplice ought to be viewed with distrust;
5. Whether the trial court erred when it failed to give an instruction directing the jury to consider Dawana Thomas an accomplice as a matter of law;
6. Whether the trial court erred when it failed to prohibit the prosecution from using three aggravating circumstances to which objections were raised;
7. Whether the trial court erred when it failed to instruct the jury regarding sympathy and mercy.

The lists in this petition of claims raised in previous pleadings do not necessarily track the enumeration in earlier filings. Rather, the lists are intended to simplify and condense the claims for the convenience of the Court and of opposing counsel.

[3] In the petition, Mr. Howard raised the following ineffective-assistance-of-counsel claims:

1. Failure to present an insanity defense;
2. Failure to refute the State's evidence of Mr. Howard's future dangerousness;
3. Failure to object to prosecutorial misconduct;
4. Failure to argue the foregoing claims on direct appeal.

CV-N-88-264.[4] On June 23, 1988, the federal case was dismissed without prejudice. No evidentiary hearing was held in the case.

On May 2, 1991, Mr. Howard filed another federal habeas corpus petition in the same court in case number CV-N-91-196.[5] Mr. Howard's petition contained claims that had been presented in state court as well as claims that had not, and on October 16, 1991, the district court granted Mr. Howard's request to stay the case so that he could return to state court for exhaustion purposes. *See* 4 ROA 792–94.

In accordance with that order, Mr. Howard filed, on December 16, 1991, an amended petition for post-conviction relief in Clark County District Court.[6] *See* 4 ROA 786–90. Without holding an evidentiary hearing, the court denied the petition on July 7, 1992. *See* 5 ROA 867–71. On March 19, 1993, the Nevada Supreme Court dismissed Mr. Howard's appeal. The U.S.

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[4] In the petition, Mr. Howard raised the following claims:

1. Ineffective assistance of counsel;
2. Failure to sever Count I of the indictment from Counts II and III;
3. Failure to grant an evidentiary hearing on the voluntariness of statements made by Mr. Howard to law enforcement;
4. Failure to instruct the jury that the testimony of an accomplice ought to be viewed with distrust;
5. Failure to instruct the jury to consider Dawana Thomas an accomplice as a matter of law;
6. Failure to prohibit the prosecution from using three aggravating circumstances to which objections were raised;
7. Failure to instruct the jury on sympathy and mercy;
8. Mr. Howard was legally insane at the time of the offense.

[5] In the petition, Mr. Howard raised the following claims:

1. Ineffective assistance of counsel at trial;
2. Ineffective assistance of counsel on direct appeal;
3. Cumulative error.

[6] In his final amended petition, Mr. Howard raised the following issues:

1. Prosecutorial misconduct;
2. Ineffective assistance of counsel at trial;
3. Speedy trial violation;
4. Cumulative error.

Supreme Court denied certiorari on October 4, 1993. *See Howard v. Nevada*, 510 U.S. 840, 114 S. Ct. 122 (1993).

On January 12, 1994, the federal district court docketed a pro se petition for writ of habeas corpus submitted by Mr. Howard in case number CV-S-93-1209. After various procedural motions were adjudicated, Mr. Howard filed a second amended petition for writ of habeas corpus on January 27, 1997. The court entered an order on September 13, 2002, staying the proceeding so that Mr. Howard could exhaust in state court his federal habeas claims.

On December 20, 2002, Mr. Howard filed his third state petition for post-conviction relief in Clark County District Court. The court did not hold an evidentiary hearing and dismissed the petition on procedural grounds on October 23, 2003. On December 1, 2004, the Nevada Supreme Court affirmed the lower court's dismissal. *See Howard v. State*, No. 42593, 120 Nev. 1249, 131 P.3d 609 (Nev. 2004) (per curiam) (table). The federal district court lifted its stay on February 23, 2005, directing the Clerk to file Mr. Howard's Third Amended Petition for Writ of Habeas Corpus.

On October 25, 2007, Mr. Howard filed in Clark County District Court his fourth state petition for post-conviction relief.[7] In an order dated November 5, 2010, the state trial court denied the petition without holding an evidentiary hearing. The Nevada Supreme Court affirmed on July 30, 2014, though in so doing it declared void one of Mr. Howard's two aggravating circumstances. *See Howard v. State*, No. 57469, 2014 WL 3784121 (Nev. July 30, 2014) (per

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[7] In his final amended petition, Mr. Howard raised the following issues:

1. The use of the felony-murder aggravator constituted double counting;
2. The use of the prior-felony aggravator was unlawful because Mr. Howard was never convicted of the earlier offense;
3. Trial counsel was ineffective;
4. The premeditation instruction was erroneous;
5. The first-degree murder statute was vague;
6. Unanimity from the jury was required on whether mitigation existed;
7. Prosecutorial misconduct;
8. Direct-appeal counsel was ineffective;
9. Appellate review was inadequate;
10. The Nevada death penalty is arbitrary and capricious;
11. Cumulative error.

curiam). On April 27, 2015, the U.S. Supreme Court declined to take certiorari review. *See Howard v. Nevada*, 135 S. Ct. 1898 (2015).

In Mr. Howard's federal habeas case, the district court denied relief on December 28, 2009. On August 10, 2015, the Ninth Circuit remanded the case to the district court for further proceedings. Litigation in district court is ongoing and no evidentiary hearing has yet been held.[8] Aside from this petition, the federal district court proceeding is the only action now pending that targets Mr. Howard's conviction and sentence.

The ground for relief raised herein has not been previously presented to this or any other court. Mr. Howard did not present the claim earlier because it was not available until recently, as the claim is based on *Hurst v. Florida*, 136 S. Ct. 616 (2016), which the U.S. Supreme Court handed down on January 12, 2016. By that date, Mr. Howard's prior state-court challenges to his conviction and sentence had already been fully disposed of. Consequently, the instant petition is the first opportunity that Mr. Howard has had to raise the claim.

This petition is being filed more than one year after the Nevada Supreme Court affirmed Mr. Howard's conviction and sentence on direct appeal. The delay was caused by the same factor noted above, i.e., the claim raised here relies on *Hurst*, and the *Hurst* opinion was not issued until January 12, 2016, more than twenty-nine years after the Nevada Supreme Court issued its opinion in Mr. Howard's direct appeal.

At trial, Mr. Howard was represented by Marcus Cooper and George Franzen. In his direct appeal, Mr. Howard was primarily represented by Lizzie R. Hatcher. Ms. Hatcher and John J. Graves both signed a motion to recall the remittitur with the Nevada Supreme Court in the direct appeal. A motion to extend the stay of the issuance of the remittitur was filed by Mr.

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[8] Mr. Howard's operative federal habeas petition raises twenty-five claims. *See* Ex. 1. Because of the volume of claims, Mr. Howard will not list each of them here and will instead refer to the recitation in the federal petition, which is attached as an exhibit, and incorporate that recitation by reference. *See id.* at 4–51; N.R.C.P. 10(c) ("Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."); Nev. Rev. Stat. § 34.780(1) ("The Nevada Rules of Civil Procedure, to the extent that they are not inconsistent with [post-conviction rules], apply to [post-conviction] proceedings . . . .").

Graves and Carmine J. Colucci. Messrs. Graves and Colucci submitted a petition for writ of certiorari to the U.S. Supreme Court in an effort to have that Court review the Nevada Supreme Court's decision in the direct appeal.

Mr. Howard has no sentences to serve after he completes the sentence imposed by the judgment under attack.

CLAIM ONE:

Mr. Howard's death sentence is invalid under the state and federal constitutional provisions guaranteeing an accused the right to a trial by jury. *See* U.S. Const. amends. VI & XIV; Nevada Const. art. I, secs. 3 & 8. In violation of these constitutional provisions, the Nevada Supreme Court in its July 30, 2014 decision struck one of Mr. Howard's two aggravating circumstances, reweighed the aggravating evidence against the mitigating evidence, and re-imposed a death sentence. Pursuant to U.S. Supreme Court precedent interpreting the Sixth Amendment, as incorporated against the States through the Fourteenth Amendment, only a jury—and not a judge or judges—can find the facts permitting the imposition of a death sentence. *See Hurst*, 136 S. Ct. at 621–24. Such fact-finding includes the process of measuring mitigation against aggravation and determining whether a death sentence is warranted. Nevada's state constitutional protections for a jury-trial right and for due process should be interpreted consistently with this federal caselaw. *See* Nevada Const. art. I, secs. 3 & 8. The Nevada Supreme Court therefore usurped the jury's constitutional role by reweighing the evidence and affirming Mr. Howard's death sentence. Now that one of two aggravators has been nullified by Nevada's highest court, Mr. Howard's death sentence is unlawful and he is entitled to a new penalty-phase proceeding before a jury of his peers.

The *Hurst* error identified above is structural, because stripping a capital jury of its constitutional fact-finding role at the penalty phase represents a defect affecting the framework within which the trial proceeds, and thus infects the entire trial process. Harmless error analysis is as a result inappropriate. If harmless error analysis is applied, the violation is prejudicial. Had the Nevada Supreme Court not engaged in its unlawful reweighing of the mitigation against the

aggravation, the court would instead have remanded for resentencing. Consequently, in the absence of the error, the result would have been different, and prejudice is apparent.

SUPPORTING FACTS:

The jury that sentenced Mr. Howard to death based its determination on two aggravating circumstances: (1) that Mr. Howard had previously been convicted of a violent felony; and (2) that he committed the murder while robbing the victim. *See* 2 ROA 294. In 2014, on a post-conviction appeal, the Nevada Supreme Court nullified the second aggravating circumstance. *See Howard*, 2014 WL 3784121, at *6. However, the court upheld the remaining aggravator, which alleged a prior violent felony. *See id.* at *5. Having struck one aggravator and affirmed the other, the court reweighed the aggravating evidence against the mitigating evidence and determined that a death sentence was still appropriate. *See id.* at *6. Accordingly, the Nevada Supreme Court affirmed the denial of post-conviction relief without remanding the case for a new penalty hearing. *See id.*

PRAYER FOR RELIEF

WHEREFORE, Petitioner Samuel Howard prays that the court issue a writ of habeas corpus and vacate his death sentence.

DATED this 5th day of October 2016.

Respectfully submitted,

GENTILE CRISTALLI
MILLER ARMENI SAVARESE

/s/ Paola M. Armeni

PAOLA M. ARMENI, ESQ.
Nevada Bar No. 8357
410 South Rampart Boulevard, Suite 420
Las Vegas, Nevada 89145

FEDERAL DEFENDER
SERVICES OF IDAHO

/s/ Jonah J. Horwitz
JONAH J. HORWITZ, ESQ. *(pro hac vice pending)*
Wisconsin Bar No. 1090065
720 West Idaho Street, Suite 900
Boise, Idaho 83702

VERIFICATION

I, Jonah J. Horwitz, declare as follows:

1. I am an Assistant Federal Public Defender in the Capital Habeas Unit for the Federal Defender Services of Idaho. I represent Samuel Howard in his federal habeas corpus proceeding, *Howard v. Baker*, D. Nev., No. 2:93-cv-1209. On October 3, 2016, Nevada counsel Paola Armeni submitted an application for me to appear before this Court *pro hac vice* on behalf of Mr. Howard.
2. Petitioner is confined and restrained of his liberty at Ely State Prison in Ely, Nevada. I make this verification on Mr. Howard's behalf because these matters are more within my knowledge than his, and because he is incarcerated in a state different from where my office is located. I have read this Petition and know the contents to be true except as to those matters stated on information and belief and as to such matters I believe them to be true.
3. I verify that Mr. Howard personally authorized me to commence this action.

/s/ Jonah J. Horwitz
Jonah J. Horwitz
Assistant Federal Public Defender
Federal Defender Services of Idaho

CERTIFICATE OF SERVICE BY MAIL

I, Joy Fish, hereby certify, pursuant to EDCR 7.26(a)(1), that on this 5th day of October 2016, I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS addressed to:

Timothy Filson
Warden, Ely State Prison
4569 North State Rt.
Ely, Nevada 89301

Steve Wolfson
Clark County District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101

Adam Paul Laxalt
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701

/s/ Joy Fish
Joy Fish
Paralegal
Federal Defender Services of Idaho

Exhibit 1

(Fourth Amended Petition for Writ of Habeas Corpus, U.S.D.C. Case No. 93-CV-1209)

Samuel Richard Rubin, ID Bar No. 5126
Federal Public Defender
Deborah A. Czuba, ID Bar No. 9648
Jonah J. Horwitz, WI Bar No. 1090065
Federal Defender Services of Idaho
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Jonah_Horwitz@fd.org
Attorneys for Petitioner, Samuel Howard

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

SAMUEL HOWARD, Petitioner, vs. RENEE BAKER, *et al.*, Respondents.	Case No. 2:93-CV-1209-LRH-VCF **FOURTH AMENDED PETITION FOR WRIT OF HABEAS CORPUS** (Death Penalty Habeas Corpus Case)

1. Name and location of the court which entered the judgment of conviction under attack: Eighth Judicial District Court, Clark County, Las Vegas, Nevada.

2. Date judgment of conviction was entered: May 6, 1983 and September 20, 1983.

3. Case number: C53867.

4. Length of sentence: Count I (Robbery with use of deadly weapon) fifteen years and a consecutive fifteen years; Count II (Robbery with use of deadly weapon) fifteen years and a consecutive fifteen years. Count II is to run consecutively to Count I. Count III (Murder with use of deadly weapon) death. Count I and II are to run consecutively to Count III should Count III be commuted.

5. Petitioner is not presently serving a sentence imposed for a conviction other than the conviction under attack in this petition.

6. Nature of the offense involved (all counts): Count I – robbery with use of a deadly weapon which occurred on or about March 26, 1980 (victim Keith Kinsey); Count II –

robbery with use of a deadly weapon which occurred on March 27, 1980 (victim George Monahan); and Count III murder with use of a deadly weapon which occurred on March 27, 1980 (victim George Monahan).

7. Plea entered: Not guilty to all counts.

8. Guilty plea was (or was not) entered pursuant to a plea bargain: not applicable.

9. Trial testimony by Petitioner: Petitioner testified at his trial.

10. Direct appeal: Nevada Supreme Court, case number 15113, conviction and penalty affirmed by opinion filed December 15, 1986, 729 P.2d 1341, 102 Nev. 572 (Nev. 1986).

Petition for Writ of Certiorari filed May 19, 1986 with the United States Supreme Court, docket 86-6937, denied October 5, 1987, 484 U.S. 872, 108 S. Ct. 203 (1987).

11. Other state corrective proceedings:

A1. Petition for Post Conviction Relief, Eighth Judicial District Court, Clark County, Las Vegas, Nevada, filed October 29, 1987, denied July 5, 1989.

2. Case Number 20368, Nevada Supreme Court, appeal from dismissal of Petition for Post Conviction Relief, affirmed November 7, 1990.

B1. Amended Petition for Post Conviction Relief, Eighth Judicial District Court, Clark County, Las Vegas, Nevada, filed December 16, 1991, denied July 7, 1992.

2. Case Number 23386, Nevada Supreme Court, appeal from dismissal of Amended Petition for Post Conviction Relief, dismissed March 19, 1993.

3. Case Number 92-8909, United States Supreme Court, Petition for Writ of Certiorari, denied October 4, 1993.

C1. Petition for Writ of Habeas Corpus (Post Conviction), Eighth Judicial District Court, Clark County, Las Vegas, Nevada, filed December 20, 2002, denied October 28, 2003.

2. Case Number 42593, Nevada Supreme Court, appeal from dismissal of Petition for Writ of Habeas Corpus (Post Conviction), affirmed (without briefing by counsel for the Respondents) December 1, 2004.

D1. Amended Petition for Writ of Habeas Corpus (Post Conviction), Eighth Judicial District Court, Clark County, Las Vegas, Nevada, filed February 24, 2009, denied November 5, 2010.

2. Case Number 57469, Nevada Supreme Court, appeal from dismissal of Petition for Writ of Habeas Corpus (Post Conviction), affirmed July 30, 2014.

3. Case Number 14-8546, United States Supreme Court, Petition for Writ of Certiorari, denied April 27, 2015.

12. The grounds for relief raised in this petition have arguably all been presented to the highest state court having jurisdiction.

13. The following grounds for relief have arguably been presented to the highest state court having jurisdiction: All claims.

14. Other federal corrective procedures:

1. CV-N-88-264-ECR, United States District Court for the District of Nevada, Petition For Writ Of Habeas Corpus filed May 24, 1988, dismissed without prejudice June 23, 1988.

2. CV-N-91-196-ECR, United States District Court for the District of Nevada, Petition for Writ of Habeas Corpus filed May 1, 1991, stayed pending exhaustion in State Court and administratively closed subject to being reopened upon application to the Clerk of the Court.

15. Petitioner has no other petition, application, motion, or appeal now pending regarding the conviction and sentence challenged by way of this petition.

16. Petitioner was not represented by counsel of his choosing at any point in the previous proceedings. Petitioner was represented by appointed counsel at all previous proceedings as follows:

1. Clark County Public Defender's Office
309 South Third Street, Suite 226
Las Vegas, NV 89101
(Trial)

2. Lizzie R. Hatcher
725 South Sixth Street
Las Vegas, NV 89101
(Direct appeal)

3. John J. Graves, Jr.
Graves & Leavitt
601 South Sixth Street
Las Vegas, NV 89101
(Petition for Writ of Certiorari and initial Petition for Post Conviction Relief)

4. David Schieck
330 South Third Street, Suite 800
Las Vegas, NV 89155
(Petition for Post Conviction Relief and appeal of dismissal of Petition [NV Supreme Court case number 20368])

5. Cal Potter, III
Potter Law Offices
1125 Shadow Lane
Las Vegas, NV 89102
(Amended Petition for Post-Conviction Relief; appeal from dismissal of Amended Petition [NV Supreme Court case number 23386]; Petition for Writ of Certiorari [No. 92-8909]; and Federal Habeas Corpus No. CV-N-91-196-ECR)

6. Patricia M. Erickson
601 South Tenth Street, Suite 108
Las Vegas, NV 89101
(Predecessor counsel in the case at bar and state exhaustion habeas petition and appeal [NV Supreme Court case number 42593])

7. Federal Public Defender of Nevada
411 E. Bonneville Avenue, Suite 250
Las Vegas, NV 89101
(Federal Habeas Corpus No. CV-N-88-264-ECR, predecessor counsel in the case at bar, and predecessor counsel in state exhaustion habeas petition and appeal [NV Supreme Court case number 57469]

8. Federal Defender Services of Idaho
702 W. Idaho Street, Suite 900
Boise, ID 83702
(Current counsel in the case at bar and successor counsel in state exhaustion habeas petition and appeal [NV Supreme Court case number 57469])

17. Statements of claims for relief:

Claim One:

Petitioner Samuel Howard was denied a fundamentally fair trial in violation of the fifth, eighth and fourteenth amendments of the United States Constitution when the trial court refused to sever Count I from Counts II and III. The following facts support this claim:

1. On May 21, 1981, Mr. Howard was charged by way of indictment with three crimes which allegedly occurred in Las Vegas, Clark County, Nevada. In Count I, Mr. Howard was charged with robbery with use of a deadly weapon. This offense allegedly occurred on or about March 26, 1980 when it was alleged that Mr. Howard took personal property - a Motorola two-way channel radio belonging to Sears, Roebuck & Company, and a wallet and its contents. The indictment alleged that the radio and wallet (with its contents) were taken from Keith Kinsey. In Count II, Mr. Howard was charged with robbery with use of a deadly weapon. This offense allegedly occurred on or about March 27, 1980 when it was alleged that Mr. Howard took personal property (a wallet and contents) from George Monahan. In Count III, Mr. Howard was charged with murder with use of a deadly weapon. This offense allegedly occurred on or about March 27, 1980 and the person killed was Mr. Monahan.

2. On January 6, 1983, a "Motion To Sever Offenses" was filed on behalf of Mr. Howard. This motion was based upon the fact that the victim in Count I was not the same alleged victim in Counts II and III; the fact that the victims were unrelated to each other; and the fact that the acts alleged in Count I (taking of a two-way radio and wallet) were not part of the same act or transaction as the acts alleged in Counts II and III (taking of a wallet and murder of that person). The state court judge denied this motion, Mr. Howard proceeded to trial on all counts, and was convicted of all three charges. The failure to sever the trial of Count I from the trial of Counts II and III unfairly combined unrelated felony charges and bolstered the credibility of each charge in the eyes of the jury, all to Mr. Howard's prejudice.

3. The failure to sever the counts for trial was constitutional error and the state cannot establish, beyond a reasonable doubt, that this constitutional error did not affect the

verdict. Moreover, this constitutional error substantially and injuriously affected the fairness of Mr. Howard's trial and rendered the convictions and sentence fundamentally unfair.

Claim Two:

Mr. Howard was denied a fundamentally fair trial and sentencing hearing in violation of the fifth, eighth and fourteenth amendments to the United States Constitution by the trial court's failure to conduct an evidentiary hearing to determine the admissibility of statements made by Mr. Howard at the time that he was in custody. The following facts support this claim:

1. The indictment, underlying the present conviction, alleged criminal acts which occurred on or about March 26 and 27, 1980 in Las Vegas, Clark County, Nevada.[1]

2. On or about April 1, 1980, Mr. Howard was arrested by officers of the Downey Police Department, in California.

3. While in the custody of the Downey Police Department, a California detective named Morrow contacted Mr. Howard in an effort to question Mr. Howard regarding the crime for which he had been arrested (a robbery in California). At this time, Detective Morrow advised Mr. Howard of his *Miranda* rights and Mr. Howard immediately stated "Yes, I know my rights officer, but you may as well talk to the wall because I'm not talking to you." Detective Morrow noted that Mr. Howard was visibly upset, incoherent and lost his composure. Notwithstanding Mr. Howard's assertion of his right to remain silent, Detective Morrow continued questioning Mr. Howard.

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[1] Mr. Howard was not charged with those crimes until May 20, 1981.

4. On April 2, 1980, Las Vegas Metropolitan Police Department Homicide Detective Leavitt traveled to California to speak with Mr. Howard about the Las Vegas charges. At the time of this interview, Mr. Howard continued to be in the custody of the California authorities.

5. Prior to Mr. Howard's trial a "Motion for Evidentiary Hearing" was filed on April 1, 1983 which requested an evidentiary hearing to determine the admissibility of statements allegedly made by Mr. Howard to police officers of the Downey Police Department and the Las Vegas Metropolitan Police Department. On April 20, 1983, a "Motion to Suppress and Supplemental Points and Authorities in Support of Motion to Suppress" was filed on behalf of Mr. Howard. This Motion requested the trial court suppress and/or strike: 1) all statements taken from Mr. Howard by Detectives Morrow and Leavitt; 2) the two-way radio and all testimony given by witnesses identifying the radio as being in the possession of Mr. Howard; 3) car keys and all evidence taken from Mr. Howard at the time of his arrest by officers of the Downey Police Department; and 4) all evidence regarding identification of Mr. Howard as one George Williams which was obtained by officers of the Downey Police Department.

6. A hearing on the Motion for Evidentiary Hearing was scheduled for April 8, 1983. However, on April 7, 1983, counsel stipulated that the motion would be continued until the date of trial, April 11, 1983. When the trial date arrived, the matter was not pursued. No further mention of an evidentiary hearing was made until the State of Nevada presented the rebuttal testimony of Detective Leavitt.

7. Detective Leavitt testified at Mr. Howard's trial that prior to beginning his interview with Mr. Howard, he (Leavitt) informed Mr. Howard of his *Miranda* rights, Mr. Howard waived those rights, agreed to speak with Leavitt, and made incriminating statements regarding the Las Vegas charges.

8. After Leavitt's rebuttal testimony, defense counsel made the following statement to the trial judge, outside the presence of the jury:

> When Detective Leavitt was testifying we approached the bench and advised the court that there was a pending motion to suppress raising voluntariness and six[th] amendment issues which would be brought out during an out of the jury's presence hearing. . . . The Court allowed us to make the objection at this time, rather than interrupt the testimony of the witness. And I would just like that on the record.

9. The trial court denied a hearing and refused to suppress the statements given by Mr. Howard to the police officers.

10. The introduction of this unconstitutionally seized evidence substantially prejudiced Mr. Howard, rendered the trial proceeding fundamentally unfair, eroded the reliability of the verdicts and had a substantial and injurious effect on the guilt and penalty phase verdicts.

Claim Three:

Mr. Howard was denied due process of law as protected by the fifth and fourteenth amendments to the United States Constitution, was denied his right to an individualized sentence as protected by the eighth amendment to the United States Constitution, and was denied his right to a speedy trial as guaranteed by the sixth amendment to the United States Constitution when Mr. Howard's trial, which was scheduled to begin on January 10, 1983, was continued over Mr. Howard's personal and specifically enunciated objection to the continuance. The following facts support this claim:

1. On May 21, 1981, a grand jury seated in the Eighth Judicial District, Clark County, Nevada returned a true bill charging Mr. Howard with two counts of robbery with use of a deadly weapon and one count of murder with use of a deadly weapon. At this time, Mr. Howard was in custody in California.

2. Mr. Howard made his first appearance in the trial court of the Eighth Judicial District, Clark County, Nevada on November 23, 1982.

3. On November 30, 1982, the trial court was informed that Mr. Howard financially qualified to be represented by the Clark County Public Defender's Office. At this time, Terrance Jackson, a member of and team leader of the Clark County Public Defender's Office, informed the trial judge regarding his personal relationship with the murder victim - George Monahan. The murder victim had been Mr. Jackson's dentist for fifteen years. Additionally, Mr. Jackson's parents both knew the victim well. The trial judge ordered Mr. Jackson to have nothing to do with Mr. Howard's case. Immediately thereafter, Michael Peters, an attorney with the Clark County Public Defender's Office, indicated that as he was newly assigned to the case he would request a one week continuance of the arraignment in order to be able to confer with Mr. Howard. Mr. Howard objected to this request and stated "I would rather have a fast and a speedy trial, plus the fact the case is nearly three years old, and I'm presently doing time in California. I would like to get on with it. I'm quite sure the People are ready." Based upon this statement, the trial court arraigned Mr. Howard on the three charges and set a trial date of January 10, 1983.

4. On December 30, 1982, Mr. Peters, counsel for Mr. Howard, provided counsel for the State of Nevada with a Motion to Continue Trial. Mr. Peters indicated to the trial court that there would be no way that he would be prepared to go forward with the trial scheduled to begin on January 10, 1983.

5. On January 4, 1983, counsel for the parties appeared before the trial court. At this time, Mr. Peters informed the trial court that defense counsel were "simply not in a position to be ready for trial by Monday." Mr. Peters stated that "the investigation that's necessary in order to adequately represent, effectively represent Mr. Howard's trial has not been done; in fact, I

seriously doubt it has even gotten off the ground." When the trial court inquired about Mr. Howard's position, Mr. Howard objected to the vacation of the trial date. Mr. Howard stated "[u]nequivocally I want to go to trial."

6. On January 7, 1983, at 4:55 p.m., three days before trial was scheduled to begin, the State of Nevada filed the "Notice of Intent to Seek the Death Penalty."

7. On January 10, 1983, Mr. Peters requested the trial court vacate the trial date, and continue the trial over Mr. Howard's objection. Even though the trial judge recognized that Mr. Howard had continually insisted on being tried on January 10, 1983, the judge continued the trial to April 11, 1983.

8. On January 18, 1983, the State of Nevada filed a "Motion to Compel Production of Fingerprint Exemplar." This motion was based upon the State's desire for a comparison to be performed between the requested fingerprint exemplar and the latent fingerprints developed and lifted from the van of the murder victim George Monahan.

9. On January 27, 1983, over objection of Mr. Howard's counsel, the trial judge ordered that Mr. Howard submit to the taking of finger and palm print exemplars.

10. Thus, the defense counsel's request for a continuance of the January 10, 1983 trial date, as well as the unconstitutional actions of the trial court resulted in:

A. the waiver of any legal challenge to the sufficiency of notice received by the defendant as to the State's intent to seek death penalty. The Notice of Intent to Seek Death Penalty was filed on January 7, 1983 at 4:55 p.m. and counsel for the defendant personally received the Notice on January 10, 1983, the morning trial was to begin. Such notice is both statutorily and constitutionally inadequate and had the trial gone forward on that date and

Mr. Howard received the death penalty, Mr. Howard would have been entitled to a new penalty hearing; and,

B. the continuance allowed the State the time to obtain an order to compel Mr. Howard to submit a fingerprint exemplar. Thus, at the time trial was originally scheduled to begin, the State did not have an exemplar of Mr. Howard's prints for examination and the testimony of the State's fingerprint expert connecting Mr. Howard to fingerprints found on Mr. Monahan's stolen van could have been discredited and impeached. The fingerprints were the only physical evidence connecting Mr. Howard to the murder victim's stolen van.

11. The unconstitutional actions of the trial court substantially prejudiced Mr. Howard, rendered the trial proceeding fundamentally unfair, eroded the reliability of the verdicts and had a substantial and injurious effect on the guilt and penalty verdicts.

Claim Four:

Mr. Howard was denied a fundamentally fair trial in violation of the fifth and fourteenth amendments to the United States Constitution and was denied his sixth amendment right to the effective assistance of counsel by the trial court's interference with the attorney-client relationship by specifically stating that defense counsel had been ineffective but thereafter refusing to allow counsel to withdraw and refusing to appoint new counsel. The following facts support this claim:

1. On November 30, 1982, the trial court was informed that Mr. Howard financially qualified to be represented by the Clark County Public Defender's Office. At this hearing, Terrance Jackson, a member of and team leader of the Clark County Public Defender's Office,

also informed the trial judge regarding Mr. Jackson's personal relationship with the murder victim – George Monahan. The murder victim had been Mr. Jackson's dentist for fifteen years. Additionally, Mr. Jackson's parents both knew the murder victim well. The trial judge ordered Mr. Jackson to have nothing to do with Mr. Howard's case.

2. On December 30, 1982, Mr. Howard filed a "Motion for Substitution and Removal Of Attorney Of Record." This Motion was based on the following facts:

A. Michael Peters was assigned to represent Mr. Howard on November 23, 1982. Between that date and December 22, 1982, Mr. Peters had been to the jail to see Mr. Howard on one brief occasion;

B. Mr. Peters had failed to answer or return any of the telephone calls placed to his office by Mr. Howard;

C. The murder victim was a personal friend and dentist of members of the Clark County Public Defender's Office;

D. Mr. Peters' heavy case load prevented him from affording the proper amount of attention to Mr. Howard's case; and,

E. Mr. Peters had failed to establish a good working relationship with Mr. Howard and Mr. Howard had thus lost all confidence and trust in Mr. Peters and the Clark County Public Defender's Office.

3. On December 30, 1982, the trial court was informed of the following additional information regarding Mr. Howard's representation by the Clark County Public Defender's Office:

A. Mr. Howard had never reviewed any of the "discovery" underlying the charges in his case based upon the fact that it was the office policy of the Public Defender's Office not to provide such documentation to its clients; and

B. Mr. Howard had told Mr. Peters about numerous pre-trial motions that Mr. Howard felt should be filed in the case and that had not been done.

4. On January 10, 1983, the trial court was informed of the following information:

A. Terrance Jackson was not the only attorney in the Clark County Public Defender's office who was familiar with the murder victim in the Howard case.

B. Mr. Gibson, another attorney at the Clark County Public Defender's office, had expressed his hope that Mr. Howard be executed. Mr. Gibson was a friend of Mr. Monahan, and played on numerous sports teams with him.

C. Mr. Howard did not trust the lawyers in the Clark County Public Defender's office because of the above relationships between the murder victim and members of the office and based upon this lack of trust had refused to discuss his case with his counsel.

D. A majority of the motions filed by Mr. Howard's counsel were boiler-plate-type motions that were filed in an effort to give some semblance of effective representation.

5. On January 10, 1983, the trial court recognized and stated the following:

A. the court's order that Mr. Jackson not be involved in any way in Mr. Howard's case was expanded to preclude Morgan Harris (the Clark County Public Defender), Mr. Jackson and any other deputy of the Public Defender's Office from becoming involved in the case without the express approval of Marcus

Cooper and/or George Franzen. The court specified that it did not want "anymore of this garbage of coming back before the court that one deputy doesn't like this defendant or whatever." While the trial judge recognized that he did not know how that remark came about, a "defendant is entitled to feel that he has [his counsel's] one-thousand percent loyalty and [his counsel's] efforts in doing so. . . . [H]e's also entitled to feel that [his counsel is] not going to be influenced . . . by any such involvement from any other members of the Public Defender's office." The trial judge specifically stated "if it occurs again that individual deputy will appear before this court to show cause as to why he should not be held in contempt."

B. Mr. Howard had continually insisted on being tried on January 10, 1983.

C. Mr. Howard's motion to the court was based upon the fact that Mr. Peters had not represented him at all and had done so without any diligence and that Mr. Peters had represented him incompetently. The trial court specifically found that these allegations were true, and also found:

D. that it was "a poor day in the judicial system when a defendant has to come by way of his own personal motion to assert that the public defender assigned to him is not doing what the law requires both of him as an employee of this county and as a lawyer admitted to practice law in this state."

E. that the court did not "know what would cause an attorney to allow this case to get this bungled up and allow a defendant to almost go to trial, [it] being almost ten days before trial, before he even has done anything with the case."

F. the trial court was "shocked" and did not find the representation to be adequate.

G. the trial court did not understand why motions were being filed so late except "to secure a continuance to [undo] what had already been done by inaction."

H. that Mr. Howard "was not competently and adequately represented."

I. that there seemed "to be a greater emphasis upon the needs of the public defenders than there [was] upon the needs and the rights of defendants" and that someone within the public defender's office "ought to begin to pay attention to the defendant's rights, not only to speedy trial but to an adequate representation."

6. On April 8, 1983, two days before Mr. Howard's trial began, Mr. Howard submitted a letter to the trial judge expressing his concern over the ineffectiveness of his counsel's representation.

7. On April 10 and 11, 1983, the first and second days of trial, the trial court was again informed of the fact that there had been no communication between Mr. Howard and his attorneys and that this had been the case since the inception of the Public Defender's representation in November of 1982.

8. The unconstitutional actions of the trial court substantially prejudiced Mr. Howard, rendered the trial proceeding fundamentally unfair, eroded the reliability of the verdicts and had a substantial and injurious effect on the guilt and penalty verdicts.

Claim Five:

Mr. Howard was denied a fair trial in violation of the fifth and fourteenth amendments to the United States Constitution where the trial court failed to give Mr. Howard's requested

instructions to the jury, at the conclusion of the guilt phase, that witness Dawana Thomas was an accomplice as a matter of law and further that the testimony of an accomplice ought to be viewed with distrust. The unconstitutional actions of the trial court substantially prejudiced Mr. Howard, rendered the trial proceeding fundamentally unfair, eroded the reliability of the verdicts and had a substantial and injurious effect on the guilt and penalty verdicts.

Claim Six:

Mr. Howard was denied a fair trial in violation of the fifth, eighth and fourteenth amendments to the United States Constitution because the instructions given to the jury allowed it to convict Mr. Howard on a degree of proof less than that required by due process. The following facts support this claim:

1. The jury was improperly instructed regarding the presumption of innocence and the prosecution's burden of proving the elements of the crime beyond a reasonable doubt.

A. The jury was instructed, pursuant to instruction number 21 of the guilt phase instructions, that:

> The defendant is presumed to be 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 and substantial, 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.

1. The instruction inflates the quantum of doubt which must be found before a "reasonable doubt" exists and thus the instruction dilutes the state's burden of proving a criminal offense beyond a reasonable doubt.

2. The instruction includes the "actual and substantial doubt" language condemned by the United States Supreme Court in *Cage v. Louisiana*, 498 U.S. 39 (1990) (per curiam).

3. The instruction states that a reasonable doubt "is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life." A doubt that would "govern or control" a person is clearly greater than one which would only cause a person to "hesitate to act."

4. The "govern or control" language is a statement defining the proper standard of satisfying the burden of proof. The "govern or control" language is not a constitutionally acceptable definition of "reasonable doubt." The Nevada instruction is a bizarre transposition of the definition of the burden of proof beyond a reasonable doubt and as such is an unconstitutionally high standard of doubt.

5. The instruction also states "doubt to be reasonable must be actual and substantial, not mere possibility or speculation." This language is functionally identical to the language condemned in *Cage*. Moreover, this instruction leads to the danger that "substantial doubt" would be interpreted by a juror in parallel with the preceding reference to a doubt which would "govern or control" a person's actions. The danger that the

jurors would adopt this parallel interpretation is exacerbated by the parallel references to "possible" doubt. The last sentence of the instruction contrasts "actual and substantial doubt" with "mere possibility." The second sentence of the instruction contrasts "mere possible doubt" with doubt which "would govern or control a person in the more weighty affairs of life." Thus, in the context of this instruction, it was inevitable that the jurors would interpret "substantial doubt" as requiring the "govern or control" standard, which is an unconstitutional standard for determining "reasonable doubt."

6. Between the two sentences containing clearly unconstitutional language, the third sentence of the instruction provides that there is reasonable doubt, if after consideration of the evidence, the jurors "can say they feel an abiding conviction of the truth of the charge." This sentence, in context, does nothing to ameliorate the defects in the rest of the instruction. The "abiding conviction" language does nothing to explain the degree of certainty required. The "abiding conviction" term is not linked to any language suggesting a proper definition of the burden of proof standard; and the immediately preceding reference to the unconstitutional "govern or control" doubt standard could only imply that the corresponding proof standard was impermissibly low.

7. The instruction does nothing to dispel the false inference that the jurors could have an "abiding conviction" as to guilt of the offense

charged if the reasonable doubts they harbored were not sufficient to "govern or control" their actions.

B. The jury was instructed, pursuant to guilt phase instruction number 15, that:

> The offense of First Degree Murder, with which the defendant is charged in the indictment, necessarily includes the lesser offense of Second Degree Murder. If the evidence is sufficient to suppon a finding of guilt of both the offense charged and a lesser included offense, but you entertain a reasonable doubt as to which offense . . . the defendant is guilty [of], it is your duty to find him guilty only of the lesser offense.

1. By its own language, this instruction erroneously allows a jury to return a verdict of guilty even when it entertains a reasonable doubt as to guilt.

C. The jury was also improperly instructed on the definition of premeditation, the mental state element of the crime, and malice. *See* Claims 7, 8 and 9, which are incorporated by reference.

2. These instructions diluted the proper standard of proof, introduced confusion and ambiguity into the jury's assessments, and abridged the fundamental principle that the accused may be convicted only when the jury finds, beyond a reasonable doubt, every fact necessary to constitute the crime with which he is charged.

3. These instructions substantially prejudiced Mr. Howard, rendered the trial proceeding fundamentally unfair, eroded the reliability of the verdicts and had a substantial and injurious effect on the guilt and penalty phase verdicts.

Claim Seven:

Mr. Howard's convictions are unlawfully and unconstitutionally imposed, in violation of the fifth, sixth, eighth and fourteenth amendments to the United States Constitution, because the

jury was not properly instructed on, and did not properly find, the mental state element of the crime of first degree murder. The following facts support this claim:

1. Except in the case of criminal negligence, Nevada law requires the "union" of act and intention to constitute a crime. N.R.S. 193.190. The mental state required for a first degree murder is willful, deliberate and premeditated intention to unlawfully take away the life of another. N.R.S. 200.030, 200.020, 200.010.

2. Mr. Howard's jurors were not clearly instructed that this mens rea was necessary to return a guilty verdict. Instead they were instructed in a confusing manner as to general intent.

The jurors were instructed by guilt phase instruction number 20 that:

> 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.

3. Although the jury was given other instructions defining "malice" and "premeditation," the jury was never told the specific mental state required except for the vague, general assertion that the crime required "an intent to do the act." Consequently, the jury could find Mr. Howard guilty solely because of his general criminal intent – the "intent to do the act" – without finding the specific mental state of the crime to be true.

4. Mr. Howard incorporates Claim 8 by reference herein. The unconstitutional definition of "premeditation" exacerbated the error defined in the present claim.

5. Mr. Howard incorporates Claim 9 by reference herein. The unconstitutional definition of "malice" exacerbated the error defined in the present claim.

6. The improper, confusing, and vague instructions regarding the mental state element invalidate the jury's verdict. This error substantially prejudiced Mr. Howard, rendered the trial proceeding fundamentally unfair, eroded the reliability of the verdicts and had a substantial and injurious effect on the guilt and penalty phase verdicts.

Claim Eight:

Mr. Howard's convictions are unlawfully and unconstitutionally imposed in violation of the fifth, sixth, eighth and fourteenth amendments to the United States Constitution because the definition of premeditation given to the jury in the guilt phase of Mr. Howard's trial was erroneous, confusing and eliminated any meaningful distinction between first and second degree murder. The following facts support this claim:

1. Mr. Howard incorporates the facts contained in paragraphs 1, 2 and 3 of Claim 7, *supra*.

2. In addition to the other instructional problems with the mental state requirement, the instructions indicated that "murder of the first degree is . . . perpetrated by any kind of wil[l]ful, deliberate and premeditated killing . . . or . . . committed in the perpetration or attempted perpetration of robbery." The jury was instructed that "murder in the second degree is murder with malice aforethought, but without the admixture of premeditation." The distinction between degrees of murder therefore hinges on the difference between malice – a deliberate intention to kill – and premeditation. N.R.S. 200.030.

3. Jury instruction number 12 defined premeditation as:

> [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. . . . 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.

This language confuses the idea of premeditation with the idea of intent to kill, destroying the crucial distinction between first and second degree murder. Defining premeditation as something instantaneous, something that can happen "*at* the time of the killing," distorts the necessary mens rea finding.

4. The misdefining of premeditation in this way, and the failure to explain the different mental states involved in the degrees of murder, deprived Mr. Howard of his right to have the jury decide all the necessary elements of the charged crime and rendered the second degree murder instruction meaningless. This error substantially prejudiced Mr. Howard, rendered the trial proceeding fundamentally unfair, eroded the reliability of the verdicts and had a substantial and injurious effect on the guilt and penalty phase verdicts.

Claim Nine:

Mr. Howard's convictions are unlawful and unconstitutionally imposed in violation of the fifth, eighth and fourteenth amendments to the United States Constitution because Mr. Howard was convicted pursuant to instructions which failed to coherently define the mental state required for murder, defined malice in a vague, incomprehensible and improper manner, and unconstitutionally shifted the burden to Mr. Howard to negate malice. The following facts support this claim:

1. Mr. Howard's jury was instructed that murder "is the unlawful killing of a human being, with malice aforethought, either express or implied."

2. The jury was also instructed that:

> Malice aforethought, as used in the definition of murder, means the intentional doing of a wrongful act without legal cause 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 but denotes rather an unlawful purpose and design in contradistinction to accident and mischance.

3. The jury was instructed that the distinction between express and implied malice was based upon the following:

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

4. Under these instructions, no rational juror could decipher the meaning of malice. It appears to be an all-encompassing mental state, extending to all cases of homicide dependent only on consciousness. The instruction is vague and makes no meaningful distinction between mental states.

5. The instruction also creates an unconstitutional presumption that malice exists whenever a homicide has occurred, thus improperly shifting the burden of proof on the mental state element of murder to Mr. Howard.

6. The effect of this erroneous, vague and unconstitutional instruction was exacerbated by the problems with the definition of premeditation (Claim 8), and the general intent instruction (Claim 7). This error substantially prejudiced Mr. Howard, rendered the trial

proceeding fundamentally unfair, eroded the reliability of the verdicts and had a substantial and injurious effect on the guilt and penalty phase verdicts.

Claim Ten:

Mr. Howard was denied his rights guaranteed by the eighth and fourteenth amendments of the United States Constitution where the trial court instructed the jury at the conclusion of the penalty hearing that a verdict, at that phase of the proceeding, may never be influenced by sympathy, prejudice or public opinion. The following facts support this claim:

1. At the penalty hearing, the trial court instructed the jury that "a verdict may never by influenced by sympathy."

2. Trial counsel specifically objected to the giving of this instruction and urged the trial court to not preclude the jury from expressing mercy or sympathy for Mr. Howard.

3. During the State's closing argument, the district attorney argued against the jury extending sympathy toward Mr. Howard.

Claim Eleven:

Mr. Howard was denied his right to due process of law as guaranteed by the fifth and fourteenth amendments to the United States Constitution, and was denied his right to an individualized sentence as guaranteed by the eighth amendment to the United States Constitution by the trial court's failure to instruct the jury with regard to the statutory mitigating circumstance that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. This unconstitutional action by the trial court substantially prejudiced Mr. Howard, rendered the penalty proceeding fundamentally unfair, eroded the reliability of the verdicts and had a substantial and injurious effect on the penalty phase verdicts.

Claim Twelve:

Mr. Howard was denied his right to due process of law as guaranteed by the fifth and fourteenth amendments to the United States Constitution, and was denied his right to an individualized sentence as guaranteed by the eighth amendment to the United States Constitution by the trial court's limitation of the mitigating circumstances, to be considered by the jury at the conclusion of the penalty hearing, to the statutory factor of "any other mitigating circumstance." This unconstitutional action by the trial court substantially prejudiced Mr. Howard, rendered the penalty proceeding fundamentally unfair, eroded the reliability of the verdicts and had a substantial and injurious effect on the penalty phase verdicts.

Claim Thirteen:

Mr. Howard was denied his right to due process of law as guaranteed by the fifth and fourteenth amendments to the United States Constitution, and his right to an individualized sentence as guaranteed by the eighth amendment to the United States Constitution by the trial court's instructions and verdict forms which were submitted to the jury, at the conclusion of the penalty hearing, which required a unanimous finding with regard to the existence of any mitigating circumstance. This unconstitutional action by the trial court substantially prejudiced Mr. Howard, rendered the penalty proceeding fundamentally unfair, eroded the reliability of the verdicts and had a substantial and injurious effect on the penalty phase verdicts.

Claim Fourteen:

Mr. Howard was denied his rights guaranteed by the fifth, eighth and fourteenth amendments of the United States Constitution by the numerous instances of prosecutorial misconduct which occurred during trial. The following facts support this claim:

1. The prosecution tampered with a juror which resulted in a motion for mistrial by counsel for Mr. Howard which was denied by the trial court.

2. During the rebuttal penalty closing argument the prosecutor expressed his personal belief that the death penalty was the only punishment to be imposed in the case.

3. During the rebuttal penalty closing argument, the prosecutor expressed his personal endorsement of the death penalty.

4. During the rebuttal penalty closing argument, the prosecutor improperly argued the improbability of rehabilitation and the possibility of escape and future unknown killings that would be committed by Mr. Howard if he were given a sentence less than death.

5. During the rebuttal penalty closing argument, the prosecutor improperly compared Mr. Howard's life to that of the victim.

6. During the rebuttal penalty closing argument, the prosecutor improperly compared Mr. Howard to a notorious murderer.

7. During the rebuttal penalty closing argument, the prosecutor referenced the notion that the community would benefit if the defendant received the death penalty.

The unconstitutional actions of the prosecutor substantially prejudiced Mr. Howard, rendered the guilt and penalty proceedings fundamentally unfair, eroded the reliability of the verdicts and had a substantial and injurious effect on the guilt and penalty phase verdicts.

Claim Fifteen:

Mr. Howard was deprived of due process of law, equal protections of the laws, and a reliable sentence in violation of the fifth, eighth and fourteenth amendments to the United States Constitution by the use of the felony of robbery to support his conviction of murder on a felony-

murder theory and to support an aggravating factor in the penalty phase. The following facts support this claim:

1. Mr. Howard was charged by way of indictment with two counts of robbery and one count of murder, all with the use of a deadly weapon. Count I of the indictment alleged a robbery on or about March 26, 1980 and further alleged that the victim of the robbery was Keith Kinsey. Count II of the indictment alleged a robbery on or about March 27, 1980 and further alleged that the victim of the robbery was George Monahan. Count III of the indictment alleged the murder of Mr. Monahan on or about March 27, 1980.

2. At Mr. Howard's trial the jury was instructed that "murder of the first degree is murder which is ... **(b) committed in the perpetration or attempted perpetration of robbery.**"

3. At Mr. Howard's trial the jury was instructed that:

> There are certain kinds of murder which carry with them conclusive evidence of malice aforethought. One of these classes of murder is murder committed in the perpetration or attempted perpetration of robbery. Therefore, a killing which is committed in the perpetration or attempted perpetration of robbery is deemed to be murder of the first degree, whether the killing was intentional, unintentional or accidental. The specific intent to perpetrate or attempt to perpetrate robbery must be proven beyond a reasonable doubt.

4. One of the aggravating circumstances alleged in the Notice of Intent to Seek the Death Penalty is that "the murder was committed while the person was engaged in the commission of or an attempt to commit any robbery."

5. Nevada is a "weighing" state, in which the existence of an aggravating factor is a necessary predicate to death eligibility, and in which aggravating factors are also weighed in the ultimate calculus to determine the appropriate sentence to be imposed.

6. The use of the same facts as a necessary element of first-degree murder and as an additional "weight" in favor of the imposition of the death penalty results in an arbitrary, capricious and irrational sentence, because two separate increments of culpability are based on the same facts which do not rationally support both imposition of liability for the murder offense and aggravation of the same offense.

7. When Mr. Howard was charged with the offense of first degree murder based upon the theory of felony murder, the application of the aggravating circumstance of robbery was unconstitutional as the circumstance *does not narrow* the class of death eligible murderers as required by both the eighth amendment of the United States Constitution and the caselaw of the United States Supreme Court. The Nevada statutes which permit the duplicative use of the robbery for the finding of first degree murder and for the imposition of the death penalty fail to narrow the class of persons eligible for the death penalty because automatically instructing the sentencing body on the underlying felony in a felony murder case does nothing to aid the jury in its task of distinguishing between first-degree homicides and defendants for the purpose of imposing the death penalty. Relevant distinctions dim, since all participants in a felony murder, regardless of varying degrees of culpability, enter the sentencing stage with at least one aggravating factor against them. The felony murderer, in contrast to the premeditated murderer, enters the sentencing stage with one aggravating circumstance automatically charged against him. This disparity in sentencing treatment bears no relationship to legitimate distinguishing features upon which the death penalty might constitutionally rest.

8. The unconstitutional statutes which permitted this action by the trial court substantially prejudiced Mr. Howard, rendered the penalty proceeding fundamentally unfair,

eroded the reliability of the verdicts and had a substantial and injurious effect on the penalty phase verdicts.

Claim Sixteen:

Mr. Howard was denied his right to due process of law, a reliable sentence, and to be free from cruel and unusual punishment, in violation of the eighth and fourteenth amendments to the United States Constitution, by the use of a prior-violent-felony as an aggravating circumstance when no sentence was ever imposed in that felony case and no judgment entered, disqualifying the case from serving as a prior "conviction" and rendering the aggravating circumstance invalid. The following facts support this claim:

1. As an aggravating circumstance, the State of Nevada alleged that the murder of Mr. Monahan "was committed by a person who was previously convicted of . . . a felony involving the use or threat of violence to the person of another." N.R.S. 200.033(2) (1979). To support the aggravating circumstance, the State relied upon a case brought against Mr. Howard in New York for committing a robbery on or about May 24, 1978.

2. At the time of Mr. Monahan's death, and at the time of Mr. Howard's trial for his murder, Nevada law had established that a prior-felony offense could only serve as an aggravating circumstance under § 200.033 if it resulted in a final judgment and sentence. Mr. Howard had not been sentenced for the New York robbery and no final judgment had been entered in that case. The prior-felony aggravating circumstance was therefore invalid.

3. By using an invalid aggravating circumstance to impose a sentence of death, the prosecution and the Nevada courts violated Mr. Howard's eighth amendment and due process rights. *See Johnson v. Mississippi*, 486 U.S. 578, 584–90 (1988).

4. The jury heard evidence that was highly prejudicial to Mr. Howard regarding the New York robbery case.

5. The unconstitutional actions of the prosecution and the Nevada courts substantially prejudiced Mr. Howard, rendered the penalty proceeding fundamentally unfair, eroded the reliability of the death sentence and had a substantial and injurious effect on the penalty phase verdict.

Claim Seventeen:

Mr. Howard was denied due process of law in violation of the fourteenth amendment to the United States Constitution when the Nevada Supreme Court held, contrary to its earlier precedent, that the prior-felony aggravating circumstance codified in N.R.S. 200.033(2) (1979) could be satisfied by a criminal case that never led to a final judgment and sentence. The following facts support this claim:

1. The facts stated in support of Claim 16 are incorporated by this reference as if fully set forth herein.

2. By upholding the prior-felony aggravating circumstance, despite the absence of a judgment and sentence in the New York robbery case, the Nevada Supreme Court increased Mr. Howard's sentence on the basis of an unexpected and indefensible expansion of the criminal law, in violation of his due process rights. *See Bouie v. City of Columbia*, 378 U.S. 347, 353–54 (1964).

3. The unconstitutional actions of the Nevada courts substantially prejudiced Mr. Howard, rendered the penalty proceeding fundamentally unfair, eroded the reliability of the death sentence and had a substantial and injurious effect on the penalty phase verdict.

Claim Eighteen:

Mr. Howard was denied a fair penalty hearing in violation of the fifth, eighth and fourteenth amendments to the United States Constitution because the instructions given to the jury allowed it to sentence Mr. Howard to death on a degree of proof less than that required by due process. The following facts support this claim:

1. The jury was improperly instructed regarding the presumption of innocence and the prosecution's burden of proving the elements of the crime beyond a reasonable doubt.

A. The jury was instructed, pursuant to instruction number 8 of the penalty phase instructions, that:

> 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 and substantial, not mere possibility or speculation.

1. The instruction includes the "actual and substantial doubt" language condemned by the United States Supreme Court in *Cage v. Louisiana*, 498 U.S. 39 (1990) (per curiam).

2. The instruction states that a reasonable doubt "is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life." A doubt that would "govern or control" a person is clearly greater than one which would only cause a person to "hesitate to act."

3. The "govern or control" language is a statement defining the proper standard of satisfying the burden of proof. The "govern or control"

language is not a constitutionally acceptable definition of "reasonable doubt." The Nevada instruction is a bizarre transposition of the definition of the burden of proof beyond a reasonable doubt and as such is an unconstitutionally high standard of doubt.

4. The instruction also states "doubt to be reasonable must be actual and substantial, not mere possibility or speculation." This language is functionally identical to the language condemned in *Cage*. Moreover, this instruction leads to the danger that "substantial doubt" would be interpreted by a juror in parallel with the preceding reference to a doubt which would "govern or control" a person's actions. The danger that the jurors would adopt this parallel interpretation is exacerbated by the parallel references to "possible" doubt. The last sentence of the instruction contrasts "actual and substantial doubt" with "mere possibility." The second sentence of the instruction contrasts "mere possible doubt" with doubt which "would govern or control a person in the more weighty affairs of life." Thus, in the context of this instruction, it was inevitable that the jurors would interpret "substantial doubt" as requiring the "govern or control" standard, which is an unconstitutional standard for determining "reasonable doubt."

5. Between the two sentences containing clearly unconstitutional language, the third sentence of the instruction provides that there is reasonable doubt, if after consideration of the evidence, the jurors "can say they feel an abiding conviction of the truth of the charge." This sentence,

in context, does nothing to ameliorate the defects in the rest of the instruction. The "abiding conviction" language does nothing to explain the degree of certainty required. The "abiding conviction" term is not linked to any language suggesting a proper definition of the burden of proof standard; and the immediately preceding reference to the unconstitutional "govern or control" doubt standard could only imply that the corresponding proof standard was impermissibly low. The instruction does nothing to dispel the false inference that the jurors could have an "abiding conviction" as to guilt of the offense charged if the reasonable doubts they harbored were not sufficient to "govern or control" their actions.

6. The giving of this erroneous and unconstitutional instruction substantially prejudiced Mr. Howard, rendered the penalty proceeding fundamentally unfair, eroded the reliability of the sentence and had a substantial and injurious effect on the sentencing verdict.

Claim Nineteen:

Mr. Howard was denied his right to effective assistance of counsel as guaranteed by the sixth and fourteenth amendments to the United States Constitution by trial counsel's failure to prepare adequately for Mr. Howard's trial, to discover and present available evidence and to argue on Mr. Howard's behalf on the basis of the evidence that was presented. The following facts support this claim:

1. Trial counsel failed to initiate adequate contact with Mr. Howard in order to form an attorney-client relationship. Mr. Howard's first contact with the Clark County Public

Defender's office was a visit from the Clark County Public Defender's investigator on December 1, 1982 (trial was scheduled to begin on January 10, 1983); thereafter Mr. Howard received visits from his trial counsel on the following dates: December 29 or 30, 1982 – first attorney visit with Mr. Cooper and Mr. Peters; January 2, 1983 – second attorney visit with Mr. Peters and Mr. Cooper; January 7, 1983 – third attorney visit with Mr. Cooper and Mr. Franzen; January 9, 1983 visit by Mr. Cooper; January 10, 1983 visit by Mr. Cooper and Mr. Franzen; January 27, 1983 visit by Mr. Franzen and Mr. Cooper; March 24, 1983 visit by Mr. Franzen and Mr. Cooper; April 20, 1983 visit by Mr. Cooper and Mr. Franzen; May 1, 1983 visit by Mr. Cooper and Mr. Franzen; June 16, 1983 visit by Mr. Cooper and Mr. Franzen.

2. Trial counsel's conflict of interest made the cooperation and assistance of Mr. Howard in the efforts of counsel impossible. The facts included in Claim 4 are specifically incorporated herein by reference as if they were recited in whole.

3. Mr. Howard was arrested on April 1, 1980 in California and charged with robbery with the use of a deadly weapon and theft/unlawful taking of a motor vehicle. Mr. Howard was represented in the California litigation by Charles Nacsin. The California litigation ended with the conviction and sentencing of Mr. Howard on May 27, 1982. Trial counsel failed to contact Mr. Nacsin and thus failed to learn the following:

A. After his arrest, Mr. Howard was initially detained in the San Bernardino County Jail.

B. Based upon his mental condition, on July 17, 1980, Mr. Howard was transferred to Patton State Hospital where he remained for one hundred and eight (108) days.

C. On December 12, 1980, Mr. Howard was transferred to Atascadero State Hospital for one hundred forty-nine (149) days. Mr. Howard remained at Atascadero State Hospital until April 7, 1981 when he was judged competent to stand trial.

D. During 1980 and 1981 a number of letters, medical reports, and certificates regarding Mr. Howard's mental state were submitted to the Superior Court and their existence was known by Mr. Nacsin.

By failing to contact Mr. Nacsin, Nevada trial counsel failed to obtain:

A. Available independent evidence that defendant was not competent to stand trial in Nevada based upon his actions at trial in California;

B. Available documents regarding Mr. Howard being declared incompetent to stand trial in California;

C. Available documents that identified family members who could have been contacted for testimony at the penalty hearing.

Moreover, by failing to contact Mr. Nacsin, Nevada trial counsel was unable to refute the prosecution's untruthful contention that Dawana Thomas testified at trial in California without Mr. Howard challenging her testimony as privileged communications made during the marriage of Mr. Howard and Ms. Thomas.

Additionally, Nevada trial counsel was unable to refute the prosecution's unsupported contention that the fact Ms. Thomas testified at the California trial and her testimony was not challenged as a privileged marital communication was evidence that Mr. Howard had never been married to Ms. Thomas. Mr. Nacsin would have informed Nevada counsel that it was at Mr. Howard's insistence that Ms. Thomas was present and that the DA in California had not planned

on calling Ms. Thomas at the California trial. As Ms. Thomas was only present because Mr. Howard demanded Mr. Nacsin call her as a witness for the defense, there was no invocation of the marital privilege by Mr. Howard. The failure to invoke the marital privilege was not evidence that Mr. Howard was not married to Ms. Thomas.

4. Trial counsel failed to obtain documents from Patton State Hospital and Atascadero State Hospital which were available pursuant to subpoena power (either through Nevada or the Interstate Compact) and thus:

A. Failed to obtain available documents regarding Mr. Howard being declared incompetent to stand trial in California which was very close in time to Mr. Howard's trial in Nevada and which would have provided independent evidence of Mr. Howard's incompetence to stand trial in Nevada;

B. Failed to obtain available documents that identified family members who could have been contacted for testimony at the penalty hearing; and

C. Failed to obtain available records to corroborate Mr. Howard's testimony at the penalty hearing.

5. Trial counsel failed to obtain transcripts of the robbery trial in California which were completed and available on November 1, 1982, which was several months before the initial trial date of Mr. Howard and five months before Mr. Howard actually began trial in Nevada. Trial counsel's failure to obtain these available independent records denied Mr. Howard his rights under the fifth and fourteenth amendment to be competent to assist counsel in his own defense. These records would have supported a finding of incompetency of Mr. Howard at the time of trial in Nevada. Additionally, trial counsel's failure to obtain transcripts prevented him from being able to refute Ms. Thomas' inaccurate testimony at the Nevada trial that she testified

in California that she was never the wife of Mr. Howard and that she testified about things that Mr. Howard had told her about the car theft and robbery with the gun.

6. Trial counsel failed to review medical records maintained by the Clark County Detention Center which indicate that on December 7, 1982, Mr. Howard felt that he was being harassed by the jail staff because previously the medical staff had determined him eligible for general population as far as from a psychiatric treatment aspect. This record is independent evidence that Mr. Howard's competency should have been challenged and could have been challenged by review of available records.

7. Trial counsel failed to obtain available documents, request a competency hearing prior to trial and submit the available documents to support a trial court finding that Mr. Howard was incompetent to stand trial.

8. Trial counsel failed to follow the prescribed rules of court and failed to obtain a suppression hearing regarding Mr. Howard's in-custody statements to police officers.

9. Trial counsel failed to present and support a viable defense that Mr. Howard was legally insane at the time of the killing.

10. Trial counsel failed to object to the giving of unconstitutional jury instructions regarding the state of mind required for conviction, reasonable doubt, premeditation, and malice at the guilt phase of Mr. Howard's trial. The facts of Claims 6, 7, 8 and 9 are incorporated herein by reference as if they were recited in whole.

11. Trial counsel failed to review available visiting records maintained by the Clark County Detention Center (or the County Jail which was in existence at the time of Mr. Howard's pretrial incarceration), thereby failing to discover records which indicated visits by friends: Tamara Durr (March 13, 1983); Joseph Gordon (April 10, 1983); Betty Richard (April 11, April

12, April 18, April 24, May 6, May 12, June 15, and June 16, 1983) and Bobbie Wheeler (April 11 and May 6, 1983) and records which also indicated that Ms. Richard and Ms. Wheeler came to visit on one or maybe two of the same dates and times, and thus failed to discover and investigate persons who may have testified at the penalty hearing and provided mitigation evidence for consideration by the jury.

12. Trial counsel failed to obtain documents maintained by the California State Prison Archives Division, and failed to obtain available documents which identified names and addresses of family member (aunt Pinkie Williams) and girlfriend (Carol Walker) who could have been contacted for testimony at the penalty hearing.

13. Trial counsel failed to review other records maintained by the Clark County Detention Center and thus failed to discover a January 10, 1983 Memorandum from Correctional Training Facility Soledad CA with a request by their inmate Benjamin D. Evans, Sr. #C-46867 to correspond with Mr. Howard, which was granted on January 14, 1983. Trial counsel's failure to review these records prevented them from discovering and investigating another possible person to testify at the penalty hearing.

14. Trial counsel failed to obtain medical records from San Bernardino County regarding Mr. Howard's attempted suicide on April 3, 1980 and subsequent diagnosis of suicidal/depression and failed to obtain available records to introduce at the penalty hearing regarding mental illness of Mr. Howard as a mitigating circumstance.

15. Trial counsel failed to obtain Mr. Howard's military records, which were available pursuant to subpoena power (either through Nevada or the Interstate Compact) and thus failed to obtain independent evidence which would have corroborated Mr. Howard's testimony

at the penalty hearing regarding the awards he received and his participation in counterinsurgency operations in the vicinity of Danang, Vietnam.

16. Trial counsel failed to explain to Mr. Howard what it meant to proffer evidence of mitigating circumstances at the penalty phase. As a result, Mr. Howard did not understand "mitigation" or what purpose it served and thus Mr. Howard was not aware that the introduction of complete and extensive evidence regarding his military record, mental health history, and traumatic adolescence experience (murder of his sister and mother by his father) would have positively benefited him during the penalty phase of his trial.

17. Trial counsel failed to object to the giving of the unconstitutional jury instruction during the penalty phase regarding "reasonable doubt." The facts as contained in Claims 6 and 18 are incorporated herein by reference as if they were recited in whole.

18. Trial counsel failed to object to the numerous instances of prosecutorial misconduct during the closing argument at the penalty stage. The facts of Claim 14 are incorporated herein by reference as if they were recited in whole.

19. Trial counsel failed to refute the prosecution's argument regarding future dangerousness by failing to call jail personnel and fellow inmates as well as to psychiatrically document and present psychiatric testimony that Mr. Howard was not a threat to the jail population if granted life imprisonment by the jury.

20. Trial counsel failed to object to the trial court's limitation of the mitigating circumstances, to be considered by the jury at the conclusion of penalty hearing, to the statutory factor of "any other mitigating circumstance."

21. Trial counsel failed to object to the trial court's instruction and verdict form which was submitted to the jury, at the conclusion of the penalty hearing, which required a unanimous finding with regard to the existence of any mitigating circumstance.

22. Trial counsel failed to conduct any investigation into Mr. Howard's background and failed to develop the following available information which should have been presented to Mr. Howard's jury at the time of the penalty phase:

> Petitioner Sam Howard, Jr. was born to Sam Howard, Sr. and Marie Jackson on August 18, 1948. Mr. Howard's mother and father were married on March 8, 1947 in Clanton, Alabama, which is in Chilton County. Mr. Howard's father was twenty-nine years of age and his mother was nineteen years old when they married. While Mr. Howard's father was originally from Montgomery, Alabama and Mr. Howard's mother was from Selma, Alabama, they met, married and lived in Clanton, Alabama.
>
> In the 1950's, the area of Alabama where Mr. Howard grew up was still very much segregated. In fact, Alabama was the most racially segregated state in the United States. Life was very hard for blacks in Alabama. Blacks were not allowed to use the same water fountains as the white townspeople. Blacks were not allowed to eat at the same restaurants. Nor were blacks allowed to use the same restrooms. Blacks had no rights. There were signs all over town that said "Colored Only." The black families were all poor. The blacks worked mainly at farm hand jobs or other handyman-type jobs. The only solace black families had was to attend church and beg God to make their lives better.

The atmosphere in Alabama caused blacks to feel oppressed. They often drank and took their frustrations out on each other. The black children were afraid and confused about their lives. Things were not fair and times were very hard.

If a black person were to drive through a small town, the sheriff or local police would stop their vehicle for no reason. Most blacks lived in fear of the local authorities. Never knowing how they would be treated by the authorities.

In the 1950's, the KKK was in full force in Clanton, Alabama. The KKK members would ride through the streets at night fully robed and blowing their horns in order to instill, and maintain, fear within the hearts of the blacks. Alabama blacks were denigrated on a daily basis. There were many unsolved black murders. The black churches were bombed, and many black men were castrated by the KKK.

The town of Clanton had a very small black community. In fact, "going across town" meant that you were going to travel six blocks away. It was common knowledge that Sam Howard, Sr. had a violent temper, especially when he was drinking. Sam Howard, Sr.'s first marriage was to a woman named Julia Hosecloth. No one really knew Sam Howard, Sr. or Julia during their marriage. There were, however, stories that Julia had been killed by Sam Howard, Sr. who, it was rumored, "cut out her guts" and "stabbed her to death." In actuality, Ms. Hosecloth died of Locked Bowel Syndrome.

Some time after Ms. Hosecloth's death, Sam Howard, Sr. met Marie Jackson in Clanton, Alabama. Marie's family attempted to dissuade her from marrying Sam Howard, Sr. based on his prior marriage and the rumors about how his first wife, Ms. Hosecloth, had died. Everyone knew, however, that Sam Howard, Sr. was a mean drunk and was dangerous to be around when he was drinking. Sam Howard, Sr. was often

beaten by the police due to his constantly drunken behavior. At that time, Chilton County, Alabama, was dry. Therefore, the only alcohol Sam Howard, Sr. could have obtained was bootleg whiskey, which was only available one county over. Regardless of her family's warnings, Marie married Sam Sr.

Marie Howard gave birth to Mr. Howard on August 18, 1948 in Clanton, Alabama. On November 22, 1950, Marie gave birth to Diane Howard. Thereafter, on June 30, 1951, Marie gave birth to her third child, Elizabeth Howard. The Howard family was poor, but they were together.

During their marriage, Sam Howard, Sr. worked for Hayes Chevrolet Company in Clanton, and Marie worked as a housekeeper/cook for the Headley family. There were rumors that Marie was cheating on Sam Howard, Sr.; however, no one knew for sure whether this was true. It was true that their relationship was very volatile. Otis Reese, who is Marie's brother, related that Sam Howard, Sr. would beat Marie, she would kick him out, then later she would take him back. Marie's family tried to get her to leave Sam Howard, Sr. because of the abuse she sustained at his hand. Mr. Reese eventually stopped visiting his sister due to the abusive way that Sam Howard, Sr. treated her. Sam Howard, Sr. was also very violent with his children. Mr. Reese stated that at one point during his daughter's life Sam Howard, Sr. cut Diane's legs so badly that it almost crippled her.

On the evening of Saturday, October 6, 1951, Sam Howard, Sr. and Marie were involved in a family argument. The newspaper articles located from that date state that Sam Howard, Sr. used a .22 automatic rifle to shoot and kill Marie and Elizabeth Howard. Marie was twenty-three years old and Elizabeth was three months and six days

old. Mr. Howard was just over three years old when he witnessed this incident. After seeing his drunk father kill his mother and little sister, Elizabeth, Mr. Howard ran and hid. This was after his father told Mr. Howard that he would get him next time. Mr. Howard`s other sister, Diane, however, was not so lucky and was shot in the upper thigh area.

Sam Howard, Sr. was tried for the murder of his wife and daughter, as well as the assault on Diane. He was sentenced to two terms of life imprisonment at the Alabama State Penitentiary. The Circuit Court records indicate that Sam Howard, Sr. was suspected of a second murder after being released from prison. Investigation in Alabama did not reveal whether he was ever convicted of this second crime. However, James Childrey, who is Mr. Howard`s cousin, advised that he is aware that Sam Howard, Sr. was released from prison and that he later killed a man and was sent to prison a second time. Mr. Childrey reported that he visited Sam Howard, Sr. in prison at Camp Kilby in Alabama. Sam Howard, Sr. eventually died in prison on July 20, 1986.

After witnessing his mother's murder, Mr. Howard and his little sister, Diane, lived with relatives who were very old and poor and could not take care of two small children on a long term basis. Mr. Howard`s cousin, Jimmie Baker, recalled that Mr. Howard never seemed the same. After the murders, Mr. Howard would cry "Mamma! Mamma!" His family kept trying to tell him that she was no longer alive and Mr. Howard just kept crying. The day after the murders, Mr. Howard cried "I want to go home." However, Mr. Howard's home and family had been destroyed by his father. He could never go home. At three years old, Mr. Howard's mother was his life. Mr. Baker recalled that after the murder of his mother Mr. Howard always seemed to be seeking

love. The kind of love one receives from their mother. Mr. Howard seemed to go through the motions of being a regular child, but always seemed as if something were missing.

Mr. Howard and Diane then went to live with the Dudley Family in Alabama. The Dudley family had no children and were the unofficial version of a foster-type home for black children.

The 1958 Alabama "Colored Family Census Card" listed Mr. Howard and Diane as living at 406 13th Street, which was the Dudley's residence. Mr. Howard and his sister, Diane, attended elementary school at the Holy Ghost Mission School in Marbury, Alabama, which was run by nuns at that time. The nuns would drive into the town (Clanton) every day to pick the children up for school in their station wagon. The nuns would return the children home at the end of the day. Eventually the state school authorities discovered that Mr. Howard was being kept home by the Dudleys to help work at the house and in the fields. As he was not attending school, Mr. Howard was taken to Mt. Meigs reform school when he was approximately twelve years old.

Mr. Howard's aunt, Pinkie Williams, who lived in Jamaica, New York, drove to Alabama and brought Mr. Howard to live with her when he was approximately sixteen years old. At that time, Mr. Howard was still living at Mt. Meigs, a juvenile facility, in Alabama. Mt. Meigs was considered a "glorified orphanage" where a lot of kids with no place else to go ended up.

Mr. Howard's cousin, Winston Williams, who is the youngest child of Pinkie Williams, recalled that Mr. Howard's early childhood had a "great effect" on Mr. Howard. However, Mr. Howard never spoke of the shooting.

In August of 1967, when Mr. Howard was nineteen years old, he enlisted in the United States Marine Corps. After boot camp, Mr. Howard ended up being sent to Vietnam from the beginning of 1968 until he was discharged in July of 1969. After Vietnam, Mr. Howard's family noted a change in him, stating that he seemed "harder." His family felt that the Marines had "brainwashed" Mr. Howard into being a killer. Although not formally diagnosed with any mental problems, Mr. Howard was not the same. He "wasn't normal."

Mr. Howard's cousin, Winston Williams, declared that when Mr. Howard came back from Vietnam he was "changed." Mr. Williams felt that Mr. Howard had different personalities and Winston noted that sometimes Mr. Howard's voice would change suddenly. Mr. Howard would become angry, hostile and violent. Mr. Williams believed Mr. Howard could have some mental problems.

Mr. Howard met Cynthia Harris while living in Jamaica, New York. They only knew each other briefly. However, as a result of their relationship, David Harris was born on November 14, 1977. Mr. Howard was not aware of this child for many years.

Years later, Mr. Howard met Dawana Thomas. This was a very volatile relationship. Ms. Thomas related that Mr. Howard was obsessed with Vietnam. She reported that every time a plane would fly overheard, Mr. Howard would get out of the car and salute it. Ms. Thomas has expressed that Mr. Howard suffered from nightmares, often mumbling in his sleep and waking up with cold sweats. Mr. Howard told her that he was dreaming of shooting at "gooks," but they kept popping back up so he would cut off their ears. Ms. Thomas thought Mr. Howard was "shell-shocked," but could only help by holding Mr. Howard while he would cry and tell her about these nightmares.

Ms. Thomas described that Mr. Howard was very violent with her. She underwent many beatings at his hand. She eventually noticed a pattern, whereby the beatings started small and ended up escalating to the point where Mr. Howard would leave and be gone for days. Ms. Thomas declared that when Mr. Howard returned he would be emotionally and physically exhausted. There would be a period of calm, then it would start again. Ms. Thomas felt that Mr. Howard was trying to control a compulsion for criminal activities. She recounted that Mr. Howard would often rock himself back and forth, pace and act like a caged animal. He would have wild mood swings – violent one minute, then crying and asking for forgiveness the next. Ms. Thomas felt like a hostage. Their relationship substantially ended in 1980 with Mr. Howard's arrest in connection with the instant case.

Claim Twenty:

Mr. Howard was deprived of due process of law, equal protection of the laws, effective assistance of counsel, and a reliable sentence in violation of the fifth, sixth, eighth and fourteenth amendments to the United States Constitution by appointed counsel's failure to provide effective assistance of counsel on appeal. The following facts support this claim.

1. Appointed counsel failed to raise meritorious issues on the direct appeal to the Nevada Supreme Court. Counsel failed to raise the claims specified as Claims 3, 4, 6, 7, 8, 9, 12, 13, 15, 18, 22, 23 and 24 in this petition which are incorporated by this reference as if fully set forth.

2. Counsel did not have any tactical justification for failing to raise these issues, and did not seek or obtain any knowing and intelligent waiver from Mr. Howard of these claims, and

did not deliberately withhold them. Counsel failed to conduct adequate legal and factual investigation and did not recognize the existence of these issues.

3. Mr. Howard was prejudiced by counsel's failure to raise these claims, as it is reasonably probable that a result more favorable to Mr. Howard would have been obtained on appeal.

Claim Twenty-one:

Mr. Howard was deprived of his right to counsel, to due process of law, to equal protection of the law and to a reliable sentence in violation of the fifth, sixth, eighth and fourteenth amendments to the United States Constitution by the failure of appointed counsel in the state postconviction proceedings to adequately investigate and develop all above noted issues. The following facts support this claim:

1. Mr. Howard has a federal constitutional right to due process of law as guaranteed by the fifth and fourteenth amendments to the Constitution during habeas litigation. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 290–95 (1998) (Stevens, J., concurring in part and dissenting in part); *see also Morrissey v. Brewer*, 408 U.S. 471 (1972), *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and *Yates v. Aiken*, 484 U.S. 211 (1988). Due process cannot be achieved in the prior habeas litigation without review, investigation and development of all above noted issues. The available facts supporting those claims are alleged in Claims 3, 4, 6, 7, 8, 9, 12, 13, 15, 18, 19, 20, 22, 23 and 24 which are incorporated by this reference as if fully set forth. Counsel did not perform a legally and factually sufficient investigation and thus failed to discover all meritorious issues arising from Mr. Howard's conviction and sentence.

2. Mr. Howard was not informed by counsel of all meritorious claims which could be raised in the postconviction proceeding, and he did not knowingly and intelligently waive, or authorize counsel to waive any claim that could be made at this proceeding.

3. Mr. Howard was prejudiced by postconviction counsel's failure to provide due process of law during the habeas litigation, which is required by the federal right to due process of law as guaranteed by the fifth and fourteenth amendments to the United States Constitution. The state district court relied upon inaccurate information in rendering its decision denying relief at the postconviction stage of Mr. Howard's litigation and it is reasonably probable that the district court would have granted relief if it had been presented with all of Mr. Howard's claims and supporting evidence.

Claim Twenty-two:

Mr. Howard was deprived of due process of law, equal protection of the laws, a reliable sentence and a fundamentally fair proceeding in violation of the fifth, eighth and fourteenth amendments to the United States Constitution by the combined effect of all the errors committed in the capital proceedings against Mr. Howard. The following facts support this claim:

1. Each of the claims specified in this Petition requires vacation of the conviction or sentence. The cumulative effect of the errors shown in these claims was to deprive the proceedings against Mr. Howard of any fundamental fairness and to result in a constitutionally unreliable sentence. Even if it were determined that any individual error did not require the vacation of the conviction or sentence, the cumulative effect of all the errors resulted in substantial prejudice to Mr. Howard.

Claim Twenty-three:

Mr. Howard was deprived of his right to due process of law, to equal protection of the laws, to a reliable sentence and to be free of cruel and unusual punishment in violation of the fifth, eighth and fourteenth amendments to the United States Constitution by the sentence of death imposed by the Nevada judicial process. This claim is supported by the following facts:

1. The administration of the Nevada death penalty has resulted in irrational, arbitrary and capricious imposition and non-imposition of sentences of death.

2. As a result of plea bargaining practices, and imposition of sentences by juries and three-judge panels, sentences of less than death have been imposed for offenses which are more aggravated than the one for which Mr. Howard was convicted, and in situations where the amount of mitigating evidence was less than the mitigation both of the present offenses and Mr. Howard's background.

3. The arbitrariness of the state procedural system is prejudicial per se and requires vacation of the sentence.

Claim Twenty-four:

Execution of Mr. Howard by lethal injection would violate the eighth amendment of the United States Constitution which prohibits cruel and unusual punishment. The facts in support of this claim are:

1. State law requires that execution be inflicted by an injection of a lethal drug. N.R.S. 176.355(1).

2. Competent physicians cannot administer the lethal injection, because physicians are proscribed from participating in an execution, other than to certify that a death has occurred under the ethical standards of the American Medical Association. American Medical

Association, House of Delegates, Resolution 5 (1992); American Medical Association, Judicial Council, current Opinion 2.06 (1980). Thus, non-physician staff from the Department of Corrections will have the responsibility of locating veins and injecting needles, which are then connected to the lethal-injection machine.

3. In executions in states employing lethal injection, including particularly the Landry, McCoy and May executions in Texas, the Rector execution in Arkansas and the Gacy execution in Illinois, prolonged and unnecessary pain has been suffered by the condemned individual by difficulty in inserting needles and by unexpected chemical reactions among the drugs injected or by violent reactions to the drugs injected by the condemned individual.

4. Mr. Howard's medical condition, diabetes, would complicate the administration of the lethal injection and would increase the probability of the infliction of unnecessary and prolonged pain.

5. Because of the inability of the state of Nevada to carry out Mr. Howard's execution without the infliction of cruel and unusual punishment, the sentence of death must be vacated.

Claim Twenty-five:

Mr. Howard was deprived of his right to be free of cruel and unusual punishment in violation of the eighth amendment to the United States Constitution by the imposition of the sentence of death. This claim is supported by the following facts:

1. State-sanctioned killing is inconsistent with the evolving standards of decency that mark the progress of a maturing society.

2. The death penalty has been rejected by the civilized nations of the modern world.

3. The death penalty is unnecessary to the achievement of any legitimate societal interests in Mr. Howard's case. Mr. Howard's mental and physical impairments and the circumstances of the offense make imposition of a death sentence upon him cruel and unusual.

4. The death sentence constitutes cruel and unusual punishment under any and all circumstances and constitutes cruel and unusual punishment in the circumstances of this case.

WHEREFORE, Petitioner Samuel Howard prays that the court grant him such relief to which he may be entitled in this proceeding.

DATED this 24th day of May 2016.

/s/ Deborah A. Czuba
Deborah A. Czuba

/s/ Jonah J. Horwitz
Jonah J. Horwitz

On behalf of Petitioner
Samuel Howard

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of May 2016, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which is designed to send a Notice of Electronic Filing to persons including the following:

Heather D. Procter
hprocter@ag.nv.gov

/s/ Joy L. Fish
Joy L. Fish

MASS
GENTILE CRISTALLI
MILLER ARMENI SAVARESE
PAOLA M. ARMENI
Nevada Bar No. 8357
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410 South Rampart Boulevard, Suite 420
Las Vegas, Nevada 89145
Tel: (702) 880-0000
Fax: (702) 778-9709

Attorney for Petitioner, Samuel Howard

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

SAMUEL HOWARD, Petitioner, vs. TIMOTHY FILSON, Warden, and ADAM PAUL LAXALT, Attorney General for the State of Nevada, Respondents.	Case No. 81C053867 Dept. No. XVII (Death Penalty Case)

PETITIONER SAMUEL HOWARD'S MOTION TO ASSOCIATE COUNSEL

Date of Hearing: October 18, 2016
Time of Hearing: 8:30 a.m.

Petitioner, Samuel Howard hereby moves this Honorable Court for an order permitting Deborah Anne Czuba, Esq. to practice in Nevada, for the purpose of this case only, pursuant to Nevada Supreme Court Rule 42 (SCR 42).

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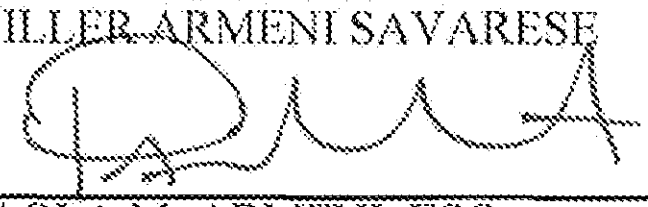
Ms. Czuba, having complied with the requirements set forth by SCR 42, hereby submits a Verified Application for Association of Counsel (attached hereto as Exhibit 1); a Certificate of Good Standing from the Arkansas Supreme Court (attached hereto as Exhibit 2); and Statement from the State Bar of Nevada pursuant to SCR 42(3)(b) (attached hereto as Exhibit 3).

Dated this 17th day of October, 2016.

GENTILE CRISTALLI
MILLER ARMENI SAVARESE



PAOLA M. ARMENI, ESQ.
Nevada Bar No. 8357
410 South Rampart Boulevard, Suite 420
Las Vegas, Nevada 89145

NOTICE OF MOTION

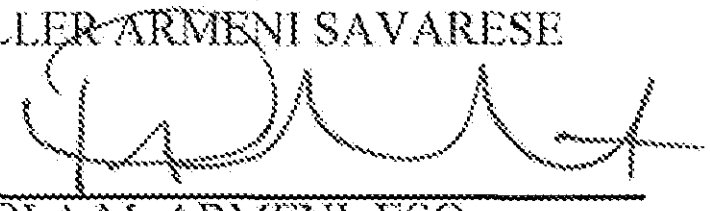
TO: All Interested Parties; and

TO: All Counsel of Record

PLEASE TAKE NOTICE that Petitioner, Samuel Howard will bring the foregoing **PETITIONER SAMUEL HOWARD'S MOTION TO ASSOCIATE COUNSEL** on for the decision on the 18th day of October, 2016 in Department XVII of the above entitled Court.

Dated this 17th day of October, 2016.

GENTILE CRISTALLI
MILLER ARMENI SAVARESE



PAOLA M. ARMENI, ESQ.
Nevada Bar No. 8357
410 South Rampart Boulevard, Suite 420
Las Vegas, Nevada 89145

CERTIFICATE OF SERVICE BY MAIL

I, Myra Hyde, hereby certify, pursuant to N.R.C.P. 5(b), that on this 17th day of the month of October, of the year 2016, I mailed a true and correct copy of the foregoing **PETITIONER SAMUEL HOWARD'S MOTION TO ASSOCIATE COUNSEL** addressed to:

Steve Wolfson
Clark County District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101
PDMotions@clarkcountyda.com

Adam Paul Laxalt
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701

An Employee of
GENTILE CRISTALLI
MILLER ARMENI SAVARESE

EXHIBIT 1

EXHIBIT 1

VAPP

ORIGINAL

DISTRICT COURT
CLARK COUNTY, NEVADA

SAMUEL HOWARD,

Petitioner,

vs.

TIMOTHY FILSON, Warden, and
PAUL LAXALT, Attorney General
For the State of Nevada,
Respondents

Case No. ~~81C53867~~ 81C053867
Dept. No. XVII

VERIFIED APPLICATION FOR ASSOCIATION OF COUNSEL UNDER NEVADA SUPREME COURT RULE 42

Deborah (First) Anne (Middle Name) Czuba (Last), Petitioner, respectfully represents:

1. Petitioner resides at 3511 E. Trail Bluff Lane (Street Address)

Boise (City), Ada (County), ID (State), 83716 (Zip Code)

(404) 797-0028 (Telephone)

2. Petitioner is an attorney at law and a member of the law firm of: Federal Defender Services of Idaho

with offices at 702 W. Idaho Street, Ste. 900 (Street Address)

Boise (City), Ada (County), ID (State), 83701 (Zip Code)

(208) 331-5530 (Telephone)

Deborah_A_Czuba@fd.org
Email

3. Petitioner has been retained personally or as a member of the above named law firm by Samuel Howard Jr. to provide legal representation in connection with the above-entitled matter now pending before the above referenced court.

4. Since September of 2014, petitioner has been, and presently is, a member of good standing of the bar of the highest court of the State of Idaho where petitioner regularly practices law.

5. Petitioner was admitted to practice before the following United States District Courts, United States Circuit Courts of Appeal, the Supreme Court of the United States, and/or courts of other states on the dates indicated for each, and is presently a member in good standing of the bars of said Courts:

	DATE ADMITTED
United States Supreme Court	September 2010
New York	January 1996
Georgia (inactive)	September 2005
Arkansas	September 2008
United States District Court for the Western District of Arkansas	September 2009
United States District Court for the Eastern District of Arkansas	September 2009
California (Pro Hac Vice)	September 2014
Ninth Circuit Court of Appeals	April 2014

6. Is Petitioner currently suspended or disbarred in any court? You must answer yes or no. If yes, give particulars; e.g., court, jurisdiction, date: No.

7. Is Petitioner currently subject to any disciplinary proceedings by any organization with authority at law? You must answer yes or no. If yes, give particulars, e.g. court, discipline authority, date, status: No.

8. Has Petitioner ever received public discipline including, but not limited to, suspension or disbarment, by any organization with authority to discipline attorneys at law? You must answer yes or no. If yes, give particulars, e.g. court, discipline authority, date, status: No.

9. Has Petitioner ever had any certificate or privilege to appear and practice before any regulatory administrative body suspended or revoked? You must answer yes or no. If yes, give particulars, e.g. date, administrative body, date of suspension or reinstatement: No.

10. Has Petitioner, either by resignation, withdrawal, or otherwise, ever terminated or attempted to terminate Petitioner's office as an attorney in order to avoid administrative, disciplinary, disbarment, or suspension proceedings? You must answer yes or no. If yes, give particulars: No.

11. Petitioner has filed the following application(s) to appear as counsel under Nevada Supreme Court Rule 42 during the past three (3) years in the following matters, if none, indicate so: *(do not include Federal Pro Hacs)*

Date of Application	Cause	Title of Court Administrative Body or Arbitrator	Was Application Granted or Denied?
None.			

(If necessary, please attach a statement of additional applications)

12. Nevada Counsel of Record for Petition in this matter is:
(must be the same as the signature on the Nevada Counsel consent page)

Paola (First Name) Monique (Middle Name) Armeni (Last Name) 8357 (NV Bar #),

who has offices at Gentile, Cristalli, Miller, Armeni, Savarese (Firm Name/Company)

410 S. Rampart, Ste. 420 (Street Address), Las Vegas (City), Clark (County),

89145 (Zip Code), (702) 880-0000 (Phone Number).

13. The following accurately represents the names and addresses of each party in this matter, WHETHER OR NOT REPRESENTED BY COUNSEL, and the names and addresses of each counsel of record who appeared for said parties: (You may attach as an Exhibit if necessary.)

NAME	MAILING ADDRESSS
The State of Nevada	
Steven B. Wolfson, Clark County District Attorney	200 Lewis Ave. Las Vegas, NV 89155-2212

14. Petitioner agrees to comply with the provisions of Nevada Supreme Court Rule 42(3) and (13) and Petitioner consents to the jurisdiction of the courts and disciplinary boards of the State of Nevada in accordance with provisions as set forth in SCR 42(3) and (13). Petitioner respectfully requests that Petitioner be admitted to practice in the above-entitled court FOR THE PURPOSES OF THIS MATTER ONLY.

15. Petitioner has disclosed in writing to the client that the applicant is not admitted to practice in this jurisdiction and that the client has consented to such representation.

I, __Deborah Anne Czuba_____, do hereby swear/affirm under penalty of perjury that the assertions of this application and the following statements are true:

1) That I am the Petitioner in the above entitled matter.

2) That I have read Supreme Court Rule (SCR) 42 and meet all requirements contained therein, including, without limitation, the requirements set forth in SCR 42(2), as follows:

(A) I am not a member of the State Bar of Nevada;

(B) I am not a resident of the State of Nevada;

(C) I am not regularly employed as a lawyer in the State of Nevada;

(D) I am not engaged in substantial business, professional, or other activities in the State of Nevada;

(E) I am a member in good standing and eligible to practice before the bar of any jurisdiction of the United States; and

(F) I have associated a lawyer who is an active member in good standing of the State Bar of Nevada as counsel of record in this action or proceeding.

2) That I have read the foregoing application and know the contents thereof; that the same is true of my own knowledge except as to those matters therein stated on information and belief, and as to the matter I believe them to be true.

That I further certify that I am subject to the jurisdiction of the Courts and disciplinary boards of this state with respect to the law of this state governing the conduct of attorneys to the same extent as a member of the State Bar of Nevada; that I understand and shall comply with the standards of professional conduct required by members of the State Bar of Nevada; and that I am subject to the disciplinary jurisdiction to the State Bar of Nevada with respect to any of my actions occurring in the course of such appearance.

DATED this 27th day of September, 2016

Petitioner/Affiant (blue ink)

STATE OF Idaho)
) ss
COUNTY OF Ada)

Subscribed and sworn to before me
this 27th day of September, 2016

Notary Public

BRUCE LIVINGSTON
NOTARY PUBLIC
STATE OF IDAHO

DESIGNATION, CERTIFICATION AND CONSENT OF NEVADA COUNSEL

SCR 42(14) Responsibilities of Nevada attorney of record.

(a) The Nevada attorney of record shall be responsible for and actively participate in the representation of a client in any proceeding that is subject to this rule.

(b) The Nevada attorney of record shall be present at all motions, pre-trials, or any matters in open court unless otherwise ordered by the court.

(c) The Nevada attorney of record shall be responsible to the court, arbitrator, mediator, or administrative agency or governmental body for the administration of any proceeding that is subject to this rule and for compliance with all state and local rules of practice. It is the responsibility of Nevada counsel to ensure that the proceeding is tried and managed in accordance with all applicable Nevada procedural and ethical rules.

I, Paola Monique Armeni, hereby agree to associate with Petitioner referenced hereinabove

Print Nevada Counsel Name

and further agree to perform all of the duties and responsibilities as required by Nevada Supreme Court Rule 42.

DATED this 3rd day of October, 2016

Nevada Counsel of Record (blue ink)

PAOLA ~~Armeni~~ Monique Armeni

STATE OF Nevada)
) ss
COUNTY OF Clark)

Subscribed and sworn to before me

this 5th day of October 2016

Notary Public

EXHIBIT 2

EXHIBIT 2

Supreme Court

State of Arkansas

Little Rock

CERTIFICATE OF GOOD STANDING

State of Arkansas
in the Supreme Court

I, Stacey Pectol, Clerk of the Supreme Court of Arkansas, do hereby certify that Deborah Anne Czuba was enrolled as an Attorney at Law and Solicitor in Chancery by the Supreme Court of this State on October 2, 2008; that no disbarment proceedings have been filed against her in this court, that she has not had any adverse disciplinary action whatsoever during the past three year period, and that her private and professional character appear to be good.

In Testimony Whereof, I hereunto
set my hand as Clerk and affix the seal of Said Court
this the 15th day of September, 2016.

STACEY PECTOL
(CLERK SUPREME COURT OF ARKANSAS)

By _____
Deputy Clerk

EXHIBIT 3

EXHIBIT 3

STAT

DISTRICT COURT
CLARK COUNTY, NEVADA

Case No. 81C053867
Dept. No. XVII

Samuel Howard

vs.

Timothy Filson, Warden and
Paul Laxalt, Attorney General
for the State of Nevada

_____/

STATE BAR OF NEVADA STATEMENT PURSUANT TO SUPREME COURT RULE 42(3)(b)

THE STATE BAR OF NEVADA, in response to the application of Petitioner, submits the following statement pursuant to SCR42(3):

SCR42(6)**Discretion.** The granting or denial of a motion to associate counsel pursuant to this rule by the court is discretionary. The court, arbitrator, mediator, or administrative or governmental hearing officer may revoke the authority of the person permitted to appear under this rule. Absent special circumstances, repeated appearances by any person or firm of attorneys pursuant to this rule shall be cause for denial of the motion to associate such person.

(a) **Limitation.** It shall be presumed, absent special circumstances, and only upon showing of good cause, that more than 5 appearances by any attorney granted under this rule in a 3-year period is excessive use of this rule.

(b) **Burden on applicant.** The applicant shall have the burden to establish special circumstances and good cause for an appearance in excess of the limitation set forth in subsection 6(a) of this rule. The applicant shall set forth the special circumstances and good cause in an affidavit attached to the original verified application.

1. DATE OF APPLICATION: October 4, 2016

2. APPLYING ATTORNEY: Deborah Anne Czuba, Esq.

3. FIRM NAME AND ADDRESS: Federal Defender Services of Idaho, 702 W. Idaho Street, Suite 900, Boise, ID 83701

4. NEVADA COUNSEL OF RECORD: Paola M. Armeni, Esq., Gentile Cristalli Miller Armeni Saverese, 410 S. Rampart Blvd., Suite 420, Las Vegas, NV 89145

5. There is no record of previous applications for appearance by petitioner within the past three (3) years.

DATED this October 12, 2016

Suzy Moore
Member Services Admin.
Pro Hac Vice Processor
STATE BAR OF NEVADA

Electronically Filed
10/18/2016 01:04:00 PM

CLERK OF THE COURT

APPL
GENTILE CRISTALLI
MILLER ARMENI SAVARESE
PAOLA M. ARMENI
Nevada Bar No. 8357
E-mail: parmeni@gcmaslaw.com
410 South Rampert Boulevard, Suite 420
Las Vegas, Nevada 89145
Tel: (702) 880-0000
Fax: (702) 778-9709

Deborah A. Czuba (*pro hac vice pending*)
Idaho Bar No. 9648
Deborah_A_Czuba@fd.org
Federal Defender Services of Idaho
702 W. Idaho St., Ste. 900
Boise, ID 83702
Telephone: (208) 331-5530
Facsimile: (208) 331-5559

Attorneys for Petitioner Samuel Howard

DISTRICT COURT
CLARK COUNTY, NEVADA

SAMUEL HOWARD, Petitioner, vs. TIMOTHY FILSON, Warden, and ADAM PAUL LAXALT, Attorney General for the State of Nevada, Respondents.	Case No. 81C053867 Dept. No. XVII (Death Penalty Case)

APPLICATION FOR ORDER WAIVING FEES PURSUANT TO NEVADA SUPREME COURT RULE 42(3)(E) AND RENEWAL OF APPLICATION FEES UNDER RULE 42(9); EXHIBIT A

Undersigned counsel respectfully requests that, pursuant to Nevada Supreme Court Rule 42 subsection 3(e), the Court waive the original fee required by SCR 42 subsection 3(a), application fees, and the annual renewal fee required by subsection 9 of the same rule.

Undersigned counsel makes this request because she is providing *pro bono* services in a death penalty habeas case, as counsel attests in the affidavit signed and notarized on October 18, 2016, and attached to this application as Exhibit A.

Respectfully submitted this 18th day of October 2016.

/s/ Deborah A. Czuba
Deborah A. Czuba
Assistant Federal Public Defender
Federal Defender Services of Idaho

Counsel for Petitioner
SAMUEL HOWARD

AFFIDAVIT OF DEBORAH A. CZUBA

Deborah A. Czuba, Affiant, respectfully requests that, pursuant to SCR 42(3)(e), the Court waive the application fee because Affiant is providing *pro bono* services in a death penalty habeas corpus case.

The facts which support this request are as follows. Affiant is the Supervising Attorney at the Capital Habeas Unit of the Federal Defender Services of Idaho ("CHU"). Samuel Howard, an indigent inmate currently seeking federal habeas relief from a state death sentence, was previously represented by the Office of the Federal Public Defender for the District of Nevada ("FPD-NV"). The FPD-NV discovered it suffered from a conflict of interest necessitating its withdrawal as counsel for Mr. Howard, and the CHU agreed to accept an appointment in the case. The CHU has been appointed in the United States Court of Appeals for the Ninth Circuit as counsel for Mr. Howard in his federal habeas case, and it is representing his interests in the U.S. District Court for the District of Nevada in the ongoing litigation there. The District Court authorized Affiant to litigate the contemplated post-conviction action in state court.

After being appointed in federal court, it is the practice of the FPD-NV to represent their indigent death row clients in state court post-conviction litigation when such litigation is necessary. In order to ensure continuity of counsel and effective representation of Mr. Howard, the CHU has agreed to assist him at the state level. Given the overlap between the federal case and the contemplated state post-conviction litigation, it will serve judicial economy for Affiant to continue his representation of Mr. Howard in the Nevada state courts.

The CHU exclusively represents indigent prisoners under sentence of death. It regularly requests and is granted fee waivers based on the poverty of its clients. As a quasi-governmental non-profit, the CHU will be absorbing significant costs to represent Mr. Howard in both state and federal court. The CHU is not equipped to shoulder the costs of the pro hac vice fees that Affiant would be required to pay to represent Mr. Howard in Nevada state court.

In light of the above, Affiant respectfully request that the pro hac vice fees be waived as to her representation of Mr. Howard.

Affiant Deborah A. Czuba does hereby swear/affirm under penalty of perjury that she has read the foregoing Application for Waiver of Fees and knows the contents thereof; that the same is true of her own knowledge except as to the matters therein state on information and belief, and as to those matters she believes them to be true.

Dated this 18th day of October 2016

Affiant Deborah A. Czuba

STATE OF Idaho)

) SS

COUNTY OF Ada)

Subscribed and sworn to before me this 18th day of October, 2016

Bruce Livingston

Notary Public

My commission expires: February 4, 2017.

BRUCE LIVINGSTON NOTARY PUBLIC STATE OF IDAHO

CERTIFICATE OF SERVICE BY MAIL

I, Joy Fish, hereby certify, pursuant to EDCR 7.26(a)(1), that on this 18th day of the month of October of the year 2016, I mailed a true and correct copy of the foregoing APPLICATION FOR WAIVER OF FEES addressed to:

Steve Wolfson
Clark County District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101

Adam Paul Laxalt
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701

/s/ Joy Fish
Joy Fish
Paralegal
Federal Defender Services of Idaho

ERR
GENTILE CRISTALLI
MILLER ARMENI SAVARESE
PAOLA M. ARMENI
Nevada Bar No. 8357
E-mail: parmeni@gcmaslaw.com
410 South Rampart Boulevard, Suite 420
Las Vegas, Nevada 89145
Tel: (702) 880-0000
Fax: (702) 778-9709

Attorney for Petitioner, Samuel Howard

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

SAMUEL HOWARD, Petitioner, vs. TIMOTHY FILSON, Warden, and ADAM PAUL LAXALT, Attorney General for the State of Nevada, Respondents.	Case No. 81C053867 Dept. No. XVII (Death Penalty Case)

ERRATA TO PETITIONER SAMUEL HOWARD'S MOTION TO ASSOCIATE COUNSEL

Date of Hearing: October 18, 2016
Time of Hearing: 8:30 a.m.

Petitioner, Samuel Howard hereby advises this Honorable Court of the following Errata to Petitioner Samuel Howard's Motion to Associate Counsel, filed October 17, 2016. The Certificates of Good Standing, were inadvertently omitted from the original filing, and true and correct copies are attached hereto. *See* **Exhibit 2** - Certificate of Good Standing from the Supreme Court State of Arkansas; *see also* **Exhibit 2-A** - State of New York Supreme Court,

...

Appellate Division Third Judicial Department; *see also* **Exhibit 2-B** - State Bar of Georgia; and *see also* **Exhibit 2-C** - Supreme Court State of Idaho.

Dated this 18 day of October, 2016.

GENTILE CRISTALLI
MILLER ARMENI SAVARESE

14254
FOR:

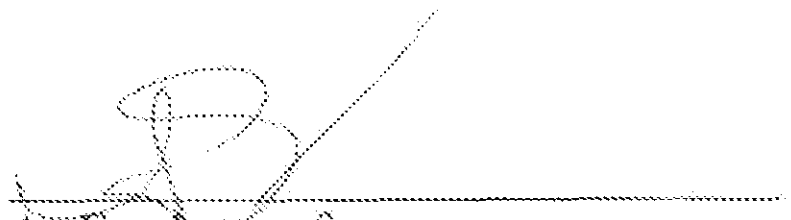
PAOLA M. ARMENI, ESQ.
Nevada Bar No. 8357
410 South Rampart Boulevard, Suite 420
Las Vegas, Nevada 89145

CERTIFICATE OF SERVICE BY MAIL

I, Stacey Concepcion, hereby certify, pursuant to N.R.C.P. 5(b), that on this 18th day of the month of October, of the year 2016, I mailed a true and correct copy of the foregoing **ERRATA TO PETITIONER SAMUEL HOWARD'S MOTION TO ASSOCIATE COUNSEL** addressed to:

Steve Wolfson
Clark County District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101
PDMotions@clarkcountyda.com

Adam Paul Laxalt
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701



An Employee of
GENTILE CRISTALLI
MILLER ARMENI SAVARESE

EXHIBIT 2

EXHIBIT 2

Supreme Court

State of Arkansas

Little Rock

CERTIFICATE OF GOOD STANDING

State of Arkansas
in the Supreme Court

I, Stacey Pectol, Clerk of the Supreme Court of Arkansas, do hereby certify that Deborah Anne Czuba was enrolled as an Attorney at Law and Solicitor in Chancery by the Supreme Court of this State on October 2, 2008; that no disbarment proceedings have been filed against her in this court, that she has not had any adverse disciplinary action whatsoever during the past three year period, and that her private and professional character appear to be good.

In Testimony Whereof, I hereunto
set my hand as Clerk and affix the seal of Said Court
this the 15th day of September, 2016.

STACEY PECTOL
(CLERK SUPREME COURT OF ARKANSAS)

By _____
Deputy Clerk

EXHIBIT 2-A

EXHIBIT 2-A

State of New York
Supreme Court, Appellate Division
Third Judicial Department

I, Robert D. Mayberger, Clerk of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, do hereby certify that

Deborah Anne Czuba

having taken and subscribed the Constitutional Oath of Office as prescribed by law, was duly licensed and admitted to practice by this Court as an Attorney and Counselor at Law in all courts of the State of New York on the **23rd day of January, 1996**, is currently in good standing and is registered with the Administrative Office of the Courts as required by section four hundred sixty-eight-a of the Judiciary Law.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court, at the City of Albany, this **23rd day of September, 2016.**

Robert D Mayberger

Clerk

EXHIBIT 2-B

EXHIBIT 2-B

State Bar of Georgia

Lawyers Serving the Public and the Justice System

Ms. Deborah Anne Czuba
Federal Defender Services of Idaho
Capital Habeas Unit
702 W. Idaho St.
Boise, ID 83702

CURRENT STATUS:	**Inactive Member-Good Standing**
DATE OF ADMISSION:	**09/16/2005**
BAR NUMBER:	**142207**
TODAY'S DATE:	**09/23/2016**

Listed below are the public disciplinary actions, if any, which have been taken against this member:

State Disciplinary Board Docket #	Supreme Court Docket #	Disposition	Date
N/A	N/A	N/A	N/A

The prerequisites for practicing law in the State of Georgia are as follows:

- **Certified by the Office of Bar Admissions, either by Exam, or on Motion (Reciprocity).**
- **Sworn in to the Superior Court in Georgia, highest court required to practice law in Georgia.**
- **Enrolled with the State Bar of Georgia, arm of the Supreme Court of Georgia.**

Attorneys licensed in Georgia and whose current status is Active are eligible to practice law in Superior Court. Attorneys may, upon application, apply for admission to the Supreme, District and State Court of Appeals.

Under the privacy/confidentiality provision of the Bar Rule 4-221(d), any complaint against a member resolved prior to the filing and docketing of a disciplinary case in the Supreme Court is not a matter of public record, and may not be revealed without a waiver from the member. It is the policy of the State Bar of Georgia to answer any inquiry about a member by disclosing only those complaints that have been docketed in the Supreme Court. With respect to matters that are currently pending as active, undocketed cases, when an inquiry is received, the State Bar of Georgia shall not disclose the existence of those complaints. Such non-disclosure should not be construed to confirm the existence of confidential complaints since the vast majority of members in good standing are not the subjects of such confidential complaints.

This member is currently in "**good standing**" as termed and defined by **State Bar Rule 1-204**. The member is current in license fees and is not suspended or disbarred as of the date of this letter.

STATE BAR OF GEORGIA

Linda Loven

Official Representative of the State Bar of Georgia

HEADQUARTERS
104 Marietta St. NW, Suite 100
Atlanta, GA 30303-2743
404-527-8700 · 800-334-6865
Fax 404-527-8717
www.gabar.org

COASTAL GEORGIA OFFICE
18 E. Bay St.
Savannah, GA 31401-1225
912-239-9910 · 877-239-9910
Fax 912-239-9970

SOUTH GEORGIA OFFICE
244 E. 2nd St. (31794)
P.O. Box 1390
Tifton, GA 31793-1390
229-387-0446 · 800-330-0446
Fax 229-382-7435

EXHIBIT 2-C

EXHIBIT 2-C

Supreme Court State of Idaho

Certificate of Good Standing

Clerk's Office)
) ss.
Supreme Court)

I, Stephen W. Kenyon, Clerk of the Supreme Court of the State of Idaho, do hereby certify that DEBORAH ANNE CZUBA on the 23rd day of September, 2014, was admitted to practice by said Court as an attorney counselor at law in all the courts of this state, and that she ever since and now is an attorney in good standing at the Bar of this Court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Court at Boise, Idaho, this 13th day of September, 2016.

Stephen Kenyon
Clerk of the Supreme Court

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CLERK OF THE COURT

ORAP
GENTILE CRISTALLI
MILLER ARMENI SAVARESE
PAOLA M. ARMENI
Nevada Bar No. 8357
E-mail: parmeni@gcmaslaw.com
410 South Rampart Blvd., Suite 420
Las Vegas, Nevada 89145
Tel: (702) 880-0000
Fax: (702) 778-9709
Attorney for Defendant Samuel Howard

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

SAMUEL HOWARD, Petitioner, vs. TIMOTHY FILSON, Warden, and ADAM PAUL LAXALT, Attorney General for the State of Nevada, Respondents.	CASE NO. 81C053867 DEPT. XVII

ORDER ADMITTING TO PRACTICE ATTORNEYS DEBORAH ANNE CZUBA, ESQ., AND JONAH J. HORWITZ, ESQ.

Deborah Anne Czuba, Esq., and Jonah J. Horwitz, Esq., having filed their Motions to Associate Counsel under Nevada Supreme Court Rule 42, together with Verified Applications for Association of Counsel, the State Bar of Nevada Statement, Ms. Czuba submitting Certificates of Good Standing for the Supreme Court State of Arkansas Little Rock, State of New York Supreme Court, Appellate Division Third Judicial Department, State Bar of Georgia, and Supreme Court of the State of Idaho, and Mr. Horwitz having filed a Certificate of Good Standing for the State of Wisconsin, and said applications having been noticed, no objections having been made, and the Court being fully apprised in the premises, and good cause appearing, it is hereby,

...

ORDERED, that said applications are hereby granted, and Deborah Anne Czuba, Esq., and Jonah J. Horwitz, Esq., are hereby admitted to practice in the above-entitled Court for the purposes of the above-entitled matter only.

Dated this 20 day of Oct, 2016.

MICHAEL P. VILLANI
DISTRICT COURT JUDGE
CASE NO.: 81C053867

Submitted by:

GENTILE CRISTALLI
MILLER ARMENI SAVARESE

By: _____
PAOLA M. ARMENI
Nevada Bar No. 8357
410 South Rampart Boulevard, Suite 420
Las Vegas, Nevada 89145
Tel: (702) 880-0000
Fax: (702) 778-9709
Attorney for Defendant Samuel Howard

Gentile Cristalli
Miller Armeni Savarese
Attorneys At Law
410 S. Rampart Blvd. #420
Las Vegas, NV 89145
(702) 880-0000

CERTIFICATE OF SERVICE

The undersigned, an employee of Gentile Cristalli Miller Armeni Savarese hereby certifies that on the 18 day of October, 2016, I served a copy of the **Order Admitting to Practice Deborah Anne Czuba, Esq., and Jonah J. Horwitz, Esq.,** by electronic means and by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to:

CLARK COUNTY DISTRICT ATTORNEY
CRIMINAL DIVISION
JONATHAN VANBOSKERCK
200 East Lewis Avenue
Las Vegas, Nevada 89101
Email: jonathan.vanboskerck@clarkcountyda.com

ADAM PAUL LAXALT
Nevada Attorney General
100 North Carson Street
Carson, City, Nevada 89701

An employee of Gentile Cristalli
Miller Armeni Savarese

Gentile Cristalli
Miller Armeni Savarese
Attorneys At Law
410 S. Rampart Blvd. #420
Las Vegas, NV 89145
(702) 880-0000