IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 77345

MARLO THOMAS

Appellant,

v.

WILLIAM GITTERE, et al.,

Respondents.

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

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

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

1. Peter LaPorta and Lee-Elizabeth McMahon represented Thomas during his first trial, and sentencing proceedings.

2. Lee-Elizabeth McMahon and Mark Bailus represented Thomas during his first direct appeal.

3. David Schieck represented Thomas in his first state post-conviction proceedings.

4. David Schieck and Daniel Albregts represented Thomas in his penalty-phase retrial.

5. David Schieck represented Thomas in the direct appeal from his penalty-phase retrial.

6. Bret Whipple represented Thomas in the state post-conviction proceeding, and appeal, following his penalty-phase retrial.

7. The Federal Public Defender, District of Nevada, represented Thomas during all subsequent proceedings.

DATED this 14th day of June, 2019.

/s/ Joanne L. Diamond
Attorney of record for
MARLO THOMAS

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I. JURISDICTIONAL STATEMENT

This is an appeal from a district court order denying Thomas's Petition for Writ of Habeas Corpus (Post-Conviction) in a capital case, No. 96C13682-1. The district court mailed its Notice of Entry of Order on October 1, 2018.[1] Thomas timely filed a Notice of Appeal on October 30, 2018.[2] This Court has appellate jurisdiction over this appeal under NRS 34.575, 34.830, 177.015(1)(b) & 177.015(3).

II. ROUTING STATEMENT

This case is retained by the Supreme Court because it is a capital case. Nev. R. App. P. 17(a)(1).

III. STATEMENT OF THE CASE

Thomas's case arises out of crimes committed at the Lone Star Steakhouse in Las Vegas on April 15, 1996. Carl Dixon and Matthew Gianakis were killed. On June 18, 1997, Thomas was convicted in the Eighth Judicial District Court of two counts of first-degree murder with use of a deadly weapon, robbery with use of a deadly weapon,

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[1] 35AA8600-8610.

[2] 35AA8611-8616.

conspiracy to commit murder and/or robbery, first-degree kidnapping with use of a deadly weapon, and burglary while in possession of a firearm.[3]

The jury found all six aggravators alleged by the State: (1) prior conviction for a violent felony (1990 attempted robbery when Thomas was seventeen years old); (2) prior conviction for a violent felony (1996 battery with substantial bodily harm); (3) murder committed in commission of a burglary; (4) murder committed in commission of a robbery; (5) murder committed to avoid or prevent lawful arrest; and (6) more than one conviction of murder.[4] The jury found no mitigating circumstances and, on June 25, 1997, Thomas was sentenced to death.[5] This Court affirmed on November 25, 1998, in case No. 31019, and issued its remittitur on November 4, 1999.[6]

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[3] 24AA5964-5970.

[4] 24AA5973-5981.

[5] 24AA5971-5981.

[6] 24AA5982-5983.

On January 6, 2000, Thomas filed a pro per petition for writ of habeas corpus (post-conviction).[7] A counseled supplement was filed by David Schieck on July 16, 2001.[8] The district court held evidentiary hearings on January 22, 2002, and March 15, 2002; the only witnesses were Thomas's trial counsel.[9] On September 6, 2002, the district court denied Thomas's petition.[10]

On February 10, 2004, in Case No. 40248, this Court affirmed Thomas's convictions but found trial counsel ineffective for failing to object to a misleading jury instruction concerning Thomas's eligibility for release if sentenced to life without parole. This Court reversed and remanded to the district court for a new penalty trial.[11]

On remand, the State alleged four aggravating circumstances: (1) Thomas's 1990 felony conviction; (2) Thomas's 1996 felony conviction; (3) murder committed to avoid or prevent lawful arrest; and (4) more

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[7] 5AA1057-1064.

[8] 5AA1065-1142.

[9] 2AA351-370 and 2AA371-382.

[10] 5AA1143-1158.

[11] 6AA1267-1284.

than one offense of murder. The jury found all four.[12] The jury found the following mitigating circumstances: (1) Thomas accepted responsibility for the crime; (2) Thomas co-operated but diverted the truth; (3) Thomas demonstrated remorse; (4) Thomas counseled others against criminal acts; (5) Thomas suffered both learning and emotional disabilities; (6) Thomas found religion; and (7) father's denial of Thomas.[13]

The jury found the mitigating circumstances did not outweigh the aggravating circumstances and sentenced Thomas to death.[14] A judgment of conviction was entered on November 28, 2005.[15] This Court affirmed on December 28, 2006.[16]

On March 6, 2008, Thomas filed a pro per petition for writ of habeas corpus (post-conviction).[17] Counseled supplements were filed by

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[12] 6AA1285-1288.

[13] 26AA6260-61.

[14] 26AA6262, 6267.

[15] 6AA1285-1288.

[16] 6AA1378-1398.

[17] 6AA1417-1428.

Bret Whipple on July 12, 2010, and March 31, 2014.[18] On May 30, 2014, the district court denied Thomas's petition.[19] This Court affirmed on July 22, 2016, and issued remittitur on October 27, 2016.[20]

Thomas filed the current post-conviction petition on October 20, 2017.[21] Without granting discovery or an evidentiary hearing, the district court entered an order denying Thomas's petition on October 1, 2018.[22] This appeal follows.

IV. STATEMENT OF THE ISSUES

1. Did the district court err in denying Thomas's claim that the penalty-retrial jury was improperly informed of his prior death sentences?

2. Did the district court err in finding ineffective assistance of initial state post-conviction counsel could not overcome procedural default of Thomas's penalty-phase retrial claims?

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[18] 6AA1429-1498.

[19] 6-7AA1499-1509.

[20] 7AA1532-1539, 26AA6274-6276.

[21] 3-4AA630-885.

[22] 35AA8600-8610.

3. Did the district court err in finding ineffective assistance of initial state post-conviction counsel could not overcome procedural default of Thomas's guilt-phase claims and in finding this was Thomas's third attempt at post-conviction relief from his guilty verdict?

4. Did the district court err in finding Thomas's actual innocence of the death penalty could not overcome the procedural default bars?

5. Are the substantive constitutional claims in Thomas's petition meritorious, justifying relief from his convictions and death sentences?

V. STANDARD OF REVIEW

The district court's application of procedural default rules is reviewed de novo.[23] This Court will give deference to the district court's factual findings unless clearly erroneous or unsupported by substantial evidence.[24] The district court's legal conclusions are reviewed de novo.[25]

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[23] *Rippo v. State*, 134 Nev.__, 423 P.3d 1084, 1093, *amended on denial of reh'g*; 432 P.3d 167 (2018).

[24] *Rippo, id.*

[25] *Wells Fargo Bank, N.A., v. Radeki*, 134 Nev.__, 426 P.3d 593, 596 (2018).

VI. STATEMENT OF THE FACTS

If the individuals in Marlo Thomas's life had fulfilled the roles they were intended to fill, he would not be on death row. The parents who should have nurtured and protected him, the lawyers who were charged with advocating for him, and the jurors who decided his fate all abdicated their responsibilities. Thomas's childhood was horrible. His trials were unfair. And his jurors committed misconduct.

This Court represents Thomas's last chance for the state corrective process to give him the fairness he has otherwise been denied. Fairness dictates granting Thomas's petition or at least remanding for further factual development.

VII. SUMMARY OF ARGUMENT

Thomas can demonstrate good cause to overcome any applicable procedural default rules based on the ineffective assistance of initial post-conviction counsel and his actual innocence of the death penalty. Thomas can demonstrate actual prejudice based on the merits of his underlying claims. Individuals on Thomas's juries were biased against him, exposed to prejudicial extraneous information, and violated the trial court's instructions. Counsel at his original trial were ineffective

for, among other things, failing to investigate and present compelling evidence supporting a first-phase mental state defense. Counsel at his penalty-phase retrial were ineffective for, among other things, failing to investigate and present compelling evidence in mitigation. Trial court errors and prosecutorial misconduct infected Thomas's trials, including improperly excluding an African-American prospective juror from the original trial, and enabling bad acts from Thomas's youth to render him death-eligible and influence the retrial jury's sentence selection. Individually and cumulatively, these errors rendered Thomas's convictions and death sentences unconstitutional.

VIII. ARGUMENT

A. Thomas was entitled to a hearing on his claim that retrial jurors learned of his prior death sentences (Claim Twenty-Six C).

> I don't feel responsible for Marlo's death sentence. As far as I am concerned, that decision had already been made by the previous jury. [26]

[26] 28AA6836-3838 at ¶5 (Declaration of penalty-retrial juror, Ceasar Elpidio).

In the instant post-conviction proceedings, five jurors provided declarations stating they learned during the penalty retrial that Thomas had been previously sentenced to death. These jurors then considered this information in reaching their verdict for the death penalty. The parties agree the fact of Thomas's prior death sentences was never disclosed on the record.[27] The jury's consideration of this prejudicial extraneous information violated Thomas's rights under the Sixth, Eighth, and Fourteenth Amendments.

The declarations vary as to whether jurors learned about the prior death sentence from the judge or one of the attorneys. But whether it was the trial judge, a prosecutor, or a defense attorney who told the jurors about Thomas's prior death sentences, the information was extraneous and prejudicial. "An extraneous influence includes . . . consideration by jurors of extrinsic evidence."[28] And the Supreme Court has held "information is deemed 'extraneous' if it derives from a source 'external' to the jury. 'External' matters include . . . information related

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[27] 35AA8585.

[28] *Meyer v. State,* 119 Nev. 554, 562, 80 P.3d 447, 454 (2003).

specifically to the case the jurors are meant to decide."[29] Supreme Court precedent is clear: An external influence affecting a juror's deliberations violates a defendant's right to a fair and impartial jury.[30]

1. The juror testimony is admissible.

The district court denied this claim without an evidentiary hearing because it ruled the juror declarations were inadmissible.[31] The court relied on NRS 50.065(2), prohibiting juror testimony concerning "the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent or dissent from the verdict . . . or concerning the juror's mental processes in connection therewith."[32] The court also ruled them inadmissible under this Court's opinion in *Echavarria v. State*, applying NRS 50.065(2) to exclude a

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[29] *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014) (internal citations omitted).

[30] *See, e.g., Turner v. Louisiana,* 379 U.S. 466, 472-73 (1965).

[31] 35AA8597-98.

[32] NRS 50.065(2)(c).

juror's statement that she only voted for the death penalty because she thought the verdict would be overturned on appeal.[33]

The district court's reliance on *Echavarria* and NRS 50.065 is misplaced. *Echavarria* did not involve prejudicial extraneous information presented to a jury. And nothing in NRS 50.065 prevents a juror from testifying about extraneous prejudicial information improperly brought to the jury's attention (even if this Court finds inadmissible any evidence of its effect on a juror's mind).

This Court's decision in *Meyer* is more analogous to the situation here. In *Meyer,* this Court held, "Where the misconduct [alleged] involves extrinsic information or contact with the jury, juror affidavits or testimony establishing the fact that the jury received the information or was contacted are permitted."[34] Accordingly, the district court should have considered the declarations offered by Thomas and held an evidentiary hearing.

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[33] *Echavarria v. State,* 108 Nev. 734, 741-42, 839 P.2d 589, 594 (1992).

[34] *Meyer,* 119 Nev. at 562, 80 P.3d at 454.

At an evidentiary hearing, Thomas would have called the following jurors who would have testified to the following admissible evidence:

Adele Basye:[35]

> 4. After the jury was selected, we were informed by one of the attorneys that the defendant had already been sentenced to death in his 1997 trial. We were also told that he was on death row at the time.

Don McIntosh:[36]

> 2. To my understanding, jurors were selected to participate in the re-trying of the defendant's penalty phase. Prior to the beginning of the trial, the judge informed the jurors that the defendant had been convicted of murder and sentenced to death in his previous trial.

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[35] 16AA3768-3772 at ¶4.

[36] 28AA6779-6785 at ¶2.

Philip Adona:[37]

We were told that the defendant was fighting the death penalty and had won his appeal and that's why we were there: he had got the death penalty before, he fought it and won, and we were there doing it again.

Ceasar Elpidio:[38]

3. I knew Marlo had already been sentenced to death by a different jury. Either the judge told us that at the beginning of the trial or the attorneys told us in their opening or closing statements. Our job as jurors was to decide whether or not to affirm the death sentence that the prior jury had given him.

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[37] 26AA6419-6421 at ¶2.

[38] 28AA6836-6838 at ¶3.

Foreperson, Conné Kackzmarek:[39]

> 6. The jury was given very specific instructions prior to the trial. We were informed that the defendant had been sentenced to death in his previous trial. As jurors, it was our job to reaffirm the defendant's prior death sentence. Once the jury was given a chance to review evidence, we were supposed to determine whether or not the defendant had been properly sentenced. It was not our job as jurors to decide if the defendant should be put to death.

2. The extraneous information was prejudicial.

The jurors' consideration of Thomas's prior death sentences prejudiced him in multiple ways. It rendered Thomas's death sentences unconstitutional under *Caldwell v. Mississippi*, where the Supreme Court found it "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."[40] And it resulted in a verdict rendered by biased jurors.

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[39] 28AA6812-6817 at ¶6.

[40] *Caldwell v. Mississippi,* 472 U.S. 320, 328-29 (1985).

a. Jurors' consideration of Thomas's prior death sentences violated the Eighth Amendment.

In *Caldwell*, the Supreme Court explained its "Eighth Amendment jurisprudence has taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State."[41] The Court expressed concern that a juror under the mistaken impression that the responsibility for the sentencing decision rested elsewhere would minimize the importance of their sentencing determination.[42] That is exactly what happened here.

Foreperson Kackzmarek understood, "As jurors, it was our job to reaffirm the defendant's prior death sentence. . . . [W]e were supposed to determine whether or not the defendant had been properly sentenced. It was not our job as jurors to decide if the defendant should be put to death."[43] Juror Elipdio's declaration stated: "Our job as jurors was to decide whether or not to affirm the death sentence that the prior

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[41] *Id.* at 329.

[42] *See id.* at 333.

[43] 28AA6812-6817 at ¶6.

jury had given [Thomas] . . . . If we validated the finding of guilt, we were required to affirm the death sentence[.]"[44] Consequently, Elpidio does not "feel responsible for Marlo's death sentence. As far as I am concerned, that decision had already been made by the previous jury."[45]

b. The extraneous information about Thomas's prior death sentences resulted in juror bias.

Even if the above-quoted portions of the juror declarations are inadmissible, Thomas is still entitled to relief. In *Tinsley v. Borg*, the Ninth Circuit recognized courts have applied implied bias to jurors who are "apprised of such prejudicial information about the defendant" it is "highly unlikely [they could] exercise independent judgment."[46] The information about Thomas's prior death sentences is of such a prejudicial nature. The Fourth Circuit has observed, "we are hard pressed to think of anything more damning to an accused than information that a jury had previously convicted him for the crime

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[44] 28AA6836-6838 at ¶¶3-4 .

[45] 28AA6836-6838 at ¶5.

[46] *Tinsley v. Borg,* 895 F.2d 520, 528 (9th Cir. 1990).

charged."[47] And in *United States v. Keating*, the Ninth Circuit remanded for a new trial after finding an unacceptably high probability Keating's federal trial verdict was based in part on extrinsic evidence that he had been previously convicted in state court of offenses stemming from the same conduct.[48] Supreme Court precedent makes clear that the presence of a single biased juror is structural error requiring automatic reversal.[49]

In the alternative, Thomas is entitled to relief under this Court's decision in *Meyer*, because "the average, hypothetical juror could have been affected by th[e] extraneous information, and there is a reasonable probability" this "information affected the verdict."[50]

3. Thomas is entitled to an evidentiary hearing.

At a minimum, Thomas is entitled to an evidentiary hearing under any of the above legal theories. The declarations submitted with

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[47] *Arthur v. Bordenkircher,* 715 F.2d 118, 119 (4th Cir. 1983) (internal quotation marks omitted).

[48] *United States v. Keating*, 147 F.3d 895, 903 (9th Cir. 1988).

[49] *See, e.g., Parker v. Gladden*, 385 U.S. 363, 366 (1966); *Neder v. United States*, 527 U.S. 1, 8 (1999).

[50] *Meyer*, 119 Nev. at 572, 80 P.3d at 460-61.

the petition offer uncontroverted proof that jurors considered prejudicial extraneous information directly undermining the reliability of Thomas's death sentences. Thomas therefore supported his claim with specific factual allegations not belied by the record that, if true, entitle him to relief. This is the standard for entitlement to an evidentiary hearing.[51] Thomas can overcome any procedural default of this claim because initial state post-conviction counsel, Bret Whipple, was ineffective for failing to investigate, develop and present this evidence in the initial state post-conviction proceedings.[52] Whipple never even interviewed the jurors.[53]

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[51] *Mann v. State*, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

[52] *See also* Section VIII.B.1.a.(1), below.

[53] *See* 16AA3768-3772 at ¶11; 26AA6419-6421 at ¶8; 28AA6779-6785 at ¶16; 28AA6812-6817 at ¶15; 28AA6836-6838 at ¶6.

Should this Court find Whipple was not ineffective because there was nothing in the record to alert him to the possibility of juror misconduct, Thomas is still entitled to relief under the holding in *Williams v. Taylor*, 529 U.S. 420, 442-43 (2000) (petitioner did not fail to develop juror misconduct claim in earlier proceedings where trial record contained no evidence to put reasonable attorney on notice of the misconduct).

Because the district court erred in failing to hold an evidentiary hearing on this claim, this Court should remand with instructions for it to do so now. In *Fullwood v. Lee*, the Fourth Circuit remanded for an evidentiary hearing based on just one juror declaration alleging Fullwood's resentencing jury improperly learned of his prior death sentence.[54] Here, there are five. And subsequent proceedings in Fullwood's case demonstrate the importance of an evidentiary hearing. After the facts were further developed at an evidentiary hearing, the district court granted Fullwood habeas relief and overturned his death sentence.[55] Thomas urges this Court to give him the same opportunity to prove his entitlement to relief.

B. Under the applicable legal standards, Thomas's petition should not have been dismissed.

This Court's precedent makes clear that the district court was required to liberally construe Thomas's petition and accept all his factual allegations as true when reviewing the State's motion to

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[54] *Fullwood v. Lee,* 290 F.3d 663, 676 (4th Cir. 2002).

[55] *See Fullwood v. Polk*, 3:98-CV-00464-GCM, Western District of North Carolina, Charlotte Division, ECF No. 8 at 6-13.

dismiss.[56] The district court could properly dismiss Thomas's petition only if it appeared "beyond a doubt that [he] could prove no set of facts which . . . would entitle him to relief."[57]

The district court erred in dismissing Thomas's petition without granting discovery and an evidentiary hearing. These proceedings were necessary to establish the factual bases of Thomas's substantive claims and his allegations of good cause to overcome the procedural bars.[58] District courts in this state have granted discovery and evidentiary hearings for these purposes in other cases involving successive petitions.[59]

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[56] *See Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. __, 327 P.3d 518, 520 (2014); *see also Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1990).

[57] *Dynamic Transit v. Trans Pac. Ventures*, 128 Nev. __, 291 P.3d 114, 117 (2012) (citations omitted).

[58] *See Pellegrini v. State*, 117 Nev. 860, 883-87, 34 P.3d 519, 535-37 (2001) (*abrogated on other grounds by Rippo v. State*, 134 Nev.__, 423 P.3d 1084, 1097 n.12 (2018)); *Jones v. Wood*, 114 F.3d 1002, 1009 (9th Cir. 1997).

[59] *See* 34AA8411.

1. The district court erred in finding Thomas could not overcome the procedural bars.

A petitioner can demonstrate good cause to overcome the defaults under NRS 34.726, 34.800, and 34.810 if he can demonstrate the delay was not his fault. This Court has held delay is not a petitioner's fault where it is caused by an impediment external to the defense.[60] "A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of any default."[61]

a. Ineffective assistance of initial state post-conviction counsel constitutes good cause.

In *Crump v. Warden*, this Court held the ineffective assistance of initial state post-conviction counsel constitutes good cause to overcome procedural bars.[62] Thomas alleged ineffective assistance by initial post-conviction counsel as good cause and prejudice to overcome any default

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[60] *See Rippo*, 423 P.3d at 1095.

[61] *Clem v. State*, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003).

[62] *Crump v. Warden*, 113 Nev. 293, 304-05, 934 P.2d 247, 254 (1997). Thomas refers to a petition alleging ineffective assistance of initial state post-conviction counsel as a "*Crump* petition" and its author as "*Crump* counsel."

of his underlying claims.[63] The allegations were timely because the instant *Crump* petition was filed within one year after this Court issued its remittitur following its decision affirming Thomas's penalty-retrial.[64]

(1) Penalty-retrial post-conviction counsel was ineffective under *Strickland*.

Bret Whipple was confirmed as penalty-retrial post-conviction counsel on January 7, 2009.[65] He filed an initial petition on July 12, 2010.[66] The petition alleged, among other things, that penalty-retrial counsel were ineffective for failing to pursue various leads Whipple identified in the guilt-phase testimony of neuropsychologist, Dr. Thomas Kinsora.[67]

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[63] Thomas alleges David Schieck was ineffective with respect to guilt-phase claims that could have been raised during post-conviction proceedings prior to this Court vacating and remanding for a new penalty trial (Thomas acknowledges any challenges to his first penalty phase are moot). Thomas also alleges Bret Whipple was ineffective during the post-conviction proceedings following this Court's remand. Thomas distinguishes these individuals as "guilt-phase post-conviction counsel" and "penalty-retrial post-conviction counsel."

[64] *Rippo*, 423 P.3d at 1097.

[65] *See* 32AA7934-7936.

[66] *See* 6AA1429-1448.

[67] *See* 6AA1434-1439.

Specifically, Whipple alleged penalty-retrial counsel failed to: (1) present available evidence that Thomas may be intellectually disabled and ineligible for the death penalty under *Atkins v. Virginia*; (2) investigate whether Thomas suffers from Fetal Alcohol Spectrum Disorder (FASD); and (3) investigate Thomas's social history and present available mitigation evidence.[68]

Despite identifying three areas where penalty-retrial counsel performed deficiently, Whipple pursued only two: the possibilities that Thomas was intellectually disabled and suffered from FASD. Although Whipple was on notice that Thomas's childhood was abusive and neglectful—and Thomas "ha[d] a right to have this generally mitigating information presented to a finder of fact"—Whipple never investigated or developed this claim.[69] His failure to do so was unreasonable under *Strickland v. Washington*.[70]

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[68] *See* 6AA1434-1439.

[69] *See* 6AA1438-39.

[70] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

After filing the initial petition, Whipple arranged for neuropsychologist Dr. Jonathan Mack to evaluate Thomas. Mack evaluated Thomas on April 2 and 3, 2012.[71] After the evaluation was complete, Mack tried to call Whipple to discuss his findings.[72] But Mack was unable to reach him. On August 20, 2012, Mack mailed a draft report to Whipple.[73] The draft report reflected Mack's opinion that Thomas was not intellectually disabled.[74]

From the outset of his representation, Whipple's focus was on proving Thomas was exempt from the death penalty under *Atkins*.[75] Mack's opinion shut that down. But Whipple never contacted Mack to discuss the draft report.[76] Instead, on March 31, 2014, Whipple filed a

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[71] *See* 29AA7146-7148 at ¶2.

[72] *See id.*

[73] *See* 29AA7146-7148 at ¶3.

[74] *See id.*

[75] *See* 30AA7436-7438 at ¶4.

[76] *See* 29AA7146-7148 at ¶3.

supplemental petition and attached an unsigned copy of Mack's report as its sole exhibit.[77]

Whipple no longer claimed Thomas was exempt from the death penalty under *Atkins*. The supplemental petition argued instead that penalty-retrial counsel were ineffective for failing to investigate and present evidence of Thomas's borderline intellectual functioning in mitigation.[78] It also alleged penalty-retrial counsel's ineffectiveness for failing to develop and present evidence that Thomas suffered from neurological impairment due to FASD.[79]

In addition to his opinion that Thomas was not intellectually disabled, Mack's report contained a wealth of mitigation information regarding Thomas's social history. This information further built on the leads Whipple identified in Kinsora's guilt-phase testimony. Yet the supplemental petition did not allege penalty-retrial counsel failed to investigate and present mitigating evidence from Thomas's childhood.

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[77] *See* 6AA1498.

[78] *See* 6AA1454-1459; *see also Thomas v. State*, No. 65916, 2016 WL 4079643 at *1 (July 22, 2016).

[79] *See* 6AA1459.

Whipple received Mack's report almost two years before filing the supplemental petition. Reasonably effective post-conviction counsel would have spent those two years investigating and developing the compelling mitigation story presented as Claim Fourteen of the current petition.[80] But Whipple did nothing. He conducted no investigation. He did not follow up with Mack to see what else could be done with the information in the draft report. He did not even bother to get the report signed.

In *Vanisi v. Baker*, this Court found post-conviction counsel's "decision to pursue a competency motion, to the exclusion of investigating mitigation evidence to support the ineffective-assistance-of-trial-counsel claim, was objectively unreasonable."[81] This Court should reach the same conclusion here. Given the wealth of information available, Whipple's election to focus only on Thomas's intellectual

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[80] Undersigned counsel was able to develop Claim Fourteen in less than one year, in order to meet the federal statute of limitations under AEDPA.

[81] *Vanisi v. Baker*, 405 P.3d 97, 2017 WL 4350947 at *2 (September 28, 2017).

impairments—especially after Mack reported Thomas was not intellectually disabled—was objectively unreasonable.[82] Because Whipple's failure to conduct a reasonable investigation lacked a strategic rationale, his representation was deficient.[83]

Whipple's deficient performance prejudiced Thomas. A constitutionally adequate investigation would have revealed the legacy of intergenerational trauma—from poverty, violence, and sexual abuse—that infected every aspect of Thomas's young life.[84] Whipple's ineffectiveness is good cause to excuse any procedural default of Claim Fourteen, as well as the other claims in the current petition that should have been, but were not, raised in the penalty-retrial post-conviction proceedings.

(2) Guilt-phase post-conviction counsel was ineffective under *Strickland*.

In the petition he filed on Thomas's behalf, guilt-phase post-conviction counsel, David Schieck, alleged trial counsel were ineffective

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[82] *See* 29AA7146-7148 at ¶3.

[83] *See Daniels v. Woodford*, 428 F.3d 1181, 1206 (9th Cir. 2005); *see also Nealy v. Cabana*, 764 F.2d 1173, 1178 (5th Cir. 1985).

[84] *See* Section VIII.C.2., below.

for inadequately investigating and preparing for the guilt phase. Specifically, Schieck argued, "no proper investigation was conducted before either the trial or penalty hearing and therefore the testimony presented was virtually unopposed . . . and does not accurately present the facts of the case."[85] He further alleged Thomas "received ineffective assistance of counsel from attorneys that had 14 other pending murder cases and did not prepare the case for trial or penalty hearing."[86] The only extra-record evidence supporting this claim was an affidavit by Thomas.[87]

Thomas's affidavit included a list of potential witnesses he had provided to trial counsel. Those witnesses were Thomas's cousins David Hudson, Ann Thomas, Vincent Diggs, DeDe Thomas, Johnnie Thomas, and Sherman Nash; his brother, Paul Hardwick, Jr.;[88] and his father,

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[85] 5AA1073.

[86] 5AA1122.

[87] *See id.*; *see also* 5AA1128; 5AA1138-1141.

[88] Although the affidavit identified "Paul Thomas," the individual's name was actually Paul Hardwick, Jr.

Bobby Lewis.[89] Schieck never spoke to them. Had Schieck spoken to these individuals, he would have discovered a viable guilt-phase mental-state-defense claim that should have been included in the petition Schieck filed.[90]

A basic function of a post-conviction petition is to show, by reference to evidence outside the trial record, what a competent investigation would have produced. "To determine whether prejudice has been established," a reviewing court "compare[s] the actual trial with the hypothetical trial that would have taken place had counsel competently investigated and presented the . . . defense."[91] Schieck's failure to interview witnesses identified in Thomas's affidavit, and to include declarations supporting the ineffective assistance of trial counsel claims, fell below an objective standard of reasonableness. Indeed, in the same order remanding for a penalty-phase retrial, this Court found "no merit" to Schieck's claim that trial counsel were

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[89] 5AA1139-40.

[90] *See* Section VIII.C.3., below.

[91] *In re Marquez*, 822 P.2d 435, 446 (Cal. 1992).

ineffective for failing to call any witnesses in the guilt phase, because "[Thomas's] affidavit names only witnesses allegedly relevant to the penalty phase and fails to explain what the witnesses' testimony would have been or how it might have altered the outcome of the trial."[92]

In the current post-conviction proceedings, Thomas included as exhibits to his petition declarations from David Hudson, Ann Thomas, and Paul Hardwick, Jr.[93] Comparing Thomas's affidavit with the information these witnesses would have given Schieck—had he interviewed them—illustrates his ineffectiveness under *Strickland*:[94]

Thomas's Affidavit	Decl. of Antionette Thomas
"Ann Thomas was interviewed by Mr. LaPorta on the weekend prior to the penalty hearing and told that he would not call her as a witness because she had been arrested one time."[95]	"Marlo told me that his mom, Georgia, didn't love him and treated him different from his brothers."[96]

[92] *See* 6AA1281-82.

[93] *See* 7AA1611-1613, 1626-1630, and 26AA6324-6327.

[94] This information should also have been developed and presented by Schieck as mitigation at Thomas's penalty retrial. *See* Section VIII.C.2., below.

[95] 5AA1140.

[96] 7AA1611-1613 at ¶2.

	"Marlo drank a lot of alcohol when he was a teenager. . . . Marlo was probably around fourteen when he was drinking and smoking weed." [97] "There was a lot of gang activity in our neighborhoods growing up. . . . When Marlo was nine or ten, I remember him being chased by gang members when he crossed territory lines."[98] "When I was fifteen, my friend, Nechelle Wilson, was killed. Marlo had been dating Nechelle. . . . Marlo was crushed when she died. . . . After Nechelle's death, Marlo started going to jail more and distanced himself from the family."[99]
Thomas's Affidavit	**Decl. of David Hudson**
"David Hudson was my cousin and would have offered favorable character evidence at the penalty hearing."[100]	"A lot of times there was no food."[101]

[97] 7AA1611-1613 at ¶4.

[98] 7AA1611-1613 at ¶5.

[99] 7AA1611-1613 at ¶6.

[100] 20AA4816-4817 at 74-75.

[101] 7AA1626-1630 at ¶2.

	"When new apartment complexes were built, we ate tar from the pavement and sometimes the roof."[102] "Many nights [Marlo and his brothers] went to bed hungry."[103] "Marlo didn't get whippings from Georgia, he took beatings."[104] "Bobby Lewis . . . was not a father figure and not a good man. . . . Bobby physically and verbally abused Georgia."[105] "It is a well-known family secret that my maternal grandfather molested my mother and her sisters, including Georgia. The molestation affected my mom and every one of my aunties emotionally, physically, and mentally."[106]
Thomas's Affidavit	**Decl. of Paul Hardwick, Jr.**

[102] 7AA1626-1630 at ¶3.

[103] 7AA1626-1630 at ¶5.

[104] 7AA1626-1630 at ¶7.

[105] 7AA1626-1630 at ¶8.

[106] 7AA1626-1630 at ¶10.

"Paul Thomas was my younger brother by eight years and was not interviewed by anyone."[107]	"Marlo seemed slower than the average child and had some disabilities."[108] "[M]any times there was no food in the house. We ate . . . syrup sandwiches, mayo sandwiches, and ketchup sandwiches."[109] "My mom beat the mess out of Marlo. She beat him with anything: extension cords, wooden kitchen spoons, pots, pans, and iron skillets. I saw her throw fold up kitchen chairs at him. . . . I saw bruises and marks on Marlo's body after these beatings. There were welts on his back from being beaten with an extension cord. . . . It made him bitter and hard. He told me he hated our mother."[110] "Mom hated Bobby and because she hated him she took it out on Darrell and Marlo. It got worse for Marlo once Darrell was out of the house."[111]

[107] 5AA1140.

[108] 26AA6324-6327 at ¶3.

[109] 26AA6324-6327 at ¶4.

[110] 26AA6324-6327 at ¶5.

[111] 26AA6324-6327 at ¶7.

	"[Mom] told me [Bobby] was very abusive and beat her all the time. Bobby did the same thing to her that she did to Marlo, he hit her with anything. He choked her and beat her like a man with his fist. Sometimes she was beaten so bad, she couldn't go to work."[112] "[One time Bobby] was beating her and the next thing she remembered was waking up in bed not knowing how she got there. Mom told me she was glad Bobby was locked up because if not, she would have probably killed him."[113]

Bobby Lewis was deceased by the time undersigned counsel were appointed, but Thomas attached to the instant petition numerous declarations from witnesses who knew him:[114]

Thomas's Affidavit	Decl. of Virgie Robinson
"Bobby Lewis, my biological father was in prison at Indian Springs and was never	"I met Bobby through my daughter's boyfriend . . . and moved in with him two months

[112] 26AA6324-6327 at ¶8.

[113] 26AA6324-6327 at ¶9.

[114] *See* 20AA4789-4797 (Lewis death certificate).

interviewed by my attorneys. He is in prison for murder, however, I believed that he could have provided insight into my childhood that could have been helpful at the penalty hearing."[115]	later. . . . A month after I moved in with him, Bobby [beat] me for the first time."[116] "[One time] Bobby was drunk. He wanted to make love but I just wanted to go to bed and sleep. Bobby jumped on me and forced me to have sex with him."[117] "Bobby beat me with his fist upside my head, hit me in my face, and choked me. I have problems with my head and neck now."[118] "Before dating Bobby, I dated a guy called Otis. . . . One night, I went to the club where Otis worked as a cook and was talking to him. Bobby came in the bar and shot Otis in the eye."[119] "The last time Bobby hurt me, he went to jail. I was at my sister['s] house and Bobby jumped through the front window, breaking the glass. Bobby was holding a sawed-

[115] 5AA1140.

[116] 7AA1660-1663 at ¶2.

[117] 7AA1660-1663 at ¶3.

[118] 7AA1660-1663 at ¶5.

[119] 7AA1660-1663 at ¶7.

	off shotgun. He . . . took me to an empty house. . . . Bobby raped me and kept me in the empty house all night."[120]
	Decl. of Johnny Hudson
	"Bobby was abusive; emotionally, psychologically, and physically. I saw Bobby pick Marlo up and throw him into a wall. Marlo was about eight at the time. His imprint was left in the wall where the sheetrock busted. Marlo got up real slow. I also saw Bobby knock the hell out of Marlo with his fist, sending him over Georgia's couch."[121] "Bobby beat the crap out of Georgia. They were always fighting. I saw Bobby hit Georgia, Georgia hit back, him hit her again, then Georgia go get a skillet and knock the mess out of him. . . . Sometimes they fought in front of the kids, including Marlo; they saw and heard it."[122] "The whole family saw Bobby get arrested for his last charge. . . . [P]olice stormed the

[120] 7AA1660-1663 at ¶10.

[121] 12AA2863-2868 at ¶6.

[122] 12AA2863-2868 at ¶7.

	house. They had guns drawn at the front and back door waiting on Bobby to surrender. Marlo cried as they put Bobby in the car. When Bobby went to prison, it had a deep impact on Marlo."[123] "When Marlo was sent to Southern Desert Correctional Center, Bobby and I were there. Marlo saw his dad every day and they spent time together."[124]
	Decl. of Matthew Young
	"I heard my aunts talk about how [Bobby] physically abused Georgia and talked down to her. The police were called a couple of times on Bobby for beating Georgia. Bobby called Georgia a fat bitch and told her she would never amount to anything. Marlo told me he was angry with Bobby for saying those things to his mom."[125]
	Decl. of Darrell Thomas
	"Dad was a fighter and a tough guy. He was a mean person. He

[123] 12AA2863-2868 at ¶8.

[124] 12AA2863-2868 at ¶9.

[125] 12AA2869-2876 at ¶11.

	denied Marlo because of Marlo's light complexion."[126] "[W]hen we lived in Gerson Park, Larry and I were sleeping and we heard Dad knock out all the windows in our apartment. Mom didn't let him in so he took a stick and broke all the wi[n]dows from the outside."[127]
	Decl. of Charles Nash. Jr.
	"Bobby was always drunk. He was real abusive and took his problems out on Marlo. Bobby hit Marlo in the head with his hands. He hit him with extension cords and tree branches."[128] "I saw Marlo with a black eye and bruises on his legs and arms. He had a big knot on his head once. Marlo told me the injuries were from Bobby hitting him."[129] "[Marlo] hated Bobby for what he did to him and he hated going home. Marlo didn't have a

[126] 7AA1618-1625 at ¶3.

[127] 7AA1618-1625 at ¶5.

[128] 7AA1614-1617 at ¶2.

[129] 7AA1614-1617 at ¶3.

	childhood because of the abuse."[130]

If Schieck had interviewed these witnesses and conducted necessary follow up investigation, he would have developed the information in the declarations submitted with the current petition. In light of the information obtained from those witnesses, effective post-conviction counsel would have retained an appropriate mental health expert to evaluate Thomas.[131] Under this Court's Indigent Defense Standards of Performance, post-conviction counsel is required to "secure the services of . . . experts where necessary to develop claims to be raised in the post-conviction petition."[132] This rule recognizes the importance of investigating, developing, and presenting extra-record

[130] 7AA1614-1617 at ¶5.

[131] Schieck was similarly ineffective for failing to retain an appropriate mental health expert to evaluate Thomas for the penalty retrial. *See* Section VIII.C.2., below

[132] Indigent Defense Standards of Performance, ADKT 411 (2008), Standard 3-9(f).

evidence where there is an allegation that trial counsel was ineffective.[133]

If Schieck had performed effectively and obtained an appropriate mental health evaluation, it would have supported a claim that trial counsel were ineffective for failing to develop and present a mental state defense, as outlined in Section VIII.C.3., below. But Schieck conducted no extra-record investigation; he relied solely on Thomas's affidavit. And he failed even to consult with a mental health expert.

At the pre-remand post-conviction evidentiary hearing, the district court asked Schieck how he intended to defend the case in light of Thomas's videotaped confession.[134] Schieck's answer demonstrates he was on notice that a guilt-phase mental state defense was critical in this case. Shieck stated that Thomas was "not confessing to first-degree murder, rather that he in fact acted in a self-defense capacity."[135] As explained in Section VIII.C.3., below, Thomas's perception of having

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[133] *See Wilson v. State*, 105 Nev. 110, 113-15, 771 P.2d 583, 584-86 (1989).

[134] 2AA354 at pg. 12.

[135] 2AA355 at pg.13.

acted in self-defense was a direct result of his severely traumatic background, supporting a guilt-phase mental state defense.

Schieck's ineffectiveness for failing to develop and present the evidence in Claim Thirteen is good cause to overcome any procedural default of that claim.[136] Schieck's failure to raise any other guilt-phase claims in the petition overcomes the default of those claims, too.

(a) District court rulings contributed to Schieck's ineffectiveness.

In his supplemental petition, Schieck argued he was entitled to an evidentiary hearing "so that counsel can explain any cause or strategy that existed" for the "errors and failures" alleged.[137] And, as discussed above, Schieck proffered Thomas's affidavit naming eight family-member witnesses and outlining their proposed testimony.[138]

The district court ordered an evidentiary hearing but unreasonably limited it to three claims. All alleged ineffective

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[136] *See* 16AA3873-21AA5030; *see also* 28AA6887-6897 (Declaration of Dr. Thomas Kinsora); 27AA6648-6687 (Declaration of Dr. Richard Dudley).

[137] 5AA1077.

[138] 5AA1078; *see id.* at 1139-40.

assistance of counsel.[139] The first two were record-based. The third, Claim Ten of Schieck's petition, alleged trial counsel were unprepared for trial. To prove Claim Ten, Schieck should have been allowed to call the witnesses noticed in Thomas's affidavit. But the district court elected to hear only from trial counsel and did not permit Schieck to call the other witnesses.[140]

At the evidentiary hearing, Schieck pointed out that Claim Ten alleged trial counsel's failure to prepare for both phases of trial.[141] But the court refused to consider the guilt-phase allegations, concluding counsel were prepared for trial because they announced ready at calendar call.[142] Schieck objected: "just because counsel . . . comes to court and . . . declares ready for trial doesn't mean they have actually done what they need to do[.]"[143] The court's response was dismissive: "You can call Mr. Thomas [to] tell us what things . . . didn't get done in

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[139] *See* 2AA349; *see also id.* at 352 pgs. 2-3.

[140] *See* 2AA349; *see generally* 2AA351-370; 2AA371-382.

[141] *See* 2AA352 at pgs. 3-4.

[142] *See* 2AA372-373 at pgs. 4-8.

[143] 2AA353 at pg. 8.

preparation for trial."[144] The court's refusal to consider Claim Ten's guilt-phase component was error.

These rulings by the court contributed to Schieck's failure to develop in the first post-conviction proceeding Claim Thirteen of the instant petition, and are good cause to overcome any procedural default of that claim. And the court's limitation of the evidentiary hearing to just three claims is good cause for Thomas's failure to develop any other guilt-phase claims raised in the current petition.

(3) The ineffective assistance of guilt-phase post-conviction counsel claims are timely.

The district court found Thomas's instant petition was his "third attempt at post-conviction relief from his guilty verdict and second attempt from the death verdict."[145] The district court was wrong. David Schieck was post-conviction counsel following Thomas's first trial, and was responsible for raising all errors relating to the trial and direct appeal. Bret Whipple was post-conviction counsel following Thomas's penalty retrial, and was responsible for raising all penalty retrial and

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[144] *Id.*

[145] 35AA8593.

related direct appeal errors. And this is Thomas's first petition challenging Schieck and Whipple's ineffectiveness in the relevant initial state post-conviction proceedings.

(a) Whipple was not *Crump* counsel for the guilt-phase postconviction.

The district court's finding that this is Thomas's "third attempt" at guilt-phase post-conviction relief suggests it believed Whipple was responsible for alleging ineffective assistance by Schieck in the guilt-phase post-conviction proceedings, as good cause and prejudice under *Crump* to excuse the default of meritorious guilt-phase claims.

There are two compelling reasons repelling any suggestion that Whipple was *Crump* counsel for the guilt-phase post-conviction proceedings. First, Whipple could not have made timely ineffective allegations against Schieck because, under *Rippo*, they were either procedurally defaulted in 2005—four years before Whipple's appointment—or they were unripe until now. Second, Whipple himself did not consider the guilt phase or Schieck's performance as post-conviction counsel within the scope of his representation.

1) *Crump* allegations by Whipple would have been untimely.

In *Rippo*, this Court held allegations of ineffectiveness by initial post-conviction counsel are timely raised if the petition raising them "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."[146] Notably, *Rippo* did not address what a petitioner must do to challenge the effectiveness of post-conviction counsel in raising guilt-based claims when this Court remands a case during post-conviction proceedings for a penalty retrial. In such circumstances, a literal reading of *Rippo* is inappropriate.

Under the district court's rationale and a literal reading of *Rippo*, allegations against guilt-phase post-conviction counsel, Schieck, should have been raised within one year of remittitur after this Court remanded for a penalty retrial. Because that remittitur issued in March

[146] *Rippo*, 368 P.3d at 740.

2004, under a literal reading of *Rippo*, any timely claims against Schieck should have been raised by March 2005.[147]

But Schieck remained counsel through Thomas's penalty retrial and his representation did not end until January 2008.[148] As this Court held in *Nika v. State*, requiring counsel in an ongoing representation to simultaneously "defend [his] own conduct" in earlier proceedings places both counsel and client "in an untenable position."[149] Schieck could not, then, have raised his own ineffectiveness while continuing to represent Thomas. If, under a literal reading of *Rippo*, Schieck's performance as post-conviction counsel had to be challenged by March 2005, separate counsel should have been appointed to initiate a *Crump* petition raising guilt-phase claims—and alleging Schieck's ineffectiveness as good cause and prejudice to overcome the procedural bars—while Schieck was defending Thomas's penalty retrial.

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[147] *See* 24AA5984-5985.

[148] 32AA7934-7936.

[149] *Nika v. State*, 120 Nev. 600, 606-07, 97 P.3d 1140, 1145 (2004); *see also Christeson v. Roper*, 135 S. Ct. 891, 894 (2015).

Any suggestion that Thomas himself could have pursued a *Crump* petition is foreclosed by the Rules of Practice of the Eighth Judicial District Court. Appointment of counsel for a *Crump* petition is initiated by the petitioner filing a pro per petition. But any attempted pro per filing by Thomas while he was represented by Schieck would have been rejected under EDCR 3.70, providing documents "delivered to the clerk of the court by a defendant who has counsel of record will not be filed."

In a case like Thomas's, where a petitioner obtained penalty-phase relief during post-conviction proceedings and the same post-conviction attorney continued to represent him at the subsequent retrial, there are only two ways to read *Rippo* and *Nika* consistently. Either (1) the allegations against Schieck were defaulted in 2005 when the district court failed *sua sponte* to appoint *Crump* counsel to review the guilt-phase post-conviction proceedings (and this failure would itself be an impediment external to the defense constituting good cause to excuse the default); or (2) the allegations against Schieck are timely now because they were made within one year after the initial state post-

conviction proceedings. Under either reading, Thomas's claims are properly before this Court for a merits review.[150]

This Court reached it's "a 'reasonable time' means one year" decision in *Rippo* to bring clarity and simplicity to Nevada's system for challenging the performance of counsel in initial state post-conviction proceedings. That clarity and simplicity would be undermined by a reading of *Rippo* requiring petitioners whose initial state post-conviction proceedings result in a new penalty trial to initiate and litigate guilt-phase *Crump* petitions at the same time as their penalty retrials. Requiring a defendant to initiate multiple *Crump* petitions when a case is remanded leads to "piecemeal litigation that would further clog the criminal justice system," which this Court in *Rippo* sought to avoid.[151]

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[150] The idea that Thomas's rights could have been protected by the district court's sua sponte appointment of *Crump* counsel while his penalty retrial was pending is problematic. *See Johnson v. State*, 133 Nev.__, 402 P.3d 1266, 1273 (2017). Because Thomas was not under a sentence of death at that time, it is unclear if the rules governing capital cases or non-capital cases would apply to him, and appointment of counsel in non-capital cases is discretionary.

[151] *Rippo*, 368 P.3d at 739; *see also Johnson,* 402 P.3d at 1271-73.

Thomas submits the more reasonable reading of *Rippo* is that, when a petitioner's initial state post-conviction proceedings result in a new penalty trial, his ineffective assistance of guilt-phase post-conviction counsel allegations are timely raised in the same petition as his ineffective assistance of penalty-retrial counsel allegations: one year from the issuance of remittitur from the denial of the penalty-retrial post-conviction petition, because that marks the end of the initial state post-conviction proceedings.

Such a result is consistent with this Court's opinion in *Johnson*. Johnson's situation was similar to Thomas's: he obtained penalty-phase relief from this Court on direct appeal, whereas Thomas obtained penalty-phase relief on appeal from his post-conviction proceedings. Finding Johnson's single petition challenging his conviction and sentence timely, this Court reiterated that the Nevada post-conviction scheme anticipates "the filing of a single petition challenging the validity of a petitioner's convictions *and* sentences."[152]

[152] *Johnson*, 402 P.3d at 1272 (emphasis in original).

2) Whipple did not perform the duties of *Crump* counsel.

Whipple did not consider the guilt phase of Thomas's trial (and necessarily, therefore, Schieck's performance as guilt-phase post-conviction counsel) within the scope of his appointment. Whipple made this clear in the declaration he gave undersigned counsel:[153]

> 3. My task was to look only at potential ineffective assistance of counsel claims from Marlo's penalty retrial. His first trial was not part of my post-conviction review.

Whipple also expressed this understanding in the introduction to his amended petition:[154]

> This honorable court appointed Bret Whipple counsel pursuant to Supreme Court Rule 250 to investigate and file Mr. Thomas' state post conviction petition related to his second penalty phase trial.

Whipple's understanding is supported by his actions: he raised no guilt-phase claims and no allegations of ineffectiveness against Schieck.

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[153] 30AA7436-7438 at ¶3.

[154] 6AA1434.

If this Court finds Whipple's appointment included acting as *Crump* counsel for the Schieck post-conviction proceedings, and his failure to raise allegations of ineffective assistance of post-conviction counsel against Schieck procedurally defaulted them and the underlying substantive guilt-phase claims, a *Strickland* analysis is inappropriate. Whipple cannot have been ineffective in a matter where he did not act as counsel. Instead, this Court should apply Supreme Court precedent and find Whipple abandoned Thomas, leaving him without *Crump* counsel at all.

In *Maples v. Thomas*, the Supreme Court distinguished between a procedural default caused by post-conviction counsel's negligent failure to act, which is attributable to the client through agency principles, and the "markedly different situation aris[ing] . . . when an attorney abandons his client without notice, and thereby occasions the default."[155] Whipple's failure to act as *Crump* counsel—if that is what he was appointed to be—left Thomas "unrepresented at a critical time for his state postconviction petition," and, because Thomas believed he

[155] *Maples v. Thomas*, 565 U.S. 266, 281 (2012).

was represented by Whipple, he "lacked a clue of any need to protect himself pro se."[156] Whipple's abandonment of Thomas constitutes good cause to overcome any procedural default because, "[i]n these circumstances, no just system would lay the default at [Thomas's] death-cell door."[157]

b. Thomas's actual innocence of the death penalty constitutes good cause.

A procedural default will be excused if failure to consider a claim "amounts to a 'fundamental miscarriage of justice.'"[158] "[T]his standard can be met where the petitioner makes a colorable showing he is . . . ineligible for the death penalty."[159] Thomas made a colorable showing that, in light of the compelling mitigation evidence presented in the petition—and the fact that two out of four aggravators alleged cannot constitutionally be applied to him—there is a reasonable probability of

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[156] *Id.* at 271.

[157] *Id.*

[158] *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537.

[159] *Id.*

a more favorable outcome,[160] especially if instructed on the correct burden of proof under *Hurst*.[161] Thomas can similarly make a colorable showing that he is categorically exempt from the death penalty because of his youth at the time of the crimes and his borderline intellectual functioning.

(1) Invalid aggravating factors were applied to make Thomas death-eligible.

Two of the four aggravating factors alleged and found by the jury at Thomas's penalty retrial are invalid. In a weighing state like Nevada, it is constitutional error to give weight to an improper aggravating circumstance, even if other aggravating circumstances remain.[162] And because a prerequisite to death-eligibility is a finding that there are no mitigating circumstances sufficient to outweigh the aggravating

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[160] *See Leslie v. Warden*, 118 Nev. 773, 59 P.3d 440 (2002).

[161] *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016). *See* Sections VIII.B.1.b.(1), VIII.C.2., and VIII.D.2.c.; *see also Leslie*, 118 Nev. at 783, 59 P.3d at 447 (acknowledging responsibility to consider all mitigating evidence when reweighing aggravators).

[162] *See McKenna v. McDaniel*, 65 F.3d 1483, 1489 (9th Cir. 1995).

circumstances, only a jury may determine if Thomas is still eligible for the death penalty.[163]

(a) The State failed to prove one of the "prior violent felony" aggravators (Claim Twenty-Five).

One of the aggravating circumstances found against Thomas was the murder was committed by a person who was previously convicted of a felony involving the use or threat of violence against another person.[164]

In reviewing whether the State proved a prior felony used or threatened violence, this Court looks only "to the statutory definition, charging document, written plea agreement, transcript of the plea canvass, and any explicit factual finding by the district court to which [the defendant] assented."[165] Because the statutory definition of an attempt offense does not show whether it uses or threatens violence,

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[163] *See Hurst*, 136 S. Ct. at 622.

[164] 21AA5189-5192, 26AA6257-6267; *see* NRS 200.033(2)(b).

[165] *Redeker v. Eighth Judicial Dist. Court ex rel. State*, 122 Nev. 164, 172, 127 P.3d 520, 526 (Nev. 2006).

this Court determines whether the State sufficiently proved the overt act itself used or threatened violence.[166]

At Thomas's penalty retrial, the State produced insufficient evidence that the "overt act" in his attempted robbery conviction establishes the use or threat of violence. The State did not produce the charging document, the written plea agreement, the plea canvass transcript, or anything constituting the "explicit factual finding by the district court to which [Thomas] assented."[167] Moreover, the relevant documents do not show that Thomas committed an overt act involving the use or threat of violence. Thus, this aggravating circumstance is invalid.

This invalid aggravating circumstance violated Thomas's constitutional rights. First, it violated Thomas's right to be free from

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[166] *See* NRS 193.330; *Burnside v. State*, 131 Nev. __, 352 P.3d 627, 645 (2015).

[167] *Redeker,* 122 Nev. at 172-73, 127 P.3d at 526. The State provided the presentence report. The record does not indicate that the district court made any explicit factual findings based on it, or that Thomas assented to the report or any findings made based on it.

cruel and unusual punishment.[168] Second, the failure to properly apply state law in applying this aggravating circumstance violated Thomas's state-created, constitutionally protected liberty interest in the fair administration of state procedures governing his trial.[169] Third, allowing this aggravating circumstance to apply to Thomas—where it would not apply to others—violates his rights under the Equal Protection Clause.[170] Fourth, the use of this improper aggravating circumstance violated Thomas's right to a reliable sentence under both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.[171]

This Court should find this aggravating factor unconstitutional as applied to Thomas and strike it.

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[168] *See Tuilaepa v. California*, 512 U.S. 967, 972 (1994).

[169] *See Hewitt v. Helms*, 459 U.S. 460, 466 (1983).

[170] *See Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985).

[171] *See Beck v. Alabama*, 447 U.S. 625, 638 (1980); *Stringer v. Black*, 503 U.S. 222, 228, 235-36 (1992).

(b) The avoid or prevent lawful arrest aggravator is unconstitutional (Claim Nine).

The State alleged, and the jury found, the murders in this case were "committed to avoid or prevent a lawful arrest or to effect an escape from custody."[172] This aggravating circumstance was too vague to provide any meaningful guidance to Thomas's jury.[173] The aggravating circumstance did not specify whether an arrest must be imminent; it did not specify whether avoiding arrest must be the sole or dominant motive; and it did not specify whether the victim must be an officer conducting an arrest or whether the victim must be the subject of another crime. Accordingly, the aggravating circumstance applies to every murder because the murder victim cannot alert law enforcement, thus the perpetrator "avoid[s] or prevent[s] a lawful arrest."[174] Because

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[172] *See* 26AA6259.

[173] *See Godfrey v. Georgia*, 446 U.S. 420, 428 (1980).

[174] *See Jeremias v. State*, 134 Nev. __, 412 P.3d 43, 52 (2018), *cert. denied*, 139 S. Ct. 415 (2018); *see also Williams v. Filson*, 908 F.3d 546, 575-76 (2018). The Ninth Circuit recognized in *Williams* that, read broadly, the aggravating circumstance would violate the Eighth Amendment. Thomas's sentencing jury was never provided a limiting instruction to reign in a broad reading. And this Court has never required one. The aggravating circumstance violates the Eighth

the jury relied on a vague and overbroad aggravating circumstance that failed to narrow the class of individuals subject to the death penalty, Thomas's death sentences must be vacated.[175]

(2) Thomas is categorically exempt from the death penalty (Claim Twenty-Seven).

Thomas was 23 years old at the time of the offense.[176] And he has been diagnosed with borderline intellectual functioning, i.e., a categorization of intelligence that is well below average but not as severe as an intellectual disability.[177] In light of his chronological age and his borderline intellectual functioning, Thomas's functional age at the time of the offense was below 18. Accordingly, Thomas should be categorically exempt from the death penalty.[178]

Amendment. Moreover, this Court's duty to uphold the Nevada constitution requires it to find the overly broad aggravating circumstance invalid under state law.

[175] U.S. Const. amends. V, VI, VIII, & XIV; Nev. Const. art. 1, §§ 1, 6, 8 and art. 4 § 21.

[176] *See* 4-5AA991-1019, 13-14AA3248-3253.

[177] 28AA6898-6949.

[178] *See Roper v. Simmons*, 543 U.S. 551, 578 (2005) (offenders under age 18 categorically exempt from death penalty); *Atkins v.*

(a) Thomas is exempt because he was under 25 at the time of the offenses.

In *Roper*, the Supreme Court established a categorical rule forbidding the execution of offenders under the age of 18 when their crimes were committed.[179] The Court relied in large part on three "general differences" between juveniles under 18 and adults, "demonstrate[ing] that juvenile offenders cannot with reliability be classified among the worst offenders."[180] Pointing to scientific and sociological studies, the Court noted that juveniles exhibit a "'lack of maturity and an underdeveloped sense of responsibility,'" which "'often result in impetuous and ill-considered actions and decisions.'"[181] Next, the Court recognized juveniles are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."[182] Finally, the Court explained "the character of a juvenile is not as well

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Virginia, 536 U.S. 304, 321 (2002) (intellectually disabled categorically exempt from death penalty).

[179] *Roper*, 543 U.S. at 578.

[180] *Id.* at 569.

[181] *Id.*

[182] *Id.*

formed as that of an adult."[183] Noting "the death penalty is reserved for a narrow category of crimes and offenders," the Court concluded that juveniles under the age of 18 simply "cannot with reliability be classified among the worst offenders."[184]

Extending *Roper* to offenders who committed their offenses while under the age of 25 is required under the Eighth and Fourteenth Amendments. Although *Roper* drew a cut-off at age 18, the rationale of *Roper* extends to individuals until at least age 25 because the human brain continues to develop. Even *Roper* recognized "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18."[185] Since *Roper*, scientific and sociological studies have concluded the human brain continues to develop well-after the age of 18.[186] And several authorities now recognize the rationale of *Roper* must

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[183] *Id.* at 570 (personality traits of juveniles more transitory, less fixed).

[184] *Id.* at 568-69.

[185] *Id.* at 574.

[186] Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 Am. Psychol. 469, 474-75 (2000) (describing a distinct developmental phase of "emerging adulthood," from eighteen to twenty-five, when much

extend to offenders under the age of 25.[187] *Roper* itself was an extension of *Thompson v. Oklahoma*, precluding the execution of offenders under the age of 16.[188] Because Thomas was 23 at the time of the offenses, he is categorically exempt from the death penalty.

c. Thomas is exempt because of his borderline intellectual functioning.

In *Atkins*, the Supreme Court ruled that our nation's "'evolving standards of decency'" and the Eighth Amendment precluded executing the intellectually disabled.[189] The Court reasoned intellectually disabled individuals are less culpable on account of their diminished

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identity formation occurs and certain high-risk behaviors are at their peak).

[187] *See, e.g.*, Kevin J. Holt, *The Inbetweeners: Standardizing Juvenileness and Recognizing Emerging Adulthood for Sentencing Purposes After Miller*, 92 Wash. U.L. Rev. 1393, 1396 (2015) (neurological research and social science conclude that cognitive abilities are not fully developed until around age 25; "arbitrary and inconsistent" to choose age 18 as age offender subject to death penalty); Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 Hofstra L. Rev. 13, 38-39 (2009) (Court's decision to place cutoff at age 18 in *Roper* was inconsistent and arbitrary in light of child development research).

[188] *See Roper*, 543 U.S. at 561-62 (discussing *Thompson v. Oklahoma*, 487 U.S. 815 (1988)).

[189] *Atkins*, 536 U.S. at 321.

capacities.[190] In addition, the justifications underpinning the death penalty, i.e., retribution and deterrence, were less applicable to the intellectually disabled.[191] With respect to retribution, the Court explained the lessened culpability of the intellectually disabled rendered the harshest punishment inapplicable.[192] Turning to deterrence, the diminished ability of the intellectually disabled "to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses . . . make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information."[193] Finally, the Court noted the intellectually disabled "may be less able to give meaningful assistance to their counsel and are

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[190] *Id.* at 318.

[191] *Id.* at 318-19 ("[T]here is serious question as to whether either justification that we have recognized as a basis for the death penalty applies to [intellectually disabled] offenders.").

[192] *Id.* at 319.

[193] *Id.* at 320.

typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes."[194]

Each reason identified in *Atkins* for exempting the intellectually disabled applies to individuals with borderline intellectual functioning, i.e., a categorization of intelligence that is well below average but not as severe as an intellectual disability. Because Thomas suffers from borderline intellectual functioning, he is categorically ineligible for execution under the Eighth Amendment.

d. Thomas is exempt because his functional age at the time of the offense was below 18.

The rationale set forth in *Roper* and *Atkins* for categorically exempting certain classes of individuals from the death penalty applies in full force to individuals who, because of their relatively young age and diminished mental abilities, have a functional age below 18 at the time of a homicide offense. A person's functional age is defined as a combination of their chronological age, physiological age, and psychological age. In light of Thomas's relatively young age and his borderline intellectual functioning, his functional age was under 18 at

[194] *Id.* at 320-21.

the time of the offense. Thomas is categorically exempt from the death penalty under the rationale of *Roper* and *Atkins*.

C. Thomas's claims have merit.

Whether Thomas can show good cause and prejudice "is intricately related to the merits of his claims."[195] The district court's dismissal of Thomas's petition resulted in actual prejudice and a fundamental miscarriage of justice because his underlying claims have merit.

1. Biased jurors deliberated Thomas's guilt (Claims Twenty-Eight and Thirteen C).

a. Juror Joseph Hannigan intentionally concealed critical information on voir dire (Claim Twenty-Eight A).

Joseph Hannigan sat on Thomas's jury. During voir dire, Hannigan concealed disqualifying information about his status as a crime victim and his association with a criminal enterprise. Hannigan's presence on the jury prejudiced Thomas.

The Supreme Court has held the "touchstone of a fair trial is an impartial trier of fact—a jury capable and willing to decide the case

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[195] *Bennett v. State*, 111 Nev. 1099, 1103, 901 P.2d 676, 679 (1995).

solely on the evidence before it."[196] Voir dire examination "serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors."[197] The Court observed "[t]he necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious."[198]

During voir dire, the trial court asked Hannigan, "Have you ever been the victim of a crime?"[199] Hannigan responded he "had a business in Boston back in 1960 and we were held up."[200] The trial court asked, "Have you or anyone closely associated with you ever been arrested for a crime?"[201] Hannigan answered he was arrested for setting up and promoting a lottery.[202] Hannigan failed to disclose, and in fact actively concealed, his involvement with a violent criminal enterprise (and the

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[196] *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (internal quotation marks and citations omitted).

[197] *Id.*

[198] *Id.*

[199] 21AA5229.

[200] *Id.*

[201] 21AA5230.

[202] *Id.*

related arrests of its members) that ran drugs through his family business and victimized him and his wife to the extent that both lived in fear for decades—including the time Hannigan served on Thomas's jury.

Before moving to Las Vegas around 1994, Hannigan managed Kerrigan's Flower Shop in Charlestown, Massachusetts.[203] In an interview with undersigned counsel's investigator, Christopher Milan, Hannigan stated that, as Kerrigan's' manager, he often gave "convicted felons a chance by allowing them to work for me after they were released from prison."[204] But not all hires worked out. Hannigan explained:

> The majority of them did fairly well and were able to get a fresh start. However, there was one employee who was a convicted murderer, and he made things very difficult for me. The convicted murderer ended up taking advantage of my kindness, which later led to federal charges being brought against him. He was by far the worst convicted felon I let work for me.[205]

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[203] *See* 29AA7140-7145 at ¶9; 29AA7149-7153 at ¶¶1, 12.

[204] 29AA7149-7153 at ¶11.

[205] 29AA7149-7153 at ¶11.

Milan discovered the "convicted murderer" was either Michael Fitzgerald or John Houlihan, the ringleaders of a twelve-man criminal enterprise dominating Charlestown at that time.[206] From 1989 through 1993, Fitzgerald and Houlihan used Kerrigan's as the command center for their violent drug ring.[207] The pair were ultimately arrested, charged, and convicted of multiple crimes in federal court.[208]

The Houlihan-Fitzgerald crime organization was sophisticated and ruthless. The First Circuit described it as follows:

> For nearly four years Michael Fitzgerald and John Houlihan ran a ruthlessly efficient drug ring from an unlikely command post: Kerrigan's Flower Shop, Charlestown, Massachusetts. The organization commanded the allegiance of numerous distributors . . . . These minions . . . helped the organization supply cocaine to hordes of buyers through an elaborate street-level distribution network. [209]

During voir dire, Hannigan concealed the details of the Kerrigan's matter and the depth of its impact on him and his family. Even in his

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[206] *See* 29AA7140-7145 at ¶¶ 10, 15; 29AA7149-7153 at ¶12.

[207] *See* 29AA7140-7145 at ¶9; 29AA7149-7153 at ¶12.

[208] *See* 29AA7140-7145 at ¶11; 29AA7149-7153 at ¶11.

[209] *United States v. Houlihan*, 92 F.3d 1271, 1277 (1st Cir. 1996).

conversations with Milan, Hannigan offered little detail. Milan discovered the name of the convicted murderer employed by Kerrigan's, and the nature of the federal crime, from court records. He further discovered Hannigan's wife, Frances, was both the owner of Kerrigan's and had provided information to law enforcement about a murder committed by the organization. The First Circuit summarized her testimony:

> [Frances'] testimony, overall, related more to the structure and operating practices of the Fitzgerald-Houlihan organization and less to the slaying . . . . By way of illustration, [Frances] testified at length about Fitzgerald's presence at Kerrigan's Flower Shop, his meetings there with other members of the conspiracy, and his daily telephone calls to [another co-conspirator] from his prison cell during the period of his immurement.[210]

Frances' testimony assisted prosecutors in obtaining convictions against Fitzgerald and Houlihan for engaging in a racketeering enterprise, racketeering conspiracy, conspiracy to commit murder in aid of racketeering, and conspiracy to distribute cocaine.

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[210] *Houlihan*, 92 F.3d at 1297 n.28.

At Milan's second meeting with Hannigan, Milan asked for additional details about Kerrigan's and the shop's involvement in the drug ring:

> When I asked [Hannigan] to confirm that Kerrigan's was the flower shop he once managed, he lowered his head and asked why he opened his "big fucking mouth." Mr. Hannigan told me he had done everything in his power to try to forget about the incident involving Michael Fitzgerald and John Houlihan. Mr. Hannigan's business was practically ruined by its involvement in Fitzgerald and Houlihan's drug ring. Mr. Hannigan stated he "lost everything, down to the shirt off my back."
>
> Mr. Hannigan did not want to elaborate on the Kerrigan's matter. He told me Fitzgerald and Houlihan were extremely dangerous people.
>
> . . .
>
> Mr. Hannigan did not want to elaborate on what exactly took place between Kerrigan's and the drug ring organized by Houlihan and Fitzgerald. Mr. Hannigan did confirm that the convicted murderer that once worked for him was either Houlihan or Fitzgerald, but would not say which.[211]

Hannigan's unwillingness to discuss Fitzgerald and Houlihan was well-founded. The First Circuit explained:

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[211] 29AA7140-7145 at ¶¶12-13, 15.

> Fitzgerald and Houlihan imposed a strict code of silence on all who came into contact with them, including their own troops. They dealt severely with persons who seemed inclined to talk too freely.[212]

An article in the New York Times reported the residents of Charlestown—a one-mile-square neighborhood on Boston Harbor—"never breathed a word" about the organization, "either out of loyalty or out of fear."[213] The government investigation of the organization cost more than one-million dollars to protect witnesses, including "a half-dozen residents who asked to be moved out of the neighborhood for fear of retribution."[214] The Hannigan's were among them: Milan's investigation revealed "[Frances] did not feel comfortable testifying in court until after she and her husband moved to Las Vegas."[215]

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[212] *Houlihan*, 92 F.3d at 1277.

[213] *Neighborhood Finally Talks, And Loosens Crime's Grip*, N.Y. Times, Mar. 26, 1991, at 1001029 (available at https://www.nytimes.com/1995/03/26/us/neighborhood-finally-talks-and-loosens-crime-s-grip.html).

[214] *Id.*

[215] 29AA7140-7145 at ¶11.

Frances testified in the winter of 1994, and the Fitzgerald-Houlihan trial ended in the spring of 1995.[216] Voir dire in Thomas's case occurred two years later. When the trial court asked Hannigan, "Have you ever been the victim of a crime?," he should have disclosed that he was a victim of the criminal enterprise.[217] And when the trial court later asked, "Have you or anyone closely associated with you ever been arrested for a crime?,"[218] Hannigan should have told the court about Fitzgerald and Houlihan.

Hannigan's failure to inform the trial court about his involvement with Fitzgerald and Houlihan was an act of intentional dishonesty and concealment. Milan reported: "When I asked Mr. Hannigan why he did not provide this information in his jury questionnaire or during voir dire, he told me he was not trying to think about it."[219] The motive for

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[216] 29AA7140-7145 at ¶11.

[217] 21AA5229.

[218] 21AA5230.

[219] 29AA7140-7145 at ¶16. Thomas has been unable to review Hannigan's jury questionnaire, but Hannigan's declaration states he failed to disclose this information. *See* 29AA7149-7153 at ¶12. The jury questionnaires from the 1997 trial are not in the record on appeal, not located in the files of prior counsel, not located in the evidence vault,

Hannigan's concealment on voir dire is simple: fear of Houlihan and Fitzgerald. Hannigan ultimately admitted to Milan:

> Fitzgerald and Houlihan were extremely dangerous. My wife and I moved to Las Vegas in order to escape any retaliation after the criminal organization was prosecuted. . . . My wife later testified against the organization, but that was not until we felt safe in our new Las Vegas home. My wife feared my life was potentially in danger.[220]

More than twenty years after moving to Las Vegas, Hannigan still lives in fear. Hannigan was afraid when Milan attempted to interview him. Milan explained

> My first attempt to interview Mr. Hannigan took place during the evening of July 25, 2017. I was able to make contact with Mr. Hannigan and we spoke briefly at the front door of his condominium. I explained my position, the office I work for, and the case to which I had been assigned. Mr. Hannigan conveyed to me that he was familiar with the case and remembered serving as a juror.

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and unavailable from the Jury Commissioner's Office. The district court denied Thomas's motion for leave to conduct discovery where he sought to obtain the questionnaires from the Clark County District Attorney's Office.

[220] 29AA7149-7153 at ¶12.

> Mr. Hannigan stated that it was not a good time and he would be unable to participate in an interview that evening. I provided Mr. Hannigan with my business card and asked him to contact me when he became available. Mr. Hannigan took my card and told me he would call me.
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> . . .
>
> I returned to Mr. Hannigan's home at approximately 11:00 a.m. on August 22. . . . Mr. Hannigan [ ] apologized for not being able to speak with me during my first visit to his home . . . . Mr. Hannigan went on to say that he had to have me checked out, as in verifying my identity and employment. Mr. Hannigan told me that he called the front desk of the Office of the Federal Public Defender, District of Nevada in order to obtain a physical description of Christopher Milan. After obtaining the description, Mr. Hannigan felt comfortable with setting up an interview.[221]

At the second meeting with Milan, Hannigan admitted his fear had not dissipated:

> Mr. Hannigan stated that he received a few phone calls after Houlihan and Fitzgerald were tried and convicted in Federal District Court. The calls involved someone telling Mr. Hannigan that members of Houlihan's and Fitzgerald's old gang wanted to talk to him.
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> . . .
>
> Mr. Hannigan went on to say that he is going to suffer for providing me with this information. He

[221] 29AA7140-7145 at ¶¶2-3, 6.

> told me that once his wife finds out, she will be extremely upset with him because they are going to have to worry about the situation all over again.[222]

(1) Hannigan's circumstances and behavior compel a finding of juror bias.

Claims of juror bias invoke three legal theories. The first theory, *McDonough*-style bias, turns on the truthfulness of a juror's responses on voir dire. [223] The second theory, actual bias, stems from a juror's preset disposition not to decide an issue impartially.[224] The Ninth Circuit has recognized, "Although [actual b]ias can be revealed by a juror's express admission of that fact, . . . more frequently, jurors are reluctant to admit actual bias, and the reality of their biased attitudes must be revealed by circumstantial evidence."[225] The final theory, implied bias, exists where "*an average person in the position of the juror in controversy* would be prejudiced."[226] Thomas is entitled to

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[222] 29AA7140-7145 at ¶¶14, 16.

[223] *See Fields v. Brown*, 503 F.3d 755, 765 (9th Cir. 2007).

[224] *See id.*

[225] *United States v. Allsup,* 566 F.2d 68, 71 (9th Cir.1977) (internal quotations and citation omitted).

[226] *United States v. Gonzalez*, 214 F.3d 1109, 1112 (9th Cir. 2000) (internal quotations and citations omitted) (emphasis in original).

remand for an evidentiary hearing under each of these theories and is entitled to relief.

(a) *McDonough*-style bias

In determining whether to grant a new trial based on an allegation of juror bias under *McDonough*, this Court applies a two-part test: "a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause."[227] A juror fails to answer honestly when he or she "intentionally conceal[s] the information."[228] And the Fourth Circuit has acknowledged, "if a juror is asked a specific question which encompasses two answers, a juror fails to answer honestly a material question in voir dire if he only mentions one of them."[229]

The district court denied Thomas's petition without an evidentiary hearing, but made no specific findings regarding this claim. As

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[227] *McDonough*, 464 U.S. at 556.

[228] *Brioady v. State*, 133 Nev.__, 396 P.3d 822, 825 (2017).

[229] *Porter v. Zook*, 898 F.3d 408, 427 (4th Cir. 2018).

discussed in Section VIII.A., above, the district court denied other juror misconduct allegations on the basis that the declarations supporting them concerned jurors' states of mind during deliberations and were thus inadmissible.[230] But Hannigan's declaration does not concern his state of mind during deliberations; it provides objective evidence of his bias and dishonesty on voir dire. The substance of the information contained in Hannigan's declaration would be admissible testimony at an evidentiary hearing.

Because the district court denied this claim without an evidentiary hearing, the only statement from Hannigan about why he failed to disclose the Kerrigan's crimes is recounted in Milan's declaration. Hannigan did not say he forgot about the Kerrigan's matter, or that he did not consider himself "closely associated" with Houlihan or Fitzgerald,[231] or that he did not consider he and his wife victims of the criminal enterprise's drug ring. Instead, Hannigan told

[230] 35AA8597-98

[231] *See* 21AA5230.

Milan he withheld the information because he was "not trying to think about it."[232] This demonstrates intentional concealment.

Hannigan heard and understood the trial court's questions asking if he had been a crime victim or if he or someone close to him had been arrested, because he answered both questions with information unrelated to Houlihan and Fitzgerald.[233] It is implausible to infer Hannigan's status as a victim of the Houlihan-Fitzgerald organization—and the arrest of someone he was as closely associated with as Houlihan and Fitzgerald—did not come to mind when he was asked those questions. Hannigan's wife testified against the pair just two years earlier, and Hannigan's life was still overshadowed by the Kerrigan's events when Milan reached out more than twenty years later. But Hannigan failed to disclose anything about the "convicted murderer" who took advantage of his kindness,[234] "ruined" his business and caused him to "los[e] everything, down to the shirt off [his] back."[235]

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[232] 29AA7140-7145 at ¶16.

[233] *See* 21AA5229-30.

[234] 29AA7149-7153 at ¶11.

[235] 29AA7140-7145 at ¶12.

Hannigan understood the questions and intentionally concealed the information. Hannigan failed to answer honestly a material question during voir dire.

This Court has succinctly stated, "As any trial attorney is aware, the jury voir dire process can be as important to the resolution of their [case] as the trial itself."[236] A truthful response by Hannigan would have led any reasonably competent attorney defending a murder case to challenge him for cause, because a truthful answer would have implicated Hannigan's actual or implied bias.[237] Thomas is entitled to a new trial under *McDonough* or, in the alternative, remand to the district court for a hearing on Hannigan's bias.[238]

(b) Actual bias

Hannigan's bias is clear from the record before this Court; but in the alternative, Thomas is entitled to a hearing on Hannigan's actual

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[236] *Khoury v. Seastrand*, 132 Nev.__, 377 P.3d 81, 85 (2016).

[237] *See id.*

[238] *McDonough*, 464 U.S. at 556 (Blackmun, J., concurring) (approving of a hearing where party may demonstrate juror's actual bias).

bias. Under *Williams v. Taylor*, Hannigan's silence in response to voir dire questions about his status as a crime victim and association with convicted criminals "could suggest . . . an unwillingness to be forthcoming." [239] This, "in turn could bear on the veracity of [Hannigan's] explanation for" nondisclosure—that he was "not trying to think about" Houlihan and Fitzgerald[240]—leading to "the need for an evidentiary hearing" on the issue of actual bias.[241]

(c) Implied bias

Given the "exceptional circumstances" of this case, Thomas's implied bias claim is dispositive.[242] Thomas is entitled to a new trial because an average person in Hannigan's position would be a biased juror in a murder case.[243] A murderer ruined Hannigan's business, caused him and his wife to flee Massachusetts and relocate to Las Vegas, put his wife through the trauma of testifying in court against

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[239] *Williams v. Taylor*, 529 U.S. 420, 441 (2000).

[240] 29AA7140-7145 at ¶16.

[241] *Williams*, 529 U.S. at 441.

[242] *McDonough*, 464 U.S. at 556 (Blackmun, J., concurring).

[243] *Gonzalez*, 214 F.3d at 1112 (internal quotation marks omitted) (emphasis in original).

members of a criminal enterprise, and left both him and his wife in fear for their lives for decades. Under such circumstances, Hannigan could hardly be faulted for harboring negative feelings towards Fitzgerald, Houlihan, and murderers generally. Because Thomas was accused of murder and on trial for his life, Hannigan's bias undermined his ability to be impartial. And Hannigan's failure to disclose the disqualifying information suggests the omission was intentional.

Hannigan's declaration includes a statement that his experience with the Houlihan-Fitzgerald enterprise "did not influence my decision [in the Thomas case] in any way." [244] This statement is not only incredible, it is irrelevant to the issue of implied bias. The Ninth Circuit has made clear, "Because the implied bias standard is essentially an objective one, a court will, where the objective facts require a determination of such bias, hold that a juror must be recused even where the juror affirmatively asserts (or even believes) that he or she can and will be impartial."[245]

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[244] 29AA7149-7153 at ¶11.

[245] *Gonzalez*, 214 F.3d at 1113.

In *Brioady*, this Court considered a juror in a child molestation trial who failed to disclose her own history of childhood molestation. At a hearing on a motion for new trial, the juror stated she failed to disclose the molestation "because she believed she could be a fair and impartial juror and did not consider herself to be a victim."[246] This Court concluded, "the question of [the juror's] ability to be impartial was not a determination for her to make."[247] Here, too, Hannigan's post-hoc assertion of impartiality does not remedy his failure to disclose critical information on voir dire.

Thomas can overcome any procedural default of this claim because Bret Whipple was ineffective for failing to investigate, develop and present this evidence in the initial state post-conviction proceedings. Whipple never spoke to Hannigan.[248] Thomas was denied his right to a

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[246] *Brioady*, 396 P.3d at 824.

[247] *Id.* at 825.

[248] *See* 29AA7153 at ¶13.

Should this Court find Whipple was not ineffective because there was nothing in the record to alert him to the possibility of Hannigan's misconduct, Thomas is still entitled to relief under *Williams*. 529 U.S. at 442-43 (because nothing in the record suggested juror's nonresponse was a deliberate omission of material information, any

fair trial and this Court should remand for a new one, or at least an evidentiary hearing to permit Thomas the opportunity to develop proof of actual bias.[249]

b. Trial counsel failed to adequately question Sharyn Brown to challenge her for cause (Claims Thirteen C and Twenty-Eight B).

During voir dire, in response to a question from the trial court, Brown disclosed she was the victim of "a number of burglaries, but the major problem was I had a home invasion robbery."[250] Brown was home during the robbery, which happened five years earlier.[251] When the trial court inquired if that experience would affect Brown's deliberations, she responded equivocally: "I don't think so."[252] Effective trial counsel would have probed further into Brown's ability to be fair and impartial in

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underdevelopment of juror bias claim was attributable to juror, not petitioner).

[249] *See Tinsley v. Borg*, 895 F.2d 520, 528 (9th Cir. 1990).

[250] 22AA5282.

[251] *Id.*

[252] 22AA5283.

Thomas's case. But trial counsel passed Brown for cause without asking a single question.[253]

In a declaration obtained in the instant post-conviction proceedings, Brown described being robbed and burglarized as "life changing events."[254] During the home-invasion robbery, Brown was duct-taped and held at gunpoint. The burglary occurred after someone followed her home and snuck in through the dog door. These experiences taught Brown she could no longer enjoy the freedoms she had taken for granted. She no longer went home alone at night and no longer wore "flashy" jewelry. Brown herself "assumed that once the defense attorneys learned about these prior incidents, they would release me due to potential prejudice."[255]

In her declaration, Brown said she remembered hearing about the Lone Star crimes when they happened, and that Thomas was the suspect. It "stuck with" her because of the film actress Marlo Thomas.[256]

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[253] 22AA5286.

[254] 30AA7453-7455 at ¶6.

[255] 30AA7453-7455 at ¶5.

[256] *See* 30AA7453-7455 at ¶3.

The homicides "hit very close to home" for Brown because she "had eaten at this particular Lone Star Steakhouse on multiple occasions."[257] At trial, Brown was never asked—individually or as part of the venire—if she had previously heard about the crime or was familiar with the crime scene.[258]

The circumstantial evidence in Brown's declaration compels a finding of implied bias. "The issue for implied bias is whether *an average person in the position of the juror in controversy* would be prejudiced."[259] Brown was duct-taped at gunpoint during a robbery. The State's case alleged Thomas kidnapped and robbed the victims at gunpoint. And Brown had on several occasions eaten at the restaurant where the events took place. The nature of her victimization and her familiarity with the crime scene "present[ed] a relationship in which the potential for substantial emotional involvement, adversely affecting

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[257] 30AA7453-7455 at ¶2.

[258] *See* 21-22AA5198-5490. Thomas has been unable to review Brown's jury questionnaire. *See* fn.219, above.

[259] *Gonzalez*, 214 F.3d at 1112 (internal quotation marks omitted) (emphasis in original).

impartiality, [was] inherent."[260] When Brown was asked if her experience would affect her deliberations, she responded equivocally. Equivocal responses have been found relevant to the issue of juror impartiality by both this Court and the Ninth Circuit.[261] Where, as here, "the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberation under the circumstances," prejudice is presumed.[262]

An adequate voir dire to identify unqualified jurors is central to guaranteeing the right to an impartial jury.[263] The Supreme Court "ha[s] not hesitated, particularly in capital cases, to find that certain inquiries must be made to effectuate [those] constitutional

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[260] *Gonzalez*, 214 F.3d at 1112 (internal citations omitted).

[261] *See id.* at 1113-14 (a juror's equivocal statement casting doubt on her ability to serve impartially "will be considered along with the relevant objective factors in determining whether implied bias exists"); *Preciado v. State*, 130 Nev. 40, 42, 318 P.3d 176, 177 (2014) ("a prospective juror who is anything less than unequivocal about his or her impartiality should be excused for cause").

[262] *Id.* at 1112 (internal quotation marks omitted).

[263] *See Morgan v. Illinois*, 504 U.S. 719, 729 (1992).

protections."[264] As part of an adequate voir dire, effective trial counsel would have asked Brown (and all the jurors for that matter) if she had heard about this crime, if she was familiar with the crime scene, and—given the charges Thomas was facing—for details of the home-invasion robbery. Thomas's trial counsel did none of these things.

Brown's truthful responses would have supported a finding of implied bias and a challenge for cause.[265] Where a biased juror is seated because of error rather than strategy, *Strickland*'s prejudice prong has been met and a new trial is warranted.[266]

2. Counsel were ineffective at the penalty retrial (Claim Fourteen).

In Claim Fourteen, Thomas alleged his death sentences are unconstitutional because of ineffective assistance at the penalty retrial.

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[264] *Morgan*, 504 U.S. at 730.

[265] *See Gonzalez*, 214 F.3d at 111; *see also Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) ("Similarly, lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges").

[266] *See, e.g., United States v. Martinez-Salazar*, 528 U.S. 304, 316-17 (2000); *Neder v. United States*, 527 U.S. 1, 8 (1999) (the presence of a biased decisionmaker is structural error "subject to automatic reversal").

Thomas was represented there by David Schieck, who was the Clark County Special Public Defender at the time, and Daniel Albregts, a private practitioner. By the time of the retrial, Schieck had been representing Thomas for several years, having initially been appointed as guilt-phase post-conviction counsel.[267]

a. Retrial counsel's mitigation investigation and presentation were deficient (Claim Fourteen B).

Although Schieck and Albregts were appointed to represent Thomas on June 30, 2004, they did not secure the services of an investigator until eight months later.[268] Maribel Yanez began working on Thomas's case shortly after being hired by the Clark County Special Public Defender's Office in March 2005, as the office's first "mitigation specialist."[269] Despite her title, Yanez had no prior experience as a mitigation specialist or investigator; she had no prior capital experience and had never worked in the field of criminal defense.[270] It was

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[267] *See* Section VIII.B.1.a.(2), above.

[268] *See* 26AA6422-6426 at ¶2.

[269] *See* 26AA6422-6426 at ¶¶2, 4, 6.

[270] *See* 26AA6422-6426 at ¶¶2-3.

Schieck's responsibility to train her, in addition to managing his responsibilities as head of the office, lead counsel on Thomas's case, and heavy caseload of other capital cases.[271]

Despite her utter lack of relevant experience, Yanez was the only investigator assigned to Thomas's case.[272] This was contrary to the prevailing professional norms of constitutionally adequate capital defense representation. The American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, updated two years before Thomas's trial, instructed that "[t]he assistance of an investigator who has received specialized training is indispensable to discovering and developing the facts that must be unearthed at trial."[273] The Guidelines defined individuals qualified for the title of "mitigation specialist" as "possess[ing] clinical and information-gathering skills and training that most lawyers simply do not have."[274] Yanez fulfilled neither of these roles.

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[271] *See* 26AA6422-6426 at ¶5; 26AA6464.

[272] *See* 26AA6422-6426 at ¶5.

[273] 13AA3096.

[274] *Id.*

Due to her inexperience, Yanez took no initiative to independently follow investigative leads. Instead, she "took one hundred percent of [her] direction from the attorneys," primarily Schieck.[275] The only times Yanez visited Thomas were at Schieck's direction.[276] If Thomas gave her the name of a potential witness, she passed it on to Schieck.[277] Yanez did not contact a single witness unless Schieck told her to.[278] At the time of Thomas's trial, "the prevailing professional national standard of practice forb[ade] counsel from shouldering primary responsibility for the investigation."[279] But that is exactly what Schieck did.

As a result of trial counsel's ineffectiveness in failing to assign a competent and experienced investigator to Thomas's case, the mitigation investigation was limited and valuable mitigation leads were not pursued or developed. Accordingly, the mitigation investigation was constitutionally deficient. Had penalty-retrial counsel engaged in a

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[275] 26AA6422-6426 at ¶6.

[276] *Id.*

[277] *Id.*

[278] *Id.*

[279] 13AA3096.

competent investigation, counsel would have discovered compelling mitigation evidence.

(1) Retrial counsel failed to investigate the area where Thomas grew up.

Thomas grew up on the west side of Las Vegas, a historically segregated, neglected, and disadvantaged community.[280] A competent mitigation investigation would have revealed that the area around the Gerson Park projects where Thomas was born and raised was blighted by poverty and violence.[281] Retired police sergeant, Bobby Gronauer, recalled:

> When I started working as a training officer in the early 1980s, the Gerson Park area was really bad. Gun violence was at an all-time high. Shootings happened all th[r]ough the night and mother[]s laid their children to sleep in bathtubs for their safety. Police were shot at regularly. Domino's Pizza would not deliver and the fire department would not answer a call without

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[280] *See* 30AA7439-7448 at ¶¶3, 6, 9; *see also* 7AA1606-1610, 7AA1614-1617, 27AA6596-6633, 29AA7154-7158, 30AA7439-7448.

[281] *See* 7AA1606-1610 at ¶¶9, 10-12; 7AA1611-1613 at ¶¶5-6; 7AA1614-1617 at ¶7; 7AA1618-1625 at ¶21; 7AA1634-1636 at ¶¶2-3, 5; 7AA1652-1656 at ¶7; 7AA1657-1659 at ¶6; 9AA2003-2006 at 3; 10AA2415-2417 at ¶¶2, 3-4; 12AA2863-2868 at ¶¶10-11; 26AA6313-6320 at ¶3; 27AA6596-6633 at 2-3, ¶¶17, 18, 28, 36; 29AA7069-7072 at ¶4.

> police escort. The community was drug infested. People were dying daily. Kids didn't play outside and families were afraid to leave their homes. It was a terrible place to live.[282]

Thomas's older brother, Darrell, described how "Mom taught us to get down on the floor when we heard gunshots. We could be watching TV and the sound of 'pow, pow, pow,' rang through the house, so everyone ducked down where they were."[283]

Thomas lost many friends to violence. For example, as a teenager, Thomas was caught in the midst of a gang-related drive-by shooting. His good friend was killed.[284] When Thomas was eleven, he witnessed the aftermath of the murder of a neighbor, known to the local kids as the Candy Lady.[285] Thomas's friend, Kareem Hunt, remembers them discussing how they had seen the victim's hog tied body.[286]

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[282] 10AA2415-2417 at ¶2.

[283] 7AA1618-1625 at ¶21.

[284] *See* 12AA2863-2868 at ¶11.

[285] *See* 7AA1634-1636 at ¶3.

[286] *Id.*

But penalty-retrial counsel knew nothing about the environment where Thomas was raised. Because Schieck "did not direct [Yanez] to investigate the neighborhood where Marlo grew up or the people outside his family he grew up with, [she] did not investigate those things."[287]

(2) Retrial counsel failed to follow leads given to them by Thomas.

As part of her mitigation investigation, Yanez mailed a document to Thomas entitled "Mitigation Factors Preliminary Checklist."[288] This document, which Thomas was instructed to complete and return in the mail, asked numerous questions about his social history, including whether he suffered from certain neurological impairments; if he experienced certain psychological syndromes; and if he was ever physically or sexually abused.[289] This method of seeking sensitive social

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[287] 26AA6422-6426 at ¶8.

[288] 20AA4992-94; *see* 26AA6422-6426 at ¶7.

[289] *See* 20AA4992-94.

history information was wholly inappropriate and fell below prevailing professional norms of the time.[290]

Thomas's answers to the mitigation checklist nevertheless provided a wealth of leads for further investigation. For example, Thomas answered that he suffered from learning disabilities.[291] He experienced mood and adjustment disorders.[292] His parents were divorced.[293] His father committed crimes; he was an alcoholic; and he was absent from Thomas's life.[294] Thomas had lived in poverty.[295] His family was constantly moving.[296] He had run away from home.[297] Thomas had used alcohol, marijuana, hallucinogens, and PCP.[298] And

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[290] *See* 13AA3161-62 (2003 ABA Guidelines, Guideline 10.7., Commentary).

[291] *See* 20AA4992.

[292] *Id.*

[293] *Id.*

[294] *See* 20AA4993.

[295] *Id.*

[296] *Id.*

[297] *Id.*

[298] *Id.*

someone he loved had died.[299] After receiving the completed checklist, Yanez did nothing.[300] She did not investigate the leads Thomas identified.[301] She never even asked him about his background and childhood experiences.[302]

If Yanez had investigated these leads, and conducted a constitutionally adequate mitigation investigation, she would have learned that sexual abuse was rampant throughout Thomas's maternal family. Family members abused other family members and introduced sexually abusive outsiders. In many instances, victims went on to abuse others, both within and outside the family.[303] When Thomas was seven years old, his cousin Victoria Hudson tried to kiss him

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[299] *Id.*

[300] *See* 26AA6422-6426 at ¶7.

[301] *Id.*

[302] *Id.*

[303] *See*, *e.g.*, 7AA1640-1643 at ¶12; 7AA1652-1656 at ¶13; 9-10AA2192-2390; 10-12AA2418-2859; 12AA2863-2868 at ¶¶13-14, 16; 12AA2869-2876 at ¶¶2, 13-19; 20AA4826-4962; 26AA6277-6279; 26AA6309-6312 at ¶5; 29AA7065-7068 at ¶9.

inappropriately.[304] Thomas confided in his wife, Angela Love, that, by the time he was sixteen years old, he had been raped.[305]

The legacy of intergenerational sexual abuse began with Thomas's grandfather, TJ. A violent man, he regularly raped Thomas's mother, Georgia, and her sisters.[306] TJ fathered children by several of his daughters, i.e., Thomas's aunts.[307] Rebecca was around fourteen when TJ first molested her.[308] Shirley became pregnant by TJ for the first time in tenth grade. She has two children by him.[309] Linda has a daughter by TJ; he impregnated her before she was thirteen years old.[310] TJ also fathered children by his daughters Betty, Annie, and

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[304] *See* 29AA7024.

[305] *See* 30AA7439-7448 at ¶22.

[306] *See* 7AA1618-1625 at ¶24; 7AA1626-1630 at ¶10; 7AA1637-1639 at ¶¶3-4; 7AA1640-1643 at ¶12; 7AA1652-1656 at ¶¶10-12; 10AA2410-2414 at ¶¶3, 4; 12AA2863-2868 at ¶12; 12AA2869-2876 at ¶13; 26AA6313-6320 at ¶21; 26AA6321-6323 at ¶3; 29AA7078-7080 at ¶¶3-4, 6-7.

[307] *See* 7AA1637-1639 at ¶3; 7AA1652-1656 at ¶10-12; *see also* 29AA7078-7080 at ¶ at 6-7.

[308] *See* 26AA6321-6323 at ¶3.

[309] *See* 7AA1652-1656 at ¶10.

[310] *See* 7AA1637-1639 at ¶¶3, 5.

Emma.[311] Annie was nine years old when TJ started molesting her.[312] The older Thomas girls collected money so their youngest sister, Eliza, could abort TJ's baby.[313]

Shirley, Rebecca, Georgia, Jonnie Annie, Linda, Emma, Eliza

TJ Thomas[314]

TJ always took his daughters away from the house to molest them. He assaulted them in the car, at the dump, and in the bushes.[315] Paul Hardwick, Sr., the father of Thomas's youngest brother, heard that

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[311] *See* 7AA1652-1656 at ¶10; 29AA7017.

[312] *See* 10AA2410-2414 at ¶4.

[313] *See* 7AA1652-1656 at ¶11; 29AA7019-7020; *see also* 29AA7078-7080 at ¶7.

[314] *See* 6AA1416-1428; 9AA2007-2011; 29AA7020, 7022.

[315] *See* 7AA1652-1656 at ¶13; *see also* 29AA7078-7080 at ¶5.

Thomas's oldest brother, Larry, was fathered by TJ: "The story in the family is that when Georgia was in high school, her sisters Jonnie and Rebecca walked her through the desert where they held her down and allowed their father to rape her and she became pregnant with Larry."[316]

Georgia met Thomas's father, Bobby Lewis, when she was pregnant with Larry.[317] Lewis was violent to her from the beginning.[318] Georgia gave birth to Lewis's son, Darrell, when she was seventeen; when she was twenty-one, she became pregnant with Thomas.[319] Georgia drank hard liquor throughout her pregnancy with Thomas.[320] She also worked at an industrial laundry, where the chemicals caused her to suffer from nausea, headaches, and vomiting.[321] And she received

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[316] 7AA1640-1643 at ¶20.

[317] *See* 7AA1652-1656 at ¶5.

[318] *See* 7AA1652-1656 at ¶5; 9AA2004.

[319] *See* 7AA1652-1656 at ¶5.

[320] *See* 9AA2009.

[321] *See* 9AA2009; 29AA7105-7111; *see also* 26AA6321-6323 at ¶4.

regular beatings from Lewis.[322] Unsurprisingly, all of these factors negatively impacted Thomas's neurological development.

The violence between Thomas's parents continued after his birth. Bobby and Georgia "beat the crap" out of each other.[323] Sometimes Georgia was beaten so badly, she could not go to work.[324] Lewis was violent to Thomas from the day Georgia brought him home as a newborn, beating Georgia with Thomas in her arms.[325] As a child, Lewis hit Thomas in the back of the head with a tire lug wrench, causing him to experience breathing difficulties.[326] When Thomas was around eight years old, Lewis threw him into a wall so hard it left an imprint where the sheetrock broke.[327]

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[322] *See* 9AA2004.

[323] *See* 7AA1626-1630 at ¶7.

[324] *See* 26AA6324-6327 at ¶8.

[325] *See* 7AA1614-1617 at ¶¶2-5; 9AA2010; 12AA2863-2868 at ¶6.

[326] *See* 7AA1614-1617 at ¶4.

[327] *See* 12AA2863-2868 at ¶6.

Thomas also experienced a lifetime of violence from Georgia.[328] Thomas's younger brother, Paul Hardwick, Jr., recalled:

> My mom beat the mess out of Marlo. She beat him with anything: extension cords, wooden kitchen spoons, pots, pans, and iron skillets. I saw her throw fold up kitchen chairs at him. She didn't throw the chairs to get Marlo's attention, she was trying to make contact and hurt him. . . . I saw bruises and marks on Marlo's body after these beatings. There were welts on his back from being beaten with an extension cord.[329]

The beatings from his parents left bruises and welts so painful that Thomas refused to bathe.[330] This earned him the moniker "stinky."[331]

When Thomas was eleven years old, Lewis was arrested for the kidnap and rape of a former girlfriend and sentenced to life in prison.[332] Thomas's cousin, Johnny Hudson, recalled:

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[328] *See* 7AA1618-1625 at ¶¶7-10; 7AA1626-1630 at ¶¶6-7; 9AA2005; 12AA2869-2876 at ¶6; 26AA6313-6320 at ¶4; 26AA6324-6327 at ¶¶5-7; *see also* 7AA1606-1610 at ¶8; 7AA1640-1643 at ¶7; 30AA7449-7452 at ¶4.

[329] 26AA6324-6327 at ¶5.

[330] *See* 7AA1614-1617 at ¶3; 7AA1618-1625 at ¶19.

[331] *See* 9AA2006.

[332] *See* 7AA1660-1663 at ¶¶2, 6, 10; 9AA2012-2191; 10AA2391-2409.

> The whole family saw Bobby get arrested for his last charge. . . . [P]olice stormed the house. They had guns drawn at the front and back door waiting on Bobby to surrender. Marlo cried as they put Bobby in the [c]ar. When Bobby went to prison, it had a deep impact on Marlo.[333]

With no support from Lewis, Georgia struggled.[334] The home was always dirty. Roaches crawled the walls, in the dirty dishes that were piled high, and across the floor.[335] Her water and power were often cut off for nonpayment, and the children were frequently hungry.[336] When Georgia was interviewed by police after Thomas was arrested for robbery as a teen, she was asked if she had found any money in her house. She answered that her youngest son, Paul Hardwick, Jr., had found a one hundred dollar bill under Thomas's mattress.[337] The officer

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[333] 7AA1626-1630 at ¶8

[334] *See* 7AA1618-1625 at ¶¶12, 14-15; 7AA1640-1643 at ¶¶2, 5; 12AA2869-2876 at ¶3; 26AA6313-6320 at ¶3; 26AA6324-6327 at ¶2; 29AA7105-7111.

[335] See Ex. 153 at ¶3.

[336] *See* 7AA1606-1610 at ¶5; 7AA1618-1625 at ¶¶12, 14-15; 7AA1626-1630 at ¶¶2-5; 12AA2863-2868 at ¶2; 12AA2869-2876 at ¶4; 26AA6324-6327 at ¶4; *see also* 26AA6313-6320 at ¶3.

[337] *See* 26AA6297-6298.

then asked Georgia if she still had the money: "No, I spent it. I'm being honest, matter of fact I just did it, I paid the water bill. When [Paul, Jr.] gave it to me I was asleep and he woke me up and he sa[id], 'Mama, we can go to the store now and buy something to eat.'"[338]

Family and friends described Thomas as developmentally delayed.[339] In school, he was identified as having severe learning problems, as well as severe emotional and behavioral problems.[340] Thomas was sent to Miley Achievement Center, the most specialized facility in the State of Nevada.[341] The impairments that landed Thomas at Miley are so profound, one of his teachers, James Treanor, has stated his belief that "an individual with Marlo's intellectual and emotional handicaps . . . should not be on death row."[342]

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[338] 26AA6298.

[339] *See* 7AA1618-1625 at ¶¶18-19; 7AA1652-1656 at ¶9; 7AA1657-1659 at ¶4; 9AA2003-2006 at ¶3; 26AA6313-6320 at 12; 26AA6324-6327 at ¶3; *see also* 30AA7439-7448 at ¶¶11-12.

[340] *See* 7AA1631-1633 at ¶¶3-4; 8AA1939-1990; 28AA6818-6821 at ¶4.

[341] *See* 7AA1631-1633 at ¶8.

[342] 7AA1631-1633 at ¶9.

Georgia was frustrated with Thomas's behavior, but she lacked the skills and emotional investment to try and change it.[343] When Thomas was around thirteen, Georgia kicked him out of the house and sent him to live with her brother, Tony Thomas, Jr.[344] Tony recalled, "Marlo arrived at our home in filthy clothes, which smelled of urine and body odor."[345] Thomas lived with Tony and his wife for approximately two years.[346] He thrived in their loving, stable household.[347] When Georgia saw his progress, she insisted Thomas come home, despite Tony's plea to keep him through high school and Thomas's desire to stay with his uncle. Tony recalled, "When Georgia took Marlo, he cried worse than ever."[348]

Time and time again courts have found counsel's failure to investigate and present readily available mitigation evidence "sufficient

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[343] *See* 9AA2005; 27AA6648-6687 at ¶72.

[344] *See* 26AA6313-6320 at ¶¶5-6.

[345] 26AA6313-6320 at ¶8.

[346] See 26AA6313-6320 at ¶5.

[347] See 26AA6313-6320 at ¶¶14-15.

[348] 26AA6313-6320 at ¶16.

to undermine confidence in the result of a sentencing proceeding, [rendering] counsel's performance prejudicial."[349] The Supreme Court has emphasized the powerful impact "privation and abuse" of the kind experienced by Thomas can have on a jury.[350] It is imperative for counsel defending a capital case to cast as wide a net as possible to discover such evidence, especially when on notice regarding its existence: "If what counsel knows or should know suggests that further investigation might yield more mitigating evidence, counsel must conduct that investigation."[351] When it comes to a capital case, counsel has a "*sacrosanct* duty to conduct a full and complete mitigation investigation."[352]

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[349] *Lambright v. Schriro*, 490 F.3d 1103, 1121 (9th Cir. 2007); *see also Rompilla v. Beard*, 545 U.S. 374 (2005).

[350] *Wiggins v. Smith*, 539 U.S. 510, 512 (2003).

[351] *Doe v. Ayers*, 782 F.3d 425, 435 (9th Cir. 2015); *see also* 2003 ABA Guideline 10.7, Commentary ("penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history." (internal quotation marks omitted)).

[352] *Earp v. Ornoski*, 431 F.3d 1158, 1175 (9th Cir. 2005) (emphasis added).

(3) Retrial counsel failed to investigate and present mental health evidence.

Penalty-retrial counsel were on notice of the need to investigate Thomas's mental health. Counsel had Kinsora's report and testimony from the 1997 trial, identifying Thomas as suffering from neurocognitive deficits, learning disabilities, and borderline intellectual functioning.[353]

On April 5, 2004, Schieck wrote to Kinsora, stating: "We would like to again utilize your services as well as explore presenting additional information. . . . If you could determine whether you have retained your records on Mr. Thomas we could set up a meeting to discuss possible avenues of defending against the death penalty."[354] On April 19, 2004, Schieck had a twenty minute phone call with Kinsora.[355] Between them, Schieck and Albregts spent several hours researching fetal alcohol syndrome.[356] This research—plus the phone call with

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[353] *See* 27AA6595; 24AA5830-5840, 5848; *see also* 2AA391.

[354] 28AA6959-6961.

[355] *See* 29AA7100.

[356] *See* 29AA7100; 26AA6475-6486; 29AA7090.

Kinsora—was the sum total of penalty-retrial counsel's investigation into Thomas's mental health. Ultimately, no mental health evidence or expert testimony was presented at the penalty retrial.

Penalty-retrial counsel had no strategic reason for their failure to investigate and present expert mental health evidence. Although Schieck decided not to use Kinsora based on his unhelpful testimony at the guilt trial, he admitted to undersigned counsel that he had no "tactical justification for not conducting further investigation to determine whether another mental health expert could provide [helpful] information."[357] Similarly, Albregts recalled no "tactical justification" for not investigating Thomas's mental health or consulting with an expert.[358]

If penalty-retrial counsel had consulted with appropriate mental health experts, they would have developed evidence to show Georgia's drinking during pregnancy resulted in Thomas suffering from alcohol related neurodevelopmental disorder (ARND). An expert like Dr. Joan

[357] 28AA6957-6958 at ¶2.

[358] 26AA6411-6414 at ¶7.

Mayfield, a neuropsychologist retained by undersigned counsel who diagnosed Thomas with ARND, would have explained that people on the fetal alcohol spectrum experience "deficits [in] . . . a broad array of neurocognitive functions," including impaired impulse control, inhibition, and emotional and behavioral control.[359]

An expert could have further explained how the interaction between ARND's negative cognitive effects (i.e., borderline intellectual disability) and a traumatic upbringing often manifest in "secondary disabilities."[360] Secondary disabilities, according to Mayfield, include "mental health problems, inappropriate sexual behaviors, disrupted school experiences, substance abuse problems, criminal behavior, confinement, poor work history, and problems living independently as an adult."[361] These permanent impairments explain—in tandem with the exacerbating impact of a traumatic upbringing—Thomas's history of behavioral problems going back to childhood. The prosecution introduced that history as a reason to kill Thomas; appropriate expert

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[359] *See* 28AA6903.

[360] *See* 28AA6905.

[361] *Id.*

testimony would have been instrumental in recasting it as a narrative for mercy.

Courts have long recognized the importance of evidence of fetal alcohol spectrum disorders in criminal proceedings.[362] As explained by Justice Sotomayor, this type of evidence has "remarkable value" and is "completely different in kind from any other evidence that the jury [may hear]."[363] The American Bar Association also noted that "the permanent neurological damage caused by fetal alcohol syndrome" could "lessen the defendant's moral culpability for the offense or otherwise support[ ] a sentence less than death."[364] This is because such evidence can establish "both cause and effect" for a defendant's actions; it provides a causal link between prenatal exposure to alcohol, resulting brain

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[362] *See, e.g.*, *Rompilla*, 545 U.S. at 390–93; *State v. Haberstroh*, 119 Nev. 173, 183–84 & n.22, 69 P.3d 676, 682–84 & n.22 (2003), as modified (June 9, 2003); *Williams v. Stirling*, 914 F.3d 302, 313–19 (4th Cir. 2019), as amended (Feb. 5, 2019); *Hurst v. State*, 18 So.3d 975, 1007–15 (Fla. 2009); *In re Brett*, 16 P.3d 601, 604–09 (Wash. 2001); *Dillbeck v. State*, 643 So.2d 1027, 1028–29 (Fla. 1994).

[363] *Trevino v. Davis*, 138 S. Ct. 1793, 1799–1800 (2018) (Sotomayor, J., joined by Ginsberg, J., dissenting from denial of certiorari).

[364] 13AA3199.

damage, and criminal activity.[365] But the jurors deciding Thomas's fate heard no mention of his ARND or its devastating consequences.

In addition to their failure to explain Thomas's neuropsychological deficits to the jury, penalty-retrial counsel failed to present expert testimony explaining the impact of the intergenerational trauma in Thomas's background. Undersigned counsel developed and presented this information to the district court through psychiatrist, Dr. Richard Dudley. In a declaration provided to undersigned counsel, Kinsora stated, if Schieck had made him aware of the social history information contained in Dudley's declaration, he "would have recommended that Mr. Schieck obtain and present to the jury a new psychiatric evaluation that directly addressed the effects of Mr. Thomas's social history, especially his traumatic upbringing."[366]

An appropriately qualified expert like Dudley could have provided the jury with a link between Georgia's difficult childhood and her parenting of Thomas. Dudley explained, as a consequence of the sexual

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[365] *Williams*, 914 F.3d at 315.

[366] 28AA6887-6897 at ¶¶11-12.

abuse by her father, Georgia was unable to bond with her own children. This lack of attachment was "profoundly felt by Marlo and thereby had a significant impact on his development. A positive attachment to a parent is step one in the eventual development of a positive sense of the self and the capacity to attach to others" and "critical to the eventual development of other psychological functions, such as mood regulation and impulse control."[367]

An expert could have told the jurors why the attempts to place Thomas in a structured environment had little hope of success, because those programs were not designed to meet his mental health needs.[368] This is because Thomas's "problematic behavior was the result of the combination of his long-standing, repeated exposure to violence, both in and outside of his home, the almost complete absence of parental protection, nurture and support, and otherwise having been raised in a chaotic and unstable environment."[369] Those programs "simply

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[367] 27AA6648-6687 at ¶34.

[368] *See* 27AA6648-6687at ¶74; *see also* 26AA6330-6334, 28AA6497-6950.

[369] 27AA6648-6687 at ¶74.

punish[ed] him for the behaviors that had resulted from all of those childhood difficulties, without helping him to identify and address those difficulties."[370] This "was not an appropriate therapeutic intervention."[371] Dudley concluded: "Instead, such a program placed the blame for [Thomas's] mental health difficulties totally on him, which ultimately only further contributed to his self-loathing, mood dysregulation, behavioral difficulties and other mental health difficulties."[372]

It was firmly established by 2005 that "mental health experts are essential to defending capital cases."[373] And "[r]esearch has shown repeatedly that well-documented and effectively presented mental health evidence has a positive impact on capital jurors."[374] Evidence of impaired intellectual functioning, for example, is so compelling that the

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[370] *Id.*

[371] *Id.*

[372] *Id.*

[373] 13AA3094.

[374] 21AA5009-5010.

Supreme Court deemed it "inherently mitigating."[375] But in closing arguments at the end of the selection phase in Thomas's case, Albregts drew the jurors' attention to the defense's lack of mental health evidence or expert testimony: "We can play arm chair psychiatrist all we want and say it was the family, it was the search for love. I'm not here to tell you any of that. I don't know."[376] Albregts "d[id]n't know" because penalty-retrial counsel completely failed to investigate Thomas's mental health and social history.

The combined effect of penalty-retrial counsel's failure to secure an appropriately qualified mitigation investigator and their failure to consult with a mental health expert rendered their performance constitutionally deficient.

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[375] *Tennard v. Dretke*, 542 U.S. 274, 287 (2004) (*citing Atkins v. Virginia*, 536 U.S. 304, 316 (2002)).

[376] 3AA583 at pg.127.

(4) Retrial counsel's deficient investigation prejudiced Thomas.

In comparison with the rich mitigation evidence detailed here, and in Section VIII.B.1.a.(2), above, retrial counsel's presentation of Thomas's childhood was incomplete, misleading, and unpersuasive:

Thomas's cousin, David Hudson:	Bobby was not involved in Thomas's life.[377] Georgia grabbed Thomas by the collar every once in a while. She spanked him sometimes but they had a good relationship.[378]
Thomas's aunt, Eliza Bosley:	Bobby was not around Thomas because he was in prison.[379] Thomas did not get a lot of love and attention.[380]
Thomas's aunt, Shirley Nash:	Bobby was in Thomas's life until Thomas was six or seven years old, then Bobby went to prison. Thomas never saw Bobby again.[381]

[377] 25AA6079-6080.

[378] *Id.*

[379] 25AA6094.

[380] *Id.*

[381] 25AA6104.

	Thomas was a typical kid. He started acting out when Bobby went to prison.[382] Georgia beat Thomas with a belt if he did something wrong.[383] Thomas started getting into trouble because of the kids he was hanging out with.[384]
Thomas's cousin, Charles Nash:	Georgia was harder on Thomas than his other siblings.[385] Thomas started hanging out with bad kids because he was neglected at home.[386]
Thomas's brother, Darrell Thomas:	Thomas had mental problems.[387]
Thomas's brother, Paul Hardwick, Jr.:	Thomas sent letters to Paul giving positive advice.[388]

[382] 25AA6105.

[383] 25AA6107.

[384] 25AA6108.

[385] 25AA6123.

[386] 25AA6123.

[387] 25AA6142.

[388] 25AA6150.

Thomas's mother, Georgia Thomas:	Bobby was very abusive towards Georgia.[389] Thomas saw Bobby beating her.[390] Bobby denied Thomas was his child.[391] Bobby would not buy things for him. Sometimes Bobby was violent with Thomas.[392] Bobby went to prison for shooting someone.[393] Thomas had a good childhood until he was around eight years old.[394] The school told Georgia that Thomas was acting out and needed mental help.[395] Thomas was put in a "mental school."[396] Georgia did not give Thomas much attention, except for beating him. She beat Thomas all the

[389] 25AA6154.

[390] 25AA6159.

[391] 25AA6157.

[392] 25AA6158.

[393] 25AA6162.

[394] 25AA6156.

[395] 25AA6163.

[396] 25AA6165.

	time.[397] Thomas accused Georgia of not loving him; she responded by beating him.[398] Darrell hit Thomas with a fire extinguisher.[399] Thomas was crying after the crimes.[400]

In *Domingues v. State*, this Court remanded for an evidentiary hearing where, as here, the mitigation evidence presented to the jury "only superficially touched on the themes of Domingues' dysfunctional childhood," but "[t]he new mitigating evidence . . . present[ed] a much grimmer and starker picture." [401] This Court stressed the importance of

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[397] 25AA6163-6164.

[398] 25AA6166.

[399] 25AA6168.

[400] 25AA6175.

[401] *Domingues v. State*, No. 69140, 2017 WL 3222272 at *2 (Nev. July 27, 2017) (unpublished disposition); *see also Abdul-Salaam v. Secretary of Pennsylvania Department of Corrections*, 895 F.3d 254, 270 (3rd Cir. 2018) (finding deficient performance and prejudice under *Strickland* where "the un-presented family member testimony" concerning childhood abuse "was of a totally different quality than the meager evidence that had been presented on that issue at trial." (internal quotation marks omitted)).

an evidentiary hearing in order to assess trial counsel's ineffectiveness.[402]

Thomas is likewise entitled to an evidentiary hearing to present evidence supporting Claim Fourteen. Under *Mann*, a hearing is required "when the petitioner asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief."[403] The State conceded below that Thomas met that standard.[404] The State described Claim Fourteen as containing "exceptionally detailed allegations impugning Mr. Schieck's effectiveness as counsel."[405] The district court erred in denying Claim Fourteen without holding an evidentiary hearing, and this Court should remand with instructions to hold one.

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[402] *Domingues,* 2017 WL 3222272 at *2.

[403] *Mann*, 118 Nev. at 354, 46 P.3d at 1230.

[404] *See* 30AA7500 ("There is no denying that in the instant Petition, Petitioner has set out detailed factual allegations in support of his claim that trial counsel were ineffective during the second penalty hearing.").

[405] *Id.*

b. Thomas was prejudiced by counsel's deficient performance throughout the penalty retrial.

But for counsel's errors—individually and cumulatively—the result of Thomas's penalty retrial would have been different (Claim Fourteen E).

(1) Counsel failed to move to exclude Thomas's juvenile criminal history (Claim Three B).

The constitutional ban on capital punishment for crimes committed by juveniles was effective when the prosecution used Thomas's juvenile criminal history to obtain a death sentence: the Supreme Court announced its decision in *Roper* on March 1, 2005, eight months before Thomas's penalty retrial began on October 31, 2005. Penalty-retrial counsel therefore had a constitutional obligation under the Sixth, Eighth, and Fourteenth Amendments to argue *Roper* barred the jury from hearing or considering Thomas's juvenile criminal history.[406] At minimum, counsel should have filed a motion in limine and lodged contemporaneous objections to preclude all the juvenile offenses from being presented at either stage of the penalty hearing.

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[406] *See* Section VIII.C.5., below.

Counsel should certainly have moved to exclude and objected to the allegations that had been dismissed, but which "non-convictions" the prosecution used to pad Thomas's criminal history against him.

As discussed in Section VIII.C.5., below, one of the juvenile offenses was listed as the State's first aggravator to make Thomas *eligible* for the death penalty. On counsel's objection, the trial court would have applied *Roper* and excluded evidence of the 1990 attempted robbery conviction, along with all of Thomas's juvenile criminal history.[407]

In light of the State's extensive reliance on Thomas's juvenile history to obtain a death sentence, there is a reasonable probability the outcome of the penalty retrial would have been different had counsel

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[407] Moreover, to protect against the possibility that the trial court still would have allowed Thomas's juvenile history into evidence, penalty-retrial counsel should have performed the constitutionally mandated mitigation investigation and marshaled evidence to humanize and explain Thomas's juvenile offenses as the record of a troubled and traumatized adolescent. *See* Section VIII.C.2.a., above. In short, penalty-retrial counsel should have seen to it that Thomas's young age during the majority of his criminal history weighed against death, not in favor of it.

moved, under *Roper*, to exclude that history from the jury's consideration.

(2) Counsel failed to challenge Thomas's 1990 conviction for assault (Claim Six D).

At the selection phase of the penalty retrial, the State introduced Alkareem Hanifa's testimony about an alleged assault against him when Thomas was a juvenile.[408] Hanifa did not personally appear; his testimony from Thomas's first penalty trial was read into the record.[409] Hanifa testified that, in December 1989, he was staying at the Arrowhead Motel in Las Vegas. Two men knocked on his door and offered to sell him crack cocaine, before forcing their way into the room.[410] Hanifa and the larger of the two began to fight.[411] The smaller man ran outside, picked up a boulder and threw it at Hanifa's head. The smaller man took money from Hanifa's pocket and the two men left the room. Hanifa reported the incident to the hotel manager, who called

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[408] *See* 2AA476-478 at pgs. 48-56.

[409] *See* Claim Six, below.

[410] 2AA476 at pgs. 49-51.

[411] 2AA476 at pg. 51.

the police.[412] The police asked Hanifa to describe his attackers.[413] About three hours later, the police brought Thomas to Hanifa's motel room and "asked if this was the [smaller] individual, and I pointed him out and said, yeah, this is him."[414]

Research repeatedly shows eyewitness identification evidence is unreliable; it is the leading cause of wrongful convictions. So-called "show-up identifications"—the type described by Hanifa—are the least reliable, and their use further increases the incidence of wrongful convictions.[415] Trial counsel were ineffective for failing to challenge Thomas's conviction for the attack on Hanifa and its admission at the penalty retrial.

(3) Counsel failed to object to excessive courtroom security measures (Claim Fourteen A).

Counsel were ineffective for failing to object to the excessive courtroom security measures at Thomas's penalty retrial, discussed in

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[412] 2AA476 at pg. 51.

[413] 2AA477 at pg. 53.

[414] 2AA477 at pgs. 53-54.

[415] *See, e.g.,* Michael D. Cicchini and Joseph G. Easton, *Reforming the Law on Show-Up Identifications*, Vol. 100, No. 2 (2010).

detail in Section VIII.C.7., below. These excessive measures included Thomas being shackled at the ankles, without the trial court establishing a manifest need to impose the restraints, and with serious questions whether the ankle chains were visible to jurors; Thomas's selection-phase witnesses appearing before the jurors shackled and in prison clothing; and the overwhelming presence of uniformed correctional officers in the courtroom.

If penalty-retrial counsel had performed effectively and objected to these excessive measures—individually and cumulatively— there is a reasonable probability Thomas would not have been sentenced to death.

(4) Counsel failed to object to the State's inflammatory closing presentation (Claim Fourteen C).

During the rebuttal closing argument at the end of the selection phase, the prosecutor showed a PowerPoint presentation to the jury. Early in the presentation, side by side images of the two victims in either their high school prom outfits or senior class pictures were

displayed. The pictures then morphed into photographs of their corpses at the coroner's office.[416]

Trial counsel unreasonably failed to object to the display and move for a mistrial.[417] This failure constituted deficient performance and prejudiced Thomas. As discussed in detail in Section VIII.C.10.b.(2), below, the presentation was improper. If counsel had objected to it, the trial court would have ordered a mistrial or at least given a curative instruction.

(5) Counsel failed to make an opening statement in the selection phase (Claim Fourteen D).

Penalty-retrial counsel agreed with the State that they would not give opening statements at the start of the selection phase.[418] This was deficient performance that prejudiced Thomas. By electing not to present an opening statement, trial counsel allowed the jury to view the State's extensive presentation of Thomas's "bad acts" without direction from defense counsel and without benefit of a forecast of the defense

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[416] *See* 26AA6411-6414 at ¶4.

[417] *See id.*

[418] *See* 2AA466 at pgs. 8-10.

case in rebuttal. Critically, penalty-retrial counsel lost the opportunity to prepare the jury for their selection-phase witnesses, who would be testifying shackled and in prison clothes, and to explain why that should not be held against Thomas.

Counsel's failure to make an opening statement fell below the standard of practice for counsel in any criminal case, let alone a capital case. "The opening statement of a criminal case is extremely important in asserting a successful defense. In fact, studies have repeatedly shown that the impression a juror has after opening statements usually carries with him or her to become the verdict in the case."[419]

Thomas was prejudiced by counsel's failure. The jurors did not receive counsel's guidance on what the selection phase would consist of, or why they should vote for life. They were not warned that most of Thomas's selection-phase witnesses would be incarcerated felons and why they should not allow that to diminish the mitigating effect of their testimony. If counsel had performed effectively and given an opening

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[419] *Rudin v. State*, 120 Nev. 121, 147, 86 P.3d 572, 589 (2004) (Rose, J., dissenting)

statement, there is a reasonable possibility one juror would have voted for life.

3. Counsel were ineffective at the guilt phase (Claim Thirteen).

In Claim Thirteen, Thomas alleged trial counsel were ineffective for, among other things, failing to present any evidence in support of a state-of-mind defense. Courts have routinely found counsel prejudicially ineffective under *Strickland* "where there was some evidence of the defendant's mental impairments in the record, but counsel failed to investigate and present a mental impairment defense to the charge."[420] Trial counsel's complete failure to properly investigate and present evidence of Thomas's psychological and social history in support of a state-of-mind defense was deficient performance that prejudiced Thomas.

[420] *Hernandez v. Chappell*, 878 F.3d 843, 856 (9th Cir. 2017); *see also Jennings v. Woodford*, 290 F.3d 1006, 1019 (9th Cir. 2002).

a. Trial counsel's investigation was deficient.

Peter LaPorta was assigned to represent Thomas on behalf of the Nevada State Public Defender (NVSPD).[421] He began working on the case shortly after Thomas's April 23, 1996, arraignment.[422] Thomas's case was handled by the NVSPD during a very tumultuous time.[423] The NVSPD was mired in disorganization and lacked stability; the office turmoil was reaching its climax as Thomas's case went to trial.[424] The jury returned their verdicts of death in Thomas's case on June 25, 1997.[425] Five days later, on June 30, 1997, the NVSPD closed down.[426]

Almost immediately after his assignment as lead counsel for Thomas, LaPorta became Chief Deputy State Public Defender—the head of the Las Vegas office.[427] In addition to his administrative duties,

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[421] *See* 26AA6437. LaPorta is deceased. *See* 26AA66398-6407.

[422] *See* 2AA373 at pg. 6.

[423] *See* 29AA7073-7077 at ¶4; *see also* 27AA6634-6647 at ¶¶2, 9-10; 29AA7073-7077 at ¶14.

[424] *See* 26AA6445.

[425] *See* 26AA6447.

[426] *See* 2AA372 at pg. 5; 2AA354 at pg. 9.

[427] *See* 2AA372 at pgs. 4-5; 2AA358 at pg. 26; *see also* 7AA1644-1651 at ¶2.

LaPorta carried the heaviest caseload of ten to fifteen murder cases at any given time.[428] That caseload was "overwhelming" and prevented LaPorta from providing constitutionally adequate representation to Thomas.[429]

Three-and-a-half months into LaPorta's representation, on August 14, 1996, Thomas prepared a pro se "Motion to Dismiss Counsel and/or Appointment of Co-Counsel."[430] The motion alleged LaPorta had failed to meet with Thomas outside of court appearances, discuss the case with him, file pretrial motions, or investigate the case.[431]

On October 2, 1996, LaPorta appeared in court on Thomas's motion and informed the court, "this is all resolved."[432] LaPorta said he "explained to Mr. Thomas and his family back in late July, early

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[428] *See* 7AA1644-1651 at ¶3; 2AA373 at pgs. 6-7.

[429] 7AA1644-1651 at ¶3; *see also* 2AA378 at pg. 27; 26AA6435; 27AA6697-6707 at ¶2; 27AA6581-6582; 27AA6688-6696 at ¶¶2, 4, 6; 7AA1644-1651 at ¶¶3-4, 6, 11, 12, 13, 14-16, 25; 26AA6434; 29AA7073-7077 at ¶¶9-13.

[430] 28AA6800-6809.

[431] *See* 28AA6802-6803.

[432] 1AA3.

August, that I was going into a period of time where I was doing two death penalties . . . . I was in trial for over five weeks . . . . And that's why he hasn't seen me."[433] LaPorta said Thomas was his "next death penalty case."[434] Thomas refused to withdraw his motion but agreed to continue it until an October 21, 1996, status check.[435] At the status check, Thomas still wanted new counsel, but the trial court denied his motion.[436]

Lee Elizabeth McMahon joined the NVSPD in November 1996 and became second chair on Thomas's case shortly thereafter.[437] Thomas's was the first capital case McMahon had ever worked on.[438] On January 29, 1997, McMahon appeared in court seeking to move up Thomas's trial based on a scheduling conflict in another capital case where

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[433] 1AA5.

[434] *Id.*

[435] 1AA4-6.

[436] *See* 1AA4.

[437] *See* 2AA354 at pgs. 9-10. McMahon is deceased. *See* 26AA6427-6428.

[438] *See* 2AA357 at pg. 22.

LaPorta was counsel.[439] At Thomas's insistence, the trial court agreed to move the case to a later date instead.[440]

McMahon requested a status check in two weeks to allow time to "discuss Mr. Thomas' concerns with him" and because she did not know LaPorta's schedule.[441] But she did "know that we have approximately fifteen murder cases scheduled between Mr. LaPorta and myself."[442] On February 7, 1997, Thomas's trial date was set for June 16, 1997, with calendar call on June 13.[443]

The investigator assigned to Thomas's case, Jerome Dyer, was a former FBI agent with a law enforcement attitude.[444] He had little or no experience in defense investigation and had never worked on a capital case.[445] It was Dyer's practice to only perform tasks the attorneys

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[439] *See* 1AA9, 11.

[440] *See* 1AA10, 11-13.

[441] 1AA13.

[442] 1AA13-14.

[443] *See* 1AA17.

[444] 7AA1644-1651 at ¶9; *see* 20AA4802-4804 at ¶3; 2AA355 at pgs. 14-15.

[445] 7AA1644-1651 at ¶9.

requested of him.[446] And Dyer was the only investigator working on all fifteen of McMahon and LaPorta's murder cases.[447]

Trial counsel's file indicates Dyer interviewed only five potential witnesses for Thomas. On June 2, 1997, Dyer interviewed Thomas's aunt, Emma Nash. The interview focused exclusively on factual guilt-innocence issues.[448] On June 5, 1997, Dyer interviewed Thomas's cousin, Charles Nash. The one page memorandum reflects only factual guilt-innocence issues.[449] On June 13, 1997—the day of calendar call in Thomas's case—Dyer interviewed Mary Resendez, a former Youth and Family Services Department worker.[450] Resendez was unable to provide any information specific to Thomas.[451] On June 14, 1997, Dyer interviewed school psychologist, Linda Overby.[452] On July 8, 1997—

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[446] *See* 7AA1644-1651 at ¶10; 20AA4802-4804 at ¶5; *see also* 2AA373 at pgs. 7-8.

[447] *See* 2AA356 at pgs. 17-18; *see also* 20AA4802-4804 at ¶1.

[448] *See* 28AA6786-6788.

[449] *See* 28AA6789-6790.

[450] *See* 28AA6791-6792.

[451] *See id.*

[452] *See* 28AA6793-6796.

thirteen days after Thomas was sentenced to death—Dyer interviewed Thomas Jackson, Thomas's juvenile probation officer. Jackson "advised he did not desire to testify for Marlo in either the guilt phase or the penalty phase of his trial."[453]

Although she had never worked on a capital case before, McMahon was responsible for preparing Thomas's mitigation case, including directing the work of neuropsychologist, Dr. Thomas Kinsora.[454] McMahon's inexperience, coupled with Dyer's woefully inadequate investigation, resulted in Kinsora receiving insufficient social history information on which to form a reliable opinion about Thomas's mental health.

In a declaration provided to undersigned counsel, Kinsora stated, "[t]he full picture of Mr. Thomas's history was unknown to me until I read Dr. Dudley's declaration" shared with Kinsora by undersigned counsel in the instant post-conviction proceedings. Kinsora confirmed: "none of Mr. Thomas's prior lawyers had provided me with most of the

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[453] *See* 28AA6797-6799.

[454] 2AA354 at pg. 11, 355 at pg. 16.

information contained in it."[455] Trial counsel's failure to properly prepare Kinsora, and provide him with adequate social history information, rendered his penalty-phase testimony not only unpersuasive, but actively damaging.[456]

If competent trial counsel had provided Kinsora with Thomas's complete social history, Kinsora would have used it to contextualize Thomas's behavior. Kinsora explained that the information in Dudley's declaration "would have been of great value to my analysis in 1996 and 1997. Had I been provided this additional social history information, I would have explained the 'creation' of Mr. Thomas as a broken individual, which I diagnosed as [antisocial personality disorder] through the prism of his terrible formative experiences."[457] Effective trial counsel would have provided Kinsora with the information in

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[455] 28AA6887-6897 at ¶9; *see* 27AA6648-6687 (Dudley Decl.).

[456] *See*, *e.g.*, 27AA6595; 24AA5840-5847, 5849-5851; 27AA6716, 6763; 28AA6887-6897; 24AA5979-5978; 24AA5853-5870; 26AA66411-6414 at ¶6.

[457] 28AA6887-6897 at ¶9.

Dudley's report and then presented Kinsora's testimony at both phases of Thomas's trial.[458]

The Ninth Circuit has made clear "that counsel has an affirmative duty to provide mental health experts with information needed to develop an accurate profile of the defendant's mental health."[459] Thus, "[r]egardless of whether a defense expert requests specific information relevant to a defendant's background, it is defense counsel's 'duty to seek out such evidence and bring it to the attention of the experts.'"[460] Trial counsel's failure to conduct a constitutionally adequate investigation to support competent and persuasive expert testimony fell below an objective standard of reasonableness. Counsel's deficient performance prejudiced Thomas because it denied him a defense to first-degree murder.

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[458] *See* 1989 ABA Guideline 11.4.1.D.7 (counsel should "secure the assistance of experts where it is necessary or appropriate for preparation of the defense [or] rebuttal of any portion of the prosecution's case at the guilt/innocence phase").

[459] *Caro v. Woodford*, 280 F.3d 1247, 1254 (9th Cir. 2002).

[460] *See Hovey v. Ayers*, 458 F.3d 892, 925 (9th Cir. 2006).

b. Counsel's failure to present a mental state defense was unreasonable.

It goes without saying that attorneys who decide to assert a particular legal theory should present that theory as forcefully as possible.[461] On trial counsel's motion, the court instructed the jury on second-degree murder.[462] The theory underlying a second-degree verdict was the lack of evidence proving premeditation beyond a reasonable doubt. But counsel failed to present any evidence to support this theory. They did not even give an opening statement in which they could have guided jurors to see the State's case through this lens. The entire defense case at the guilt phase was McMahon's closing argument. And that argument spanned just four-and-a-half transcript pages.

During her closing argument, McMahon—for the first and only time—introduced the jury to the idea of a mental state defense. She argued, when the jurors looked back on Thomas's videotaped confession, they would find: "what he was saying, whether his judgement was bad, whether his perception was bad, whether he underestimated the impact

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[461] *See* 2003 ABA Guideline 10.8.B.

[462] *See* 22AA5494; 14AA3287.

of his acts, that was not premeditated, it was not intentional, it was not a design to kill."[463] Without any expert evidence to support it, the jury heard the defense theory exactly as it was presented: as an afterthought.

It was deficient and prejudicial under *Strickland* to wait until closing argument to introduce the concept of lesser culpability and lack of intent to the jury, to mention state of mind as a defense only fleetingly, and to give the jury no guidance to connect that defense with the second-degree-murder instruction. Counsel's failures were especially inexcusable in light of the readily available evidence supporting a case for a state-of-mind defense.

The reports and opinions of Drs. Dudley and Mayfield, as detailed in Section VIII.C.2., above, represent the kind of expert testimony a constitutionally effective defense team would have obtained and presented to Thomas's jury during the guilt phase in order to support a state-of-mind defense. An expert like Mayfield would have explained individuals with alcohol related neurodevelopmental disorder (ARND)

[463] 23AA5555.

experience "deficits [in] . . . a broad array of neurocognitive functions," including impaired impulse control, inhibition, and emotional and behavioral control."[464] An expert like Dudley would have explained how the ARND, along with Thomas's history of trauma and his borderline intellectual functioning, affected his cognitive abilities and perceptions of danger.[465]

Dudley's declaration paints a picture of how these impairments influenced Thomas's mindset at the time of the offense. When the struggle broke out between Thomas and the victims in the Lone Star men's restroom, "It was clear that [Thomas] felt he was being attacked by two young men who were comparable to him in age, size, and strength, and that he was unsuccessfully attempting to defend himself against both of them."[466] In Dudley's expert opinion, this "triggered an exacerbation of the symptoms that had resulted from Marlo's . . . trauma history; therefore, he felt he was at risk of serious harm; and therefore, when he saw he had the opportunity to grab the knife, he

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[464] *See* 28AA6903.

[465] *See* 27AA6648-6687; 28AA6898-6949.

[466] 27AA6648-6687 at ¶98.

impulsively did so." That kind of expert testimony, which trial counsel neither pursued nor presented, would have provided compelling evidence of the psychological defense that Thomas never premeditated or intended to kill anybody.

In *Bloom v. Calderon*, "[c]ounsel put in issue [the defendant's] mental capacity to premeditate, to intend to kill, and to act with malice," but then failed to assemble and put on available psychiatric evidence.[467] The Ninth Circuit found deficient performance and prejudice under *Strickland*.[468] In *Seidel v. Merkle*, the Ninth Circuit found counsel deficient for failing to pursue available evidence of the effect of the defendant's "psychological history of multiple trauma."[469] The Court found prejudice because, "if a defense of mental illness had been presented, the jury would not have found the existence of malice," and instead "in all likelihood would have returned a verdict of manslaughter."[470]

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[467] *Bloom v. Calderon*, 132 F.3d 1267, 1278 (9th Cir. 1997).

[468] *Id.*

[469] *Seidel v. Merkle*, 146 F.3d 750, 757 (9th Cir. 1998).

[470] *Id.*

Like the defendants in *Bloom* and *Siedel*, Thomas was prejudiced by trial counsel's deficient performance. The jury verdicts as to both victims found Thomas guilty of first-degree murder with use of a deadly weapon.[471] But the verdicts do not specify whether the jury found Thomas guilty of felony murder or premeditated murder. It is reasonably probable that, in light of the mostly unrebutted evidence presented by the State, Thomas was convicted under a theory of premeditation—a conviction the effective use of psychological expertise might reasonably have avoided.

c. Thomas was prejudiced by counsel's deficient performance throughout the guilt trial.

But for counsel's errors—individually and cumulatively—the result of Thomas's guilt trial would have been different (Claim Thirteen G.).

[471] *See* 24AA5964-5970.

(1) Counsel failed to make necessary objections (Claims Fourteen D and E).

"One of the most fundamental duties of an attorney defending a capital case at trial is the preservation of any and all conceivable errors for each stage of appellate and post-conviction review."[472]

At the end of Deputy Medical Examiner Dr. Robert Jordan's testimony, the State introduced Exhibit 84, a diagram he prepared during the autopsy purporting to indicate his observations of stabbing and cutting wounds Carl Dixon's body.[473] Trial counsel failed to object to the admission of Exhibit 84, even though Jordan had already testified sufficiently about Dixon's injuries and introduced a number of photographs to illustrate his testimony.[474] This cumulative presentation was unduly prejudicial.

Trial counsel also failed to object to the State's leading of Detective Kelly Bryant. Throughout the State's direct examination of

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[472] 2003 ABA Guideline 10.8, Commentary (internal quotation marks omitted))

[473] *See* 1AA188.

[474] *See* 1AA175-188.

Bryant, the prosecutor repeatedly led the witness with questions that assumed facts damaging to the defense. For example, "Did [Thomas's aunt] Emma Nash provide you with a firearm which she indicated was in the defendant's possession earlier that day?"[475]

Had trial counsel performed effectively, there is a reasonable probability Thomas would not have been found guilty of first-degree murder.

(2) Counsel failed to adequately prepare to cross-examine codefendant Kenya Hall (Claim Fourteen F).

During the redirect examination of Kenya Hall at Thomas's preliminary hearing, trial counsel explained he did not have a copy of Hall's statement.[476] Counsel's failure to prepare for Hall's preliminary hearing testimony was especially damaging because Hall refused to testify at trial, and therefore was never the subject of competent cross-examination. Such cross-examination would have revealed that Hall

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[475] *See* 1AA224-231.

[476] *See* 21AA5098.

had been threatened and coerced into testifying,[477] which could have been used to undermine the State's case at trial.[478]

4. Thomas is entitled to a new trial because the State violated *Batson v. Kentucky* (Claim One).

In Claim One, Thomas alleged the State violated *Batson* at his first trial when it exercised a peremptory challenge against prospective juror Kevin Evans, the first African-American potential juror not excused for his views on the death penalty.[479] Thomas raised a similar claim in his direct appeal, which this Court denied. But this Court did not have the benefit of its recent opinion in *Williams v. State* when it ruled on Thomas's direct appeal.[480]

In *Williams*, this Court held "where . . . a district court fails to properly engage [the *Batson*] inquiry, and it appears more likely than not that the State struck the juror because of her race," a petitioner is

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[477] *See* 5AA1139.

[478] *See Reynoso v. Giurbino*, 462 F.3d 1099, 1110 (9th Cir. 2006).

[479] *Batson v. Kentucky*, 476 U.S. 79, 96-98 (1986); *see* 6AA1348-1428.

[480] *Williams v. State*, 134 Nev.__, 429 P.3d 301 (2018).

entitled to a new trial.[481] That is exactly what happened here: the district court incorrectly applied the third step of *Batson* when Thomas objected to the State's use of a peremptory challenge against Evans. And this Court did not consider the district court's misapplication of *Batson*'s third step on direct appeal because appellate counsel failed to allege it. Direct appeal and initial state post-conviction counsel's ineffectiveness for failing to raise this argument overcomes any procedural default. Accordingly, the district court's ruling that this claim is time barred and controlled by the law-of-the-case doctrine was in error.[482]

The use of a peremptory challenge to remove a potential juror solely because of his or her race violates the Equal Protection Clause.[483] When ruling on a *Batson* objection, the trial court is required to conduct a three-step analysis: (1) the defendant must make a prima facie case of discrimination; (2) the prosecutor must provide a race-neutral

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[481] *Id.* at 305.

[482] 35AA8594.

[483] *Batson*, 476 U.S. at 91.

explanation; and (3) the court must decide whether the defendant established the prosecutor's stated reason is pretext for discrimination.[484]

Generally, an appellate court, like the trial court, reviews the first step of the *Batson* inquiry by considering the totality of the circumstances in determining whether the opponent of a peremptory challenge made a prima facie showing of discrimination.[485] This analytical step is moot, however, when, as here, the prosecutor offered reasons for the challenge and the trial court advanced to step three.[486] At step two, the State's offered reasons must be deemed race-neutral unless a discriminatory intent is inherent in the explanation.[487]

Under the third step, "the persuasiveness of the State's explanation is relevant."[488] Although the defense has the burden of

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[484] *Id.* at 94-98; *Ford v. State*, 122 Nev. 398, 402-03, 132 P.3d 574, 577 (2006).

[485] *Ford*, 122 Nev. at 403, 132 P.3d at 577.

[486] *Hernandez v. New York*, 500 U.S. 352, 359 (1991); *Ford*, 122 Nev. at 403, 132 P.3d at 577.

[487] *Ford*, 122 Nev. at 403, 132 P.3d at 578.

[488] *Id.*

proving purposeful discrimination, that burden is assessed against the State's explanation.[489] For instance, "[a]n implausible or fantastic justification by the State may, and probably will, be found to be pretext for intentional discrimination."[490] In addition, a prosecutor's justifications may be deemed pretextual when the prosecutor questions African-American prospective jurors differently than white prospective jurors.[491] A defendant may also show a prosecutor's proffered reason was a pretext for discrimination by comparing it with voir dire responses from other prospective jurors.[492]

The prosecutor's proffered reasons for striking Evans were: Evans (1) was twenty-two years old, (2) lived at home, (3) had a "cavalier" attitude, (4) chewed gum, (5) indicated he had not previously considered the appropriateness of the death penalty, and (6) showed some hesitation when asked if he could vote for death.[493] Trial counsel

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[489] *Id.*

[490] *Id.*

[491] *Ford*, 122 Nev. at 405, 132 P.3d at 579.

[492] *Id.*, 132 P.3d at 578.

[493] 22AA5429-5430.

responded that many potential jurors indicated they had not previously thought about the death penalty and other young people were in the venire.[494]

Instead of simply assessing the defense's burden against the prosecutor's proffered reasons, the district court manufactured its own additional reasons in support of the strike. The court noted: (1) Evans wore an earring in his ear and (2) may be a little immature.[495] Describing the *Batson* motion as "a close call,"[496] and relying solely on the prosecutor's proffered reason that Evans was "young" and the court's own opinion that "a lot of times prosecutors don't want young men," the district court allowed the strike against Evans. [497]

The district court's reliance on reasoning other than that offered by the prosecutor ran counter to the teachings of *Batson*. The Supreme Court has been clear: "The judge is an arbiter not a participant in the judicial process. Allowing the court to provide race-neutral reasons for

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[494] 22AA5431.

[495] *Id.*

[496] 22AA5432.

[497] *See* 22AA5432.

the State violates [the Constitution].'"[498] In failing to determine the credibility of the prosecutor's explanation for striking Evans based on what the prosecutor actually said, the district court misapplied the third and final step of *Batson*. As this Court recently held in *Cooper v. State*, "judicial speculation about the State's reasons is inconsistent with the *Batson* framework."[499] The Ninth Circuit agrees: "it does not matter that the prosecutor might have had good reasons to strike the prospective jurors. What matters is the *real* reason they were stricken."[500]

The determination at step three—whether "the opponent of the strike has proved purposeful racial discrimination"[501]—is made in light of "all of the circumstances that bear upon the issue of racial

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[498] *Williams v. Louisiana*, 136 S. Ct. 2156, 2157 (2016) (alteration in original).

[499] *Cooper v. State*, 134 Nev. __, 432 P.3d 202, 206 (2018).

[500] *Paulino v. Castro*, 371 F.3d 1083, 1090 (9th Cir. 2004) (emphasis in original).

[501] *Johnson v. California*, 545 U.S. 162, 168 (2005) (internal quotation marks omitted).

animosity."[502] The circumstances surrounding the strike of Evans support a finding of purposeful discrimination.

Responding to the State's race-neutral reasons at step two, trial counsel noted many potential jurors indicated they had not previously thought about the death penalty and other young people were in the venire.[503] This Court has found, "the similarity of answers to voir dire questions given by jurors who were struck by the prosecutor and answers by those jurors of another race or ethnicity who remained in

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[502] *Snyder v. Louisiana*, 552 U.S. 472, 483-85 (2008); *see also Foster v. Chatman*, 136 S. Ct 1737, 1754 (2016).

[503] 22AA5431. A more complete comparative juror analysis than offered by trial counsel further supports a finding of purposeful discrimination. At Thomas's 2005 penalty retrial one of the same prosecutors, David Schwartz, accepted a non-African-American juror with all the same factual characteristics used to justify the peremptory challenge against prospective Evans. Seated juror Christina Shaverdian was twenty-one years old at the time of voir dire. 26AA6335-6336 at ¶3; *see* 16AA3884. She was the youngest of all the seated jurors and alternates. *Id.*; *see* 16AA3773-3912. And she lived at home. 2AA422 at pgs. 35-36.

The complete dates of birth for the jurors were redacted from their questionnaires under Local Rule IC 6-1. Thomas submits the declaration from paralegal Katrina Davidson in lieu of moving to file the questionnaires unredacted and under seal.

the venire" is a relevant consideration at step three.[504] And when the prosecutor directly asked Evans, "Do you have some hesitation as to whether or not you could vote for [death]?," Evans answered, "No."[505]

When trial counsel moved for a mistrial after their *Batson* motion was denied, the prosecutor admitted he "watched [Evans during the voir dire process] before he was even called; he was sitting in the back, kind of slouching, smirking, chewing gum."[506] The prosecutor even went to the trouble of learning Evans's employer would not pay for jury service and questioning his financial ability to sit.

The prosecutor told Evans that Silver State Disposal—Evans's employer—"has a policy of not paying their employees" when they are on jury service. The prosecutor predicted Thomas's trial "could take up to two weeks" and asked Evans, "Do you have financial responsibilities?' The prosecutor then suggested to Evans, "The fact that they do not pay you for coming down here . . . might have some [e]ffect on your ability to

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[504] *Williams*, 429 P.3d at 307 (internal citations omitted).

[505] 22AA5425.

[506] 22AA5479-5480.

give us your full attention during this trial."[507] No other juror was subjected to a similar line of questioning. This Court has found, "the disparate questioning by the prosecutors of struck jurors and those of another race or ethnicity who remained in the venire" is a relevant consideration at *Batson*'s step three.[508]

Thomas notes both *Williams* and *Cooper* were prosecuted by the Clark County District Attorney's Office—the same prosecutor's office that struck Evans. "[E]vidence of historical discrimination against minorities in jury selection by the district attorney's office" is another relevant factor this Court considers at step three.[509] It is unlikely that discrimination in the Clark County District Attorney's Office is a recent phenomenon. Rather, it is a remnant of a discriminatory past reaching back to at least the time of Thomas's trial.

This Court has held, when a trial court applies the wrong legal framework to a *Batson* objection, remand for an evidentiary hearing is

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[507] 22AA5422-5423.

[508] *Williams*, 429 P.3d at 307 (internal citations omitted).

[509] *Id.*

generally required.[510] The purpose of the evidentiary hearing is to resolve the question of discrimination in jury selection.[511] But "'[i]f the district court finds that the passage of time has rendered such a hearing meaningless, it shall vacate [the] defendant's convictions and schedule a new trial.'"[512] Thomas welcomes an evidentiary hearing, but contends this Court can rule in his favor based on the record.

In addition, more than twenty years have passed since the prosecutor struck Evans. The passage of so much time will certainly hinder the district court's ability to accurately determine whether the prosecutor's proffered reasons were credible. This Court has recognized the "important role that the district court plays at step three of the *Batson* inquiry."[513] Whether a prosecutor's "explanation for a peremptory challenge should be believed will largely turn on an evaluation of credibility and usually will involve an evaluation of the

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[510] *Libby v. State*, 113 Nev. 251, 258, 934 P.2d 220, 224 (1997).

[511] *Libby*, 113 Nev. at 258, 934 P.2d at 224.

[512] *Id.* (quoting *United States v. Thompson*, 827 F.2d 1254, 1262 (9th Cir. 1987)).

[513] *Conner v. State*, 130 Nev. __, 327 P.3d 503, 509 (2014).

demeanor of the jurors and the attorney who exercises the challenge."[514] It is unlikely a remand would result in an accurate credibility determination twenty years after the fact. On this record and given the current circumstances, this Court should reverse Thomas's convictions and remand for a new trial.

5. Using Thomas's juvenile bad acts to obtain his death sentences violated the Eighth Amendment (Claim Three).

In *Roper*, the Supreme Court ruled children younger than eighteen at the time of a homicide offense are ineligible for the death penalty.[515] The Court based this conclusion on scientific evidence demonstrating fundamental psychological and physiological differences between adolescents and adults "render[ing] suspect any conclusion that a juvenile falls among the worst offenders."[516] In Thomas's case, "this maturation process was even further delayed as a result of his pre-existing cognitive deficits."[517]

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[514] *Id.* at 509.

[515] *Roper v. Simmons*, 543 U.S. 551 (2005).

[516] *Id.* at 569-70.

[517] 27AA6648-6687 at ¶76 (Dudley).

If a constitutional capital punishment regime must narrow the death penalty to "the worst offenders"—and *Roper* categorically excludes juveniles from "the worst offenders"—*Roper* logically extends to preclude a capital defendant's juvenile criminal history from a jury's consideration at the penalty phase. The Supreme Court highlighted in *Miller*, "[O]ur history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults. . . . [I]f 'death is different,' children are different too."[518] Nothing in the Supreme Court's jurisprudence suggests a person's juvenile criminal history loses this "difference" once that person reaches the age of eighteen and stands convicted of murder. Yet the State used Thomas's juvenile criminal history against him in both the eligibility and selection phases of his penalty retrial.[519]

Thomas's claim is different from the one this Court considered in *Johnson v. State*.[520] Johnson's juvenile history was admitted only at the

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[518] *Miller v. Alabama*, 567 U.S. 460, 481 (2015) (internal quotation marks and citations omitted).

[519] *See* 26AA6337-6407.

[520] *Johnson v. State*, 122 Nev. 1344, 148 P.3d 767 (2006).

selection phase of his capital trial. Thomas's conviction for attempted robbery—committed when he was seventeen years old—was used as a prior violent felony to make him *eligible* for the death penalty.[521] In *Johnson*, this Court found significant that, "Because [Johnson's juvenile record] was admitted only during the selection phase of his hearing, there are no concerns that it may have improperly influenced the jury's weighing of aggravating and mitigating circumstances."[522] For Thomas, the juvenile record *was* an aggravating circumstance. This violates the rationale of *Roper*.

This Court's finding in *Johnson* that use of a juvenile record at the selection phase is relevant to a defendant's character directly contravenes *Roper*, which was based in part on the fact that the "character of a juvenile is not as well formed as that of an adult."[523] And the use of Thomas's juvenile criminal history at the selection phase was

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[521] *See* 1AA5189-5192, 26AA6258, 6263.

[522] *Johnson*, 122 Nev. at 1354, 148 P.3d at 774.

[523] *Roper*, 543 U.S. at 570.

far more pervasive and prejudicial than in *Johnson*.[524] One-by-one, the State reviewed each of Thomas's juvenile violations, beginning in 1984 when the eleven-year-old child was charged with battery for striking a teacher.[525] Blurring the constitutional distinction between offenses Thomas committed as an adult and those he committed as a child, the prosecutor argued "there's a pattern to this that you're gonna see here about acting violently and physically towards other people; assaultive behavior. . . . That's the pattern."[526]

The prejudice from the improper admission of Thomas's juvenile criminal history was magnified because he is black. Substantial evidence and scholarship demonstrates the criminal justice system is more merciful toward white juvenile offenders than black juvenile offenders. One commentator noted "the overrepresentation of black youths at every critical stage in the juvenile justice system" indicates "the maxim is not that children are different, but that white children

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[524] *Compare* 3AA668-677 with *Johnson*, 122 Nev. at 1354, 148 P.3d at 774.

[525] 3AA576 at pg. 99.

[526] 3AA576 at pg. 99.

are different. . . . Black children are black first, and children second."[527] Although the prosecution never used the term, the specter of the young black "superpredator" hovered throughout the penalty retrial. The State would not have benefitted from this pervasive and highly prejudicial stereotype had Thomas's juvenile history been properly excluded under the principle of *Roper*.

The State's use of a damaged child's bad behavior to send an adult Thomas to death row violated the Eighth Amendment.

6. Juror bias and misconduct infected the penalty retrial (Claim Twenty-Six).

Thomas's death sentences are invalid under the federal constitutional guarantees of due process, a fair trial, an impartial jury, a reliable sentence, effective assistance of counsel, and freedom from cruel and unusual punishment because penalty-retrial jurors were biased and engaged in juror misconduct and penalty-retrial counsel were ineffective with respect to the seating of these jurors.

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[527] Robin Walker Sterling, *"Children Are Different": Implicit Bias, Rehabilitation, and the "New" Juvenile Jurisprudence*, 46 Loy. L.A. L. Rev. 1019, 1066-68 (2013)) (citations and alterations omitted).

a. Jurors refused to consider and give effect to Thomas's mitigation (Claim Twenty-Six A).

A capital juror is required to consider and give effect to any mitigation evidence proffered and then decide its weight.[528] Juror Don McIntosh disclosed during voir dire he believed Thomas's upbringing was irrelevant to his adult life.[529] The only mitigation McIntosh would consider was how Thomas spent his time in prison.[530] In a declaration provided in the instant post-conviction proceedings, McIntosh said he was surprised to be picked as a juror after he disclosed he would not consider any childhood mitigating evidence. He was explicit in his declaration, stating that "[n]one of that information mattered to me and I didn't consider it in my deliberations."[531]

Juror Janet Cunningham was also unqualified to sit on Thomas's jury. Cunningham's juror questionnaire indicated she would not consider mitigation evidence at all.[532] Like McIntosh, Cunningham

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[528] *Boyde v. California*, 494 U.S. 370, 377-378 (1990).

[529] 2AA439 at pg. 103.

[530] *Id.*

[531] *See* 28AA6779-6785 at ¶4, *Id.* at ¶10.

[532] 16AA3782.

provided a declaration stating any evidence regarding Thomas's upbringing had no effect on her and she did not consider it in her decision: "I indicated on my juror questionnaire that I would not consider mitigation and I would have said the same thing during voir dire if the judge or attorneys had asked me."[533]

The refusal of McIntosh and Cunningham to consider and give effect to Thomas's mitigation evidence constituted juror bias that violated his rights to a fair trial, impartial jury, and a reliable sentence. These violations were structural error and prejudicial per se.

b. Penalty-retrial counsel were ineffective during voir dire (Claims Twenty-Six B and F).

Effective counsel would have challenged McIntosh for cause when he disclosed he would not consider mitigation evidence except Thomas's prison record.[534] Such a challenge would have been successful because a court must grant a challenge for cause when a juror's views would "prevent or substantially impair the performance of his duties as a juror

[533] 26AA6415-6418 at ¶3.

[534] 2AA439 at pg. 103.

in accordance with his instructions and his oath."[535] This failure was particularly egregious because penalty-retrial counsel knew Thomas's prison record was problematic, leaving nothing in mitigation McIntosh would consider.

Effective counsel would also have used voir dire to shore up Cunningham's questionnaire response that she would not consider mitigation evidence, thereby subjecting her to a challenge for cause. Cunningham's declaration is clear: had she been asked on voir dire, she would have affirmed her position that she would not consider mitigation evidence.[536] But penalty-retrial counsel did not ask.[537]

The ineffective voir dire did not stop there. Juror Philip Adona said he "might consider" Thomas's background and upbringing as mitigation evidence.[538] Juror Janet Jones believed a person's

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[535] *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)).

[536] *See* 26AA6415-6418 at ¶3.

[537] *See* 2AA428 at pg. 61, 2AA429 at pg. 62.

[538] 2AA436 at pgs. 91-92.

background or upbringing is no excuse for committing crimes.[539] Penalty-retrial counsel neither challenged them for cause, nor educated them that they must consider and give effect to mitigation evidence.

Juror Christina Shaverdian disclosed a friend of hers was killed by a drunk driver two years earlier.[540] The anniversary was two weeks before jury selection.[541] Shaverdian described her friend's death as a "murder" and said she had been "too emotional" to attend the driver's trial.[542] Shaverdian twice stated this experience made her biased in favor of victims' family members.[543] Shaverdian was not subject to a challenge for cause.

All of these unqualified, biased jurors were seated and prejudiced Thomas's penalty retrial.

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[539] 2AA436 at pgs. 92-93.

[540] 2AA448 at pg. 139, 2AA458 at pgs. 179-80.

[541] 2AA458 at pg. 179.

[542] 2AA448 at pg. 139, 2AA458 at pg. 180.

[543] *Id.*

(1) Counsel failed to challenge jurors who could not consider all sentences (Claim Twenty-Six F).

A prospective juror must be struck for cause if his or her views on capital punishment will prevent or substantially impair the performance of his or her duties in compliance with the juror's oath or instructions from the Court.[544] The trial court instructed Thomas's penalty-retrial jury to consider four sentences: a term of one-hundred years, with parole eligibility after forty years; life imprisonment with the possibility of parole; life imprisonment without the possibility of parole; or death.[545] Trial counsel failed to challenge for cause four prospective jurors—and one seated juror—who's views on the death penalty prevented them from considering all four sentences in compliance with the court's instructions.

Cunningham's declaration indicates, at the time of Thomas's trial, she "would never consider a sentence of life with the possibility of parole for someone convicted of first-degree murder. I said this on my

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[544] *Witt*, 469 U.S. at 424.

[545] 24AA5891-5892.

questionnaire and would have said the same thing during voir dire if the judge or attorneys had asked me."[546] Penalty-retrial counsel were ineffective for failing to voir dire Cunningham about this response and challenge her for cause. As a seated juror, Cunningham's refusal to consider all penalties violated Thomas's rights to an impartial jury, a fair trial, and a reliable sentence.

Additionally, prospective jurors Nancy Norander, Elena Villanueva, Shannon Martinez, and LeRoy Thompson stated they would only consider sentences of life without parole or the death penalty, making them ineligible to sit on Thomas's jury.[547] But penalty-retrial counsel failed to challenge them for cause, instead wasting precious peremptory challenges to remove them. This was ineffective.

c. Juror Cunningham introduced extraneous prejudicial information into deliberations (Claim Twenty-Six D).

In her declaration, Cunningham admitted that, during deliberations, she shared her own special knowledge of how the parole

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[546] 28AA6786-6788 at ¶6.

[547] 2AA439 at pg. 105, 2AA440 at pg. 109, 2AA441 at pg. 111, 2AA442 at pgs. 115-116.

system works.[548] Her son had been to prison and, through that experience, she learned convicted defendants are released before serving their full sentence.[549] Cunningham told the other jurors life without parole was misleading and did not mean Thomas would never be released.[550] Cunningham admitted this extraneous (and erroneous) information influenced her own vote for death. "Anything less than that," she said, "and he had a chance of parole."[551] It is reasonable to infer this extraneous information influenced the votes of others jurors: McIntosh's declaration states more than one juror believed the death penalty was the only way to ensure Thomas would never be released.[552] The role of Cunningham in influencing that understanding by other jurors must, at a minimum, be explored at an evidentiary hearing.

The district court dismissed this sub-claim, finding the declarations of McIntosh and Cunningham were inadmissible under

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[548] *See* 26AA64156418 at ¶6.

[549] *Id.*

[550] *Id.*

[551] *Id.*

[552] *See* 28AA6779-6785 at ¶13.

NRS 50.065(2) and this Court's decision in *Echavarria*.[553] But the district court was wrong. Because the affidavits contain objective facts constituting juror misconduct, they are admissible.[554]

Evidence of the parole process in Nevada was not presented at the penalty retrial, thus the jury could not properly consider parole as a factor in its deliberations.[555] Because a reasonable possibility exists that at least one juror's reasoning was affected by extrinsic evidence, Thomas is entitled to a new trial or, in the alternative, an evidentiary hearing to determine how pervasive Cunningham's misconduct was during deliberations.[556]

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[553] 35AA8597-98. *See* Section VIII.A., above.

[554] *See Tanner v. United States*, 483 U.S. 107, 117 (1987); *Warger v. Shauers*, 135 S. Ct. 521, 527 (2014); *Bushnell v. State*, 95 Nev. 570, 574-75, 599 P.2d 1038, 1041 (1979).

[555] *United States v. Navarro-Garcia*, 926 F.2d 818, 820 (9th Cir. 1991).

[556] *United States v. Vasquez*, 597 F.2d 192, 193 (9th Cir. 1979).

d. Jurors decided Thomas's sentence before deliberations (Claim Twenty-Six G).

McIntosh's declaration stated he made up his mind to vote for death before deliberations began.[557] Adona's declaration stated he would not consider a sentence less than death after the State presented its case in chief.[558] McIntosh and Adona violated the court's instructions, which read: "We also ask that you wait in forming your opinion as to what the sentence should be until after you've heard all the evidence that's going to be presented both by the State of Nevada and by the defendant."[559] The court also instructed: "Do not make up your mind about what the verdict should be until after you've gone to the jury room to decide the case and you and your fellow jurors have discussed the evidence."[560] McIntosh's and Adona's failure to abide by these instructions violated Thomas's rights to an impartial jury, a fair trial, and a reliable sentence.

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[557] *See* 28AA6779-6785 at ¶12.

[558] *See* 26AA6419-6421 at ¶6.

[559] 24AA5989 at pg. 6.

[560] 24AA5993 at pg. 19.

7. Thomas's penalty retrial was unconstitutionally tainted by excessive security measures (Claim Two).

a. Thomas was shackled in violation of *Deck v. Missouri*.

The morning of jury selection, penalty-retrial counsel noted Thomas was in the anteroom with "chains on his hand, plus a belly chain, plus leg chains."[561] Penalty-retrial counsel argued, "There is a serious constitutional issue concerning having the defendant in visible chains in front of the jury," and requested "unless the Court makes a specific finding that he is a danger or has acted out that he not be restrained in front of the jury."[562] The Court responded, there "is a screen of some sort" in front of the defense table and directed penalty-retrial counsel to "go sit in the [jury] box and see if you can see anybody's feet."[563] Penalty-retrial counsel indicated he could see co-counsel's shoes.[564]

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[561] 2AA415 at pgs. 6-7.

[562] *Id.*

[563] 2AA415 at pg. 7.

[564] *Id.*

The height of Thomas's ankle chains was then discussed, including whether jurors would be able to see them.[565] Without resolving the visibility of the ankle chains, penalty-retrial counsel noted Thomas's arm restraints would be visible.[566] The Court then ordered the arm and belly chains removed but the leg chains to remain. In doing so, the court made no findings specific to Thomas, and stated no reasons indicating it was exercising any discretion over the matter. Instead, the court's reason for Thomas's leg restraints were: "a person who's already been convicted of two first-degree murders with use of a deadly weapon has more reason to flee than someone who doesn't know what penalty they received the first time around."[567]

In *Deck v. Missouri*, the Supreme Court made clear, before ordering a defendant restrained in front of the jury, a court must make compelling findings specific to the individual defendant.[568] The reason for Thomas's restraints—that he had "already been convicted"—was

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[565] 2AA415 at pgs. 7-8.

[566] 2AA415 at pg. 8.

[567] *Id.*

[568] *See Deck v. Missouri*, 544 U.S. 622, 624 (2005).

neither specific to him nor a compelling justification. In fact, it was the same reason found inadequate by the Supreme Court in *Deck*.[569] In *Deck*, as here, "[t]he record contain[ed] no formal or informal findings . . . . The judge did not refer to a risk of escape . . . or a threat to courtroom security. Rather, [the trial judge] gave as his reason for imposing the shackles the fact that Deck already 'has been convicted.'"[570] This, the Court found, failed to demonstrate "the trial judge saw the matter as one calling for discretion."[571]

The Supreme Court held in *Deck*, "Where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation."[572] Instead, the State must prove beyond a reasonable doubt the improper shackling did not contribute to the verdict.[573]

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[569] *Id.* at 634.

[570] *Id.*

[571] *Id.*

[572] *Id.* at 635.

[573] *Chapman v. California,* 366 U.S. 18, 24 (1967).

The record here suggests Thomas's restraints were visible to his jurors. The trial court offered, if Thomas dropped his pants over the ankle chains and stayed "tucked in under the table when the jury comes in and goes out, [ ] I don't think that the jury will be able to see."[574] But after Thomas was brought into the courtroom, trial counsel interrupted the court's opening remarks to express continued concerns, noting, "The problem is the chain between his legs, but if you weren't really, really trying to see it."[575] The court moved along without ensuring no juror would be able to see Thomas's restraints.

The Supreme Court held in *Deck*, "The appearance of the offender during the penalty phase in shackles [ ] almost inevitably implies to a jury . . . that court authorities consider the offender a danger to the community" and "almost inevitably affects adversely the jury's perception of the character of the defendant."[576] The risk that Thomas's death sentences were imposed in any part because jurors saw him shackled is constitutionally intolerable. This Court should remand for

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[574] *Id.*

[575] 2AA415 at pg. 9.

[576] *Deck*, 544 U.S. at 633.

an evidentiary hearing where it can be ascertained whether any juror saw Thomas's shackles.

b. Thomas's selection-phase witnesses appeared shackled in front of the jury.

Thomas's restraints were only one part of a bigger show of excessive security measures that tainted his trial. The trial court took the unnecessary and prejudicial measure of requiring Thomas's selection-phase witnesses to testify in shackles and prison clothing.[577] In *Wilson v. McCarthy*, the Ninth Circuit recognized that the right to appear before a jury free of shackles extends to defense witnesses.[578] In both defendant-shackling and witness-shackling cases, the trial court "must balance the prejudicial effect of shackling with considerations of courtroom decorum and security."[579] Critically, prisoner status alone is insufficient to warrant shackling.[580]

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[577] *See* 26AA6422-6426 at ¶12; 16AA3768-3772 at ¶7; 28AA6779-6785 at ¶9.

[578] *Wilson v. McCarthy*, 770 F.2d 1482, 1484 (9th Cir. 1985).

[579] *Id.*

[580] *Id.* at 1485.

Although the Ninth Circuit found no abuse of discretion for shackling Wilson's witness, the factors supporting that conclusion are absent in Thomas's case. In *Wilson*, the trial court held a hearing and placed its reasons for shackling the witness on the record.[581] It then took steps to reduce the possibility of prejudice to Wilson by seating the witness before the jury came in and not permitting him to stand.[582] Thomas's trial court did none of these things. It made no record of its reasons for shackling the witnesses; failed to consider less drastic measures; and failed to instruct the jury to disregard the shackles.[583]

When the jury's view of a witness in shackles is brief, the defendant must make an affirmative showing of prejudice.[584] Here—where Thomas's witnesses were visibly shackled for the entirety of their testimony—prejudice must be presumed. And even though not required, Thomas has shown prejudice. The declaration of juror Don McIntosh

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[581] *Id.*

[582] *Id.*

[583] *See Id.* at 1485-86.

[584] *Id.*

stated: "Inmates were in shackles, would have been more believable if they were not shackled for testimony."[585]

Penalty-retrial counsel were ineffective for failing to object to the witnesses appearing in shackles and prison clothing; failing to request the court state on the record its reasons for shackling them; failing to request less drastic measures; and failing to request an instruction to the jury.

c. The "parade of uniformed correctional officers" was unconstitutionally prejudicial.

The shackling errors were compounded by the overwhelming presence of uniformed correctional officers, in addition to the court's usual security.[586] The Supreme Court has held, "the sight of a security force within the courtroom might under certain circumstances create the impression in the minds of the jury that the defendant is dangerous or untrustworthy."[587] In reviewing a claim based on the excessive

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[585] *See* 28AA6779-6785 at ¶9.

[586] *See* 26AA6419-6421 at ¶6; 28AA6812-6817 at ¶11.

[587] *Holbrook v. Flynn*, 475 U.S. 560, 569 (1986) (internal quotation marks and citations omitted).

presence of security personnel at trial, courts "look at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to [the] defendant's right to a fair trial."[588]

In a declaration provided to undersigned counsel, penalty-retrial counsel's investigator, Maribel Yanez, recalled a "parade of uniformed correctional officers [was] in and out of the courtroom. There were correctional officers called as state witnesses, plus a minimum of two transport officers for every one of the . . . inmate witnesses, and all of them were wearing green jumpsuits."[589] Yanez described it as "a sea of green."[590] Yanez remembered thinking "if it was having an impact on me then it must be having an impact on the jurors."[591] She even heard "there were so many correctional officers at this hearing, it was threatening security at High Desert State Prison[.]"[592]

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[588] *Williams v. Woodford*, 384 F.3d 567, 588 (9th Cir. 2004).

[589] 26AA6422-6426 at ¶11.

[590] *Id.*

[591] *Id.*

[592] 26AA6422-6426 at ¶12.

The presence of excessive security personnel at Thomas's trial prejudiced him because it created "an unacceptable risk . . . of impermissible factors coming into play," i.e., the jurors' perception of Thomas as dangerous.[593] The Supreme Court has "stressed the acute need for reliable decisionmaking when the death penalty is at issue."[594] Because this Court cannot be confident that the presence of excess security personnel did not influence the jurors' verdict of death, it should remand for an evidentiary hearing.

8. The State failed to comply with Supreme Court Rule 250, thus death was not a sentencing option (Claim Seven).

This Court promulgated specific rules governing the timing of the State's notice of intent to seek the death penalty.[595] A notice must be filed no later than 30 days after the filing of an information or indictment, and "must allege all aggravating circumstances which the state intends to prove and allege with specificity the facts on which the

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[593] *Holbrook*, 475 U.S. at 570.

[594] *Deck*, 544 U.S. at 632.

[595] *See* SCR 250(4)(c), (d).

state will rely to prove each aggravating circumstance."[596] These rules permit a late filing of the notice or an amendment upon a showing of good cause.[597] And with respect to an amendment alleging additional aggravating circumstances, the State must move for an amendment within 15 days after learning of the grounds supporting the additional aggravating circumstance. Finally, the State must file with the district court a notice of evidence in aggravation no later than 15 days before trial that "summarize[s] the evidence which the [S]tate intends to introduce at the penalty phase of trial."[598]

In this case, the State filed a notice of intent to seek the death penalty on July 3, 1996, and an improperly instructed jury returned two sentences for death.[599] In 2004, this Court granted Thomas's post-conviction petition and vacated his death sentences. This Court remanded to the district court for further proceedings. The State did not file a notice of intent to seek the death penalty following remand.

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[596] SCR 250(4)(c).

[597] SCR 250(4)(d).

[598] SCR 250(f)

[599] 21AA5189-5192.

The State was under no obligation to seek death on remand. Accordingly, the State should have complied with Rule 250 and filed a notice of intent to seek the death penalty within 30 days of the issuance of remittitur following this Court's remand.[600]

The State's failure to file a notice of intent to seek the death penalty and identify the aggravating circumstances it would rely on during the penalty retrial violated Rule 250. That violation violated Thomas's constitutionally protected liberty interest in the fair administration of rules and procedures governing the State's obligations under Rule 250.[601] Because the State failed comply with Rule 250, death was not a sentencing option.

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[600] Rule 250(4)(c) provides that notice shall be filed within 30 days after the filing of an information or indictment. But when a case returns following remand, the issuance of remittitur should be the operative deadline for the State to file notice of its intent to seek death. Such a reading would harmonize the rule with the practical reality that the State could not file a notice within 30 days after the filing of an information or indictment in cases remanded for new penalty hearings.

[601] *Walker v. Deeds*, 50 F.3d 670, 672 (9th Cir. 1995) ("Nevada law creates a liberty interest in sentencing procedures protected by the Due Process Clause of the Fourteenth Amendment.").

In addition, penalty-retrial counsel were ineffective for failing to object to the State continuing to seek death after it failed to timely file a notice of intent. Had counsel objected, the State would have been foreclosed from seeking death on remand because it did not file the necessary notice. Penalty-retrial counsel's performance was deficient and prejudiced Thomas.[602] He is entitled to relief.

9. Prosecutorial misconduct rendered Thomas's convictions and death sentences unconstitutional (Claims Seventeen and Eighteen).

Pervasive prosecutorial misconduct "so infected [Thomas's] trial [and penalty retrial] with unfairness as to make the resulting conviction[s] [and death sentences] a denial of due process."[603] Trial and penalty-retrial counsel were ineffective for failing to object to every instance of misconduct, and appellate and initial post-conviction counsel

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[602] *Strickland v. Washington*, 466 U.S. 668, 691 (2015).

[603] *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)); *see Valdez v. State*, 124 Nev. 1172, 1189, 196 P.3d 465, 477 (2008).

were ineffective for failing to effectively raise these issues on appeal and in the first post-conviction proceedings.[604]

a. Prosecutorial misconduct at the guilt trial (Claim Seventeen)

The prosecution's opening and closing arguments included comments "completely irrelevant to the issues in the case, [that] could only have impermissibly served to inflame the emotions of the jury," constituting misconduct.[605] During opening arguments, the prosecutors made repeated reference to the youth of the victims.[606] In closing, they twice argued there could have been four homicides instead of two, accusing Thomas of additional crimes he was never charged with.[607]

The inflammatory closing arguments continued: "Little did these two young men know that something evil was lurking out in the

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[604] *See Zapata v. Vasquez*, 788 F.3d 1106, 1112 (9th Cir. 2015) (analyzing as ineffectiveness claim counsel's failure to object to prosecutorial misconduct).

[605] *McGuire v. State*, 100 Nev. 153, 156-57, 677 P.2d 1060, 1063 (1984); *see also Viereck v. United States*, 318 U.S. 236, 247-48 (1943).

[606] *See* 22AA5481; 22AA5485; 22AA5486; 22AA5487.

[607] 23AA5523-24.

parking lot, this evil person who is the defendant, Marlo Thomas;"[608] referring to Thomas's "wrath," and the "brutal" and "horrific" offenses;[609] and arguing the situation "paints a mural of sheer terror and horror" with Thomas as "the artist who's responsible for that picture, or the mural."[610]

The prosecutors shifted the jury's attention from the facts of the individual case before it to a general societal consideration by conflating "justice" with finding Thomas guilty.[611] It is error for a prosecutor "to try to exhort the jury to 'do its job'; that kind of pressure, whether by the prosecutor or defense counsel, has no place in the administration of criminal justice."[612]

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[608] 22AA5499.

[609] 23AA5524.

[610] 23AA5524-25.

[611] 23AA5550. *See Viereck*, 318 U.S. at 247 and n.3; *United States v. Leon-Reyes*, 177 F.3d 816, 822 (9th Cir. 1999).

[612] *United States v. Young*, 470 U.S. 1, 18 (1985); *accord Evans v. State*, 117 Nev. 609, 633, 28 P.3d 498, 515 (quoting *Young*, 470 U.S. at 18).

The prosecutors misstated the mens rea required for first-degree murder.[613] And they argued facts not presented or supported by the evidence, suggesting Thomas "intend[ed] to punish" Carl Dixon because of the number of stab wounds.[614] This pervasive misconduct rendered Thomas's convictions unconstitutional and this Court should grant relief.

b. Prosecutorial misconduct at the penalty retrial (Claim Eighteen)

Prosecutors may not engage in improper argument.[615] Here, the prosecutor's arguments, singly and cumulatively, so infected the retrial with unfairness as to make the resulting death sentences a denial of due process. Insofar as trial or appellate counsel failed to object or raise any of these claims, they were ineffective.

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[613] 23AA5543. *See Boyde v. California*, 494 U.S. 370, 384 (1990) (prosecutorial arguments that misstate the law can constitute prejudicial misconduct).

[614] 23AA5544. *See Rose v. State*, 123 Nev. 194, 209, 163 P.3d 408, 418 (2007) (improper for prosecutor to refer to facts not in evidence).

[615] *See Berger v. United States*, 295 U.S. 78, 85-86 (1935).

(1) The prosecutors injected character evidence into the eligibility phase (Claim Eighteen A).

The trial court bifurcated Thomas's penalty retrial. The eligibility phase was strictly limited to evidence of aggravating and mitigating circumstances. The selection phase was then open for "[t]he other bad acts, the garbage, the kitchen-sink information."[616] The court's order came after extensive argument, and concluded with a very clear statement that nothing but evidence of aggravators and mitigators would be admissible in the eligibility phase.[617]

The State willfully violated that order by posing leading questions to Thomas's mother, Georgia, eliciting information about Thomas's past misdeeds irrelevant to its case in aggravation.[618] The State used this tactic as a prelude to the procession of juvenile criminal records and other character evidence presented during the selection phase, as discussed in Section VII.C.5., above. The State's introduction of this information through Georgia folded the selection phase into the

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[616] 2AA404.

[617] 2AA403-412.

[618] *See* 25AA6180-6182.

eligibility phase. This violated Thomas's right to a jury determination of death-eligibility strictly on the statutory elements required under NRS 175.554(3), and his rights to due process and a fair and reliable sentencing hearing under the Sixth, Eighth, and Fourteenth Amendments.

(2) The prosecutors made improper closing arguments (Claim Eighteen B).

(a) They misled the jury on the relevance of Thomas's mitigation.

During closing argument at the selection phase, the prosecutor told the jury, with respect to the "sad" facts of Thomas's life history presented by the defense, "there has to be some causation, connection between that fact and the thing that the person did before it becomes a mitigator."[619] In doing so, the prosecutor misrepresented the law and misled the jurors about the scope of their responsibility to decide the relevance and weight of mitigating evidence.[620] The jury decides the weight to be given to proffered mitigation evidence, and its discretion to

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[619] 25AA6238.

[620] *See, e.g., Tennard v. Dretke*, 542 U.S. 274, 285-89 (2004).

do so is virtually absolute in the selection phase of a penalty hearing.[621] When a prosecutor's statements effectively "foreclose the jury's consideration of . . . mitigating evidence," the jury cannot make the fair and individualized decision demanded by the Eighth and Fourteenth Amendments.[622] This Court on direct appeal agreed these arguments were improper.[623]

(b) They made other improper closing arguments.

During closing arguments at the selection phase, the prosecutor improperly inflamed the passions and prejudices of the jury, asking "what kind of trial did [the victims] receive from the defendant in that kitchen, in that bathroom, in that blood with that knife going up and down and up and down . . . . How did they plead their case as that knife was coming up and down?"[624] And, "What were Carl's last thoughts as

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[621] *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998) ("our decisions suggest that complete jury discretion [at the selection stage] is constitutionally permissible").

[622] *See id.* at 276-77.

[623] *See* 6AA1387.

[624] 3AA574 at pg. 91.

he laid there on the floor bleeding out? He knew he was dying. He was in pain. Was he thinking of his family? Was he thinking of his mother? Was he thinking of the people that he loved?"[625] This Court has found such "arguments asking jurors to place themselves in the place of the victim . . . are exceedingly improper in and of themselves."[626] This line of argument also veered into an impermissible imaginary script argument that improperly conveyed a victim's last moments.[627]

The prosecutor improperly commented on the authenticity of Thomas's allocution, arguing it was mere "lip service."[628] He took it further, arguing, "Criminals don't think that way. They don't feel natural remorse, they don't worry about

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[625] 3AA575 at pg. 95.

[626] *Jacobs v. State*, 101 Nev. 356, 359, 705 P.2d 356, 359 (1985) (internal quotation marks omitted).

[627] *See State v. Thurber*, 420 P.3d 389, 412-13 (Kan. 2018) ("Prosecutors step outside the wide latitude [afforded during closing argument] when employing an 'imaginary script' to convey a victim's last moments because such a comment is unsupported by the evidence.").

[628] 3AA580 at pg. 113.

consequences. They just worry about what they want. They are selfish to the extreme. It's me, me, me, me world."[629]

This Court must consider the new allegations of prosecutorial misconduct cumulatively with the error it found on direct appeal and find it so infected Thomas's penalty retrial that his death sentences cannot stand.

10. Thomas's convictions and death sentences are unconstitutional because of trial court error (Claims Fifteen, Sixteen, and Eighteen C).

a. Trial court errors at the guilt phase (Claim Fifteen)

(1) The court failed to declare a mistrial after evidence of an unrelated arrest (Claim Fifteen A).

NRS 48.045(2) provides in relevant part: "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." Here, Thomas's aunt, Emma Nash, revealed to the jury that Thomas had previously been in jail. Nash testified, "I said to him, 'Marlo, have you

[629] 3AA580 at pg. 116.

did something that would put you back in jail?'"[630] The trial court denied trial counsel's motion for a mistrial.[631] No admonishment to disregard the statement was given to the jury before it was excused.[632] This error was not harmless beyond a reasonable doubt. Thomas is entitled to relief.

(2) The court erroneously admitted gruesome photographs (Claim Fifteen B).

The State moved to admit various gruesome photographs. Trial counsel objected to their introduction as prejudicial, inflammatory, and/or duplicative of other photographs.[633] The trial court erred in overruling counsel's objection. This error was not harmless beyond a reasonable doubt. Thomas is entitled to relief.

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[630] 1AA137.

[631] 1AA138-142.

[632] 1AA137.

[633] *See, e.g.*, 1AA75-80.

(3) The court erroneously admitted a cumulative autopsy diagram (Claim Fifteen C).

At the end of Deputy Medical Examiner, Dr. Robert Jordan's, testimony, the State introduced Exhibit 84, an autopsy diagram depicting Dixon's injuries.[634] The trial court erred in admitting Exhibit 84 where Jordan had already testified sufficiently about Dixon's injuries and introduced a number of photographs to illustrate his testimony.[635] This cumulative presentation was unduly prejudicial. This error was not harmless beyond a reasonable doubt. Thomas is entitled to relief.

(4) The court improperly signaled its approval of a state witness's testimony (Claim Fifteen D).

The trial court improperly inserted its opinion of the testimony of a witness for the State, Terry L. Cook, a criminalist with the Las Vegas Metropolitan Police Department.

At the end of Cook's testimony on serology and the blood evidence presented against Thomas, the trial court thanked Cook and added, "It

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[634] 1AA188.

[635] *See* 1AA175-188.

was very enlightening."[636] It was error for the trial court to comment on the testimony in a manner that bolstered the witness's credibility.[637] The Supreme Court has "emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence should be so given as not to mislead, and especially that it should not be one-sided[,]" because "his lightest word or intimation is received with deference, and may prove controlling."[638] It is clear that a prosecutor may not bolster his own witness.[639] A trial court bolstering a prosecution witness is even more prejudicial.

The comment denied Thomas his rights to a trial by jury, in violation of the Sixth Amendment, and to a fair trial and due process under the Fourteenth Amendment. This error was not harmless beyond a reasonable doubt. Thomas is entitled to relief.

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[636] 2AA255.

[637] *See*, *e.g.*, *United States v. Cisneros*, 491 F.2d 1068 (5th Cir. 1974).

[638] *Quercia v. United States*, 289 U.S. 466, 470 (1933) (internal quotation marks omitted).

[639] *See Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 188 (2005); *United States v. Kerr*, 981 F.2d 1050, 1053 (9th Cir. 1992) (quoting *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1980)).

(5) This Court must consider the impact of these errors cumulatively.

Thomas raised Claims Fifteen A (failure to grant a mistrial after "back in jail" comment), B (admission of gruesome photographs), and C (admission of enlarged autopsy diagram) in the first direct appeal. This Court found no error from Claims Fifteen B and C. The Court agreed the "back in jail" comment, Claim Fifteen A, was error but found it harmless.[640] The addition of Claim Fifteen D changed the matrix of Thomas's trial court error claim. This Court must now consider all of Thomas's claims of trial court error cumulatively.[641]

b. Trial court errors at the penalty retrial (Claims Sixteen and Eighteen C)

(1) The court improperly limited the defense theory regarding Angela Love (Claim Sixteen A).

On cross-examination of Detective David Mesinar, penalty-retrial counsel asked a series of questions about his decision to arrest Angela

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[640] *See* 5AA1006-1008.

[641] *See Daniels*, 428 F.3d at 1214 (noting importance of considering cumulative effect of multiple errors "and not simply conducting a balkanized, issue-by-issue harmless error review").

Love, Thomas's girlfriend, and charge her as an accessory to Thomas's crimes—a recommendation the district attorney did not accept.[642] During redirect, penalty-retrial counsel objected on the basis the prosecutor was leading Mesinar to obliterate the mitigating effect of that cross-examination. The trial court overruled the objection, stating, in front of the jury, "the instructions are whether or not the State charges one, all, half of them is a decision for the prosecuting attorney. It's not something for this jury to worry or be concerned about. [Love] is not on trial here now."[643] The trial court continued, "why the district attorney didn't decide to prosecute [Love] is not a defense in the case because we're not here to defend the case. It's not even mitigation. So I don't know why you brought it up."[644]

This was an entirely inappropriate and unconstitutionally limiting comment on mitigation evidence in the middle of a penalty hearing. Supreme Court case law is clear: "the Eighth and Fourteenth

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[642] 25AA6042 at pgs. 224-226.

[643] 25AA6044 at pg. 234.

[644] 25AA6044 at pg. 234.

Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and *any of the circumstances of the offense that the defendant proffers* as a basis for a sentence less than death."[645] Mesinar testified he believed he had probable cause to arrest Love as an accessory, and he did so. Penalty-retrial counsel proffered that "circumstance of the offense" in mitigation through Mesinar's testimony. The trial court's comment on the supposed irrelevance of Love's involvement and the inferences reasonably drawn from the district attorney's decision not to charge her was erroneous.[646] It prejudiced the jury against the defense's presentation of evidence and theories of mitigation and deprived Thomas of his rights to due process and a reliable and individualized sentencing decision. This error was not harmless beyond a reasonable doubt.

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[645] *Lockett*, 438 U.S. at 604 (latter emphasis added).

[646] *See* NRS 3.230 (judge not permitted to comment on evidence).

(2) The court failed to ameliorate the State's prejudicial closing presentation (Claim Eighteen C).

During the rebuttal closing argument at the end of the selection phase, the prosecutor showed a PowerPoint presentation to the jury. Early in the presentation, side by side images of the two victims in either their high school prom outfits or senior class pictures were displayed. The pictures then morphed into photographs of their corpses at the coroner's office.[647] Penalty-retrial counsel failed to object to the display and move for a mistrial. *See* Section VIII.C.2.b.(4), above.

In *Watters v. State*, this Court reversed a conviction after a PowerPoint slide during opening statements displayed the defendant's booking photo with the word "GUILTY" across it.[648] This Court held the propriety of PowerPoint "as an advocate's tool . . . . depends on content and application. . . . [A] PowerPoint may not be used to make an

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[647] *See* 26AA6411-6414 at ¶4. Thomas learned of the improper presentation from penalty-retrial counsel, Dan Albregts. Thomas sought to obtain the PowerPoint from the District Attorney's Office via an informal discovery request. His request was denied. He again sought to obtain it via a formal discovery motion, which was denied by the district court.

[648] *Watters v. State*, 129 Nev. 886, 313 P.3d 243 (2013).

argument visually that would be improper if made orally."[649] Similarly, in *Sipsas v. State*, this Court recognized: "A photograph lends dimension to otherwise non-dimensional testimonial evidence. That an erroneous admission of a photograph would cause undue prejudice is certain. The extent of that prejudice is immeasurable."[650]

The PowerPoint display was improper and intended only to inflame the jury. The trial court erred in failing to *sua sponte* order a mistrial or admonish the jury to disregard the display.

11. The racial make-up of the jury pool did not represent a fair cross-section of the community (Claim Ten).

Thomas's Sixth Amendment rights were violated because the composition of the jury pool at his penalty retrial did not represent a fair cross-section of the community.[651]

To demonstrate a prima facie violation of the fair-cross-section requirement, under *Duren v. Missouri*,[652] Thomas had to demonstrate:

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[649] *Id.* at 247.

[650] *Sipsas v. State*, 102 Nev. 119, 124, n.6, 716 P.2d 231, 234 n.6 (1986).

[651] 3AA729-730.

[652] *Duren v. Missouri*, 439 U.S. 357, 358-59 (1979).

> "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process."[653]

The district court erred at step two and failed to consider step three.

On the day of jury selection, after the morning session when the jurors had been excused for lunch, trial counsel noted that only two black potential jurors had been drawn. One was disqualified as an ex-felon, the other remained in the venire.[654] Trial counsel argued he was "making a record for future purposes" in case it was subsequently held that the jury "selection process in Clark County is discriminatory and is not a cross-section of society."[655]

The court responded: "Sixty people came in here. By my count three of them are either obviously or potentially black."[656] The Court

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[653] *Williams v. State*, 121 Nev. 934, 940, 125 P.3d 627, 631 (2005).

[654] 2AA427 at pg. 56.

[655] 2AA427 at pg. 57.

[656] 2AA428 at pg. 58.

found nine percent of the population of Clark County is black, and nine percent of sixty would be five potential jurors.[657] Consistent with this Court's analysis in *Williams*, Thomas satisfied the first two steps under *Duren*: (1) African Americans are a distinctive group in the community; and (2) two or three black potential jurors in a sixty-person venire was not fair and reasonable in relation to the representation of African Americans in Clark County.

But the trial court disregarded *Duren* and *Williams*, concluding instead the "law requires that jurors be chosen randomly from the community, not equally from the community," thus the jury selection process was not discriminatory.[658] The trial court never considered nor allowed Thomas to satisfy the final step of *Duren*, i.e., demonstrating the underrepresentation in step two resulted from the "systematic exclusion" of the minority group from the jury pool.[659] Had the district

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[657] *Id.*

[658] *Id.*

[659] *See Evans v. State*, 112 Nev. 1172, 1186, 926 P.2d 265, 274 (1996) (quoting *Taylor*, 419 U.S. at 530).

court not erred in its handling of this issue, Thomas would have satisfied the final step of *Duren*.

At the time of Thomas's penalty retrial, the jury pool was selected by use of a computer program, utilizing data compiled by the Nevada Department of Motor Vehicles (DMV).[660] Because the database contained only names of Clark County residents with driver's licenses or DMV-issued identification cards, it systematically excluded almost ten percent of the jury-eligible population.[661] Exclusive use of the DMV list exacerbated the systematic under-representation of racial minorities, because economic and other factors can disproportionately affect their ability to obtain driver's licenses or ID cards.[662]

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[660] *See* 32AA7787.

[661] 32AA7800, 7803; *see also* 16AA3747-3767.

[662] 32AA7803. Rules of Practice of the Eighth Judicial District Court, Rule 6.10 required the use of the DMV list and "such other lists as may be authorized by the chief judge," and, in 2002, this Court recognized the need to use three or more source lists in selecting prospective jurors. *See* Pet. Ex. 77, 32AA7851, 7869, 7870; *see also Williams*, 121 Nev. at 942 n.18, 125 P.3d at 632 n.18.

The jury commissioner of the Eighth Judicial District Court mailed summonses to the individuals selected by the program.[663] A study suggests, at the time of Thomas's trial, as many as one-quarter of the summonses were returned as undeliverable, and more than twenty-percent of the remaining summonses failed to generate any response.[664] While nearly one-half the available jury pool was effectively eliminated in this process, the Jury Commissioner's office took no steps to identify non-respondents or ascertain correct addresses for undeliverable summonses. This exacerbated the exclusion of racial minorities.[665]

After individuals reported in response to a summons, the Jury Commissioner had absolute discretion to excuse them by phone.[666] A study suggested, at the time of Thomas's trial, as many as sixty percent of respondents may have been disqualified or excused from serving.[667] Eighth Judicial District Court Rule 6.50 permits the court

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[663] *See* 32AA7800.

[664] *See* 32AA7804.

[665] *Id.* at n.13.

[666] *See* 32AA7801.

[667] *See* 32AA7805.

administrator to excuse potential jurors on the basis of "child care problems or severe economic hardship," problems falling disproportionately on minorities to the extent they comprise a less affluent segment of the community.[668]

The above-discussion demonstrates, at the time of Thomas's penalty retrial, African Americans were systematically excluded from jury pools in Clark County. Because Thomas satisfied all three prongs of *Duren*, his death sentences must be set aside.

12. The adjudication of Thomas's case by interested judges violated his constitutional rights (Claim Twenty-Two).

Thomas alleged in Claim Twenty-Two A and B that his convictions and death sentences are invalid due to the adjudication of his case by elected judges who failed to conduct a fair and adequate appellate review.[669] The district court found this claim procedurally barred.[670]

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[668] *Id.* at n.14.

[669] 4AA823-829.

[670] 35AA8596.

This Court denied a similar claim in *McConnell* because the petitioner "failed to substantiate" it "with any specific factual allegations demonstrating actual judicial bias."[671] Thomas's case is different: he specifically alleged Justice Nancy Becker was biased in favor of the State at the time she voted to deny his second direct appeal because she was negotiating for employment with the district attorney's office that was prosecuting him.[672]

a. Justice Becker had a conflict of interest when she decided Thomas's appeal (Claim Twenty-Two C).

On November 7, 2006, Justice Nancy Becker lost her bid for re-election to this Court. Shortly after, Justice Becker began negotiating for a job with the Clark County District Attorney's office, the prosecuting office in Thomas's case.[673] On December 28, 2006, this

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[671] *McConnell v. State*, 125 Nev. 243, 256, 212 P.3d 307, 316 (2009).

[672] 4AA828-829.

[673] *See* 28AA6822-6825 ("District Attorney David Roger said Becker first called him later that month [November] or in early December to discuss possibly working for his office.").

Court issued its decision in Thomas's second direct appeal.[674] By January 5, 2007, The Las Vegas Review-Journal was reporting that Justice Becker was considering employment with the Clark County District Attorney's office.[675] Eventually the Clark County District Attorney and Justice Becker agreed that she should receive an exemption from Clark County to earn a salary close to what she received as a Nevada Supreme Court Justice.[676] Justice Becker eventually received this exemption and the county agreed she would earn $120,000 annually.[677]

The Due Process Clause of the Fourteenth Amendment requires a trial before a judge with no actual bias against the defendant or interest in the outcome of the case.[678] The right to an unbiased judge includes

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[674] *See Thomas v. State*, 122 Nev. 1361, 148 P.3d 727 (2006).

[675] *See* 28AA6826-6829 ("Former Supreme Court Justice Nancy Becker is considering accepting a newly created position as an appellate attorney in the district attorney's office. Before she can accept the job, however, District Attorney David Roger will have to analyze his budget to find the necessary funds to pay Becker's salary.").

[676] *See* 28AA6822-6825.

[677] *See id.*

[678] *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997).

the right to an appellate court free from any biased judge.[679] In determining whether a judge's failure to recuse is a constitutional question, "[t]he inquiry is an objective one. The Court asks not whether the judge is actually subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'"[680] Here, the financial incentive created by Justice Becker's negotiation of a salary with a party appearing before the court creates an unconstitutional potential for bias. An average judge in this position is not "likely" to be neutral. The United States Court of Appeals for the District of Columbia recently considered an analogous factual situation, where a judge sought employment with the office prosecuting a case over which he presided. There, the Court found, "it is beyond question that judges may not adjudicate cases involving their prospective employers."[681] The

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[679] *See Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909 (2016); *see also Aetna Life Ins. Co v. Lavoie*, 475 U.S. 813, 827-28 (1986).

[680] *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 881 (2009); *see also Rippo v. Baker*, 137 S. Ct. 905, 907 (2017) (per curiam).

[681] *In re Al-Nashiri*, No. 18-1279, 2019 WL 1601994 at *8 (D.C. Cir., April 16, 2019).

rationale for such a prohibition is simple: "an unscrupulous judge may be tempted to use favorable judicial decisions to improve his employment prospects . . . And even in the case of a scrupulous judge with no intention of parlaying his judicial authority into a new job, the risk that he may *appear* to have done so remains unacceptably high."[682] The Supreme Court has made clear "a due process violation arising from the participation of an interested judge is a defect not amendable to harmless-error review."[683] Justice Becker's conflict of interest is structural error and Thomas is entitled to relief.

13. Appellate counsel were ineffective (Claims Nineteen and Twenty).

Thomas had a right to effective assistance of counsel on appeal.[684] There is a reasonable probability, but for counsel's errors, the results of the direct appeal proceeding would have been different.[685]

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[682] *Id.* (emphasis in original).

[683] *Williams*, 136 S. Ct. at 1909 (internal quotation marks omitted).

[684] *See Lafler v. Cooper*, 566 U.S. 156, 165 (2012).

[685] *See Evitts v. Lucey*, 469 U.S. 387, 397 (1985).

a. Guilt-phase appellate counsel was ineffective (Claim Nineteen).

Appellate counsel were ineffective for failing to raise, in whole or in part, Claims One (*Batson*), Four (jury instructions), Six (Confrontation Clause violations), Eleven (death qualification), Twelve (insufficient evidence of guilt), Fifteen (trial court error), Seventeen (prosecutorial misconduct), and Twenty-Two (inadequate appellate review and the use of elected judges), and for failing to raise the numerous additional constitutional violations alleged in the petition that were susceptible to review on direct appeal.

b. Penalty-retrial appellate counsel was ineffective (Claim Twenty).

Appellate counsel was ineffective for failing to raise, in whole or in part, Claims Two (excessive security measures), Three (Roper violation), Five (jury instructions), Six (Confrontation Clause violations), Seven (Rule 250 notice), Eight (improper evidence), Nine (avoid or prevent unlawful arrest aggravator), Ten (fair cross-section), Eleven (death qualification), (Sixteen (trial court error), Eighteen (prosecutorial misconduct), Twenty-One (cumulative error), Twenty-Two (elected judges and fair appellate review), Twenty-Three (death

penalty unconstitutional), Twenty-Four (international law), Twenty-Five (prior violent felony aggravator), Twenty-Six (juror misconduct), and Twenty-Seven (ineligibility under Atkins and Roper), and for failing to raise the numerous additional constitutional violations alleged in the petition that were susceptible to review on direct appeal.

D. Thomas's claims are not barred by the law-of-the-case doctrine.

In addition to Claim One (*Batson*), discussed in Section VIII.C.4., above, the district court invoked the law-of-the-case doctrine to dismiss Claims Four (deficient jury instructions at the guilt phase), Five (deficient jury instructions at the penalty retrial), Six (Confrontation Clause violations), Claim Eleven (death qualification), and Twelve (insufficient evidence of guilt).[686] The district court was incorrect in finding all these claims previously decided by this Court. As discussed below, Claims Five and Six contain new allegations substantially altering the claims presented previously.

Because constitutional errors that may be harmless in isolation can have the cumulative effect of rendering a trial fundamentally

[686] 35AA8594-95.

unfair, the district court was required to review all Thomas's claims—old and new—for cumulative error.[687] The district court's order failed to address Thomas's cumulative error claim (Claim Twenty-One).[688] This Court should review Thomas's claims—including those it previously rejected—for cumulative error.[689]

1. The guilt-phase jury instructions were erroneous (Claim Four).

In Claim Four, Thomas alleged his convictions and death sentences are unconstitutional because the jury received deficient guilt-phase instructions.[690] This Court denied this claim on direct appeal, finding "no plain or patently prejudicial errors exist."[691] But the Court reviewed the claim for plain error because trial counsel failed to preserve it.[692] Effective counsel would have objected to the instructions;

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[687] *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985); *Parle v. Runnels*, 505 F.3d 922, 927-28 (9th Cir. 2007).

[688] *See* 35AA8590-8599.

[689] *See Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008); *Parle*, 505 F.3d at 927-28.

[690] 3AA678-689.

[691] 5AA1019.

[692] *See id.* at n.5.

the burden on appeal would then have been the State's: to prove the error was harmless beyond a reasonable doubt.[693] Because the ineffectiveness of all prior state counsel overcomes the procedural default of Claim Four, this Court should now review it de novo under the harmless error standard.

(1) First-degree murder (Claim Four A)

This Court laid out the proper instructions for first-degree murder in *Byford v. State*.[694] Thomas's jury did not receive the *Byford* instruction; instead, it was instructed under *Kazalyn v. State*.[695] The failure to give the *Byford* instruction violated Thomas's constitutionally protected liberty interest in the fair administration of state procedures governing his trial.[696]

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[693] *See Chapman v. California*, 366 U.S. 18, 24 (1967).

[694] *Byford v. State*, 116 Nev. 215, 236-37, 994 P.2d 700, 714-15 (2000).

[695] *Kazalyn v. State*, 108 Nev. 67, 825 P.2d 578 (1992); *see* 14AA3281.

[696] *See Hewitt v. Helms*, 459 U.S. 460, 466 (1983).

Nevada law is clear that the elements of willfulness, deliberation, and premeditation are distinct.[697] But the *Kazalyn* instruction conflated these three elements into a bare intent requirement. "By defining only premeditation and failing to provide deliberation with any independent definition, the *Kazalyn* instruction blurs the distinction between first- and second-degree murder."[698]

Under the Due Process Clause, the State must prove every element of an offense beyond a reasonable doubt.[699] The *Kazalyn* instruction allowed Thomas's jury to find willfulness and deliberation by merely finding premeditation. A jury instruction that "ha[s] the effect of relieving the State of the burden of proof enunciated in *Winship* on the critical question of petitioner's state of mind" violates that petitioner's due process rights.[700]

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[697] NRS 200.030(1)(a); *see Hern v. State*, 97 Nev. 529, 532, 635 P.2d 278, 280 (1981).

[698] *Byford*, 116 Nev. at 234-35, 994 P.2d at 713.

[699] *In re Winship*, 397 U.S. 358, 364 (1970).

[700] *Polk v. Sandoval*, 503 F.3d 903, 909 (9th Cir. 2007) (quoting *Sandstrom v. Montana*, 442 U.S. 510, 521 (1979)).

The *Kazalyn* instruction erases the distinction between first- and second-degree murder, rendering the offense of first-degree murder unconstitutionally vague and overbroad.[701] And the failure to provide adequate warning of what conduct constitutes first-degree murder violates the notice requirement of the Due Process Clause. The lack of distinction between first- and second-degree murder leads to dissimilar treatment of similarly situated persons, violating the Equal Protection Clause.[702]

The absence of meaningful distinction between first- and second-degree murder also violated Thomas's right to a reliable sentence.[703] In Nevada, a high degree of premeditation is a condition of death eligibility just like the finding of a valid aggravating circumstance.[704] The Supreme Court has stated, to base death eligibility on a vague aggravating factor, invites "arbitrary and capricious application of the

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[701] *See Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

[702] *See Cleburne*, 473 U.S. at 439; *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) (citations omitted).

[703] *See Beck*, 447 U.S. at 638.

[704] *Jones v. State*, 101 Nev. 573, 582, 707 P.2d 1128, 1134 (1985).

death penalty."[705] Basing death eligibility on a conviction for a capital offense, when the conviction is predicated upon a vague definition of the elements that are supposed to distinguish it from a non-capital offense, is even more arbitrary and capricious. Finally, predicating a death sentence on second-degree murder fails to narrow the class of defendants eligible for the death penalty, violating the Eighth Amendment.[706]

(2) Felony murder (Claim Four B)

In addition to willful, deliberate, and premeditated murder, the State alleged felony murder theories (committed in the perpetration or attempted perpetration of burglary, robbery, and kidnapping).[707] But the jury was not instructed, in order to find Thomas guilty of felony murder, it had to find he formed the intent to commit the underlying felony prior to the murder. Nevada law is clear that "[a] conviction for felony murder will not stand if the jury finds the felony occurred as an

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[705] *Stringer*, 503 U.S. at 228, 235-36.

[706] *See Zant v. Stephens*, 462 U.S. 862, 877 (1983).

[707] *See* 14AA3282.

afterthought to the killing."[708] The failure to properly instruct the jury relieved the State of its burden to prove every element of the offense, in violation of Thomas's right to due process.[709]

(3) Equal and exact justice (Claim Four C)

Thomas's jurors were instructed to deliberate "with the sole, fixed and steadfast purpose of doing equal and exact justice between the defendant and the State of Nevada."[710] The instruction created a reasonable likelihood the jury would not apply the presumption of innocence in favor of Thomas, and would instead convict and sentence him based on a lesser standard of proof than the Constitution requires.[711] Thomas acknowledges this Court rejected similar challenges to this instruction.[712] None of those decisions addressed *Winship* and *Sullivan* and this Court should do so now.

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[708] *See Nay v. State*, 123 Nev. 326, 334-35, 167 P.3d 430, 436 (2007).

[709] *Winship*, 397 U.S. at 364.

[710] 14AA3302.

[711] *See Winship*, 397 U.S. at 364; *Sullivan v. Louisiana*, 508 U.S. 275, 279-82 (1993).

[712] *See*, *e.g.*, *Leonard v. State*, 114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998); *Daniel v. State*, 119 Nev. 498, 522, 78 P.3d 890, 906 (2003).

(4) Reasonable doubt (Claim Four D)

The reasonable doubt instruction given at Thomas's trial was unconstitutional.[713] The "actual, not mere possibility or speculation" language in the reasonable doubt instruction is similar to language condemned by the Supreme Court.[714] The "govern or control" language, describing the standard of proof beyond reasonable doubt, essentially reverses the burden of proof, in violation of *Victor v. Nebraska*.[715] The characterization of the standard of proof as an "abiding conviction of the truth of the charge," cannot be linked to any proper definition of the reasonable doubt standard and, in conjunction with the language that immediately preceded this statement, provided the State with an impermissibly low standard of proof.

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[713] *See* 14AA3295.

[714] *See Cage v. Louisiana*, 498 U.S. 39, 41 (1990) (per curiam).

[715] *Victor v. Nebraska*, 511 U.S. 1, 20 (1994); *see*, *e.g.*, *McAllister v. State*, 88 N.W. 212, 214-15 (Wis. 1901); *Commonwealth v. Miller*, 21 A. 138, 140 (Penn. 1891); *contra Lord v. State*, 107 Nev. 28, 40, 806 P.2d 548, 555-56 (1991); *Ramirez v. Hatcher*, 136 F.3d 1209, 1210-15 (9th Cir. 1998).

The use of this unconstitutional definition of reasonable doubt impermissibly minimized the standard of proof and is prejudicial per se.[716] Thomas acknowledges this Court and the Ninth Circuit have rejected similar challenges to this instruction.[717] None of those decisions addressed the authorities Thomas relies on, and this Court should do so now.

(5) Lack of unanimity (Claim Four E)

Thomas's jury was not instructed that its verdict must be unanimous as to a theory of first-degree murder.[718] Due process requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged."[719] Due process is violated when inherently different acts are used to define an element of the crime without a requirement the jury agree on the

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[716] *Sullivan*, 508 U.S. at 278-79.

[717] *See*, *e.g.*, *Nevius v. McDaniel*, 218 F.3d 940, 944-45 (9th Cir. 2000); *Ramirez v. Hatcher*, 136 F.3d 1209, 1211-13 (9th Cir. 1998); *Canape v. State*, 109 Nev. 864, 871-72, 859 P.2d 1023, 1028 (1993).

[718] *See* 14AA3283.

[719] *Winship*, 397 U.S. at 365.

specific act committed.[720] The flexibility of states to define "different course of conduct, or states of mind, as merely alternative means of committing a single offense" is not unlimited.[721] When the "difference between means become so important that they may not reasonably be viewed as alternatives to a common end," due process requires the "separate theories of crime [ ] be treated as separate offenses subject to separate jury findings."[722] In an effort to make this distinction, the Supreme Court in *Schad v. Arizona* directed courts to consider factors like "the moral and practical equivalence of the different" acts that may satisfy the element of a single offense.[723]

The Court clarified the matter of unanimity in *Richardson v. United States*, holding where a statute creates specific and required elements of a crime, as in premeditated murder or felony murder, the jury must be unanimous as to every element, not just the act of

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[720] *See Schad v. Arizona*, 501 U.S. 624, 633 (1991).

[721] *Id.* at 632.

[722] *Id.* at 634.

[723] *Id.* at 637.

killing.[724] Additionally, in Nevada, unanimity is required in all criminal cases.[725] Unanimity in this context means every juror agrees the defendant committed the same, single, specific criminal act, as well as each statutory element enumerated.

Thomas's right to due process was violated because the trial court allowed the jury to convict him of capital murder under materially different and morally inequivalent acts and mental states, without requiring a consensus as to the theory under which Thomas was guilty. Unlike premeditated murder, felony murder does not require the defendant commit the killing or even intend to kill, so long as the defendant is involved in the underlying felony.[726] On the other hand, felony murder—but not premeditated murder—requires proof the defendant had the requisite intent to commit and did commit the underlying felony.[727] The different theories possessed no elements in

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[724] *Richardson v. United States*, 526 U.S. 813, 817 (1999).

[725] *See* NRS 175.481.

[726] *See Evans v. State*, 113 Nev. 885, 944 P.2d 253 (1997), citing NRS 200.030(1)(a)).

[727] *See*, *e.g.*, *Leslie v. Warden*, 118 Nev. 773, 59 P.3d 440 (2002).

common except the fact of a murder. The instructions permitted the jury to convict Thomas based on a finding that he murdered the victims without proof beyond a reasonable doubt of all underlying elements.

Thomas acknowledges this Court ruled on several occasions that a jury need not be unanimous in determining under which theory of criminality the State proved its case.[728] Nonetheless, Nevada's statute defining first-degree murder sets forth two separate offenses and as a matter of due process, fundamental fairness, and the right to a jury trial under the federal and state constitutions, this Court should find the failure to give a unanimity instruction was error.

(6) Malice (Claim Four F)

The malice instructions provided for an impermissible and unconstitutional presumption that deprived Thomas of his rights to a fair trial, equal protection, due process of law, and freedom from cruel and unusual punishment.[729] The implied malice instruction required

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[728] *See*, *e.g.*, *Walker v. State*, 113 Nev. 853, 944 P.2d 762 (1997); *Evans*, 113 Nev. 885, 944 P.2d 253.

[729] *See Yates v. Evatt*, 500 U.S. 391, 400-02 (1991).

the jury to find malice "when no considerable provocation appears."[730] In other words, the mandatory presumption of malice applies when there is nothing more than proof of a killing. These predicate facts—which do not constitute facts at all but the absence of such—are not "so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding the ultimate fact."[731] A jury could, in fact, find a killing without also finding that it was committed with malice.

In addition, the alternative predicate facts of a "heart fatally bent on mischief" are so vague as to be devoid of content and perjorative, and they allow a finding of malice simply on the ground that the defendant is a bad man.[732] As one court commented, "Juries are to determine whether specific acts have been committed with requisite culpability, not whether defendants have generally depraved, wicked and malicious

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[730] 14AA3278.

[731] *Yates*, 500 U.S. at 406 n.10.

[732] *See* 14AA3277.

spirits."[733] A reasonable juror would also have understood the "heart fatally bent on mischief" language to require an objective, rather than subjective, standard in determining whether Thomas acted with conscious disregard of life, thereby entirely obliterating the line separating murder from involuntary manslaughter.[734] Either way, the language in the jury instruction improperly lowered the State's burden of proof and requires reversal of Thomas's convictions.[735]

2. The penalty-retrial instructions were erroneous (Claim Five).

Only Claim Five A (failure to give lack of premeditated intent instruction) was raised on direct appeal. Because this Court must consider the prejudicial impact of the instructional errors cumulatively, Claim Five A cannot be segregated from the new allegations contained in Claims Five B (failure to give emotional disabilities as mitigation

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[733] *United States v. Hinckle*, 487 F.2d 1205, 1207 (D.C. Cir. 1973); *People v. Phillips*, 414 P.2d 353 (Cal. 1966) (disapproving language on non-constitutional grounds); *cf. Dixon v. United States*, 548 U.S. 1, 7 (2006) (noting vagueness of "evil mind" mental state).

[734] *See*, *e.g.*, *Boyde v. California*, 494 U.S. 370, 382 (1990) (assessing effect of language of instruction on reasonable juror).

[735] *See Winship*, 397 U.S. at 364.

instruction) and C (failure to instruct on outweighing beyond a reasonable doubt).[736]

a. The jury was not instructed that lack of premeditated intent was mitigating (Claim Five A).

The trial court violated Thomas's right to an individualized sentencing determination when it refused to instruct the jury with his proposed mitigator that the killings were committed without premeditated intent.[737] As penalty-retrial counsel noted, there was no indication from the guilt-phase verdict whether the jury found Thomas guilty of premeditated murder or felony murder. Thomas therefore had a significant factual basis on which to argue to the penalty-retrial jury he had not acted with premeditation.

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[736] *See Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973) ("[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." (citation omitted)).

[737] 25AA6187-88, 6206. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

b. The jury was not instructed that emotional disabilities were mitigating (Claim Five B).

The trial court similarly violated Thomas's right to an individualized sentencing determination when it denied a proposed jury instruction on his emotional disabilities growing up.[738]

c. No "outweighing beyond a reasonable doubt" instruction was given (Claim Five C).

The jury found Thomas eligible for the death penalty because it found six aggravating circumstances and concluded they were not outweighed by the mitigation evidence. The district court failed to instruct the jury the State was required to prove *beyond a reasonable doubt* the mitigation evidence did not outweigh the aggravating circumstances.

The district court's failure to instruct on the beyond-a-reasonable-doubt standard for weighing constitutes plain error.[739] The Supreme

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[738] *See* 25AA6189-6191.

[739] *Tavares v. State*, 117 Nev. 725, 729, 30 P.3d 1128, 1130–31 (2001). Thomas recognizes this Court recently issued its opinion in *Castillo v. State*, No. 73465, 135 Nev. __, 2019 WL 2306412 (2019), on May 30, 2019. In *Castillo*, this Court made the same errors that it made in *Jeremias*. *See* below. Remittitur has not yet issued in *Castillo*, which

Court in *Hurst* held a jury must find beyond a reasonable doubt *all* conditions precedent to the imposition of a death sentence, not just the presence of an aggravating circumstance.[740] Thus, in "relatively unique" states, like Nevada, that require resolution of the outweighing determination in the state's favor as a condition of death eligibility,[741] the outweighing determination, along with any other death-eligibility findings, must be made by the jury beyond a reasonable doubt.[742]

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means the case is not yet final. This Court may yet correct its erroneous decisions in *Jeremias* and *Castillo* on a petition for rehearing.

[740] *Hurst*, 136 S.Ct. at 619 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."); *id.* at 621 (explaining Sixth Amendment, "in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt").

[741] *Hollaway v. State*, 116 Nev. 732, 745, 6 P.3d 987, 996 (2000).

[742] In rejecting this point in *Jeremias*, this Court relied on *Ex parte Bohannon*, 222 So.3d 525, 532 (Ala. 2016) *cert. denied sub nom. Bohannon v. Alabama*, 137 S. Ct. 831 (2017). *See Jeremias*, 412 P.3d at 53. This reliance was misplaced. *Bohannon* analyzed *Hurst* and concluded that it was "consistent with the Sixth Amendment" for Alabama judges to determine if aggravating circumstances outweigh mitigating circumstances. 222 So.3d at 532. *Bohannon* also concluded that *Hurst* did not invalidate the Alabama practice of juries "recommending" sentences, but leaving the final authority with the judge. *Id.* at 534. But in April of 2017, Alabama governor Kay Ivey signed into law a bill requiring juries, not judges, to have the final say on whether to impose the death penalty. *See* Kent Faulk, *Alabama Gov.*

This Court recently stated, although *Hurst* "appears to characterize the weighing determination as a 'fact,'" the Supreme Court was simply "quoting the Florida statute, not pronouncing a new rule that the weighing of aggravating and mitigating circumstances is a factual determination subject to a beyond-a-reasonable-doubt standard."[743] But the Florida Supreme Court, on remand from *Hurst*, interpreted its own statutes and the Supreme Court's decision to mean all eligibility findings, including the outweighing determination, are factual and subject to *Hurst*.[744]

Here, the jury was not instructed the State had to prove beyond a reasonable doubt that the mitigation evidence did not outweigh the

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Kay Ivey signs bill: Judges can no longer override juries in death penalty cases, http://www.al.com/news/birmingham/index.ssf/2017/04/post_317.html (Apr. 11, 2017). In addition, Alabama's former death-penalty scheme, like many states, included outweighing as part of the selection phase, not the eligibility phase. *See Bohannon*, 222 So.3d at 532. This Court should not rely on case law from another jurisdiction—that already has been legislatively overwritten—to overlook *Hurst*'s unique application to Nevada.

[743] *Jeremias*, 412 P.3d at 53–54.

[744] *Hurst v. State*, 202 So.3d 40, 53–58 (Fla. 2016), *cert. denied sub nom. Florida v. Hurst*, 137 S. Ct. 2161 (2017).

aggravating circumstances. Because *Hurst* requires the jury to apply the beyond-a-reasonable-doubt standard to the weighing determination and Thomas's jury did not make that finding, the trial court erred.

3. The Confrontation Clause was violated at the guilt phase and penalty retrial (Claim Six).

The Sixth Amendment limits the admission of testimonial hearsay statements unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine the declarant.[745]

a. Kenya Hall's preliminary hearing testimony was improperly admitted.

On June 27, 1996, codefendant Kenya Hall testified at Thomas's preliminary hearing. He testified under a plea agreement in which he waived his Fifth Amendment right against self-incrimination and agreed to testify at Thomas's trial.[746] At a hearing in his own case on June 13, 1997, Hall announced his intention to renege on his plea

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[745] *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004).

[746] *See* 29AA7004-7007.

agreement, invoked his privilege against self-incrimination, and refused to testify at Thomas's trial.[747]

Because Thomas's counsel were not present, the hearing was continued until June 16, 1997—the first day of Thomas's trial. Hall reiterated his intention not to testify.[748] The State then moved for admission of Hall's preliminary hearing testimony.[749] Over the confrontation objection of penalty-retrial counsel, the trial court ruled Hall's preliminary hearing testimony would be read into the record.[750]

Hall's preliminary hearing testimony was read to the jury in the guilt phase of Thomas's trial and again in the eligibility phase of his penalty retrial. This violated Thomas's Sixth Amendment rights.[751]

b. Additional Confrontation Clause violations infected the penalty retrial.

The Sixth Amendment clearly states confrontation is required "in all criminal prosecutions." In *Apprendi v. New Jersey*, the Supreme

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[747] *See generally* 1AA19-21.

[748] *See* 22AA5477-78.

[749] *See* 22AA5478.

[750] 22AA5479-80.

[751] *See* 25AA6014-6028.

Court clarified that defendant's facing sentencing proceedings are entitled to constitutional protections and, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."[752] *Ring v. Arizona* applied the rationale of *Apprendi* to capital cases.[753]

Several courts considering this issue have found the right of confrontation applies to all evidence in the eligibility phase of a capital trial.[754] In *United States v. Mills*, a California federal district court went one step further, finding the Confrontation Clause applies to both the eligibility and selection phases.[755] Thomas recognizes this Court in

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[752] *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

[753] *Ring v. Arizona*, 536 U.S. 584 (2002).

[754] *See United States v. Jordan*, 357 F.Supp.2d 889, 902-03 (E.D.Va. 2005) (federal district court ruled government could not introduce a witness's grand jury testimony and other statements during the eligibility phase of the capital proceeding); *United States v. Johnson*, 378 F.Supp.2d 1051, 1061 (N.D. Iowa 2003) (the "constitutional safeguards" of the Confrontation Clause should apply to the eligibility phase just as they apply to the trial phase).

[755] *United States v. Mills*, 446 F.Supp.2d 1115, 1135 (C.D. Cal. 2006). This decision was followed in *United States v. Sablan*, 555 F.Supp.2d 1205, 1221 (D.Colo. 2007).

Summers v. State held *Crawford* does not apply to evidence admitted during a capital penalty trial.[756]

Both the eligibility and selection phases of Thomas's penalty retrial were marked by the State's virtually unlimited license to admit out-of-court statements and pretrial testimony as evidence in support of its case for death. Thomas respectfully urges this Court to overrule *Summers* and find this evidence was improperly introduced.[757]

(1) Confrontation violations at the eligibility phase

The improper admission of Hall's preliminary hearing testimony at the eligibility phase was compounded when, over penalty-retrial

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[756] *Summers v. State*, 122 Nev. 1326, 1327, 148 P.3d 778, 779 (2006).

[757] *See, e.g.*, Amanda Harris, *Surpassing Sentencing: The Controversial Next Step in Confrontation Clause Jurisprudence*, 64 Fla. L. Rev. 1447 (2012).

As to confrontation violations at the eligibility stage of Thomas's penalty retrial, it is important to note that *Summer*s predates the Supreme Court's decision in *Hurst*. In *Hurst*, the Court held that statutory prerequisites to a capital defendant's eligibility for the death penalty are "elements" of a capital offense, receiving all of the protections guaranteed under the Sixth Amendment. Insofar as the Confrontation Clause is a provision of the Sixth Amendment, it applies with full force in the eligibility stage of a capital trial in Nevada.

counsel's hearsay and confrontation objections, the trial court allowed Trooper David Bailey of the Nevada Highway Patrol to repeat Hall's out-of-court statements.[758] This hearsay testimony was particularly prejudicial. As Bailey recounted it, Hall said Thomas told him to hold a gun on one of the restaurant employees while the employee opened a safe.[759] Bailey said Hall repeated to him the instructions Thomas gave Hall: "put [the gun] to his head . . . get the money and then shoot the guy."[760]

The trial court also allowed the previous testimony of Loletha Jackson to be read to the jury as part of the proof of Thomas's prior conviction for a violent felony, an aggravating circumstance under NRS 200.033(2)(b).[761]

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[758] 25AA6009 at pgs. 84-94.

[759] 25AA6011 at pg. 92.

[760] *Id.*

[761] *See* 25AA6062-6063 at pgs. 55-62.

(2) Confrontation violations at the selection phase

(a) Witnesses were permitted to read from documents they did not write.

The trial court allowed numerous out-of-court testimonial statements into evidence during the selection phase, including presentence reports, parole and probation reports, and prison disciplinary reports, all of which were testimonial in nature and therefore must be presented at trial by the official who authored them.

The trial court allowed the introduction of at least twenty-three juvenile court petitions, presentence reports, police reports, and prison disciplinary reports charging Thomas with all manner of violent and non-violent offenses. All of these documents, separately and together, violated his right to confront his accusers, as guaranteed by the Confrontation Clause.[762] One document was a juvenile court certification order detailing Thomas's juvenile history with law enforcement, including numerous charges that were dismissed.[763]

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[762] *See* 2AA468-469 at pgs. 16-22 (accepting numerous State exhibits into evidence).

[763] *See* 26AA6337-6358.

Introduction of this document alone violated the Sixth Amendment because Thomas was deprived of the opportunity to confront most, if not all, of the people who alleged the charges contained in his record as a juvenile offender.[764]

The trial court allowed Patricia Smith and John Springgate, both agents of the Division of Parole and Probation, to present and read from charging documents that they did not author themselves.[765] Springgate, for example, read from presentence reports from Thomas's felony convictions in 1990 and 1996.[766] Springgate did not participate in investigating or preparing either document.[767]

The trial court allowed Detective David Mesinar to testify from a report drafted by crime scene analyst David Ruffino.[768] The trial court's

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[764] *See also* 26AA6359-6407.

[765] 2AA470-476 at pgs. 24-48.

[766] 2AA472-476 at pgs. 32-48; *see* 26AA6387-6407.

[767] 2AA474 at pg. 43.

[768] 25AA6028-6045 at pgs. 170-236.

admission of the report as an exhibit exacerbated the Confrontation Clause violation.[769]

(b) The prior testimony of multiple witnesses was read to the jury.

The trial court allowed Alkareem Hanifa's previous testimony to be read to the jury. Hanifa testified that, in 1989, Thomas hit him in the head with a rock and robbed him of $350.[770]

The trial court allowed the prior testimony of Marty Neagle to be read to the jury. At the time of his prior testimony, Neagle was a correctional officer at Ely State Prison. He recalled an incident in 1994 in which Thomas tried to incite other inmates to violence against correctional officers who were responding to a fight on the prison yard.[771]

The trial court allowed the prior testimony of Roger Edwards, a former correctional officer at Ely State Prison, to be read to the jury. In his previous testimony, Edwards read from or summarized the

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[769] *See* 25AA6034-6042 at pgs. 191-223.

[770] 2AA476-478 at pgs. 48-56.

[771] 2AA492-497 at pgs. 113-32.

allegations contained in at least four prison disciplinary reports authored or initiated by other, non-testifying correctional officers at Ely State Prison. The reports alleged that Thomas committed acts of violence or made threats of violence toward other inmates and correctional officers. Edwards' testimony spoke to only one incident that he actually witnessed.[772]

4. Cumulative, inadmissible, and improper evidence was admitted at the penalty retrial (Claim Eight).

At the penalty retrial, the State was allowed to introduce a long procession of witnesses who presented all manner of repetitive evidence regarding Thomas's juvenile criminal history, prior bad acts, and prejudicial victim impact testimony, in violation of his right to a fair hearing and reliable sentence.

a. Cumulative and prejudicial testimony was introduced about prior bad acts (Claim Eight A).

Most of the improper testimony concerned uncharged criminal acts allegedly committed by Thomas while incarcerated, ranging from improper verbal comments, to inciting other prisoners, to throwing

[772] 3AA504-514 at pgs. 162-201.

urine on correctional officers. To the extent this litany of testimony involved eyewitnesses to the incidents described, it extended so long as to become cumulative and prejudicial. More egregious, however, were the multitudes who testified about events they did not see, despite defense counsel's hearsay, authenticity, and confrontation objections. In light of the manifest credibility deficiencies of such testimony—as well as the raft of documents on Thomas's behavior in his preteen years and early adolescence—the trial court erred in not limiting the unauthenticated allegations against Thomas in the selection phase.

This Court on direct appeal found the jury was entitled to know about Thomas's lengthy prison disciplinary record, and this evidence was not cumulative.[773] But, as detailed in Section VII.C.8., above, Thomas's prison disciplinary record should never have been admitted because the State violated the notice provision of Rule 250.

b. Improper victim impact statements (Claim Eight B)

Fred Dixon's characterization of Thomas as "the lowest form of social sewage" was an incendiary attack that defense counsel's objection

[773] *See* 6AA1389.

could not undo. Viewed separately or of a piece with the procession of character evidence described above, Dixon's comment was unduly prejudicial and rendered the subsequent sentences unreliable under the Eighth Amendment. Indeed Nevada's capital sentencing scheme fails to put proper, constitutional limits on victim impact testimony to protect capital defendants and their proceedings from instances such as this one, in which a rapid rise in emotion can infect the proceedings beyond any cure, before the trial court can remedy it.[774]

This Court on direct appeal ruled Dixon's statement improper, but not reversible error.[775] This Court must cumulate the prejudice from the errors in Claims 18(A)—now taken in light of the Rule 250 Notice violation alleged in Claim Seven—and (B) and find Thomas is entitled to relief.

5. It was error to death qualify the jury (Claim Eleven).

The death-qualification process violated Thomas's Sixth Amendment rights because it left his guilt in the hands of a conviction-

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[774] *See generally Payne v. Tennessee*, 501 U.S. 808, 825 (1991).

[775] 6AA1389.

prone jury that was not drawn from a fair-cross section of the community.[776]

Individuals opposed to the death penalty constitute a distinct and recognizable group in American society. The subset of this group who can be excluded on the basis of *Witherspoon v. Illinois* also constitutes a distinct group.[777]

A potential juror's views on the death penalty are wholly irrelevant to the question of guilt. But death-qualification systematically excludes these individuals from both phases of a capital trial, and studies show this results in more conviction-prone capital juries.[778]

This Court on direct appeal denied this claim on the basis that "no plain or patently prejudicial errors exist."[779] But the Court reviewed the

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[776] *See, e.g.*, 2AA429 at pgs. 64-65.

[777] *Witherspoon v. Illinois*, 391 U.S. 510, 520 (1968).

[778] *See Hovey v. Superior Court of Alameda County*, 616 P.2d 1301, 1310-53 (Cal. 1980); *see also Witherspoon*, 391 U.S. at 520 n.18.

[779] 5AA1019.

claim for plain error because trial counsel failed to preserve it.[780] Counsel were ineffective for failing to do so. If counsel had objected, the burden would have been on the State to prove the error was harmless beyond a reasonable doubt.[781] Because the ineffectiveness of all prior state counsel overcomes the procedural default of this claim, this Court should review the claim de novo under the harmless error standard.

E. Laches should not apply.

The district court found the State was entitled to a rebuttable presumption of prejudice under NRS 34.800 because the current petition was filed more than: "20 years from the original jury trial;" "18 years from the affirmance of the guilty verdict on direct appeal;" "12 years after the last penalty hearing;" and "10 years from the affirmance on the direct appeal of the death sentences."[782] The district court made no finding that Thomas had failed to rebut the presumption of prejudice under NRS 34.800. To the extent this Court finds the district court applied laches to deny Thomas's petition, the district court erred.

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[780] *See id.* at n.5.

[781] *See Chapman*, 366 U.S. at 24.

[782] 35AA8593-94.

As outlined in detail in Section VIII.B., above, Thomas can demonstrate good cause and prejudice to overcome any applicable procedural bars, including NRS 34.800. Thomas can rebut the presumption of prejudice to the State because his claims are based on "grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred."[783] Thomas can demonstrate any delay in raising the facts and claims in the current petition is not attributable to him. Rather, any delay is the result of initial post-conviction counsel's ineffectiveness. And Thomas's ability to fully litigate allegations of ineffective assistance of initial post-conviction counsel under *Crump* was placed on hold when this Court ordered a new penalty trial.[784]

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[783] NRS 34.800. *See Crump*, 113 Nev. at 305, 934 P.2d at 354; *see also State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 239, 112 P.3d 1070, 1079 (2005) (holding State would have been unsuccessful in pleading laches and prejudice "given our determination that [petitioner] had established cause and prejudice under NRS 34.726 for the untimely filing of his petition.").

[784] *See State v. Powell*, 122 Nev. 751, 759, 138 P.3d 453, 458 (2006).

Thomas's allegations of ineffective assistance of initial post-conviction counsel were filed within "a reasonable time after [they] became available," i.e. "after the remittitur issued in the appeal from the denial of his first post-conviction habeas petition."[785] Under *Rippo*, "a reasonable time" is one year.[786] The remittitur in the appeal from the denial of the initial post-conviction proceedings issued October 27, 2016, and the current petition was filed October 20, 2017, making Thomas's *Crump* petition timely under *Rippo*.[787]

If this Court applies laches to Thomas's petition, *Crump* and *Rippo* would be rendered meaningless. Remittitur issued in the appeal from the denial of Thomas's initial post-conviction petition a decade after the conclusion of the direct appeal following his penalty retrial.[788] Thomas's petition was timely under *Rippo* but five-years past the triggering date for laches, potentially closing any avenue of relief for the

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[785] *Lisle*, 351 P.3d at 729.

[786] *Rippo*, 368 P.3d at 739.

[787] 3AA630; 26AA6274-6276.

[788] *See Thomas v. State*, 122 Nev. 1361, 148 P.3d 727 (2006).

ineffective assistance of his post-conviction counsel.[789] But the laches bar in NRS 34.800 is discretionary, both on its face and as interpreted by this Court.[790] Because Thomas timely asserted good cause based on the ineffective assistance of initial state post-conviction counsel, this Court should give him the benefit of *Crump* and decline to impose the laches bar, as in other cases.[791]

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[789] The district court's separation of Thomas's guilt and penalty proceedings for purposes of calculating the laches bar was improper. *See* 35AA8593. Thomas's judgment of conviction was not valid until this Court issued remittitur following the affirmance on direct appeal following his penalty retrial. *See* NRS 176.105 (setting forth requirements of valid judgment of conviction)

[790] *See Langir v. Arden*, 82 Nev. 28, 36, 409 P.2d 891, 895 (1966) ("[e]specially strong circumstances must exist to sustain the defense of laches when the statute of limitations has not run."). *See* NRS 34.800(1) ("[a] petition *may* be dismissed" under certain circumstances (emphasis added)); *see also Robins v. State*, No. 65063, 2016 WL 5801204 (Nev. Sept. 22, 2016) (unpublished), (laches "statute clearly uses *permissive* language"; "the district court could exercise its discretion and decline to dismiss the petition under NRS 34.800."); *Weber v. State*, No. 62473, 2016 WL 3524627, at*3 n.1 (Nev. June 24, 2016) (unpublished) (noting court could have summarily affirmed district court's application of laches but remanding for evidentiary hearing).

[791] *See Rippo*, 423 P.3d at 1093 n.7; *Lisle*, 351 P.3d at 728-29 (same); *State v. Bennett*, 119 Nev. 585, 599-604, 81 P.3d 1, 8 (2003) (same).

IX. CONCLUSION

Thomas requests this Court reverse the order of the district court and vacate his convictions and death sentences. Alternatively, Thomas requests this Court remand this case with instructions that the district court grant an evidentiary hearing to demonstrate good cause and prejudice and the merit of his claims.

DATED this 14th day of June, 2019.

Respectfully submitted,

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/s/ *Joanne L. Diamond*

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Assistant Federal Public Defenders

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/s/ *Joanne L. Diamond*
Assistant Federal Public Defender

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I hereby certify that this document was filed electronically with the Nevada Supreme Court on June 14, 2019. Electronic Service of the foregoing APPELLANT'S OPENING BRIEF shall be made in accordance with the Master Service List as follows:

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/s/ *Jeremy Kip*
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