disclose to the accused. Based upon the prosecution's alleged comments regarding the "open file," petitioner asserts that trial counsel ought to have been able to rely implicitly on the completeness of that file.

That reliance may have been misplaced. Petitioner alleges numerous ineffective assistance of counsel claims, based upon his attorneys' failure to conduct adequate investigation into a vast number of matters, including, but not limited to, mitigation evidence available from county and state records, and potential *Brady*, *Giglio* and *Kyles* material. The particular twist which makes all of this difficult is as follows.

Because the petitioners' lawyers were informed that their cases were "open file," they may (or may not) have been within their rights to assume that all of the information which law enforcement officials should have disclosed to them (particularly *Brady*, *Giglio* and *Kyles* material) would be located in the files of the district attorney. The FPD has provided fairly substantial evidence suggesting that the "open file" policy of the CCDA may be quite illusory, much to the petitioner's detriment. This evidence consists of various other capital cases from our district, in which Nevada courts have found that the CCDA's office had failed to comply with its duties of disclosure.

State v. Butler, Case No. C155791, Eighth Judicial District Court, is instructive. In that case, a capital sentence was vacated because of a prosecution's failure to disclose evidence.

This incident was preceded by another case in which the state had deliberately failed to disclose documents, despite a pending request for complete discovery. Petitioners have cited almost ten other cases in which courts have either vacated capital sentences for failure to disclose by the CCDA, or in which members of the CCDA's office have admitted to serious defaults regarding their obligations when it comes to disclosure of documents. *See e.g., Jiminez v. State*, 112 Nev. 610, 620-21, 918 P.2d 687 (1996)(court finding that CCDA failed to comply with disclosure obligations regarding *Giglio* material and exculpatory evidence; *Miranda v. McDaniel*, Clark County Case No. C057788, findings of fact and conclusions of law (2/13/96)(finding ineffective assistance of counsel for failure to investigate inconsistencies in testimony of key prosecution witnesses, where inconsistencies known to prosecution and information was disclosed partially by prosecution); *Haberstroh v. McDaniel*, Clark County Case No. C076013 (prosecution devoted much of the penalty phase in this death penalty case to the evidence suggesting petitioner had made a "shank" [a jail made stabbing weapon]; prosecution failed to disclose evidence in possession of Clark County Detention Center that suggested the "shank" was in fact a digging tool, used by another inmate in an escape attempt, and which had then allegedly been hidden in petitioner's cell without

his knowledge; prosecutor did not disclose this evidence to defense, because he was himself unaware of it.)[3]

This particular alleged failing may be critical. The records custodians of the District Attorney's office and of the LVMPD (herein "Metro") have given sworn testimony in the *Haberstroh* case to the effect that no institutional procedure exists by means of which Metro assures that all *Kyles* material in its possession is forwarded to the CCDA's office for review. Further, the testimony in *Haberstroh* also suggested that the CCDA's office also lacks an institutional procedure or policy by means of which it may ensure that its "open file" contains everything which it is required to disclose. This testimony is certainly relevant to the issue at hand, insofar as it demonstrates a pattern of organizational behavior under Fed. R. Evid. 406. *See generally Bouchat v. Baltimore Ravens, Inc.*, 226 F.3d 489, 493 (4th Cir. 2000). An "open file" which does not contain all of the material it is supposed to have is not only misleading in the extreme, it may also violate the requirements of *Kyles* and its progeny. *See generally Smith v. Secretary, New Mexico Dept. of Corrections*, 50 F. 3d 801, 828 (10th Cir.), *cert. denied*, 516 U.S. 905 (1995).

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[3] The Court is fully aware that the cases cited herein and by petitioner in his brief are not reported authorities. As such, they may not be cited for their precedential value. Petitioner has has not cited them for that purpose, nor has the Court relied on them in that role. Instead, petitioner has cited these cases as *evidence* of the alleged problems in transmission of critical documents between the outlying police enforcement agencies in Las Vegas and the Clark County District Attorney's office. Insofar as the cases are cited as evidence, they are not precedential, and do not violate any of the Court's or the Ninth Circuit's proscriptions against citation of unpublished authorities.

Petitioner has alleged in this case that his own counsel rendered him constitutionally ineffective assistance of counsel, because he was apparently duped by the allegedly illusory "open file" policy. In reality, counsel arguably ought to have conducted a "house-to-house" search of all of the various outlying law enforcement agencies in Las Vegas in order to assure himself that he had gathered all of the evidence and documents which the defense of his client required. Because trial counsel did not make this exhaustive survey, according to petitioner, there is simply no means by which he may be assured that documents critical to the litigation of this case have been found and reviewed by the petitioner's counsel. And, as a result, petitioner claims that there is simply no way to tell whether critical *Brady*, *Giglio* and *Kyles* material has gone unnoticed as in *Haberstroh* and its ilk.

Of particular note in this case is the fact that petitioner's current counsel recently attended a file review of the remaining "open file" in the CCDA's possession. Following that review, on June 21, 2001, the deputy CCDA in charge of the file review apparently admitted to having removed documents from the "open file" prior to the file review. The actions of the deputy CCDA, if true, are hardly consistent with an "open file" policy. The Court finds it curious in the extreme that the CCDA would tout its "open file" policy, and yet sanitize those files before allowing defense counsel to view them.

Moreover, counsel have identified documents which ought to be in the open file, but which appear to be missing. Of greatest note is the absence of any information regarding Mr. Lee, an informant that testified against petitioner. Lee allegedly received various forms of consideration in exchange for his testimony against petitioner, including some form of assistance from the Las Vegas authorities in Lee's criminal cases pending in Texas. If that was the case, one would expect some reflection of that agreement-plea memoranda, copies of conviction, and the like-to be present in the "open file" of a similar case. Yet, according to petitioner, none of the these documents was found in the "open-file" case which current counsel recovered from petitioner's prior counsel. Certainly, one ought to expect documents of that nature to be located in the "open file." Their absence suggests at least the possibility that petitioner's rendition of the facts is true.

Based upon the foregoing, petitioner argues that he has demonstrated a case of good cause for discovery to be allowed. As discussed above, the **one** question of relevance in resolving a habeas corpus petitioner's discovery motion under Habeas Rule 6 is whether petitioner has demonstrated "good cause" to conduct the requested discovery. There is some judicial gloss establishing rules for the manner in which the court's discretion is to be exercised on Rule 6 motions. The Supreme Court has found, for example, that if through "specific allegations before the court," the petitioner can "show reason to believe that the petitioner may, if the facts are fully

developed, be able to demonstrate that he is ... entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." *Bracy v. Gramley*, 520 U.S. 899, 908-909 (1997)(*quoting Harris v. Nelson*, 394 U.S. 286, 300, (1969). The Court further noted in *Bracy* that "habeas corpus Rule 6 is meant to be 'consistent' with *Harris*." *Id; (citing* Advisory Committee's Note on Habeas Corpus Rule 6, 28 U.S.C. § 2254, p. 479).

The Court's inquiry in determining whether good cause exists for allowing discovery focuses upon whether the petitioner has sufficiently alleged a constitutionally based claim which, if proven, would entitle him to relief. That the claim may currently lack complete factual support is not sufficient grounds to deny the requested discovery. After all, the discovery process is designed to allow the litigant to seek out the facts which support his claim. It would make little sense to require the petitioner to have complete and detailed knowledge of the facts proving his claim prior to the institution of the discovery process. On the other hand, a purely speculative claim, one without any legal or factual structure whatever, cannot give rise to "good cause" for discovery. Therefore, an unproven, yet plausible theory, which has been sufficiently alleged, and which would cause the petitioner to be retried if factually proven, is sufficient for "good cause." *C.f. McDaniel v. United States District Court (Jones)*, 127 F.3d 886, 888 (9th Cir. 1997)(court refusing to issue mandamus against district

court order allowing discovery, where claims were not purely speculative and had basis in the record) (*citing Harris v. Nelson*, 394 U.S. 286, 299 (1969)).

Petitioner has made the required showing of good cause with respect to the "open file" discovery. There is significant evidence which demonstrates literally that the "right hand does not know what the left hand is doing," when it comes to the CCDA's obligation to assure the prompt and proper disclosure of *Brady, Giglio* and *Kyles* material. Petitioner has provided evidence that the CCDA and the other "outlying" law enforcement agencies have routinely failed to disclose these critical documents, and, indeed, even if disclosure did take place, no means exists by which counsel may review the record to assure themselves that all of the documents in any particular given case have been identified, reviewed, and transmitted to the appropriate entity.

These apparent facts resonate strongly with several claims for relief which petitioner has asserted. For example, petitioner has denounced his trial counsel's performance for failure to assemble all of the information which ought to have been present in the "open file." Petitioner contends that, irrespective of the "open file" policy, his trial counsel had a duty to perform in a constitutionally adequate manner, and that counsel's failure to beat the bushes to flush out all of the potentially critical records and documents constitutes ineffective assistance of counsel.

Even beyond the ineffectiveness claim, however, is the petitioner's claim that the apparent illusory functioning of the "open file" policy gives rise to substantive claims for *Brady*, *Giglio* and *Kyles* violations under the Fifth, Sixth and Fourteenth amendments. Should petitioner's version of the facts ultimately prove true, there is a possibility that petitioner has been convicted in violation of the United States Constitution. Allegations of this sort are all that is required by *Bracy*, and the Court finds that petitioner is entitled to conduct the discovery he seeks in the "open file" requests.

In spite of this finding, the Court is concerned about the breadth of the discovery which petitioner now seeks. As noted above, he seeks to conduct either document discovery from or take the deposition of a document custodian in virtually every law enforcement agency and sub-agency in the greater Las Vegas metropolitan area. If the Court were to allow the service of every subpoena now, the sheer amount of discovery might be overwhelming. It appears to the Court that an objection on grounds of breadth and relevance might be raised, and that the Court might be constrained to consider such an objection very seriously.

In order to ward off any potential objection on this score, the Court will allow petitioner to conduct the discovery he desires, but only after compliance with the following conditions. First, petitioner must file and serve points and authorities in which he describes in specific terms those documents which he has

already received from the district attorney through the "open file" procedure. Then, he must describe in detail those documents and categories of documents which he expects he ought to have received from the CCDA by means of the "open file" policy. For example, if petitioner believes that he ought to have found records from the Clark County Detention Center in the "open file," he must first state what records he has received through the "open file" system which he believes came from the detention center. Then, he must identify those records or categories of records which he believes ought to have received from the detention center, but which he has found neither in his file nor anywhere else.

The Court's goal in following this procedure is to minimize the intrusion of the discovery process into the daily law enforcement operations in Las Vegas, while, at the same time, conducting the allowed discovery as quickly as possible. Therefore, petitioner should do his best to identify with particularity those documents and records which he believes he should have, but which he never received through the "open file" process.

Following the filing and service of petitioner's brief, respondents shall have an opportunity either to assist the petitioner in procuring the identified records, or to file objections to the production of the identified documents. Thus, if respondents concur that petitioner is entitled to the documents he has identified in his brief, they should contact the appropriate agency through appropriate means, in an effort to dislodge the

documents to petitioner for review without further delay. In the alternative, respondents may object to the disclosure of certain documents, but only on grounds other than whether "good cause" exists to allow the discovery.

The parties should not lose sight of the Court's ruling while delving into to the details of the discovery process. Petitioner has shown good cause for this discovery, and he shall be allowed those documents which he ought to have been given prior to and during his trial according to law. Respondents and petitioner may assist the Court in expediting this process, but they ought not to waste time attempting to relitigate matters already decided.

3. IAD Documents.

Petitioner here seeks leave to serve subpoenas on the Eighth Judicial District Court clerk in charge of Clark County's compliance with the Interstate Agreement on Detainers. Petitioner has apparently requested all of the documents regarding this issue from the Eighth Judicial District Court, but has received no response from either the Court or the deputy clerk.

Petitioner's IAD claim is contingent upon the time and date that the Eighth Judicial District Court received the IAD materials. If the materials were not timely received, it is possible that a claim would have existed under the IAD for the petitioner's release. While this does not necessarily give rise to a constitutionally based claim, it may form the "predicate failure" for an ineffective assistance of counsel claim. The argument would

be that petitioner's counsel failed to investigate the facts and circumstances around the IAD issue. If counsel had so investigated, in petitioner's view, he may have found that the terms and conditions of the IAD had not been strictly complied with, and that petitioner would have had an argument under the IAD for release prior to trial.

This set of facts appears to satisfy *Bracy*, albeit not overwhelmingly. As noted above, all that petitioner need identify at this point is a theory which, if proven, would entitle him to relief. Based upon the facts as petitioner has alleged them, it seems that a claim of ineffective assistance of counsel could arise from the IAD material. If the details of the IAD were not strictly complied with, there is a potential that petitioner could have avoided prosecution altogether. If that potential existed, trial counsel would have been remiss in not following through on the issue, and may have rendered ineffective assistance as a result. Petitioner is therefore entitled to the discovery he needs to flesh out this claim.

The Court observes, however, that petitioner appears to have attempted to secure all of the documents he desires through informal processes. It is appropriate that petitioner should attempt to do so, for if petitioner had not already done so, the Court would order such actions. Therefore, petitioner shall be allowed to serve the requests regarding the IAD documents. No point would be served by requiring petitioner to engage in another round

of requests from the state officials. For future reference, however, the Court notes that a petitioner will be obliged to seek IAD documents through informal processes before being allowed to seek formal discovery.

4. California Tax Documents

Petitioner here seeks the discovery of certain tax documents which relate to the employment of petitioner's alibi witnesses. As with the IAD documents above, petitioner now seeks these documents not to support the credibility of the alibi, but to demonstrate the ineffectiveness of his trial counsel. In essence, petitioner complains that his counsel rendered him ineffective assistance of counsel for his failure to investigate certain California tax records. If counsel had done so, petitioner maintains, he may have discovered documents which could have supported the alibi testimony of the witnesses in question.

It does not appear to the Court that petitioner has alleged any sort of constitutionally based claim which would entitle petitioner to relief. To be sure, he has asserted that these documents, if they did exist, would have substantiated the petitioner's alibi witnesses. Yet there is nothing in the record which suggests that the alibi witnesses were so badly impeached during their testimony that such additional rehabilitation was necessary or required. Because petitioner has not demonstrated that the lack of rehabilitation of his alibi witnesses caused his conviction, he cannot claim that the discovery of additional

rehabilitative documents would give rise to a claim that would ultimately lead to the granting of the petition for the writ of habeas corpus. Petitioner shall not be allowed to serve these discovery requests.

5. Records of the Clark County M.E.

Petitioner finally seeks leave of Court to allow service of various discovery requests on the Clark County Medical Examiner, expressing particular interest in the report written by Dr. Nina Hollander in this and other similarly situated cases. In a nutshell, petitioner and his counsel contend that Holland, the forensic scientist who conducted the autopsy of the victim in this case, was grossly incompetent in conducting this case and many other Las Vegas murder cases.

Petitioner cites numerous articles from Las Vegas newspapers in which Dr. Hollander was indicted for various acts of legerdemain and malfeasance during her career in Las Vegas. According to petitioner, the state was well aware of Hollander's lack of credibility and professional acumen. According to the files of petitioner which former counsel kept in storage, the CCDA was fully aware of the grievous faults to which Hollander's testimony could be subjected. Rather than disclose those faults, petitioner claims that the CCDA either intentionally or negligently hid them from petitioner.

Petitioner's theory for the release of these documents is virtually identical to that of the "open-file" documents. He claims first that his trial counsel rendered him ineffective assistance of counsel in that he failed to do sufficient examination of the record that would have uncovered these documents. Moreover, the records of the autopsy and like documents ought to have been turned over to the CCDA under *Kyles*, according to petitioner, and therefore register both as potential ineffectiveness claims and substantive violation.

To this extent, this evidence is identical to the "open file" material, and the Court's order regarding any discovery to be conducted here shall be the same. To reiterate that order: petitioner shall have a period of time within which to identify those documents and materials which he believes came out of the CCDA's "open file" policy. Petitioner shall then set out in detail those documents and recorders which are not in the "open file," but which petitioner believes ought to be there.

Respondents shall then have an opportunity either to: 1) assist petitioner in securing the documents and records he has identified; 2) object to the production of the documents based upon regular discovery principles.

IT IS THEREFORE ORDERED that petitioner's motion for leave to conduct discovery (Docket #16) is **GRANTED IN PART AND DENIED IN PART**.

IT IS FURTHER ORDERED that petitioner may proceed forthwith with the discovery regarding his history of incarceration

in Nevada and California; provided, however, that petitioner shall seek the disclosure of only his records. Petitioner has not yet demonstrated the existence of "good cause" for the discovery of prison records of third parties.

IT IS FURTHER ORDERED that petitioner shall be allowed to conduct discovery into the "open file" policy of the Clark County District Attorney and the Clark County Coroner's office; provided, however, that petitioner's ability to conduct the requested discovery shall be limited as follows. Petitioner shall, within thirty days of the date of the entry of this order on the record, provide the Court with a pleading in which he sets forth in detail a description of all documents which he believes that he has received by means of the "open file" policy of the CCDA. He then also must set forth in detail those documents and categories of documents which he expects he ought to have received from the CCDA by means of the "open file" policy.

IT IS FURTHER ORDERED that respondents shall have thirty days following the filing and service of petitioner's brief within which to either 1) assist petitioner in securing the release of the identified documents from the appropriate agency; or 2) file any objections to the discovery requested by petitioner. Specifically, respondents may object to the nature and scope of discovery as irrelevant, over broad, or as violative of the attorney client privilege. Respondent shall not, however, be allowed to reargue the *Bracy* issues which the Court has resolved herein.

IT IS FURTHER ORDERED that upon the filing of the respondents' brief, the discovery issue shall be resubmitted to the Court for resolution. There shall be no reply points and authorities allowed or considered.

IT IS FURTHER ORDERED that petitioner shall be allowed to conduct discovery into the compliance with the Interstate Agreement on Detainers; provided, however, that petitioner and his counsel shall first seek disclosure of these documents through normal channels.

IT IS FURTHER ORDERED that petitioner shall not be allowed to conduct discovery regarding the alibi witnesses and their records which may exist within the California Franchise Tax Board or another like entity.

Dated, this 26th day of September, 2002.

UNITED STATES DISTRICT JUDGE

EXHIBIT AA

EXHIBIT AA

EXHIBIT 1

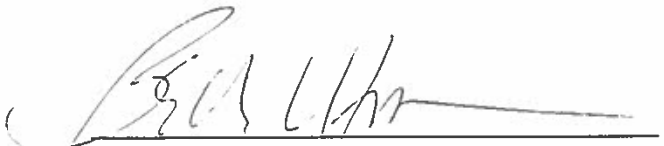
Declaration of Becky L. Hansen

1. I am a Certified Legal Assistant, employed by the Federal Public Defender, District of Nevada.

2. On August 19, 2002, I made a copy of Bates No. 1619 which is a page out of a document production prepared and copied by the Office of the Washoe County District Attorney in response to a federal subpoena duces tecum granted by Judge Phillip M. Pro on April 23, 1999, in *Williams v. McDaniel,* Case No. CV-S-98-56 PMP (LRL).

3. Gary H. Hatlestad, Chief Appellate Deputy, Washoe County District Attorney, indicated in a letter dated May 13, 1999, that he hand delivered the document production, Bates Nos. 1 through 9126, to the Office of the Federal Public Defender in Reno, Nevada on May 14, 1999.

4. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and that this declaration was executed on August 19, 2002 in Las Vegas, Nevada.



Becky L. Hansen

EXHIBIT 2

4. Argue that you have made your challenge only in response to certain psychological responses or body language of the jurors. Be ready to explain.

5. Fully voir dire even those jurors that you intend to excuse.

6. Use some challenges on others than the members of the purported group.

7. Make it clear to the defense attorney that since the mistrial or jury dismissal has been made at his request, jeopardy has not attached, and the case will be retried. The next jury panel might be even worse for him. See generally, Crist v. Bretz, 437 U.S. 28, 98 S. Ct. 2156 (1978); United States v. Dinitz, 424 U.S. 600, 96 S. Ct. 1075 (1976); and Lee v. United States, 432 U.S. 23, 97 S. Ct. 2141 (1977).

8. Accuse the defense attorney of being the one who is practicing group bias and ask for a hearing.

B. Death penalty voir dire

The Supreme Court ruled in Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770 (1968) that

> a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. (88 S. Ct. at 1777)

The Court notes that a prospective juror need only state that he will consider all of the penalties provided by law and will not automatically vote against the death penalty regardless of what evidence might be developed at the trial. Likewise, the prospective juror must state that his attitude towards the death penalty will not prevent him from making an impartial decision as to the guilt or innocence.

The venireman must state unambiguously that he would automatically vote against the death penalty; a general opposition to such punishment is not sufficient to have him excused for cause. Boulden v. Holman, 394 U.S. 478, 89 S. Ct. 1138 (1968); Maxwell v. Bishop, 398 U.S. 267, 90 S. Ct. 1578 (1970).

Thus, the general response, "I don't believe in capital punishment," is not a sufficient statement that the prospective juror could not impose the death penalty no matter what the facts. In Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954 (1978), jurors properly were excused for cause after they said that they could not take the oath that they would follow the law.

However, a juror cannot be excused for stating that his deliberations on issues of fact would be "affected" by the knowledge that

EXHIBIT 3

Washoe County District Attorney

RICHARD A. GAMMICK
DISTRICT ATTORNEY

May 13, 1999

Rebecca Blaskey
Assistant Federal Public Defender
330 South Third Street, Suite 700
Las Vegas, Nevada 89101

Re: Williams v. McDaniel, Case No. CV-S-98-56-PNP(LRL)

Dear Ms. Blaskey:

Some time in late April, early May, I received a subpoena duces tecum from your office referencing Williams v. McDaniel. Rather than cull through the files and pulling out what the subpoena requested - or what I think it requested - I decided to collect all the files in our possession respecting the murder of Mrs. Carlson by your client and his alleged accomplices and have all the files copied and forwarded to your Reno office. You and your colleagues will have (most of) these materials, hand-delivered by me, by May 14, 1999, the date of compliance recited in the subpoena.

Having said that, however, I will tell you that I did not have any filed pleadings or filed court transcripts copied and forwarded. I assume you already have them, or will acquire them from the Washoe County Clerk's Office.

Secondly, insofar as I can tell, we, in the Washoe County District Attorney's Office, do not have a custodian of records or the type of custodian of records contemplated by your certificate of custodian of records. No one here can take an oath and swear to the truth of what your certificate avers. Consequently, I will not be sending it along.

Also, Exhibit D requests inspection and copying of various "documents and things" concerning the role or mechanisms of the Washoe County District Attorney's Office in selecting individuals to serve on Grand Juries or Petit Juries, demographic data respecting the persons charged with any kind of homicide, demographic data concerning victims of homicide, charging criteria utilized by the Office and a list of the persons in the office who participated or involved in deciding in

which cases a death penalty would be requested. The Washoe County District Attorney's Office did not, at the times indicated, generate or create the kinds of records, documents, lists, statistical reports or demographic data contemplated by Exhibit D. Consequently, I cannot send that information along, because it was never generated and I do not have it.

Finally, it will be unlikely that I will be able to send along duplicates of tape recorded interviews or photographs until next week. Once they are completed, I will send them along.

If I can be of any further assistance, please do not hesitate to contact me.

Yours truly,

RICHARD A. GAMMICK
DISTRICT ATTORNEY

By _____
GARY H. HATLESTAD
Chief Appellate Deputy

GHH/lj

MOT

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ATTORNEYS FOR PETITIONER

DISTRICT COURT
CLARK COUNTY, NEVADA

MARLO THOMAS,

Petitioner,

v.

TIMOTHY FILSON, et. al.

Respondents.

Case No. 96C136862-1
Dept. No. XXIII

Death Penalty Habeas Corpus Case

MOTION AND NOTICE OF MOTION FOR EVIDENTIARY HEARING

Date of Hearing: July 25, 2018
Time of Hearing: ~~11:00~~ 9:30 a.m.

NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff

PLEASE TAKE NOTICE that the MOTION FOR EVIDENTIARY HEARING filed in this Court on June 8, 2018, will come on for hearing before this Court in Department No. XXIII on the 25th day of July, 2018 at the hour of ~~11:00~~ 9:30 o'clock a.m. located at the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada 89101.

Respectfully submitted this 8th day of June, 2018.

RENE L. VALLADARES
Federal Public Defender

By: */s/ Jose A. German*
JOSE A. GERMAN
Assistant Federal Public Defender
Attorney for Petitioner

POINTS AND AUTHORITIES

I. Thomas has met the standard for this Court to order an evidentiary hearing.

A petitioner is entitled to a post-conviction evidentiary hearing when he asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief. *Mann v. State*, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002); *Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 226 (1984). This is the appropriate standard to be applied when evaluating a request for an evidentiary hearing to establish good cause to overcome procedural defaults. *Berry v. State*, 131 Nev. Adv. Op. 96, 363 P.3d 1148, 1155 (2015). A claim is not "belied by the record" just because a factual dispute is created by the pleadings or affidavits filed during the post-conviction proceedings. A claim is "belied" when it is contradicted or proven to be false by the record as it existed at the time the claim was made.

The Nevada Supreme Court has held "[w]here . . . something more than a naked allegation has been asserted, it is error to resolve the apparent factual dispute without granting the accused an evidentiary hearing." *Vaillancourt v. Warden*, 90 Nev. 431, 432, 529 P.2d 204, 205 (1974). The Court "has consistently recognized a habeas petitioner's statutory right to have factual disputes resolved by way of an evidentiary hearing." *Mann*, 118 Nev. at 356, 46 P.3d at 1231. An evidentiary hearing is required on the substantive claims, to demonstrate good cause to overcome a procedural bar, and to show a fundamental miscarriage of justice to overcome a procedural bar. *Pellegrini v. State*, 117 Nev. 860, 883-87, 34 P.3d 519, 535-37 (2001). Thomas is entitled to an evidentiary hearing for all of these

reasons.

A. Thomas is entitled to an evidentiary hearing to prove his claims that trial and initial post-conviction counsel were ineffective.

It is beyond dispute that Thomas had the right to effective assistance of counsel during his prior state post-conviction proceeding and that prior counsel's ineffectiveness, if proven, would constitute good cause to overcome the procedural default bars. *Crump*, 113 Nev. at 305, 934 P.2d at 254; *Rippo v. State*, 132 Nev. __, 368 P.3d 729, 736-38 (2016), *reh'g denied* (May 19, 2016), *cert. granted on other grounds, judgment vacated sub nom*, *Rippo v. Baker*, 137 S. Ct. 905 (2017). Thomas's allegations of ineffective assistance of initial post-conviction counsel are not belied by the record and, if true, would entitle him to a finding of good cause.

Initial post-conviction counsel, David Schieck, conducted no investigation into Thomas's social history. Schieck made a blanket allegation of trial counsel's ineffectiveness, but the only extra record evidence supporting it was an affidavit by Thomas. *See* Opp. at 8 The affidavit provided Schieck with a plethora of witnesses that had critical information regarding Thomas's life. Nothing suggests Schieck ever spoke with any of them. Schieck's failure to investigate prevented Thomas from raising multiple allegations of ineffective assistance of guilt-trial counsel, including failure to investigate and present guilt-phase mental state evidence.

Second post-conviction counsel, Bret Whipple, was also ineffective. Whipple disregarded the findings of Dr. Jonathan Mack, who reported that Thomas could not be diagnosed with intellectual disability, and continued to pursue a baseless *Atkins* claim. *Id.* at 17. Whipple failed to conduct any investigation into the

numerous red flags in Dr. Mack's report. If followed, those red flags would have led him to a rich, persuasive mitigation narrative. *Id.* at 16.

Whether Thomas can show good cause and prejudice based on the ineffective assistance of prior post-conviction counsel "is intricately related to the merits of his claims." *Bennett v. State*, 111 Nev. 1099, 1103, 901 P.2d 676, 679 (1995); *see Rippo*, 368 P.3d at 740 ("A showing of undue prejudice necessarily implicates the merits of the postconviction-counsel claim"). In order to prove prejudice on his claim that Schieck and Whipple were ineffective, Thomas must be permitted to present evidence that the ineffective assistance of trial counsel claims they failed to raise are meritorious.

Multiple courts in this state have granted evidentiary hearings in capital cases involving successive petitions based on the ineffective assistance of prior post-conviction counsel. *See McConnell v. Baker*, Case No. CR02P1938, Order for Evidentiary Hearing (2JDC Aug. 30, 2013), Ex. 1; *Gutierrez v. State*, Case No. 53506, Order of Reversal and Remand (Nev. Sep. 19, 2012), Ex 2; *Vanisi v. McDaniel*, Case No. CR98P0516, Order (2JDC Mar. 21, 2012), Ex. 3; *Rhyne v. McDaniel*, Case No. CV-HC-08-673, Order Setting Evidentiary Hearing (4JDC Aug. 27, 2009) Ex. 4; *State v. Greene*, Case No. C124806, Reporter's Transcript of Argument/Decision at 55-56 (8JDC June 5, 2009), Ex. 5; *State v. Floyd*, Case No. C159897, Recorder's Transcript of Hearing Re: Defendant's Petition for Writ of Habeas Corpus at 5-6 (8JDC Dec. 13, 2007), Ex. 6. Thomas is similarly entitled to an evidentiary hearing to demonstrate initial post-conviction counsel's performance

fell below objective standards of reasonableness and he suffered prejudice as a result.

In its Response and Motion to Dismiss, the State conceded Thomas has met the standard to be entitled to an evidentiary hearing on Claim Fourteen of his Petition, alleging retrial counsel were ineffective. *See* Mot. at 41 ("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."); *see also id.* (describing Claim Fourteen as containing "exceptionally detailed allegations impugning Mr. Schieck's effectiveness as counsel"). Since much of the evidence that would be presented at a hearing on Claim Fourteen also implicates the allegations in Claim Thirteen that guilt-trial counsel were ineffective, this Court should order a hearing on all Thomas's claims that prior state counsel were ineffective.

B. Thomas is entitled to an evidentiary hearing to demonstrate good cause based on limitations imposed by the post-conviction courts in the initial post-conviction proceedings.

"An impediment external to the defense" sufficient to overcome procedural default "may be demonstrated by a showing 'that the factual or legal basis for a claim was not reasonably available to counsel, or that "some interference by officials," made compliance impracticable.'" *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d, 503, 506 (2003) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)); *see also Rippo*, 368 P.3d at 738. In this case, the factual bases supporting the claims of trial counsel's ineffectiveness for failure to investigate and present mitigation and guilt-phase mental state evidence were not reasonably available to Thomas, in

substantial part, because of limiting rulings by the post-conviction courts. *See* Opp. at 21-24.

While the court granted an evidentiary hearing during Thomas's first post-conviction proceeding, it erred in imposing limitations that prevented Schieck from developing an adequate ineffective assistance of guilt-trial counsel claim. *See id.* at 21

During the second post-conviction proceeding, Whipple was denied funds to investigate and develop the evidence brought in Claim Fourteen, and an evidentiary hearing at which to present it. *See id.* at 23 The post-conviction court found trial counsel's decisions to be strategic by simply reviewing the record.

Thomas is entitled to an evidentiary hearing to present the results of the constitutionally adequate investigation undertaken by undersigned counsel with the benefit of the resources the prior post-conviction courts failed to grant.

C. Thomas is entitled to an evidentiary hearing to demonstrate good cause based on the State's failure to disclose material exculpatory and impeachment evidence.

As explained in Claim Six of the Petition, the State failed to disclose material impeachment and mitigation evidence. *See id.* at 24. Multiple courts in this state have granted hearings on successive petitions based on allegations under *Brady v. Maryland*, 373 U.S. 83, 87 (1963). *See Casillas*, *Gutierrez v. Legrand*, Case No. CR08-0985, Order (2JDC Aug. 26, 2014), Ex. 7; *State v. Reberger*, Case No. 91C098213, Transcript (8JCD Mar 31, 2014), Ex. 8; *State v. Homick*, Case No. 86-C-074385-C, Minutes (8JDC June 5, 2009), Ex. 9; *State v. Lopez*, Case No. 85C068946, *see* Evidentiary Hearing on Defendant's Petition for Writ of Habeas Corpus,

December 4, 2009. Thomas is entitled to an evidentiary hearing to demonstrate that the State withheld evidence and that the evidence was material.

D. Thomas is entitled to an evidentiary hearing to demonstrate good cause based on actual innocence of the death penalty.

The Nevada Supreme Court has held t"[w]here the petitioner has argued that the procedural default should be ignored because he is actually ineligible for the death penalty, he must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him death eligible." *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); *see also Sawyer v. Whitley*, 505 U.S. 333, 336 (1992). Thomas has met this standard.

No reasonable juror would have found Thomas death eligible if presented with the powerful mitigation put forth in Claim Fourteen of the Petition. *See* Opp. at 25. This is supported by the assertions made in Claims Nine and Twenty-Five – specifically, that two out of the four alleged aggravators cannot constitutionally be applied to Thomas. Additionally, Thomas has made specific allegations in Claims Three and Twenty-Seven, that due to his youth at the time of the offense and borderline intellectual functioning, he is rendered illegible for the death penalty.

Thomas is entitled to an evidentiary hearing to demonstrate that all these factors, individually and in combination, render him actually innocent of the death penalty.

II. Conclusion

For the foregoing reasons, Thomas requests that this Court hold the State's Motion to Dismiss in abeyance and grant him an evidentiary hearing to show cause

and prejudice to overcome the procedural default bars raised by the State.

DATED this 8th day of June, 2018.

Respectfully submitted
RENE L. VALLADARES
Federal Public Defender

/s/ Jose A. German
Jose A. German
Assistant Federal Public Defender

/s/ Joanne L. Diamond
JOANNE L. DIAMOND
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

In accordance with EDCR 7.26(a)(4) and 7.26(b)(5), the undersigned hereby certifies that on June 8, 2018, a true and accurate copy of the foregoing MOTION FOR EVIDENTIARY HEARING was filed electronically with the Eighth Judicial District Court and served by Odyssey EFileNV, addressed as follows:

Steven S. Owens
Chief Deputy District Attorney
motions@clarkcountyda.com
Eileen.davis@clarkcountyda.com

/s/ Jeremy Kip
AN EMPLOYEE OF THE
FEDERAL PUBLIC DEFENDER,
DISTRICT OF NEVADA

EXHS

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Attorney for Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

MARLO THOMAS,

Petitioner,

v.

TIMOTHY FILSON, et al.,

Respondents.

Case No. 96C136862-1
Dept. No. XXIII

Death Penalty Habeas Corpus Case

EXHIBITS IN SUPPORT OF MOTION AND NOTICE OF MOTION FOR EVIDENTIARY HEARING

Date of Hearing: July 25, 2018
Time of Hearing: 11:00 a.m.

Exhibit No.	Description
1.	Order for Evidentiary Hearing, *McConnell v. State of Nevada*, Second Judicial District Court Case No. CR02P1938, August 30, 2013
2.	Order of Reversal and Remand, *Gutierrez v. State of Nevada*, Nevada Supreme Court Case No. 53506, September 19, 2012
3.	Order, *Vanisi v. McDaniel, et al.*, Second Judicial District Court Case No. CR98P0516, March 21, 2012
4.	Order Setting Evidentiary Hearing, *Rhyne v. McDaniel, et al.*, Fourth Judicial District Court Case No. CV-HC-08-673, August 27, 2009
5.	Reporter's Transcript of Argument/Decision, *State of Nevada v. Greene*, Eighth Judicial District Court Case No. C124806, June 5, 2009
6.	Recorder's Transcript of Hearing re: Defendant's Petition for Writ of Habeas Corpus, *State of Nevada v. Floyd*, Eighth Judicial District Court Case No. C159897, December 13, 2007
7.	Order, *Casillas-Gutierrez v. LeGrand, et al.*, Second Judicial District Court Case No. CR08-0985, August 26, 2014
8.	Transcript of Hearing Defendant's Pro Se Petition for Writ of Habeas Corpus (Post-Conviction), State's Response and Countermotion to Dismiss Defendant's Petition for Writ of Habeas Corpus (Post-Conviction), *State of Nevada v. Reberger*, Eighth Judicial District Court Case No. C098213
9.	Minutes, *State of Nevada v. Homick*, Eighth Judicial District Court Case No. 86-C-074385-C, June 5, 2009

CERTIFICATE OF SERVICE

In accordance with EDCR 7.26(a)(4) and 7.26(b)(5), the undersigned hereby certifies that on June 8, 2018, a true and accurate copy of the foregoing EXHIBITS IN SUPPORT OF MOTION AND NOTICE OF MOTION FOR EVIDENTIARY HEARING was filed electronically with the Eighth Judicial District Court and served by Odyssey EFileNV, addressed as follows:

Steven S. Owens
Chief Deputy District Attorney
motions@clarkcountyda.com
Eileen.davis@clarkcountyda.com

/s/ Jeremy Kip
An Employee of the
Federal Public Defender,
District Of Nevada

EXHIBIT 1

EXHIBIT 1

FILED
Electronically
08-30-2013:01:23:09 PM
Joey Orduna Hastings
Clerk of the Court
Transaction # 3964287

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

ROBERT LEE McCONNELL,
Petitioner,

vs.

THE STATE OF NEVADA,
Respondent.
_____/

Case No.: CR02P1938
Dept. No.: 8

ORDER FOR EVIDENTIARY HEARING

Currently before the court in this capital postconviction case is the State's *Motion to Dismiss Petition for Writ of Habeas Corpus (Post-Conviction)* filed on January 31, 2013. The State seeks to dismiss Petitioner ROBERT LEE McCONNELL's (McConnell) *Petition for Writ of Habeas Corpus (Post-Conviction)* filed on November 1, 2010. This petition is McConnell's second petition for post-conviction relief. His first was denied by the district court, and the denial was later affirmed by the Nevada Supreme Court. *See McConnell v. State*, 125 Nev. 243, 212 P.3d 307 (2009) (en banc) (per curiam). In this petition, McConnell alleges, *inter alia*, ineffectiveness of post-conviction counsel pursuant to *Crump v. Warden*, 113 Nev. 293, 934 P.2d 247 (1997) (per curiam).

The State contends McConnell's petition is procedurally barred by NRS 34.726 (petition must be filed within 1 year after entry of judgment of conviction or remittitur after appeal), NRS 34.800 (if petition is not filed within five years after a

decision on direct appeal, a rebuttable presumption of prejudice inures to the State), and NRS 34.810 (dismissal of petition is required if petitioner relies on grounds that could have been but were not raised earlier, or if petitioner files a successive petition lacking new or different allegations, or if the court construes the failure to allege new or different allegations as an abuse of the writ). And as a necessary corollary, the State contends McConnell has failed to sufficiently allege good cause and prejudice to excuse these procedural defaults.

"Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory." *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005) (en banc) (per curiam). Once the State raises procedural default, "the burden then falls upon the petitioner to show . . . that good cause exists for his failure to raise any grounds in an earlier petition and that he will suffer actual prejudice if the grounds are not considered." *Crump v. Warden*, 113 Nev. 293, 302, 934 P.2d 247, 253 (1997) (per curiam) (internal quotation marks and citation omitted). Any claim in any petition must be raised within a reasonable time after discovering it to satisfy good cause. *Hathaway v. State*, 119 Nev. 248, 252, 253, 71 P.3d 503, 506 (2003) (per curiam).

After reviewing the moving papers, the court concludes McConnell has established that an evidentiary hearing is appropriate to consider whether the procedural default rules apply to his claim for ineffective assistance of post-conviction counsel only. *Riker*, 121 Nev. at 234, 112 P.3d at 1082. To this limited extent, McConnell's petition is granted. NRS 34.770(3). And in light of the capital nature of this case, the court finds such a hearing would be prudent in ensuring the interests of justice are served.

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Accordingly, the parties shall contact the Judicial Assistant in Department Eight **within ten (10) days** to set this matter for an evidentiary hearing.

IT IS SO ORDERED.

DATED this 30th day of August, 2013.

LIDIA S. STIGLICH
District Judge

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 30th day of August, 2013, I electronically filed the following with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

David Anthony, Esq. for Robert Lee McConnell; and

Terrence McCarthy, Esq. for the State of Nevada.

I deposited in the Washoe County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

Kathryn Rogers
KATHRYN ROGERS
Judicial Assistant

EXHIBIT 2

EXHIBIT 2

IN THE SUPREME COURT OF THE STATE OF NEVADA

CARLOS GUTIERREZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53506

FILED

SEP 19 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus in a death penalty case. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

Appellant Carlos Gutierrez subjected his three-year-old stepdaughter to a pattern of abuse culminating in her death on June 15, 1994. Gutierrez pleaded no contest to first-degree murder, pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), and a three-judge panel sentenced him to death. This court affirmed his conviction and sentence on direct appeal. Gutierrez v. State, 112 Nev. 788, 920 P.2d 987 (1996). Gutierrez subsequently filed a second post-conviction petition for a writ of habeas corpus with the district court, which was dismissed on procedural grounds. In this appeal from the district court's denial of that post-conviction petition for a writ of habeas corpus, Gutierrez claims that the district court erred by determining his claims were procedurally barred. Gutierrez further complains that he was entitled to an evidentiary hearing.

Having considered the parties' arguments and the submissions before us, we conclude that Gutierrez is entitled to an

evidentiary hearing regarding his ability to overcome the procedural bars to further consideration of his death sentence. We also note several issues of concern that need further development on remand.

Gutierrez's death sentence has been addressed in two other, independent proceedings: (1) in Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) (Avena), 2004 I.C.J. 12 (March 31), the International Court of Justice (ICJ) held that the United States violated Article 36(1)(b) of the Vienna Convention on Consular Relations, Dec. 14, 1969, 21 U.S.T. 77, by failing to inform Gutierrez of his right to consular assistance in defending his capital murder charge, id. at 51; and (2) in State v. Gonzalez, Case No. CR96-0562 (Nev. Second Jud. Dist. Ct.), the interpreter for the three-judge panel that sentenced Gutierrez to death was convicted of perjury for having falsified his credentials at Gutierrez's death penalty hearing.

Avena addressed the convictions and sentences of 51 Mexican nationals, of whom Gutierrez is one. On its face, "[t]he decision in Avena . . . obligates the United States 'to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals,' 'with a view to ascertaining' whether the failure to provide proper notice to consular officials 'caused actual prejudice to the defendant in the process of administration of criminal justice.'" Medellin v. Texas (Medellin I), 552 U.S. 491, 536 (2008) (Stevens, J., concurring) (third alteration in original) (citation omitted) (quoting Avena, 2004 I.C.J. at ¶153(9); id. at ¶ 121).

Avena does not obligate the states to subordinate their post-conviction review procedures to the ICJ ruling. Thus, the Supreme Court has rejected post-conviction claims similar to Gutierrez's by two other

Avena defendants, Humberto Leal Garcia and Jose Ernesto Medellin, holding that "neither the Avena decision nor the President's Memorandum purporting to implement that decision constituted directly enforceable federal law," Leal Garcia v. Texas, 564 U.S. ___, ___, 131 S. Ct. 2866, 2867 (2011) (5-4 decision), to which state procedural default rules must yield. Medellin I, 552 U.S. at 498-99. Nonetheless, in declining to stay Leal Garcia's and Medellin's executions, the Supreme Court noted that neither had shown actual prejudice to a constitutional right due to lack of timely consular access. Medellin v. Texas (Medellin II), 554 U.S. 759, 760 (2008) ("[t]he beginning premise for any stay [of execution] . . . must be that petitioner's confession was obtained unlawfully," and thus that the petitioner was "prejudiced by his lack of consular access"); Leal Garcia, 564 U.S. at ___, 131 S. Ct. at 2868 (noting that, in supporting Leal Garcia's application for a stay of execution, "the United States studiously refuses to argue that Leal was prejudiced by the Vienna Convention violation," and that "the District Court found that any violation of the Vienna Convention would have been harmless" (citing Leal v. Quarterman, No. SA-07-CA-214-RF, 2007 WL 4521519, at *7 (W.D. Tex. Dec. 17, 2007), vacated in part sub nom. Leal Garcia v. Quarterman, 573 F.3d 214, 224-225 (2009))). And while, without an implementing mandate from Congress, state procedural default rules do not have to yield to Avena, they may yield, if actual prejudice can be shown. See Medellin I, 552 U.S. at 533, 536-37 & n.4 (Stevens, J., concurring) (discussing Torres v. State, No. PCD-04-442, 2004 WL 3711623 (Okla. Crim. App. May 13, 2004), where the State of Oklahoma "unhesitatingly assumed" the burden of complying with Avena by ordering "an evidentiary hearing on whether Torres had been prejudiced by the lack of consular notification"; Justice

Stevens rightly described this burden as "minimal" when balanced against the United States' "plainly compelling interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law" (internal quotation marks omitted)).

Unlike Medellin and Leal Garcia but like Torres, Gutierrez arguably suffered actual prejudice due to the lack of consular assistance. The Mexican consulate in Sacramento (the closest to Reno, where Gutierrez's death penalty hearing occurred) has provided an affidavit swearing that it would have assisted Gutierrez had it been timely notified. Although the form its assistance would have taken remains unclear—a deficiency an evidentiary hearing may rectify—cases recognize that, "[i]n addition to providing a 'cultural bridge' between the foreign detainee and the American legal system, the consulate may . . . 'conduct its own investigations, file amicus briefs and even intervene directly in a proceeding if it deems that necessary.'" Sandoval v. United States, 574 F.3d 847, 850 (7th Cir. 2009) (quoting Osagiede v. United States, 543 F.3d 399, 403 (7th Cir. 2008)).

It is apparent that Gutierrez needed help navigating the American criminal system. At the time of his arrest, Gutierrez was 26 years old, had the Mexican equivalent of a sixth-grade education, and spoke little English. Rather than go to trial, he entered an unusual no-contest plea to first-degree murder. His sentence was determined after an evidentiary hearing by a three-judge panel.[1] Both he and his wife were

[1]Gutierrez was sentenced to death by a three-judge panel before the decision in Ring v. Arizona, 536 U.S. 584, 609 (2002), which holds that a sentencing judge, sitting without a jury, may not find aggravating

continued on next page...

charged in connection with the death of their three-year-old daughter. There is some suggestion that his wife's role was greater than came out at his penalty hearing.

A number of witnesses testified at Gutierrez's penalty hearing, some Spanish-speaking. Gutierrez and the State each had an interpreter, but the court had its own interpreter as well, Carlos Miguel Gonzalez, who interpreted for 3 of the State's 16 witnesses.[2] A year after Gutierrez was sentenced to death, interpreter Gonzalez pleaded guilty to perjury that he committed during Gutierrez's death penalty hearing, when he swore he was certified and formally educated as an interpreter but was not.[3]

...continued
circumstances necessary for imposition of the death penalty. See also NRS 175.554(2) ("the jury shall determine . . . whether an aggravating circumstance or circumstances are found to exist").

[2]The legal status of court interpreters is unclear. Charles M. Grabau & Llewellyn Joseph Gibbons, Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation, 30 New. Eng. L. Rev. 227, 287-88 (1996). The commentary to Canon 3 of the Model Code of Professional Responsibility for Interpreters in the Judiciary (Nat'l Ctr. State Courts 2002) states that "[t]he interpreter serves as an officer of the court and the interpreter's duty in a court proceeding is to serve the court and the public to which the court is a servant."

[3]Gonzalez's presentence investigation report gives this account of his false testimony during Gutierrez's death penalty hearing:

> On August 8, 1995 . . . Gonzalez was called upon to act as an interpreter for the state of Nevada with respect to a death-penalty phase of the capital murder case entitled, "The State of Nevada vs Carlos Gutierrez", #CR94-1795 . . . .
>
> . . . .

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...*continued*

> During direct questioning, and after being duly sworn, [Gonzalez] represented to the Court that he was certified as an interpreter in both the state of California and within the federal system. Mr. Gonzalez also, under direct questioning, informed that he had been educated at the University of Madrid for one year studying Spanish Literature. He went on to report receipt of a Bachelor's Degree in Spanish Literature with a minor in Computer Science received at the University of Arizona. Lastly, with respect to his education, Mr. Gonzalez reported his possession of a Master's degree received from the University of San Diego in the field of Linguistics. Additionally, Mr. Gonzalez testified to having served as an interpreter for the Superior Court in California for approximately seven years.
>
> Shortly thereafter, an investigation was initiated by the Washoe County, Nevada, Public Defender's Office so as to ascertain the defendant's true credentials. During that investigation it was learned that Mr. Gonzalez had completely fabricated his educational and employment background. [Among other things], it was learned that Mr. Gonzalez had never been certified within the state of California or by any federal entity as an interpreter and therefore could not have worked as an interpreter within the California Court system. . . . Mr. Gonzalez did not receive any type of certificate or degree from the educational facilities [he named nor] even attended . . . either the University of San Diego . . . or the University of Arizona.

While NRS 176.156(5) generally provides for the confidentiality of presentence reports, the Gonzalez presentence report is part of the record on this appeal and in the docket, neither of which is sealed.

The United States Constitution does not require certified interpreters.[4] United States v. Si, 333 F.3d 1041, 1043 n.3 (9th Cir. 2003) (citing Perovich v. United States, 205 U.S. 86, 91 (1907)). But it does require reliable evidence.[5]

Gutierrez's death penalty hearing was not tape-recorded. However, the certified court reporter's transcript reports exchanges between the defense interpreter and the State's interpreter expressing concern with court-interpreter Gonzalez's accuracy. In addition to a specific dispute over whether a word meant "hit" or "spank," one interpreter noted that Gonzalez relied on Cuban-Spanish, not the Mexican-Spanish the witnesses spoke. Alone, these technical flaws might

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[4]Nevertheless, there is a growing movement that encourages or requires court-appointed certified interpreters. See, e.g., 28 U.S.C. § 1827 (2006); Minn. Gen. R. Pract. § 8.02 (2012); Or. Rev. Stat. § 45.275 (2011); Tenn. S. Ct. R. 42(3) (2012); Tex. Gov't Code. Ann. § 57.002 (2012). See also Maxwell Alan Miller et al., Finding Justice in Translation: American Jurisprudence Affecting Due Process for People with Limited English Proficiency Together with Practical Suggestions, 14 Harv. Latino L. Rev. 117, 150 (2011) (recommending certified or qualified interpreters in all stages of the proceedings).

[5]In Nevada, criminal defendants who do not understand English have "'a due process right to an interpreter at all crucial stages of the criminal process.'" Ouanbengboune v. State, 125 Nev. 763, 768, 220 P.3d 1122, 1126 (2009) (quoting Ton v. State, 110 Nev. 970, 971, 878 P.2d 986, 987 (1994)). Although an interpreter does not have to perform word-for-word interpretations, errors that fundamentally alter the defendant's statements or the context of his statements may render the interpretation constitutionally inadequate. Baltazar-Monterrosa v. State, 122 Nev. 606, 614-17, 137 P.3d 1137, 1142-44 (2006). Here, Gutierrez's interpreter's skills are not challenged. The challenge is to the accuracy of the interpreter who translated the State's Spanish-speaking witnesses for the court.

not amount to much, but they must be considered in conjunction with the deeper, more disturbing issue as to the integrity of Gonzalez's services as an interpreter. At the sentencing hearing for Gonzalez, in urging a significant sentence for his perjury, the State described interpreter Gonzalez as "a sociopath" who, while "articulate, well groomed, [and] well mannered . . . does not know how to recognize or offer truthful assertions." Perhaps exaggerating things—but perhaps not—the State further described interpreter Gonzalez's role as "integral" to the Gutierrez "death penalty hearing where he was interpreting." The State cannot now dismiss the gravity of Gonzalez's role in the death penalty process nor ignore the potential dishonesty during translation given its own statements at interpreter Gonzalez's sentencing hearing.

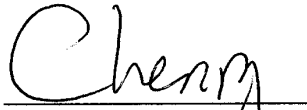
The dissent suggests that any mistranslations that occurred were not prejudicial to Gutierrez because they were "resolved on the record" or were "collateral." However, the record indicates that Gutierrez's interpreter repeatedly objected to Gonzalez's interpreting mistakes until she was told to "stop objecting" by the State's interpreter and that Gutierrez's interpreter felt intimidated by Gonzalez. This alone warrants further consideration because of the duty court interpreters have to serve the court and the public. Reasonable minds can differ on whether these errors were prejudicial and that is precisely the reason an evidentiary hearing is necessary.

Additionally, without an evidentiary hearing, it is not possible to say what assistance the consulate might have provided. Would the problems with interpreter Gonzalez have been recognized and addressed earlier? Would the hearing have been tape-recorded, in addition to stenographically reported? What is clear, though, is if a non-Spanish

speaking U.S. citizen were detained in Mexico on serious criminal charges, the American consulate was not notified, and the interpreter who translated from English into Spanish at the trial for the Spanish-speaking judges was later convicted of having falsified his credentials, we would expect Mexico, on order of the ICJ, to review the reliability of the proceedings and the extent to which, if at all, timely notice to the American consulate might have regularized them. Perhaps timely consular notice would not have changed anything for Gutierrez; perhaps the interpreter's skills, despite his perjury, were sound. These are issues on which an evidentiary hearing needs to be held.

Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.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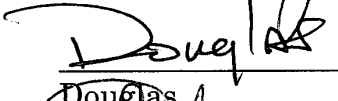
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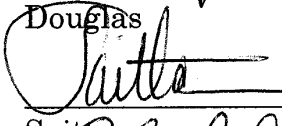
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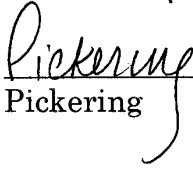
_____, J.
Pickering

cc: Hon. Jerome Polaha, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Washoe County District Attorney
Potter Law Offices
Northwestern University School of Law, Bluhm Legal Clinic
Washoe District Court Clerk

PARRAGUIRRE, J., with whom HARDESTY, J., agrees, dissenting:

I would affirm the district court's denial of Gutierrez's post-conviction petition for a writ of habeas corpus on the ground that it is procedurally defaulted. Because his post-conviction petition was untimely and successive, it was procedurally barred absent a showing of good cause and prejudice. NRS 34.726(1); NRS 34.810. To overcome the procedural bars, Gutierrez argued three circumstances provided good cause. First, he argues that post-conviction counsel's ineffectiveness caused the delay in filing his post-conviction petition; however, that claim itself is procedurally barred and cannot satisfy good cause. See State v. Dist. Ct. (Riker), 121 Nev. 225, 235, 112 P.3d 1070, 1077 (2005) (concluding that claims of ineffective assistance of first post-conviction counsel are not immune to the timeliness bar of NRS 34.726). Second, Gutierrez contends that this court's inconsistent application of procedural bars excuses the delay; however we have repeatedly rejected this argument. Riker, 121 Nev. at 236, 112 P.3d at 1077 (concluding that this court does not arbitrarily "ignore[ ] procedural default rules" and that "any prior inconsistent application of statutory default rules would not provide a basis for this court to ignore rules, which are mandatory"). Third, his assertion that any delay in filing his post-conviction petition was not his fault as contemplated by NRS 34.726(1) fails. See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (concluding that petitioner must show that "an impediment external to the defense prevented him or her from complying with the state procedural default rules"). Gutierrez's submissions disclose no additional information or argument that demands a different conclusion or justifies an evidentiary hearing. But even if

Gutierrez showed that the delay was not his fault, NRS 34.726(1), and good cause for filing his successive petition, NRS 34.810, he cannot show prejudice.

Gutierrez suggests that his rights under the Vienna Convention on Consular Relations were ignored because the police failed to advise him of his consular rights and to notify the Mexican Consulate of his arrest. Had he been afforded those rights, Gutierrez argues, consular officials would have (1) ensured that he understood the United States legal system and the proceedings against him; (2) attended the proceedings, assisted trial counsel, and endeavored to ensure a fair trial; (3) informed him and counsel of Gutierrez's treaty rights; and (4) monitored counsel's representation and language interpretation. His claims related to his consular rights have been known since at least his first post-conviction proceedings and his bare allegations of harm fall short of establishing prejudice.

As for Gutierrez's interpreter claim, he similarly fails to show prejudice. He argues that Gonzalez mistranslated certain words in the testimony of three prosecution witnesses—Virginia Martinez, Maria Torres, and Alfredo Gutierrez, all of whom testified about Gutierrez's relationship with the victim, whether they observed any injuries on the victim, and/or the day the victim died. Although Gonzalez translated this testimony, two other interpreters were present, with one specifically focused on listening for and correcting any errors.[1] Some of the alleged

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[1]On the prosecution's behalf, Gonzalez interpreted for witnesses who needed assistance. Olivia Ynigez was tasked to notify the prosecutor of any translation problems. Margarita Larkin interpreted for Gutierrez

continued on next page...

mistranslations concerned injuries the witnesses observed on the victim; however, those matters were addressed and resolved on the record. Other alleged mistranslations Gutierrez identifies related to collateral matters that were immaterial to the victim's injuries or Gutierrez's actions or relationship to the victim. See Ouanbengboune v. State, 125 Nev. 763, 768-69, 220 P.3d. 1122, 1126 (2009) (stating that translating errors that fundamentally alter the substance of trial testimony will render the interpretation inadequate). And other witnesses provided substantially more compelling testimony about Gutierrez's treatment of the victim and her injuries, in addition to testimony about autopsy findings revealing that the victim had sustained significant bruising on her body and internal injuries from blunt force trauma, including lacerations and bruising to tissues and organs and fractures. Moreover, the translation issues have been known since the penalty hearing, and Gutierrez still has not identified any errors other than those raised and resolved at the penalty hearing.

The majority concludes that Gutierrez was entitled to an evidentiary hearing on his claims of good cause. I must disagree. He is entitled to an evidentiary hearing only if he "assert[ed] specific factual allegations that [were] not belied or repelled by the record and that, if true, would entitle him to relief." Nika v. State, 124 Nev. 1272, 1300-01, 198 P.3d 839, 858 (2008). None of Gutierrez's three good-cause arguments

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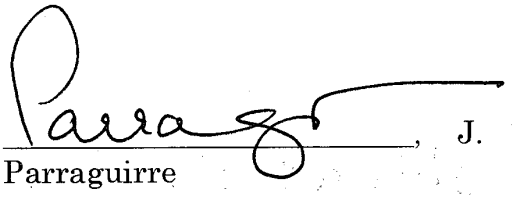
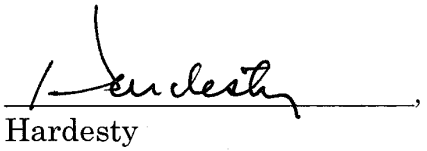
...continued
when a witness spoke English and listened to Gonzalez's translation to advise the district court of any problems with the interpretation.

satisfy that requirement, as they are purely legal in nature and therefore will not benefit from an evidentiary hearing. His consular assistance claim is supported by bare allegations of error. There is no basis for an evidentiary hearing.



_____, J.
Parraguirre

I concur:



_____, J.
Hardesty

EXHIBIT 3

EXHIBIT 3

FILED
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Joey Orduna Hastings
Clerk of the Court
Transaction # 2839353

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

SIAOSI VANISI,

Petitioner,

v.

Case No. CR98P0516

Dept. No. 4

E.K. McDANIEL, WARDEN and CATHERINE CORTEZ MASTO, ATTORNEY GENERAL OF THE STATE OF NEVADA,

Respondents.
_____/

ORDER

Petitioner Vanisi has filed a second petition for writ of habeas corpus. The State moved to dismiss, asserting various procedural bars. The court finds that the claims of innocence are not sufficient to overcome the procedural bars. However, petitioner has also alleged that the failure to present all his claims in his first petition was due to the ineffective assistance of his first post-conviction lawyers in failing to properly investigate and plead the ineffective assistance of his trial lawyers. The State asserted that the claim of ineffective assistance of post-conviction counsel is pleaded in conclusory terms, and not with the specificity required by *Hargrove v. State*, 100 Nev. 498, 686 P.2d 222 (1984).

On February 23, 2012, this court heard oral arguments. The court has determined that the issue of whether the petition was pleaded with sufficient particularity is close enough to

proceed to the next step of holding an evidentiary hearing to determine whether the ineffective assistance of post-conviction counsel can be established sufficiently to overcome the procedural bars. Accordingly, the court directs a further hearing in which the court may hear testimony on the subject of the ineffective assistance of post-conviction counsel with the goal of clarifying those claims.

Counsel shall contact the administrative assistant of this department within 10 days of this order to schedule a hearing relating to the motion to dismiss.

DATED this 20 day of March, 2012.

Connie J. Steinheimer
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 21st day of March, 2012, I filed the attached Order with the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

_____ **Personal delivery to the following: [NONE]**

__X__ **I electronically filed with the Clerk of the Court, using the ECF which sends an immediate notice of the electronic filing to the following registered e-filers for their review of the document in the ECF system:**

Terrence McCarthy, Esq.
Deputy District Attorney

Tiffani Hurst, Esq.
Assistant Federal Public Defender

_____ **Deposited in the Washoe County mailing system in a sealed envelope for postage and mailing with the United States Postal Service in Reno, Nevada: [NONE]**

_____ **Placing a true copy thereof in a sealed envelope for service via:**

_____ Reno/Carson Messenger Service – **[NONE]**

_____ Federal Express or other overnight delivery service **[NONE]**

DATED this 21st day of March, 2012.

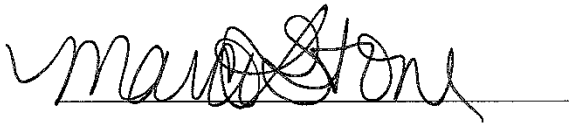

EXHIBIT 4

EXHIBIT 4

 Gary Taylor

FILED

2009 AUG 27 P 3:25

Case No. CV-HC-08-673

Dept. No. I

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

KELLY E. RHYNE,

Petitioner,

vs.

ORDER SETTING EVIDENTIARY HEARING

E.K. McDaniel, et al.,

Respondents.

/

On August 21, 2009, a hearing was held to consider various motions, including the Respondent's Motion for Protective Order, filed August 11, 2009; the Petitioner's Motion for Leave to Conduct Discovery, filed on March 16, 2009; and the Respondent's Motion to Dismiss Petition for Writ of Habeas Corpus, filed on October 24, 2008.

The court finds that it currently has insufficient information to rule on the issues raised by the parties' various motions. Furthermore, the court finds that good cause exists to overcome the procedural bar created by the Petitioner's untimely filing of his petition. See NRS 34.726. This court finds that dismissing the Petitioner's petition on procedural grounds, without an evidentiary hearing, could result in prejudice to the Petitioner that would amount to a miscarriage of justice. See *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519 537 (2001). Having found that

good cause exists to schedule an evidentiary hearing to fully address the issues raised by the parties' motions, the court hereby schedules an evidentiary hearing to commence in this court on June 15, 2010. The parties should prepare themselves to address, inter alia, the following issues: (1) the Elko County District Attorney's Office's investigation of Mr. Stermitz and Mr. Kump regarding subornation of perjury, (2) the discovery issues claimed as work product raised in the parties' motions and at the August 21, 2009 hearing, (3) the problems raised by pre-trial publicity of statements made by the district attorney. (4) the circumstances surrounding the removal of Ms. Wilson as the Petitioner's counsel, (5) the competency of the Petitioner during both the guilt and penalty phases of trial, and (6) any issues relating to the ineffective assistance of counsel during trial and on appeal. The court finds that an evidentiary hearing is required to clarify and fully address these issues.

Based on the foregoing,

IT IS HEREBY ORDERED that good cause exists to schedule an evidentiary hearing. The evidentiary hearing will be scheduled to commence on June 15, 2010.

DATED this 27th day of August 2009.

Norman C. Robison
Senior District Judge

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Andrew J. Puccinelli, District Judge, Fourth Judicial District Court, Department II, and that on this 27 day of August, I served by the following method of service:

(x) regular US mail	( ) overnight UPS
( ) certified US mail	( ) overnight Federal Express
( ) registered US mail	( ) Fax to #
( ) overnight US mail	( ) hand delivery
( ) personal service	(x) box in clerk's office

a true copy of the foregoing document addressed to:

Gary Woodbury, District Attorney
Office of the District Attorney
1515 7th Street
Elko, Nevada 89801

Gary A. Taylor
Federal Public Defender's Office
411 E. Bonneville Avenue, Suite 250
Las Vegas, NV 89101

Mark Mills

EXHIBIT 5

EXHIBIT 5

COPY

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * *

STATE OF NEVADA,

Plaintiff,

vs.

TRAVERS ARTHUR GREENE,

Defendant.

Case No. C124806
Dept. XIV

REPORTER'S TRANSCRIPT
OF
ARGUMENT/DECISION

BEFORE THE HONORABLE DONALD M. MOSLEY

DISTRICT JUDGE

Taken on Friday, June 5, 2009

At 9:00 a.m.

APPEARANCES:

For the State: STEPHEN S. OWENS, ESQ.
Chief Deputy District Attorney

For the Defendant: HEATHER FRALEY, ESQ.
DAVID ANTHONY, ESQ.
Assistant Federal Public Defenders

Reported by: Maureen Schorn, CCR No. 496, RPR

LAS VEGAS, NEVADA. FRIDAY, JUNE 5, 2009, 9:00 A.M.

* * * *

THE COURT: C124806, State versus Travers Arthur Greene. Where is Mr. Greene?

MR. ANTHONY: He is in custody, Your Honor.

THE COURT: Do you wish to waive his presence?

MR. ANTHONY: Yes, Your Honor.

THE COURT: We have present Mr. Anthony and Ms. Fraley representing Mr. Greene. Mr. Owens is present for the State.

This is on for argument and decision concerning a Petition for Writ of Habeas Corpus. We're going to be, unfortunately, interrupted just a little. We have the City appeals in about 15 minutes, and we have to finish up this other matter. So if you will indulge me, we will try to get through this, but it's going to be little disjointed.

Let me begin by discussing the matter procedurally. I've gone over this at length, I can assure counsel, and there are 17 issues brought before the Court in the Petition for Writ of Habeas Corpus.

I have isolated five of those issues which are, in my judgment, new issues that have not been litigated.

And so we're going to entertain those five, and only those five.

I will hear your argument in the matter, but absent some revelation that I'm not aware of, the others have been either taken up on appeal, or when Ms. Connolly represented Mr. Greene and Petitioner filed a Petition for a Writ of Habeas Corpus, which was decided in the fall of 2004.

For the record, Ms. Connolly proffered her writ on approximately the 21st of June of 2002. An extensive continuation was given so that she could supplement her writ and there was, as I recall, requests for various other personnel, investigators and that sort of thing, and so it did drag on some time.

We called it the 22nd of November of 2004. We discussed it and had a hearing at that time, and a decision was rendered the 20th of December of 2004.

So I would indicate to counsel, and I perhaps should have given you some indication of this before, maybe my Clerk did, maybe he didn't, but it would have been helpful.

What I am contemplating here is Ground 3, which talks about exculpatory evidence or impeachment information;

Ground 5, which discusses actual innocence and

the formulation of specific intent;

Ground 10, which discusses the defendant's juvenile record and how it was used as an aggravating factor during the penalty phase;

Ground 14, ineffective assistance of counsel on the part of Ms. Connolly, primarily in her proffer of issues and arguments in her writ, and I would further say it is rather limited so that can be entertained, I think realistically, focusing on particular aspects of her writ;

And, Ground 16, which talks about the lethal injection which is contrary to the Eighth Amendment. So that is what I have seized upon. We might -- well, any other business we can conduct before we get into the actual issues here?

Would you care to be heard on my choosing of those particular issues?

MS. FRALEY: Yes, Your Honor. Our focus was going to be on the ineffective assistance of Ms. Connolly, and related to that would require us to discuss our allegations that were made with regards to Claims 1 and 2 in our petition.

Because our primary allegation is that Ms. Connolly was ineffective in failing to develop her claim of ineffective assistance of trial counsel with regards to his mitigation presentation at the penalty

phase and, also, in regards to his handling of the medication issue.

THE COURT: Who is he?

MS. FRALEY: Mr. Schieck, Your Honor; trial counsel.

THE COURT: All right. Well, I don't have it before me, but Ground 1 is what, exactly?

MS. FRALEY: That trial counsel was ineffective in failing to investigate and present adequate mitigation evidence; in particular, related to Mr. Greene's life history and his mental health issues.

THE COURT: And Ground 2?

MS. FRALEY: Ground 2 was that trial counsel was ineffective in his handling of the medication issue. Mr. Greene was medicated with antipsychotic medication during his trial, despite the fact that he was not psychotic and, therefore, should not have been prescribed those medications.

And we do contend that that had an effect both on his ability to communicate with his counsel, and on his demeanor at the trial which then affected the jury's determination at sentencing.

THE COURT: All right. Mr. Owens, do you care to be heard on this issue?

MR. OWENS: Those two issues were addressed

during the first postconviction proceedings. To the extent that they're reraising them, I think while the case continues to control, they need to bring something new to the table that was not considered during the first postconviction proceedings.

And I haven't seen anything in their brief that would change either this Court's ruling on those matters, or the Nevada Supreme Court's affirmance.

THE COURT: Well, what Ms. Fraley is saying is that Ms. Connolly failed to challenge Mr. Schieck for not bringing these matters up at trial or during appeal.

Were they brought up on the appeal? I take it not.

MR. OWENS: The medication issue has been addressed throughout. It was addressed at trial, it was addressed at every stage of the proceedings. Whether Mr. Schieck should have been aware, he was aware of the defendant's psychological problems.

The question has been whether or not he was force-medicated. That was resolved during the last postconviction proceedings that there was nothing in the record to support the Defense's allegation at that time that he had been forced medication; therefore, a Riggins hearing was not necessary.

Furthermore, there was no indication on the

defendant's part that he was acting odd or strange in court such that it would put Mr. Schieck on notice that he was not competent, and that he would have had to have hired an expert.

Mitigation evidence was presented --

THE COURT: Just a moment. Let's take one thing at a time. My Clerk had made the decision that the second ground, that of this medication use during the trial, had been litigated.

And you're saying it had. In what context? Was it part of the appeal proffered by Mr. Schieck? Probably was not, was it?

MR. OWENS: The first postconviction proceedings were appealed. So, yes, the Nevada Supreme Court has reviewed that issue.

THE COURT: It was brought up then on appeal?

MR. OWENS: Yes.

THE COURT: Okay. And the Supreme Court ruled in what way?

MR. OWENS: They affirmed your ruling that there was no error in Mr. Schieck's failure to put it on for a Riggins hearing to determine the involuntariness of the medication, nor was Mr. Schieck ineffective in not hiring a psychiatrist.

He had requested one. He was authorized to obtain one. He said for strategy reasons he did not get one. He was concerned that the psychiatrist report would not be favorable, that it would come back and say the defendant was violent and antisocial, and it would not be helpful to his case.

That was part of the first postconviction proceedings and the subsequent appeal.

MS. FRALEY: Your Honor, if I might respond?

The State is correct that some of the allegations regarding the medication issue and the ineffective assistance of trial counsel on mitigation issue were raised.

However, our claim is that Ms. Connolly, postconviction counsel, was ineffective in her litigation of those issues. In particular, she was ineffective for failing to develop the evidence necessary to demonstrate prejudice, both with regards to trial counsel's ineffectiveness on the mitigation claim, and with regards to his ineffectiveness on the medication claim.

This Court when it heard the issue before, and when the Nevada Supreme Court decided the issue, wasn't presented with the names or declarations of any collateral witnesses that should have been presented at the penalty phase.

Ms. Connolly said that Mr. Schieck, trial counsel, was ineffective for failing to present additional mitigation witnesses. However, she failed to name or locate or interview or present declarations from any of those witnesses.

And our contention is that she was ineffective for failing to do that. Her obligation as a postconviction attorney was to do a full and complete work-up on the case, investigate everything that trial counsel should have done, and proffered the evidence that she contended that trial counsel should have presented.

She failed to do that in this case and she was ineffective for that. And because we are here on a timely claim for ineffectiveness, this Court can consider all of the evidence that we have presented that we claim that she was ineffective for failing to present.

And if this Court were to review this evidence, it would be clear that the evidentiary presentation before the Trial Court was substantially different than the one here. In addition, the evidence --

THE COURT: Excuse me. I'm not following you. What did you just say?

MS. FRALEY: That the evidentiary presentation that trial counsel made to the jury was substantially different than the evidence that's before

this Court now, and it's substantially different than the evidence that was before this Court on the first postconviction.

And with regards to the State's argument on the law of the case, the Nevada Supreme Court has specifically held that in Sioux (phonetic) versus Clark County, that where the evidence is new and substantially different, that law of the case does not hold.

And that is the case here, Your Honor. Because we have presented declarations from family members, from friends indicating the horrible life experiences that Mr. Greene had, indicating the severe effect that his rape that he suffered when he was nine years old at the hands of a 35-year-old man had on him, and had on his psychological development.

In addition, Ms. Connolly admitted at the evidentiary hearing that Dr. Mortillaro, the psychiatrist that she hired, was not qualified to conduct the kind of psychological evaluation on Mr. Greene that was required.

THE COURT: What would that be?

MS. FRALEY: What would that be?

THE COURT: What kind of examination would have been proper?

MS. FRALEY: Like the one that we have presented, Your Honor, from Dr. Tumor (phonetic), one that

indicates that Mr. Greene's life experiences; the rape that he suffered, his adoption, the way that his family raised him, his extended incarceration in California Youth Authority, all of those things impacted his psychological development.

THE COURT: Is it not true that it could be said that that's just one expert disagreeing with another?

MS. FRALEY: Well, I mean, in light of Ms. Connolly's admission at the evidentiary hearing that he wasn't qualified, I would say no.

THE COURT: Well, Ms. Connolly's opinion of Dr. Mortillaro doesn't mean two beans to me. We've been using that doctor in this court for over a decade to my certain knowledge.

MS. FRALEY: Well, one of the things that would have impacted even Mr. Mortillaro's ability to do an adequate evaluation of Mr. Greene, was the fact that he wasn't presented with the kind of collateral evidence to explain Mr. Greene's life history that we have been presented here.

He wasn't presented with his social history. He wasn't presented with declarations from other family members, such as Mr. Greene's cousin who grew up with him, and could have testified to his behavior when he was a child, and the negative impact that his rape had on him.

Peggy Bolo, who was an aunt who could have testified to the failings of his parents in raising him, and their inability to adequately account for the sexual assault that he endured.

People that Mr. Greene was friends with at the time of the crime who could have testified to his drug abuse.

THE COURT: Let me interrupt you just a moment here. Let's focus on the second ground for a moment, this medication issue. This was brought up at trial, brought up on appeal, and it was brought up in the first writ. So why are we still litigating that?

MS. FRALEY: Because Ms. Connolly was ineffective in her litigation of that issue, Your Honor.

THE COURT: What about my determination at trial? And what about the Supreme Court's determination on appeal?

MS. FRALEY: Your Honor, what happened at trial was that Mr. Schieck made a reference to the Trial Court that he had instructed Mr. Greene to stop taking antipsychotic medication.

The evidence presented at the evidentiary hearing on the first date postconviction indicated that Mr. Schieck did not know why his client was taking this medication. He failed to have an independent

psychological evaluation conducted to determine whether that medication was even being properly given to Mr. Greene.

And the fact is, it wasn't. He was not psychotic. He was improperly administered antipsychotic medication, and that medication had a severe and detrimental impact on Mr. Greene, both on his ability to communicate with trial counsel and, also, on his demeanor in front of the jury.

And, Your Honor, we have presented declarations from five jurors indicating that Mr. Greene's demeanor, which was the result of these improper medications, was one of the reasons that they sentenced him to death.

And if Ms. Connolly had performed effectively, she would have conducted those interviews. She would have interviewed Mr. Winfrey, as we did, his codefendant, who would have testified as he did in the declaration here that we've obtained, that Mr. Greene was not himself, that he was clearly affected by the medication.

THE COURT: What was his demeanor?

MS. FRALEY: His demeanor was emotionless and flat, and the jury interpreted that as remorselessness and as emotionless, and they saw him as somebody who was, therefore, not deserving of mercy, that he was just a cold-blooded killer that deserved the death penalty.

If either Mr. Schieck would have conducted a proper evaluation and gotten his client clean of these improper medications, he would have had the appropriate affect and that wouldn't have impacted the jury, or if Mr. Schieck would have told the jury the reason my client looks this way is because of this medication, then, also, they wouldn't have held that against him.

And that is exactly what the declarations we have obtained say.

THE COURT: Mr. Owens, what do you say to that?

MR. OWENS: That is exactly the issue that was addressed before by this Court and we had an evidentiary hearing. Ms. Connolly made this very same argument.

Now, she didn't go out and get affidavits from the jurors, probably because Ms. Connolly recognizes that they're inadmissible. You can't get affidavits from jurors and ask them what influenced their decision-making process. There's a statute that says you're not supposed to do that.

The Federal PD like to do it. They're not as familiar with the law here in Nevada. They're not admissible, can't be used. But everything else she just said Ms. Connolly did in the first postconviction

proceedings.

MS. FRALEY: Your Honor, the jurors, what they witnessed as far as Mr. Greene's demeanor is absolutely admissible, what they saw as far as Mr. Greene being flat and emotionless.

THE COURT: Their affidavits are not admissible. Now, this is not a new issue to the Court. I have been faced with this on many occasions, and I think I made the announcement I'm going to make in a moment during Ms. Connolly's writ.

The problem is, there's a catch-22. Either they're prescribed medications and they refuse to take it, or won't take it and, therefore, their extent of cooperation at trial is compromised.

Or they're prescribed medication and they do take it, and the medication makes them such that they're not themselves, that they don't understand what's going on or whatever.

It's a lose-lose situation from the Prosecutors' point of view. But, notwithstanding, that issue has been litigated and we're not going to relitigate it, that the medication or lack thereof at trial is no longer an issue.

And I might add that Mr. Schieck nor this Court noticed anything wrong with the demeanor of this individual, or we would have done something at the time.

Granted, it was years ago and I can't remember everything that went on at trial.

But I do know that when I see people behaving in a rather peculiar way, I inquire, as does counsel oftentimes. And Mr. Schieck is a very experienced attorney, if there was something new to have him bring these subjects up when it's warranted.

I'm going to halt for just a moment. Please have a seat and we're going to need to talk to Mr. Stanton.

(Whereupon, another matter on calendar was heard.)

THE COURT: Now, on this question of Ms. Connolly's extent of her investigation or her challenging the lack of witnesses, she's not here today, of course.

And it begs the question, should she not be present and should not an evidentiary hearing lie to inquire of these matters?

MS. FRALEY: Yes, Your Honor. We would request an evidentiary hearing.

THE COURT: Mr. Owens, what's your thinking?

MR. OWENS: Well, certainly, if they have raised facts which, if true, would entitle them to relief, then an evidentiary hearing with Ms. Connolly would be appropriate.

I don't see any facts in here that they have

alleged that, if true and if proven up, would entitle them to relief.

Ms. Connolly put forth all this mitigation evidence that I've been hearing about today. She raised it in her petitions. David Schieck raised mitigation evidence with the jury.

The jury was told about Travers Greene. They were told about his childhood. They were told that he had been sexually molested by a neighbor when he was nine years old. They were told he had received psychological counseling. They were told that he had an illegal drug problem. They were told by a cousin that said he was angry, aggressive, depressed, withdrawn and suicidal because he found out that he was adopted.

And Greene gave a statement in elocution saying that he had suffered from childhood trauma.

So that issue was raised previously. Unless they're coming forward with new mitigation evidence and information, not just additional witnesses who would testify to the same things, then I don't know that there's any reason to have an evidentiary hearing.

MS. FRALEY: Your Honor, we are coming forward with new evidence of mitigation. And it's absolutely false that the mitigation evidence that we've presented here before this Court now was presented to this

Court in a previous statement.

THE COURT: Well, what is it?

MS. FRALEY: Your Honor, the only mitigation evidence that Ms. Connolly presented was Mr. Mortillaro's report and a declaration from Mr. Greene's biological mother.

The evidence that we have presented to this Court includes abundant documentary evidence outlining Mr. Greene's traumatic childhood. Just as the United States Supreme Court held in Williams that trial counsel was ineffective for failing to present records that indicated his client had a traumatic childhood.

We've presented records, police records from Mr. Green's assault. And while it is true that at trial his parents -- the only people that testified at the trial in the penalty phase on Mr. Greene's behalf were his two adoptive parents, and a family friend who didn't even really know anything about Mr. Greene.

And a review of his testimony reveals he had no knowledge about Mr. Greene. So, really, it's just the adoptive parents. Mr. Schieck had the parents testify that Mr. Greene was, quote, "sexually molested."

The fact is, and the evidence that we have presented from the police reports from that, is that when Mr. Greene was nine years old he was raped, anally raped

and forced to perform fellatio on a 30-something-year-old convicted pedophile for an extended period of time over the course of a year.

And that man would pay Mr. Greene .50 cents for performing fellatio on him. Those are exactly the kind of facts that if the jury would have heard would have affected their sentencing determination.

In addition, it is absolutely false that the jury was presented with evidence of Mr. Greene's drug problems. We have presented evidence --

THE COURT: Excuse me. Drug problems during what time period?

MS. FRALEY: Mr. Greene became addicted to drugs when he was young. At the time of the crime in this case, he was severely addicted to PCP and methamphetamine. And we have presented evidence from experts and from witnesses who were friends with Mr. Greene at the time of the trial, indicating that he was severely addicted and intoxicated on those drugs.

THE COURT: At what point?

MS. FRALEY: Your Honor, Mr. Greene was addicted to those drugs when he was a teenager, and also at the time of the trial right before his arrest. From the time he moved to Las Vegas in December of I believe it was 1993, until the time that he committed this crime in

September of 1994, he developed a severe addiction to methamphetamine and PCP, and he was actually on those drugs at the time of this offense.

That is exactly the kind of evidence that Courts have repeatedly held weighs on a jury's sentencing determination.

In addition, we have presented evidence from Mr. Greene's cousin that he was raised with that he was severely affected by his parents not giving him counseling for his sexual abuse.

We have presented evidence from Mr. Greene's aunt, and this absolutely was not presented at the trial and the State can't even allege that it was, that Mr. Greene was brutally beaten by his uncle, a teenager who was on steroids when Mr. Greene was a young child.

Throughout his childhood, this man, this uncle would baby-sit him and would beat him. And we have family members who could testify what a severe impact this had on Mr. Greene's development, and on his mental health.

None of that evidence was presented at trial. I'm sure Your Honor remembers that none of that evidence was presented in the first state postconviction. Postconviction counsel was absolutely bound under the standards of reasonableness to present that evidence.

And in light of that evidence, it is clear that

there is a reasonable probability that that would have impacted at least one of the jurors' sentencing determinations.

And for that reason we would say that we are absolutely entitled to an evidentiary hearing, to not only present the testimony of Ms. Connolly with regards to what she did, but also those witnesses.

THE COURT: Well, Mr. Schieck was not apprised, I don't believe, of this history on the part of his client. Is there some of suggestion that Mr. Greene just didn't tell him? Or he did tell him and he ignored it?

MS. FRALEY: Your Honor, there is no indication that Mr. Schieck conducted an adequate investigation to determine --

THE COURT: Well, he spoke to the client. The client is sitting there talking to his attorney. You would think that he would make mention of all these things.

MS. FRALEY: Your Honor, once Mr. Schieck found out about the adoptive parents, he stopped there. The family members that Mr. Schieck talked to were the two adoptive parents who testified, the grandmother and the sister.

He decided not to present the testimony of the

grandmother or the sister. But based on his discussions with those people, and in addition based on the CYA records that he did obtain and did present, those things indicated that Mr. Greene had mental health problems, had drug problems, had serious life history problems that the parents couldn't explain.

And it is incumbent upon trial counsel not to just present the testimony of the parents, but to present a full life picture of this person to try to convince the jury not to sentence him to death.

Mr. Schieck did not conduct a reasonable investigation. He did not ask Mr. Greene about extended family members. He did not attempt to locate extended family members.

He did not attempt to locate additional documentary evidence demonstrating Mr. Greene's psychological problems, and the problems with his life history.

And because he didn't conduct a sufficient investigation, he could not have made a tactical decision not to present that evidence.

THE COURT: Do we know to what extent Ms. Connolly brought these subjects up?

MR. OWENS: Judge, she alleged that David Schieck didn't do all these things and, specifically, that

he failed to call Greene's biological parents.

The Nevada Supreme Court looked at that and they said there is no prejudice, that this information, any information that the biological parents could have offered -- that's why it's important to look at the facts that were elicited, not just what witnesses were called -- nothing that the biological parents could have offered would have changed the outcome of the case.

And they affirmed your ruling that there was nothing ineffective in David Schieck's investigation in that regards.

MS. FRALEY: And, Your Honor, the Nevada Supreme Court's holding that she didn't demonstrate prejudice is exactly the problem here. That is why we are contending she was ineffective, Your Honor, because she failed to develop and present those facts.

And you'll notice the State has failed to address our allegation about Mr. Greene being beaten by his uncle, because that evidence was not presented. It was not alleged by Ms. Connolly, it was not investigated or presented by her.

The evidence that was before the Nevada Supreme Court was, basically, none; as I pointed out, simply the declaration from the biological parents and Mr. Mortillaro's report. She did not present the

declarations from the other family members or the other records.

THE COURT: Let me ask you this. What proof is there that he was beaten by his uncle?

MS. FRALEY: Your Honor, we have presented a declaration from his aunt, her name is Jackie Watson, and she witnessed that. In addition, his cousin Erica Watson witnessed him being abused by this uncle.

And those witnesses could be available to testify if Your Honor were to grant an evidentiary hearing.

MR. OWENS: Judge, I agree the beating was not previously raised in this case. If you want to have an evidentiary hearing and ask Ms. Connolly why she didn't investigate beyond just the biological parents, but go to even another level of family to find out every single beating that troubled kids have in cases like this, then you can certainly do so.

But even assuming those allegations are true, Ms. Connolly brought out the fact that David Schieck didn't allege sufficiently the rape and the drugs.

And the Nevada Supreme Court said no. They heard about the rape, they heard about the drugs, they heard about the psychological problems, they heard about all this. Maybe they didn't hear about the beating, granted, but I think that's cumulative and would not have changed

the outcome.

If it would not have changed the outcome, then what's the purpose of putting Ms. Connolly on the stand to try to figure out whether it was effective or not effective of her to discover the beating?

MS. FRALEY: Your Honor, it absolutely would have affected the outcome. The evidentiary presentation before the jury what Mr. Schieck presented was simply the parents.

And, basically, what they testified to was that Mr. Greene was adopted, that he was quote, "molested," that he had some legal troubles, that he was basically a juvenile delinquent, that they did everything they could to help Mr. Greene, and that for whatever reason he continued to be a problem and then this offense happened.

A full investigation which we have conducted creates the evidentiary picture which we have presented, which is that Mr. Greene has suffered abandonment and rejection from the time of his birth.

His parents put him up for adoption when he was seven months old. His adoptive parents divorced when he was five leaving him estranged from his mother. And the evidence that we presented demonstrates what a negative impact that had on him.

We presented evidence not that Mr. Greene was

sexually molested, that he was anally raped and forced to perform fellatio on a 35-year-old man when he was nine years old.

Hearing those kind of details and facts absolutely would have changed the jury's determination. They've heard that as a result of these problems Mr. Greene found himself having trouble in school, and got incarcerated in CYA.

More evidence that we presented that Ms. Connolly didn't present was the criminogenic effect that CYA has on children, how he was forced to fend for himself in CYA, what a violent place that that is for people to be, and how that impacted his development as a young child and a teenager.

Then how he developed, as a result of all this long line of problems, a severe drug addiction to PCP and methamphetamine, two of the most damaging drugs that anybody could take.

None of that evidence was presented, and that a completely different evidentiary picture could absolutely, and would absolutely have swayed at least one juror to say that Mr. Greene does not deserve to die.

THE COURT: All right. I'm going to reserve the decision to have a hearing until we've finished some of these other issues.

Ground 3, failure to disclose exculpatory material, impeachment information. I have here that a witness was shown to have lied about a matter, Ms. Barker. Is that the issue there?

MS. FRALEY: No, Your Honor. The Brady claim before this Court now is different than the Brady claim that was before this Court before.

The Brady claim that we have here is that State's witness Anthony Fisher received undisclosed benefits at the trial. He was charged with trafficking in controlled substances, child neglect, possession of controlled substances. Those charges were pending against him at his trial.

The State failed to elicit testimony to that regard, and failed to disclose that evidence.

THE COURT: Excuse me. What evidence are we talking about? Was there a deal struck that if he testified in a certain matter he would be given some leniency?

MS. FRALEY: According to Mr. Fisher, yes, the declaration that they came to Mr. Fisher, yes. Mr. Roger came to his home and promised him that if he would testify in Mr. Greene's trial, that he would be given benefits in this case.

And, you know, it's clear in this case that there

was something fishy going on with Mr. Fisher, because he was not on the original witness list. In fact, his name was not added to the witness list in this case until sometime about a month before the trial started.

And there is no evidence in any of Metro's records to indicate how they even came about Mr. Fisher, which is one of the reasons why we asked for discovery in this case on that issue.

But this Court should note that the Federal Court in this case has found that we presented good cause, and that this Brady claim is potentially meritorious, and they have granted us a stay as to that claim.

THE COURT: Response?

MR. OWENS: The Federal Courts find everything meritorious and refer matters back here for third, fourth and fifth decisions. So I don't know that their consideration issues is anything Your Honor needs to consider.

We have this happen all the time where we oftentimes have to rely on witnesses, friends of the defendant who are not always the most reputable. And it happens all the time where 10, 20 years after the fact they will come out and they will recant their testimony at trial, or they'll say something different.

Here it is 12 years after the trial, and we've

got Mr. Fisher supposedly telling their investigator that there was some sort of deal in exchange for his testimony. Certainly, you could hold an evidentiary hearing on that.

My argument would be even if his allegation were true, would it have changed the outcome of the case? And I would say no. Mr. Fisher, although he testified to the defendant's admission to the murder, he was not such a significant witness that he was either mentioned in the Supreme Court's opinion on direct appeal, or the appeal from the denial of postconviction.

The key witnesses in this case that the litigation and the appellate proceedings have all focused on are this Heather Barker and Phil Souza. Heather Barker was an eye witness to the shooting.

Regardless of whether defendant had made some sort of admission to this Mr. Fisher, he admitted it, essentially, to Mr. Souza and said when he heard the news say that they had discovered two bodies, Mr. Greene turns to his codefendant, Mr. Winfrey, and says: Now we're not -- they found the bodies, we're not done yet.

That disturbed Mr. Souza so much he went and reported it to the police. So it was upon those two witnesses, Barker and Souza, that the case really hinged.

Mr. Fisher was impeached with a prior felony conviction. His credibility was already somewhat in

question. So even if there had been some sort of deal, which I am not admitting, I'm just saying for purposes of deciding whether or not we need to have an evidentiary hearing, assume it's true, and assume that the jury was then told that he's getting some sort of deal on yet another drug case, would it have changed the outcome of the case?

I think no. I think the Court could resolve it that way and not even have to flush out all those facts. Mr. Fisher ended up pleading to another felony and getting that running consecutive to the misdemeanor -- or the felony marijuana conviction that he had.

That kind of belies any claim that he was given some extraordinary deal in exchange for testimony. That's fairly commonplace. Drugs are going to get you probation and, in fact, it was another felony, not just an outright dismissal, or a reduction down to a misdemeanor belies any claim now 12 years later that he got some sort of deal.

MS. FRALEY: Your Honor, if I may quickly, the reason this is just coming up 12 years later is because trial counsel was ineffective for failing to investigate Mr. Fisher. Ms. Connolly was ineffective for failing to interview and investigate this issue, and the State had suppressed this evidence.

The United States Supreme Court recently held in

Kohn versus Bell on a second postconviction petition that a Brady claim was raised and was timely because the State had failed to disclose the evidence.

The State didn't disclose to us that this deal was struck. Ms. Connolly was ineffective for not performing adequate investigation. We discovered it and presented it as soon as we could, given when we found the evidence.

THE COURT: Let me ask you, what is the form of Mr. Fisher's testimony? You said an affidavit, or what was it?

MS. FRALEY: Your Honor, the evidence that we presented is in the form of a declaration.

THE COURT: Declaration. A sworn declaration?

MR. ANTHONY: Yes, Your Honor.

MS. FRALEY: Yes, Your Honor.

THE COURT: Is there anything of that ilk from Mr. Roger?

MS. FRALEY: No, Your Honor. We've asked to depose him in our discovery motion.

MR. ANTHONY: I haven't spoken to Mr. Roger, no.

THE COURT: If we're going to accept the sworn declaration of Mr. Fisher, we can certainly accept

one from Mr. Roger, and that would be something I will be looking for too.

And there's also some mention of Ms. Barker who had lied about taking drugs. Is that right, or not?

MS. FRALEY: Your Honor, we're not -- we would submit any claims about Ms. Barker on our petition.

THE COURT: You would submit it, or you're not pursuing it?

MS. FRALEY: Your Honor, we do believe that the Trial Court should have allowed further evidence of her lying about her drug use. We do still maintain that, but we don't have anything in particular to add from what's already been argued in the petition.

THE COURT: Mr. Owens, do you have anything to say about that?

MR. OWENS: Regarding Heather Barker, I didn't realize there was any claims in the second petition regarding Heather Barker. I thought that was all from the first postconviction proceedings.

MS. FRALEY: It's the same claim that was raised before.

MR. OWENS: So if it's a repeat of the same claim, then I'm --

THE COURT: It was litigated in the first petition?

MR. OWENS: Heather Barker testified in an evidentiary hearing in the first postconviction proceedings. It was a Brady claim that she had lied, and they brought in a witness to say she had lied, and you heard testimony from her and denied that Brady claim as to her, and that was affirmed on appeal.

THE COURT: That was decided then.

Ground 5, actual innocence, specific intent. This goes back to the use of drugs; is that correct?

MS. FRALEY: Yes, Your Honor. Goes to Mr. Greene's psychological problems and, in particular, his use of methamphetamine and PCP at the time of the offense.

Our allegation is that in light of Mr. Greene's problem and in light of his drug intoxication, he was incapable of forming the specific intent necessary to commit first degree murder.

THE COURT: All right. Now, wasn't this litigated, his drug use?

MS. FRALEY: No, Your Honor. His drug use has never been litigated. Ms. Connolly didn't raise it. It was not addressed at trial.

MR. OWENS: Well, it came up in the context of mitigating evidence that the jury heard. They did hear that he had abused drugs, so that was considered by the

jury's mitigation evidence.

Now I think it's been offered for purposes of actual innocence.

THE COURT: Right. But was the indication at the time of trial that he was using drugs through the time of the offense? Or do we know?

MS. FRALEY: Your Honor, there was no evidence presented at the trial to that effect.

MR. OWENS: I don't know if it just came out in penalty, or whether it was offered in trial as well. I certainly know in penalty it came out.

MS. FRALEY: Nothing was presented at the guilt phase with regards to Mr. Greene's drug intoxication. And we had presented an affidavit from a doctor indicating what a horrible and impairing effect these drugs can have on somebody, and on their ability to make decisions.

And, in particular, in light of the instructional error here about whether Mr. Greene premeditated and deliberated, there is no way he could have premeditated and deliberated in light of the fact that he was intoxicated with these drugs, according to our expert.

THE COURT: Well, do we know the extent that he was under the influence at the time of the offense?

MS. FRALEY: Yes, Your Honor. His statement

to the police indicates that he had taken PCP at the time of the offense. Unfortunately --

THE COURT: Was he tested?

MR. FRALEY: I'm sorry. No, Your Honor, he was not tested.

THE COURT: Was there any indicia of behavior suggesting that at the time, Mr. Owens, that you're aware of?

MR. OWENS: No. Other than shooting two people in cold blood and laughing about it, which I think is more indicative of just a cold-blooded murderer; no, nothing that I saw that indicated that he was high on drugs.

THE COURT: Well --

MR. OWENS: Your Honor, I would also offer that an expert can't come in some 12 years later and opine subjectively that a criminal did or did not possess the requisite intent for premeditated murder.

That's a jury question. That's invading the province of the jury. And we do not have the diminished capacity defense here in Nevada. An expert can come in any say they were insane.

But to suggest that he was incapable of forming the intent to premeditate it, that sounds an awful lot like diminished capacity, which I think is one of the

other claims raised in this brief somewhere.

There is no such defense in Nevada. There are factors that the jury can consider, but that ultimate question, I don't think their expert would have been allowed to come in here and opine the way that they are arguing it here today.

MS. FRALEY: Your Honor, the State had to prove at trial beyond a reasonable doubt that Mr. Greene premeditated, deliberated and wilfully committed a first degree murder.

If trial counsel had performed effectively, we would have presented evidence to demonstrate that Mr. Greene was severely intoxicated on PCP and methamphetamine at the time of the offense.

And the effects of methamphetamine and PCP aren't different today than they were 10, 12, 40 years ago. Those drugs always have the same effect on people. And in particular in this case, they affected Mr. Greene so severely that he could not have committed first degree murder.

And if that evidence would have been presented to the jury, whether or not an official diminished capacity defense is available, yes, the jury is allowed to consider that evidence.

And if it would have been presented, they would

have been less likely to find him guilty of first degree murder.

THE COURT: At our hearing in 2002 -- or, actually, 2004 with Ms. Connolly, was that question put to Mr. Schieck as to his knowledge of the situation, use or lack of use?

MR. OWENS: His failure to retain an expert certainly was a subject that he was examined about. He said he did not get a psychiatrist or other expert to examine the defendant in part because he was concerned that the report would not be favorable to his client.

MS. FRALEY: And, Your Honor, the case law is clear that such a decision cannot, cannot be considered tactical. Because tactical and strategic decisions can only be made after a reasonable investigation is conducted.

And deciding not to conduct a psychological evaluation because you are afraid of it is the definition of not conducting an adequate investigation. He had to get that report, see what it said before he could decide whether or not to present that evidence.

MR. OWENS: This is spoken by attorneys that don't do trials, they do appeals. They review other peoples' work retroactively. If they go and get that report, the State gets it, and then we can use it against

them.

Mr. Schieck, that's what he's doing. He's an experienced trial attorney, and it's the law of the case that his strategy was upheld by Your Honor and upheld by the Nevada Supreme Court as a valid reason, not ineffective assistance to not go and get that expert.

MS. FRALEY: Your Honor, as the United States Supreme Court held in Wiggins, quote, "Strickland does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategies."

The Supreme Court and the Ninth Circuit have held time and again that trial counsel must conduct a reasonable investigation. And in death cases in particular, determining the psychological status of your client is imperative.

Mr. Schieck applied for a psychologist because he thought it was necessary. He testified at one of the evidentiary hearings that he ran out of time, and that's the only reason he didn't do it.

THE COURT: He applied for what? For funding?

MS. FRALEY: Yes, Your Honor. He filed a motion for appointment of a psychologist in this case, and in that motion he said: I would be ineffective if I did

not get this evaluation done.

As our petition indicates, at one of the hearings that was held in front of Your Honor, Mr. Schieck said: I need an evaluation, I decided a psychological evaluation was necessary, but I ran out of time and that's why I didn't do it.

MR. OWENS: And he also said that he was concerned that it would be adverse to his client. He gave several different answers, and Your Honor weighed that at the time and you said that it was not ineffectiveness, and that was upheld by the Nevada Supreme Court.

I don't know why we're going over it again.

THE COURT: Did I make that determination?

MS. FRALEY: Yes, Your Honor. However, that is not reasonable under the case law. It is not reasonable for --

THE COURT: With all due respect, the fact that you disagree with it doesn't mean it's appealable in this court, or something we're going to review again.

If I said it was a strategy then when I had the witnesses here and we had the actual hearing ongoing, I'm inclined to think that that's exactly what it was. So Ground 5 would be dismissed as a strategy for the Defense.

Ground 10 is the behavior of a delinquent, or someone who is of record as a minor, and you say that's

not admissible. I'd like to know why? Because we receive that kind of evidence all the time when we sentence people.

MR. ANTHONY: Your Honor, maybe I can field these last two. There's been a Supreme Court decision that came out, I believe, in 2004. The case is called Roper v. Simmons. And that's the case that holds that you cannot sentence a person to death for crimes that were committed when they were a juvenile.

And what we have done in the petition is just that we have extended that reasoning of Roper to situations where the State in the penalty phase of a capital trial uses the juvenile records of the defendant and argues that they should be used in favor of a sentence of death.

And that's, basically, the argument, is that in the unique circumstances of a capital sentence hearing pursuant to that new authority, that it would be improper to use -- for the State to use that evidence in a penalty hearing, in a capital penalty hearing.

THE COURT: With all due respect, isn't that a rather long stretch?

MR. ANTHONY: We don't believe so, Your Honor. It doesn't seem to be -- you know, when you talk about factors that make a person eligible for the death

penalty and those are factors that occurred when they were a juvenile, those are just as important in a lot of circumstances as what age they were when they actually committed the murder itself.

Because as the Court knows, you have to find a statutory aggravating circumstances before a defendant is eligible for the death penalty, and so that's an important determination.

THE COURT: The State's position?

MR. OWENS: They're arguing for an extrapolation of Roper. I have yet to hear any case, or any Court anywhere that has used Roper in that way to then say you can never use any evidence of a juvenile's misconduct in a capital penalty hearing.

Interesting argument for a trial somewhere, but not for raising in a successive petition.

THE COURT: Well, certainly, I understand the Supreme Court's decision that you cannot execute minors, or people who committed offenses while they were minors. That's rather understandable and very plain.

Whether we agree or disagree is notwithstanding, but it is certainly understandable, the rationale that was utilized. I think that's quite a stretch to go from there to say that you can't use a juvenile's record in a penalty phase, so I'm not going to subscribe to that.

I don't think there's a problem with that, so we're going to deny any recovery on Ground 10.

Now, Ground 14 is a rather kind of a blanket argument that Ms. Connolly was prevented from developing her facts and claims, and it goes on.

In what way we she prevented, counsel?

MS. FRALEY: Your Honor, our contention is that she attempted to develop the fact to support her claims by applying to this Court for the appointment of a neuropharmacologist to explain the medication issue.

She had asked to present the testimony of the biological mother at the evidentiary hearing.

THE COURT: Excuse me. She asked to do what with the biological mother?

MS. FRALEY: To present her testimony at the evidentiary hearing, Your Honor. And Your Honor did not allow that and that, basically, that those things restricted her ability to develop the facts necessary to prove prejudice on her ineffective assistance of trial counsel claim.

THE COURT: Response from counsel?

MR. OWENS: Well, if that was error for you to rule, then it should be raised on appeal. It was, in fact, raised on appeal and the Nevada Supreme Court said it wasn't error.

I don't know how it could possibly then constitute an adverse legal ruling to constitute an impediment external to the defense that prevented them from raising a particular issue.

They did raise it. It's just the Courts had ruled against them, that's all.

THE COURT: Is that true, Ms. Fraley?

MS. FRALEY: Your Honor, the claim regarding Your Honor's rulings was raised on appeal and it was denied by the Nevada Supreme Court.

However, our focus here is more on Ms. Connolly's ineffectiveness, independent of Your Honor's ruling. And we do contend that she was ineffective, and we have gone over that with regards to the mitigation evidence and the medication issue, and in not raising these claims that we're addressing today.

THE COURT: Well, I think these two issues in particular; about the failure to bring forth the biological mother, and, also, the additional expert required has been resolved. And so I'm not going to give any regress or any remedy as to Ground 14.

And I think I mentioned to Ms. Connolly at the time, and I'll it mention today, that while these appeals are important in their scope and in their ultimate results, it does not mean that we open the thing up for a

new trial.

And that's what we see oftentimes with appellate counsel, it's just almost start all over 12, 15 years later with all the evidence that is either valid or invalid from various people that come forward, motives notwithstanding, and we're going to have a new trial.

And that's what, essentially, we get to oftentimes. And I think that's what I felt with Ms. Connolly's request with bringing his mother and all this sort of thing is just retrying the case, and that will not be allowed.

The last ground, 16, about the cruel and unusual punishment. I always have to question when I see these arguments.

What would be the proper way to execute a person? Does anyone know?

MR. ANTHONY: Your Honor, maybe I can try to field that question. As Your Honor might know, the lethal injection chamber in Nevada is housed in the old gas chamber.

And our contention is that the way that that's set up causes a lot of unique problems. I think the most important problem that we've identified, we've proffered to the Court a declaration from a Board certified anesthesiologist. His name is Dr. Mark Heath.

Dr. Heath talks about how the person who actually injects -- there's a combination of three chemicals. And the person who actually injects those chemicals is located in another room. And so when they inject the chemicals they come through the wall of the chamber and into the person, into the IV.

And so the person who is actually injecting the chemicals can't see the person that they're injecting them into. And that is one of the most glaring problems that we've identified with the way that lethal injection occurs in Nevada, which is, the person who injects the chemicals needs to see the person that they're injecting them into.

THE COURT: Why?

MR. ANTHONY: Otherwise the person could be conscious. And as we've explained in the declaration, that would contravene all medical ethics. That's not even something that would be permitted to do to an animal if you put them to sleep.

The person putting an animal to sleep would be to know that they were unconscious before you put in that last chemical, because the last chemical is the one that stops the heart.

And it's important to the person administering the chemicals to know whether the person is conscious or not conscious. So that's one of the big problems that

we've identified with the protocol here in Nevada.

THE COURT: Has there ever been a case that you're aware of where the third chemical was introduced while the person was conscious?

MR. ANTHONY: There's a lot of anecdotal evidence, Your Honor. We did include an affidavit from a person who has witnessed several executions.

The United States Supreme Court also recently addressed this issue where they talked about how in certain states there is some anecdotal information about the defendant being conscious at the time that the final lethal chemical is administered. And it usually causes the person to flop around and gasping that occurs.

The second chemical that's administered is a paralytic which disguises the person's involuntary movements. So for people who watch a lethal injection it might appear as if the person is unconscious.

But if they are not truly unconscious, the paralytic just disguises the fact that they are actually suffocating to death slowly while the third chemical is being administered, and they have a heart attack.

THE COURT: Has this issue ever been brought in another state and on the Supreme Court?

MR. ANTHONY: It has been brought in other states, Your Honor. I think that the cases vary by the

facts. For example, in California a Federal Court has ordered the Attorney General's office to modify their lethal injection procedure.

The basis for that ruling was the other issue that I wanted to address, which is the issue about inadequate training. The EMT's from the Fire Department who perform this procedure aren't necessarily experts at administering lethal chemicals. That's not something that they do on a normal basis.

So it's very important --

THE COURT: Well, who would? I don't think you could say anyone routinely administers lethal chemicals.

MR. ANTHONY: That's absolutely correct, Your Honor.

THE COURT: So what do they want to do? Just no one is qualified?

MR. ANTHONY: I don't think that that's the answer. But what the U.S. Supreme Court talks about is, there has to be evidence that there's some sort of training about how they measure each of those chemicals.

Because they have to be delivered in a certain amount and in a certain sequence, and if they're not, it could cause a disastrous effect. And that has never been fully litigated in Nevada.

Our argument is that these cases depend on the facts, not necessarily on a single governing law. And it's really up to the lethal injection protocol that exists in each state.

It's our contention that there's no training that accompanies these EMT's to do the procedure, unlike the time that this was heard by the U.S. Supreme Court.

And where they held that the Kentucky procedure was okay because there was proof that there was training that was occurring with the EMT's, where they were actually going through dry runs where they were measuring out the chemicals, and where they were performing adequate venue puncture, which is where they insert the lines.

And we would argue that there is no evidence that that exists in Nevada, and that's the problem that we raised.

THE COURT: Am I correct in my assumption that there is a written protocol somewhere on the subject?

MR. ANTHONY: There is, Your Honor. There is a written protocol; however, it contains substantial gaps about training. And that's really the reason that we brought this argument up, is because we have a copy of the protocol. It's an exhibit to the petition.

We've had an expert anesthesiologist review the protocol, and then he's produced a declaration identifying

his concerns where there are gaps in the protocol, particularly with respect to training, and with respect to the person who inserts the chemicals is in a different room and can't see the person.

THE COURT: Aside from the latter, the fact that they're in a different room, my first impression, and I may be incorrect here and I'd like to hear about it, but my first impression was that this is patently simple to measure a certain amount of chemical into three different hypodermics, insert it in a line that, as you say, through the wall or whatever and it's connected to the defendant.

You have a sequence, I would think, a time schedule set up there for when these things are supposed to be done, and the amount.

What training do you need for something like that? If you're an EMT you have medical training. What else would you need?

MR. ANTHONY: Well, I would agree with the Court that to a layman like myself it's also kind of hard to understand what could possibly go wrong, but that's why people go to school for anesthesiology. I think it's a course --

THE COURT: Well, they're trying to save someone, they don't want them to die. That's very important. Obviously, as we know, that's a dangerous

aspect of any operation, the fact that the person is put under the various drugs to render them unconscious.

MR. ANTHONY: I guess what our declaration talks about is achieving sufficient I think it's called anesthetic death is very difficult to do, and maybe to a layman it wouldn't seem that that was the case.

But at least in the field of anesthesiology, to get someone to a sufficient level where they've achieved unconsciousness is actually a very technical medical procedure.

And without adequate training as to that aspect, that's what we would argue is the problem, is that we have people who aren't trained, who aren't anesthesiologists, or who aren't Medical Doctors, and they're the ones that are doing this.

THE COURT: And, of course, the Medical Doctors by virtue of their Hippocratic oath are reluctant, if not just absolutely refuse to get involved; is that correct?

MR. ANTHONY: That's correct, Your Honor, and that's another problem.

THE COURT: Any response, Mr. Owens?

MR. OWENS: As tantalizing as it is to jump in on the merits, our position has always been that this cannot be raised in a postconviction petition. Even if

the Warden's protocol was found to be improper, all he has to do is change it.

This Court -- the Warden is not a party. The Attorney General is not here defending the Warden and his protocol. A postconviction petition can only challenge the Judgment of Conviction.

The fact would remain, even if the protocol were illegal, the Judgment of Conviction would remain intact that he is sentenced to death by lethal injection. The courts don't decide anything further than it's by lethal injection.

It's the Warden who determines what particular chemicals, in what order, what all the procedures are. If you want to challenge that, you've got to sue the Warden directly.

There is no execution schedule for Mr. Greene. We could be years away. I don't even know if there's a current protocol in place, because we don't execute anyone here. William Castillo is the last one I'm aware of. The Warden was on the fly making changes in the execution protocol hours before the execution was to be carried out.

So what protocol will be in effect if and when we ever get to the execution chamber with the Defendant Greene, it cannot be known. It's not cognizable in the postconviction petition, and it certainly is not ripe for

review.

THE COURT: Okay. So this is lack of standing? Is that what you're saying?

MR. OWENS: Wrong format, the Warden is not here. And a postconviction proceeding can only challenge the Judgment of Conviction. There's nothing in the Judgment of Conviction that dictates a particular protocol.

The Warden determines that in his discretion, and he's free to change it without checking with the Court, change it any time he wants.

THE COURT: What's your response to that?

MR. ANTHONY: Well, first of all, Your Honor, Courts have routinely reviewed these types of issues. So the issue about whether this can proceed at all I don't necessarily think is an issue.

It's our position that the State of Nevada is the State of Nevada. The Attorney General is vicariously a party to the judgment here. They are the supervisors, I guess in a sense, of the District Attorneys.

They have different roles in our State system, but they are named as a party in our pleadings. So the idea that the Attorney General's office isn't before the Court, I don't think that that's a tenable position.

The other argument about mootness, I mean, I

IN THE SUPREME COURT OF THE STATE OF NEVADA
* * * * * * * * * *

MARLO THOMAS, Appellant, v. WILLIAM GITTERE, et al., Respondents.	No. 77345 District Court Case No. 96C136862-1 (Death Penalty Case)

APPELLANT'S APPENDIX

Volume 34 of 35

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

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CERTIFICATE OF SERVICE

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 APPENDIX shall be made in accordance with the Master Service List as follows:

Steven S. Owens
Chief Deputy District Attorney

/s/ *Jeremy Kip*
An Employee of the
Federal Public Defender,
District of Nevada

perhaps or perhaps not, the -- This is the declarant, keep in mind. The same person is consistent. There is the more shadowy figure throughout this.

We have this man and another companion, who may or may not have been the participant in the conversation, arrested with a knife with that description, and committing an armed robbery in that neighborhood.

Your Honor, additionally, if we look at Chambers versus Mississippi, what we're looking at here is, I believe, it clearly is admissible as an exception to the hearsay statute.

We have Chambers versus Mississippi, which tells us -- and, of course, that was also a death penalty case in which -- I mean, if Mr. Harmon's argument that for some reason it isn't admissible, would be persuasive to this Court, I would then argue under Chambers versus Mississippi that we have clearly exculpatory information, facts, reality that the jury should hear in a capital case, because of the Constitutional mandate of a right to present a defense, the right to compulsory process, the right to due process.

So, if you apply the Chambers analysis to any state statute, which Mr. Harmon may argue would render this kind of a statement inadmissible, I would argue that that would fail in light of the -- over -- certainly the superseding

Constitutional mandate here.

THE COURT: I'm not sure I understand that argument. Are you telling me that the United States Supreme Court says that there's a special evidence code for capital cases?

MS. FITZSIMMONS: No. What I am saying, is in the context of a capital case, the United States Supreme Court has held that, if a state statute results in the defendant's inability to present exculpatory evidence at trial, that can result in a denial of due process, equal protection, the Sixth Amendment, the Fifth Amendment and the right to compulsory process.

THE COURT: So the rules don't count in capital cases?

MS. FITZSIMMONS: Pardon me?

THE COURT: The rules don't count in capital cases?

MS. FITZSIMMONS: The rules count in capital cases. There's a heightened scrutiny. What we're concerned about, obviously, in a capital case, is that the rules not be employed to circumvent the more overwhelming Constitutional considerations of due process and a fair trial, and the jury's ability to hear exculpatory evidence in this context.

I am not conceding, your Honor. I'm stepping back to Chambers because I think both things needed to be mentioned here. But I'm not conceding at all, and, indeed, if we need to brief it, we can brief it.

I think, clearly, at a trial, this testimony would have come in, or should have come in. I obviously can't presuppose how this Court would have ruled. But I believe I can certainly supply this Court with ample authority that, in this circumstance, where we have -- Obviously, there's a concern. If my brother -- I'm on trial for my life and my brother says he heard, you know, some guy in a bar say something. But we have those indicia of reliability here.

Mr. Harmon said he didn't doubt Mr. Johnson's good faith. Mr. Johnson doesn't know Mr. Jiminez, or anyone else. In fact, Mr. Johnson's only involvement in this, or interest in this, was as a friend -- out of friendship with a -- with Sharon Lundy, who was a friend of the, you know, one of the victims.

So, we don't have any of the things that obviously we would be concerned about normally in a criminal case. And, in fact, we have independent indicia of reliability. This man said this conversation occurred. He described the individuals. He described the very unusual weapon. And, lo and behold, two days later -- And, again, we all are aware of the similarities.

Now, your Honor, passing through the threshold, then, that we have now been discussing as to whether or not, if you ordered a new trial, this testimony would have come in,

or could come in. And I believe that it could.

What we're dealing with here in the context of this evidentiary hearing is a Brady issue. And my reading of Brady and its progeny is quite clearly that, if the defense doesn't have something that clearly the police have -- and that has been established here -- We have that between the, I believe, it's Exhibit B and the testimony of Mr. Weinstock.

I am not accusing, and I never have accused, Mr. Harmon of bad faith here. What we know is somehow between Point A and Point C, at Point B, something happened so that the Constitutionally mandated flow of information to the defense didn't happen.

It could have been -- and I have my own very strong feelings about Detective Harry, I believe were borne out by his demeanor on the stand. But in any event, it could have been that Detective Harry misplaced them in some haze. It could have been something more sinister. It could have been that it got lost in the mail or misfiled. That doesn't matter. What matters is that Mr. Weinstock did not have evidence which is clearly exculpatory.

Now, again, your Honor, and Mr. Harmon has done an able job of arguing what he can argue. This is not a Sparks situation. This is not a situation where I'm alleging the destruction of evidence. In that case, malice or ill will on

behalf of the State would matter. That's a neutral factor in a Brady analysis, your Honor.

So, I ask the Court -- And, again, your Honor -- Well, I'll get to that point after I briefly touch on the second point that was raised, as an offshoot of Brady, the Giglio issue, Billy Ray Thomas.

Now, I raised the issue of Billy Ray Thomas because, obviously, I am alerted as counsel when I see a jailhouse informant with a substantial arrest record, who comes forward and testifies that he didn't get anything for what he -- for coming forward, but he just wanted to do the right thing. Because, in my experience, informants never are motivated by anything but some kind of self-interest.

So, I was alerted to it. I made the allegation in the petition. I was permitted after the evidentiary hearing was scheduled in this case to use subpoenas, and I used a subpoena and subpoenaed the jail records.

I was actually interested in many things, including how Billy Ray Thomas came to be housed in the same cell as Victor Jiminez. They don't keep those records. But I did see, in response to my subpoena to the North Las Vegas Jail, this document which has been admitted concerning Billy Ray Thomas. I forget which exhibit letter it is.

But, in any event, I was interested to see -- Of

course, the jury did hear that Billy Ray Thomas was released on his OR after he came forward with Victor. He testified that that was because it was Aspirin. Nobody ever brought up the fact he was arrested, essentially, for the sale of an imitation controlled substance.

But that's not, in my opinion, the important information. The important information is that, in July, right before trial, Mr. -- the first trial -- Mr. Thomas was arrested with others for standing on a street corner in North Las Vegas and, I believe, yelling out, rock, rock, rock. Having rock cocaine on his person.

One of his codefendants kicked in the whole interior or part of the interior of a police car. Mr. Thomas is arrested yet on another occasion involving rock cocaine activity in the community, and is cut loose by Bruce Scroggins.

Now, Detective Scroggins, when I called him, immediately said to me, yeah -- I mean, he -- Detective Scroggins said, yes, I dismissed it. I -- What he said to me on the phone was substantially similar to his testimony here in court, which is that, I dismissed the charges against Billy Ray Thomas.

I had known, of course, earlier because my investigator had happened to be, as Mr. -- as Detective

Scroggins testified to -- my investigator, approximately a year ago, happened to be in Detective Scroggin's office when Billy Ray Thomas called.

I mean, clearly, he is an informant. He is a snitch for Detective Scroggins. And, your Honor, Detective Scroggins has the absolute right to give Billy Ray Thomas anything he wants. He can give him a Cadillac. He can give him freedom. He can give him immunity with the DA's approval. He can give him anything for being an informant, but he has got to disclose that to the defense.

And, your Honor, I'd be happy to brief -- I think I've stated the primary cases in my supplemental petition. But you have to tell the defense if a benefit has been bargained for, as Mr. Harmon has argued, and I do not believe one was with Mr. Harmon. I certainly have no evidence to prove that. You have to tell the defense if a benefit has been received, because of cooperation. You have also got to disclose to the defense if an informant that you are calling in your case is an informant in other cases.

And we have shown, your Honor, in the course of these proceedings, that the last two criteria, or the last two factors existed that were not disclosed. It was never disclosed to the defense. And, in fact, Mr. Harmon has stated in his answer to the supplemental petition that Detective

Harry testified that Billy -- at this trial, that Billy Ray Thomas received nothing for his cooperation in this case, which is inconsistent with what he said here.

Whether or not it was bargained for, the benefit was received. And whether or not it was bargained for, Billy Ray Thomas, at the time he testified at the trial that ended up in the adjudication of guilt in this case, had been working for some time as an informant in other cases. And that needed to be disclosed too, and was not.

Now, Billy Ray Thomas --

THE COURT: I'm having a little trouble with your --

MS. FITZSIMMONS: Okay.

THE COURT: -- benefit received argument. If a police officer knows that a particular snitch is out there and happens to see him doing something wrong and lets him walk for selling cocaine, or whatever he's doing out there, does the police officer have to sua sponte, in his own mind say, guess what, I'll bet you some day some defense counsel in that other case is going to want to -- in all the cases that he's ever snitched on, is going to want to know about that. I have to start writing reports on all the cases he's snitched on so that defense counsel picks up on that.

I don't think police would be expected to do that.

MS. FITZSIMMONS: Well, obviously, we have different

views. That's not what happened here.

What I do think, yes. I think, if -- Let's just --

THE COURT: That's what he testified happened. He said he caught him doing something, and because he's been good to the prosecutor and the police, he let him off.

MS. FITZSIMMONS: Well, that's not what happened, your Honor. He was arrested by other people. Detective Scroggins stepped in in the course of reviewing the case.

THE COURT: Okay. Stepped in. Maybe he was arrested by -- He was arrested by somebody.

MS. FITZSIMMONS: He was --

MR. HARMON: NCF'd, is what he said.

MS. FITZSIMMONS: Yeah. He was formally arrested.

THE COURT: Right.

MS. FITZSIMMONS: He would have been prosecuted, although other cases summarily are NCF'd and some aren't. I mean, that's -- this could have gone either way. But Detective Scroggin's clear testimony in this courtroom was consistent with what he told me, which is that he made the decision to NCF this case because of Billy Ray Thomas' assistance in the case against Victor Jiminez and other cases in which he --

THE COURT: Similar things happen all the time.

MS. FITZSIMMONS: Well, they have to be disclosed.

THE COURT: I have criminal calendars on a daily basis

where prosecutors, police, even defense attorneys, will come to me and say, my client is helping the cops on a murder case. They want him out of jail. Or, they want whatever. Will you OR him?

And in cases where we normally wouldn't grant an OR, we do it.

MS. FITZSIMMONS: Of course you do.

THE COURT: Now, am I supposed to write a report?

MS. FITZSIMMONS: No. Because you are a judge. You're immune from this, your Honor.

What -- Of course you OR them. This is what I was saying earlier. You can give the guy a Cadillac and a million bucks.

THE COURT: Right.

MS. FITZSIMMONS: You can do anything to --

THE COURT: It's going to have a chilling effect on helping people out that help police, isn't it?

MS. FITZSIMMONS: Well, what happens is that the deals are cut, and whether or not the deals are cut the quid pro quo occurs. As Detective Scroggins testified to, the benefits flow.

That's also fine as long as it's disclosed. You can't then take the stand and have an informant say, I just had a revelation and decided to do this. And, no, I've never

gotten anything.

And you can't have a police detective say he's never received anything because of his cooperation when it's not the truth. And even had Detective Scroggins and Billy Ray Thomas not made those statements, you have -- You can do what you want as long as you disclose it.

And we've all been involved -- I'm sure you've been involved in trials, and I must be confident that Mr. Harmon has been involved in trials, as have I, where you've had a snitch that's gotten all kinds of benefits. And those are disclosed. And the defense counsel can impeach or cannot impeach, depending on the other circumstances of the case and the -- I mean, that depends on a number of factors.

But you've got to get to the point where everybody's operating with the same information as to what benefits this person received. What -- Is he an informant?

Had Arnie -- Let's assume, your Honor, that Arnie Weinstock had been told what he should have been told under Giglio. And let's assume that Billy Ray Thomas is now on the lamb, and avoided subpoena, and is on the lamb, apparently, for another warrant. You know, and is calling -- Well, this is Detective Scroggin's testimony.

Let's assume that he was an informant in two other cases, and that the informant status had been disclosed,

giving Mr. Weinstock a reason to look into Billy Ray Thomas and his information he provided in other cases. And let's say he lied like a big dog. That clearly -- Those kinds of things -- That's the reason you have to disclose the informant status, because that is fertile field, your Honor, in these cases for impeachment, and which is always exculpatory evidence when you're dealing with a jailhouse snitch.

So, you're worried about a chilling effect if we approach the bench and, hey, Judge, can you give him a break? There's a bad guy he's helping us with. That's not your obligation. That would not be my obligation. But that is the obligation of the State.

I mean, it's just clear. The Ninth Circuit -- There's really no way around that. And if it has a chilling effect, you deal with that on the back end. You can certainly try to rehabilitate a witness.

But, you see what you're saying, Judge, when you're saying it's a chilling effect, you're recognizing the value of this kind of material on cross-examination. You're right.

THE COURT: I'm recognizing the value of it to the person that's willing to help police.

MS. FITZSIMMONS: Right.

THE COURT: Who is not going to get out of jail if I'm approached again on this kind of a thing.

MS. FITZSIMMONS: Well, I don't understand that.

THE COURT: I'm not going to let him out. I'm going to say, police, I'm not going to cooperate with you.

MS. FITZSIMMONS: Why would you do that?

THE COURT: Then -- Because I wouldn't want to place myself and police and prosecutors in the same position you're trying to place them in.

MS. FITZSIMMONS: Your Honor, that's one thing I just really feel I have to address. I'm not trying to place anybody anywhere. I came to this case much later than you did or Mr. Harmon did.

THE COURT: You gave me the impression that you thought that there was some kind -- somebody's consciously doing something wrong with Billy Ray Thomas.

MS. FITZSIMMONS: No.

THE COURT: And I --

MS. FITZSIMMONS: The only thing that was wrong was it wasn't disclosed. I don't know, and Mr. Harmon has not indicated that he had any knowledge that Billy Ray Thomas was arrested. I asked him when he was on the stand if he Scoped him. He had no recollection of doing so.

But Detective Scroggins -- And, again, this is a decent guy who's doing his work, and he testified he didn't know he was supposed to disclose this kind of thing. He

hadn't gotten training. He hadn't been told that, hey, you know, there's this thing called the United States Constitution and there are these cases that come out of, you know, the United States Supreme Court, the Nevada Supreme Court and the Ninth Circuit Court of Appeals which require this kind of disclosure.

I'm not -- This isn't about blame. This is about justice. This is about a fair trial for Victor Jiminez.

I -- You know, when you're saying, well, in the future you might not want to let somebody loose if that meant defense counsel in some future date would know what happened so they could impeach this person, that's telling me two things. And the thing that's most significant for this proceeding is that's telling me that everyone understands the reason these things aren't disclosed is because juries listen to these kinds of things.

We see time and time again what juries -- the difference with a witness that comes into court that has no inducements and hasn't received anything is very different than the way that -- We're even entitled to instruction, your Honor, if someone receives a benefit as a result of their cooperation.

The law recognizes, I ask the Court to recognize this, and I think that this is one of -- This just very

clearly -- This was something that when Detective Scroggins testified on the stand, that, yes, this is prior to the trial. Billy Ray Thomas was an informant in lots of cases. This was the first time, to my knowledge, and I'm confident unless -- you know, I certainly can't show otherwise, that anyone knew this. That would have been fertile field. It wasn't disclosed.

We go back to the Brady issue. And, obviously, I am limited because there are many, many other issues here on which we did not present evidence. But the cumulative effect of these two things alone, your Honor, if you look at the Supreme Court opinion, if you look at what occurred, if you look at the arguments, the -- You know, if Billy Ray Thomas had been impeached, as he would have been impeached had this information been disclosed and had the other information been disclosed, this could very well have been a different trial.

We saw, you know -- Well, I won't get into that. But, in any event, your Honor, I know, you know, I've sat here and you've been -- I mean, we've had our moments, but you've certainly been paying attention to what I'm saying, and Mr. Harmon's been paying attention, and I know this has taken a good deal of your court time. But -- And I know that at certain times in these proceedings I would say, well in Federal Court -- and that's because I came to this court on

remand from Federal Court.

It is not because I necessarily anticipate that I'm going to have to proceed all the way back to Federal Court to get justice for Victor Jiminez. I am hopeful here, that as unpleasant as this may be, I understand that no District Court Judge, to my knowledge, in Nevada has ever granted post-conviction in a guilt phase issue in a capital case. It hasn't --

THE COURT: I don't know about that. I've granted post-conviction --

MS. FITZSIMMONS: Yes. Oh, I know.

THE COURT: -- but I don't know that it was about a capital case.

MS. FITZSIMMONS: Sure. The stakes are different in a capital case. The amount of resources --

THE COURT: I've only had a few capital cases.

MS. FITZSIMMONS: Yeah.

THE COURT: You've got to understand, you're not dealing with a large sampling.

MS. FITZSIMMONS: Okay. I'm not pointing at you either, Judge. What I'm saying is, in the state, we see this. And I can tell you, because it's something I have looked into alone and with others, that it just hasn't been done.

And because of that and other factors, maybe I would

not be hopeful -- and, obviously, rulings and things may not have -- The hearing's been difficult, I think, for all of us. But Friday night I couldn't sleep because of this court hearing, and I turned on the television about eleven thirty and there was a show on in which they were interviewing defense counsel -- different defense counsel from across the country and who were describing what it was like to see their client executed.

And I thought back on the court hearings, and I thought back on the joking that's occurred, you know, with Victor here and without Victor here. And I know that probably each of you who were here for these trials had very strong feelings about the case, the way the first trial went, the evidence that you saw, and I'm walking into something as a newcomer.

But I'm going to ask the Court to consider the fact that in this case, what I believe are strong issues, the Court may feel are not so strong, but they are issues that exist in a context of a young man with no prior violent history, who was convicted in a case involving -- it may have been -- obviously, it was strong enough to convict him -- but circumstantial evidence, and who has now been on death row.

The stakes in this proceeding, every step of the way, your Honor, are very high. And I did not mean to

minimize when I would say, well, I'd like to get this in the record for Federal Court. It's because that's where I've been.

But this is where I am now. And I am not minimizing this. I am hoping that the Court recognizes that these issues are substantial, and these issues do merit relief at this level. And I thank you for the time that you've given me.

MR. HARMON: Your Honor, I, too, will try to be brief. I have equally strong feelings about the case. Counsel says we're here about a fair trial for Victor Jiminez. I believe he got a fair trial; however, I would say to the Court that part of it is incidental.

The entire proceeding was initiated because two citizens of this community were brutally murdered. There's no evidence they provoked their assailant or assailants. They were victims of robbery homicide. And one senior citizen, in his late sixties, probably dropped like a rock when he was stabbed many times in the back.

But we're here because anyone who has been proven to have been involved in that crime should pay the price, and pay the full price.

It's always a matter of perspective. My perspective is that the Nevada Supreme Court has already twice reviewed this case. I'll start with a disclaimer. I don't remember a

lot of what went on. I don't remember the details and all the nuances of the testimony of Billy Ray Thomas. But I know that the State Supreme Court has already ruled that there was certainly sufficient evidence in this record to sustain all the convictions against Victor Jiminez.

I know that Mr. Jiminez, and I don't want defense counsel or the Court or anyone down the line to lose sight of this fact, basically convicted himself. It is Mr. Jiminez. Regardless of these other leads, that, in all probability, from the prosecutive point of view, were always rabbit tricks.

They weren't going anywhere. This case isn't substantively different than any murder case. As one of the detectives said, you start out with a million suspects. It could be anyone.

But they got a call from a confidential informant, who pointed them towards Mr. Jiminez, and then they confronted him. And they obtained some of his clothing. And after they ran some luminol tests and they established that there was blood from the knees down on his pants -- they'd already started the interview -- they went back to him, and Mr. Jiminez said, after they explained to him, there's blood on your trousers --

This isn't something John Johnson hears from people who really are not even positively identified. And Johnson

doesn't have the foggiest idea what the context was of the conversation he overheard.

This is Jiminez who says to the cops, all right, you got me. And there's more conversation about, well, suppose I did this by myself. If I talk to you, is that going to help out? And they say, well, tell us. And then Mr. Jiminez says, I can't, because my family will be in danger. And he puts his head down on the table and presumably sobs softly and doesn't say anymore.

But this is the same Victor Jiminez who talked to his parents. Now whether they are stepparents or natural parents or foster parents or whatever, it doesn't really make any substantiative difference. But they had strong ties to Mr. Jiminez. They were protective of Victor Jiminez.

The behavior of Frank and Lydia Jiminez in this courtroom at various times was featured in issues presented to the State Supreme Court. But the bottom line is, after he had talked with his parents, Bruce Scroggin was with him on the elevator, and Jiminez was sobbing. And Scroggin implied, what's wrong, Victor? And Victor said, after a short pause, it just feels better to tell someone about it.

Now, what had he told them? Well, we know at least, Judge, because it came into evidence, it had the necessary trustworthiness under the evidence code to come into evidence,

even though Lydia Jiminez would never proceed far enough with her testimony to acknowledge it, but we know that she had written a little postscript to her formal statement to the officers. And according to the mother of the defendant, he said, I did it. I did it. But I wasn't there by myself. And then he said the bartender jumped on him.

But, Judge, it was for those reasons, and other corroborating evidence, the burglary of Richard Warner's truck, the stealing of knives that were consistent with weapons used in the crime, the statement to -- of Leandrew Domingo, the big indian, who may or may not have been involved in the crime. But the comment while they awaited the court hearing, well, we're going to be locked up for a long time. And there was an illusion of not getting any sexual gratification.

There was testimony from Terry Cook, the criminalist, who didn't even find the six spots of blood on the right shoulder of Mr. Jiminez's jacket the first time. But he was directed to go back and examine the jacket, and he found human blood.

But this is representative of the type of evidence that persuaded the jury -- in essence two juries. It's true the first jury was hung. But without going into some diatribe about the mentality of that juror, I witnessed her performance

out in the hallway after the first trial. Two juries, at least twenty-three out of twenty-four, were persuaded that Victor Jiminez was a killer.

And on two separate occasions jurors have imposed the death penalty. And whether I disagree or not with the reversal of his first penalty, it really doesn't matter to these proceedings. If the State Supreme Court saw fit to reverse the penalty, we did it again, and they reviewed it and they affirmed it.

But now, Judge, we have a great system in this country, and we tolerate these appellate procedures to go on ad infinite. And it's not surprising that even though I'm the primary prosecutor on the case, a lot has slipped my mind during the years.

We've had over six years go by and Mr. Jiminez is still on death row and we're still affording him the effective counsel of Mrs. Fitzsimmons. We're still giving him the procedural safeguards. And it seems to me, at some point, we've got to streamline the procedure.

But I just want to take a few moments, having put this in what I believe to be its proper perspective. I want to address for a few minutes the issues raised.

Judge, I can stand without any reservation and tell you that, in my mind, there's been no Brady violation. There

hasn't been a Giglio violation.

I was asked about this case when I was on the witness stand. I remember Brady v. Maryland very well. Actually Giglio, G-i-g-l-i-o, it's reported at 92 Supreme Court at 158, is a little opinion that I wasn't really that familiar with.

But Giglio, and I start in reverse order, is the one which would appear possibly to deal with the issue regarding Billy Ray Thomas. I want to put Giglio in context, however, because I will note, in reading from Page -- Actually, I interpolated the U.S. Citation and the Supreme Court Reporter Citation. It's 92 Supreme Court 763.

I want to read to the Court a few lines from Page 766 of Giglio v. United States, which actually, I think, sums up what has happened in this evidentiary hearing.

"We do not, however, automatically require a new trial whenever a combing of the prosecutor's files, after the trial, has disclosed evidence possibly useful to the defense, but not likely to have changed the verdict." And they cite then U.S. v. Keogh, K-e-o-g-h.

Judge, the Giglio case, which did involve the failure of the prosecution to disclose -- Actually, it involved the prosecutor's office, and it was apparently the left hand not knowing what the right hand was doing. Because

the first prosecutor involved in the prosecution had agreed that the witness -- in fact, he was an accomplice of Giglio. In fact, he was the only witness -- unlike this case -- the only witness who furnished any type of evidence that connected Giglio in any way to the passing of forged checks.

He was a felon who had worked as a bank teller, and they evidently, according to his version, they cooked up this conspiracy for him to approve checks that were forged by Giglio. And the first prosecutor on the case apparently agreed that he wouldn't be charged. He'd be given immunity if he cooperated, first at the grand jury in giving testimony, and later on if he cooperated at trial. And, evidently, at least, the prosecutor who handled the trial claimed not even to have known that this was bargained for.

Your Honor, this isn't even remotely close to the fact situation we have. Counsel was talking. She was confronting me with this being clearly a Giglio situation we have in this case, not mentioning that the witness in Giglio was his accomplice, and not mentioning that he was the only witness who had a shred of connecting evidence.

THE COURT: What you just explained to me as being the facts of that case have to do with bargained for consideration. In other words, you testify and I won't prosecute you.

MR. HARMON: Absolutely.

THE COURT: Is that right?

MR. HARMON: Yes.

THE COURT: Okay. Now, that's not what I see as the Billy Ray Thomas issue --

MR. HARMON: That is not this case. And, your Honor, the suggestion by counsel that someone has misrepresented what happened isn't true.

THE COURT: Well, her suggestion is, if a police officer knows an individual who that officer sees being prosecuted or arrested for something and knows that individual has done favors for the State, he can't release that individual or decide to NCF him without writing some sort of a report to -- on that other case so that the defense attorney becomes aware of it. Now, that's, as I understand it, what the issue is.

MR. HARMON: Or disclosing it in some way to the defense.

THE COURT: I don't -- I've never heard of a case that says he has to do that. If he does, I think we better teach the prosecutors --

MR. HARMON: Well, certainly Giglio doesn't require that. Not in the type of circumstance we're talking about. This was a specific bargain worked out with the accomplice/witness. In this case, Bruce Scroggin truthfully testified that there was no bargain in connection with Billy Ray Thomas. Whatever

happened to him was independent of any bargain which occurred.

And this situation, which was NCF'd in April of '87, was something Scroggin made very clear the witness hadn't asked for. In fact, there's no evidence Billy Ray Thomas even knew he did it. It was done out of consideration for his continued activity as an informant. There was no express bargain in the Giglio situation. That simply is not applicable.

Counsel talks about things being clearly exculpatory. And, I agree, if evidence is clearly exculpatory, that it must be disclosed.

Your Honor, the courts, however, have traditionally, in defining what that means, made a distinction between exculpatory evidence and evidence offered simply for the purpose of impeachment. And at the very most, that's all this business about Thomas from time to time being an informant could have been, is impeachment evidence.

Now, if the defense digs sufficiently beforehand, perhaps they discover this on their own. I'm simply saying that the prosecution and the police, under Brady v. Maryland -- And the same applies to these hispanics who were arrested three days after the murder. If the defense is resourceful enough to discover that, then they can have a crack at introducing it at trial. Although, I submit, it's

not nearly as likely to be as admissible as Ms. Fitzsimmons maintains now.

I'm saying that that may be interesting information. It may be something that Arnie Weinstock says now, six years later, or four, or five, might be useful. But it does not fall into the category of Brady v. Maryland, in that context, your Honor, because with the defense talking about exculpatory evidence.

I certainly was curious to know exactly how the courts define that, because it was apparent early in these proceedings that Ms. Fitzsimmons would have a different definition than I had.

I remember that Louis Carroll had one of his characters say once, when I use a word, it means exactly what I want it to mean, neither more nor less. And I would imagine when the defense uses exculpatory, it's not going to always mean the same as when a prosecutor uses it.

I do observe in the context of the grand jury proceeding that we have a statutory definition, which in effect is, if it explains away the charge, then it's exculpatory and prosecutors must present it at a grand jury hearing. And we have the Frank case in this jurisdiction, which in the context of grand jury hearings discusses that definition of exculpatory evidence.

And there certainly are a number of areas where obviously it is exculpatory. If I have evidence that someone has mistakenly identified Victor Jiminez, that is, if we had have had eyewitnesses and there was someone who saw an assailant or assailants and made the wrong identification, and I know about that, then that is clearly exculpatory. That is something which tends to explain away the charge.

If we've got fingerprint evidence or firearms evidence or blood evidence or DNA evidence that exonerates someone, then that is clearly exculpatory. Now that's Brady material.

What the defense in this case is talking about is, evidence of two people who were arrested, and it's not right by the offense, it's over a mile away, and it's three days later, and it's a robbery. And if we went in every direction a mile away, there's no telling how many offenses we would have come up with.

Now, that may be interesting. The defense may feel that's something that possibly we'd like to explore. But it sounds to me like that was covered in the language in the Giglio case. It's just something that they think might be hopeful, but it's not Brady material.

Now, the United States v. Agurs, A-g-u-r-s, case, there is a discussion of the type of evidence that actually

falls into the Brady category. And this decision is reported at 96 Supreme Court 2392. And I'd like to read, with the Court's indulgence, a few lines from Page 2401.

They're saying, on the other hand, since we have rejected the suggestion that the prosecutor has a Constitutional duty routinely to deliver his entire file to defense counsel, we cannot consistently treat every nondisclosure as though it were air.

Then they go on to say: The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. And that's what I'm here wanting to talk about.

Reading on: Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that, if the omitted evidence creates a reasonable doubt that did not otherwise exist, Constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt, whether or not the additional evidence is considered, there is no justification for a new trial.

Now, what the defense is talking about and has been the primary thrust of the issue they've presented in their brief and at this evidentiary hearing, really boils down to

what was conveyed by a lady named Sharon Bromley, now Lundy -- apparently she used to work with the Las Vegas Metropolitan Police Department Pawn Shop Detail -- to North Las Vegas detectives.

She, at some point, and, of course, the detective doesn't remember, maybe doesn't want to remember that he furnished on a casual basis to someone who is certainly of a non-investigative status -- But there was some photographs, according to her, given her, and she went out and there were several times she made contact with John Johnson.

Judge, I don't question his good faith. I don't question his sincerity. I will observe, to me, it seems like there's an inherent implausibility in this idea that -- it sounds like it was the very evening after she got in touch with him, he happened to be out here. They'd been talking about the Gabe's Bar case and he happens to be out at Jack Daniels, and supposedly these two people -- if we're to believe counsel's version -- are confessing to their own involvement in a public place.

I heard what Mr. Johnson said. It just so happens, my experience as a prosecutor is that culprits are a bit more subtle -- in my twenty-five years. I haven't observed that it would be something that killers would readily want to do when -- as Johnson explained -- one of these declarants is

face to face with him, to be disclosing a murder.

And what I think is far more reasonable in this conversation he overhears, which is a mixture of English and Spanish, and he apparently understands very few words of Spanish, is that they may have been discussing the same case, but as a news item. In the same context that he discussed it with Lundy, a lot of people.

I asked Al Adams, formerly of North Las Vegas, where Jack Daniels was. And, apparently, it's about a mile in the other direction. It's in the 2400 block, according to him, and we're talking about 1622 for Gabe's Bar. If you want to call it in the same neighborhood, that's fine. We can define neighborhood anyway we want to.

But the fact is, it sounds like it was very soon afterwards. And it may have been a totally innocent conversation.

Now, I first heard counsel complaining that Weinstock couldn't get the hearsay out through Bromley. He tried, and clearly it was hearsay.

And my position now is, and I certainly anticipated that the Court might be interested in what the actual statutory definition is of a statement against penal interest, and it is spelled out in 51.345. And it's got to be a statement against interest which so far tended to subject the

declarant to criminal liability that a reasonable man in his position would not have made the statement unless he believed it to be true. And then it goes on to talk about the need for corroborating circumstances, which clearly indicate the trustworthiness of the statement.

But, now counsel surprises me, since she's relying on this as her main point. She didn't make any effort to present to the Court the exact testimony of the witness. I did. I thought that was the most germane thing to focus on. And what he said is, from the witness stand -- and this is all he knows -- Whatever evening it was. In a public place. He was there, others were there. These people were having a conversation. And he said he wasn't even paying any attention until he heard something about the killing of a bartender.

Well, I suppose if Sharon Lundy would have been there and they would have had their meeting at the Jack Daniels Bar, as opposed to his office, and these people were subpoenaed to come into court, they could have said, at some point, we don't understand a lot of English, and we weren't paying attention to what Johnson and Lundy were saying, but at some point, we heard something about the killing of a bartender, and, so, our interest perked up. That in and of itself doesn't establish anything.

I don't understand how counsel can say it would have

been admissible had Mr. Weinstock known about it, it would have come before the jury, when, to me, it's quite patent hearsay.

Then the witness went on to say: And after that, when I began to listen and it was a combination of Spanish and English -- and these are his exact words -- I heard something to the effect of -- He's not even sure what he heard. I wish we could have made sure the other one was dead. And that doesn't even sound like our case.

Judge, I don't know what they're talking about. He didn't know what they were talking about.

There were multiple stab wounds in the bodies of these two victims. And there's little doubt in my mind -- I still have a little bone to pick with the high court. When you've got a multiple killing -- and for Velasquez there was no excuse for his murder, except to seal his lips. But the court ruled, well, it wasn't a killing which was undertaken for the purpose of avoiding a lawful arrest. There wasn't any evidence of that, and, so, initially, of course, they reversed. They said we didn't prove that aggravating circumstance.

But that's the only reason to get rid of him. And I feel very sure that Mr. Jiminez and whoever else was there with him, were quite positive when they left that premise --

the premises of Gabe's Bar that morning, both of those men were dead.

Judge, it's my contention that there's been no Brady violation. This isn't even Brady material. And I urge the Court to deny the Petition for Post Conviction Relief.

MS. FITZSIMMONS: Your Honor, if I might respond to a few points raised by Mr. Harmon. Mr. Harmon, and certainly justifiably so, goes through some of the evidence in an attempt to convince this Court, I suppose, that each of the errors that we have raised individually and cumulatively are harmless.

If you look at the totality of the evidence of the trial as it is in the record before this Court, if you look at the factors relied on by the Nevada Supreme Court, clearly the claimed admissions by Victor Jiminez were factors, as was the testimony of Billy Ray Jacobs, as were other factors.

I would just point out that Detective Harry -- Obviously there's nothing really to corroborate the fact that Victor made those statements, as Detective Harry claimed he did, but Detective Harry's recollection.

Your Honor, in -- this is the problem that I am having in presenting what I see as the full totality of the problems with this conviction. Because I believe had -- but for the instances of ineffective assistance of counsel that I

have raised -- or alleged in the petition, these other issues would not -- Mr. Harmon would not be in a position to sit here, as he has done, and discuss the other evidence in quite the way he's been able to do so. But that is what I am left with.

Your Honor, I find it interesting that Mr. Harmon is a twenty-five-year prosecutor in this jurisdiction -- was not quite familiar with Giglio. In my mind, your Honor, that is in some ways more significant than if he had said he was unfamiliar with Miranda.

When he is reading to this Court from the Giglio opinion, and he is talking about how in Giglio we are talking about bargained for testimony, absolutely -- and Giglio is about checks and this is about murder. But there are countless cases in every -- in certainly the Ninth Circuit, in every circuit in ever state in this country that are progeny of Giglio, and those cases establish what the law is concerning this duty.

And I'm really -- This is not the histrionics of somebody arguing before the court. I'm amazed of the limited view of the responsibility that has been portrayed by Mr. Harmon in these proceedings.

THE COURT: I must confess to you, I was not familiar with this case, Giglio versus U.S., either.

MS. FITZSIMMONS: Okay. Well, this is obviously -- You know, you have not had many capital cases, Mr. Harmon has. I would appreciate an opportunity, if the Court is interested in considering this further, to brief this.

I noticed Mr. Harmon has read from a couple of cases that he has not -- were not contained in his briefs. And I could certainly be happy to supply this Court with the laws that exist in the Ninth Circuit, and as it existed at the time of the trial, concerning the obligation to disclose the kind of material that we're talking about here.

And, your Honor, I just -- one more point on the Billy Ray Thomas issue. In Mr. Harmon's answer and opposition to the supplemental petition, on Page 39, he states in response, in arguing against the prospective Billy Ray Thomas claim -- This is before the evidence was produced: Defendant claims that there were "inducements offered to Thomas for his testimony, when the record clearly indicates there were no inducements. Thomas testified he had been promised nothing for his testimony. So far so good. And received no benefits for it.

Now, Mr. Harmon's saying, well, maybe Billy Ray Thomas didn't know that he was getting out of jail on this charge. Maybe he just thought it was his lucky day. I, of course, questioned what it would have been like for the State

to bring a jailhouse informant who had been released on one charge and is now -- was now coming in chains in custody to testify against Victor Jiminez.

But, in any event, Mel Harmon continues. Furthermore, the detective who took his statement -- that's Bruce Scroggins -- confirmed he did not threaten Thomas. No indication of that. Or promised him any favors. No testimony from Detective Scroggins there were any promises. And that he did not secure any benefits for Thomas in exchange for the information he gave.

Well, he did secure benefits. At the very minimum, Detective Scroggin's testimony is, these benefits, these NCF of these felony charges, occurred because of the --

THE COURT: There's no evidence that Scroggins called up Thomas and said, I just NCF'd you. That's so you'll do this.

MS. FITZSIMMONS: Exactly. Two different factors. And that's why I was reading it and trying to make the distinction for the Court.

What Mr. Harmon said is that Thomas didn't know it. You know, didn't ask for it. Didn't know it. Didn't get it. And he also said Detective Scroggins testified, and Detective Scroggins clearly knew what he had done.

Mr. Harmon has told this Court, again at Page 39, that Detective Scroggins confirmed in this trial testimony

that he didn't threaten Thomas, promise him anything, and he didn't secure any benefits for Thomas in exchange for his testimony.

He did secure benefits for Thomas. He reduced charges. I'm just telling your Honor, without laboring it, because, obviously, we're all -- and, again, Mr. Harmon has said this and it's true. We have a very different view of exculpatory, and, obviously, we have a very different view of the state of the law in Giglio. And I think that maybe -- We can sit here and argue until we're all blue in the face. I would like a chance to brief that for the Court.

Moving on to the next issue, which is the Brady issue. Again, Brady's Brady. You know, Miranda's Miranda. These things evolve. And what we're talking about here in the context of this case is -- and the law is -- And, if you'd like, I'll be happy to brief this for you.

There are cases that say that a prosecutor has a duty to disclose other suspect information because it's Brady material. We can't argue. I mean, there are other arguments that have been made. But this is clearly other suspect information.

Mr. Harmon has posed examples to the Court of what he views as Brady material: a false identification, fingerprints that don't match, maybe a hair that belongs to

somebody else. Well, why is that Brady? Why is that exculpatory? Because it points away from the guilt of the defendant and towards other suspects. That's what this information was, your Honor.

I didn't go -- and Mr. Harmon said this on Friday and he said it again today. We could go anywhere in a one mile radius for Gabe's Bar and find other things, other events, I suppose, other rivalries.

Your Honor, we didn't come upon this information by me doing a blanket subpoena for location incident reports for a mile radius of Gabe's Bar. This material was found in this file, in this case, under this DR Number. I am not the person who's coming in late in the day and saying, oh, but look. Here's this other crime.

This came to me in the context of the investigative detectives in this case feeling there is a connection, working on the connection, going and -- Well, I don't believe they went. But, in any event, that's where this is.

I'm not the person that's making this connection. This connection was made at a time very close in proximity -- temporally to the event and prior to the arrest of Victor Jiminez.

So I hope the Court is not misled. Because that's not what I'm doing here. And I hope I made that clear.

Now, although Mr. Harmon says, and has said before, that he does not argue the good faith of Mr. Johnson -- and because he said that, I let go a police detective who was in the hall waiting to testify to the credibility of Mr. Johnson -- Mr. Harmon has kind of back doored the Court. I mean, back doored the subject by saying, but I find it inherently implausible that Mr. Johnson could hear this information in the morning, overhear this conversation at night, and that two people would be in a public place talking about such an event.

I think we all recall Mr. Harmon making that argument. That's because it suits Mr. Harmon to say it's implausible to think that two people would be somewhere talking about a murder. Because why? Because that would be a reckless thing to do. Because they could get in trouble.

Then Mr. Harmon, in the context of his hearsay objection says, well, this doesn't come into our statutory exception because, of course, it's a statement against penal interest. But he didn't believe --

You know, this isn't a statement -- I mean, it's one or the other. Either Mr. Harmon doesn't believe that the conversation was interpreted correctly by Mr. Johnson, because it's difficult to believe two people could be blurting out a murder in public. But if that's the case, then, your Honor,

then the first criteria, the hearsay exception is met, because it is a declaration of interest that would substantially put these people in jeopardy for their criminal conduct.

And I believe that it does. I believe that the statute is dead on point in this case, and the prophylactic reasons that we have -- this concern are not met here. That we don't have any showing that this was a set up job. That Mr. Johnson has any reason to become involved. These are innocent bystanders. People that are volunteered information, much as people often do.

And I think that a jury ought to be -- I mean, a jury should be entitled to hear this. Mr. Harmon can then argue against it.

You see, this is the basic problem as I'm hearing it from Mr. Harmon. And I am concluding, your Honor. But we're both advocates, and I think Mr. Harmon is a, you know, entrenched prosecutor. I'm an entrenched defense attorney. I haven't been at it as long. But we both really do view the world differently. And the law puts on him a duty, and this is a duty that I quite confidently don't think I could handle because I'm an advocate. I think it would be very difficult for me.

It's this man, coming from where he comes in life and his perspective and his belief in the rightness of his

cause, who is going to determine what -- or what is not exculpatory. And I believe that Mr. Harmon can do that and can do that honorably.

But I question what happens when you have someone who is an advocate who then thinks -- This is what the mental process is -- Well, here's two guys, and, yeah, you know, they were overheard, and they were I.D.'d, and they had a knife. I mean, all of what we have bundled together here.

But then in the same thought process we're going to have Mr. Harmon say, but, on the other hand, isn't it kind of coincidental, and it's hard -- you know, arguing against the position. And then in his own thought process, perhaps -- and I am not saying, nor does Mr. Harmon claim, that he knew this material, he is arguing now that it is not exculpatory.

But this is the problem. Clearly -- I mean, Mr. Weinstock, who tried the case, I, who would love to try this case and would do so for free if we got a new trial, am telling you that as an advocate on this side --

THE COURT: I don't know about this one, but I've got some more if you're interested in volunteering.

MS. FITZSIMMONS: No, no. This has been -- They're difficult cases, your Honor, in this --

But, in any event, this is mother's milk to defense counsel. This kind of information. And beyond just the

ability -- Mr. Weinstock has read the exculpatory definition as it comes to grand jury. That is not what the law is. But just beyond that ability to talk about other suspects.

At the time that this information should have been available it could absolutely have led to actual evidence. I mean, the knife is now gone, unfortunately. The people are gone. We have some information that one did -- they did some time. They were in custody in Nevada at the time of Mr. Jiminez's trial.

All right. We have no information anything was ever run physically about them. Any results. They were here, now they're gone, and now Mr. Jiminez is on death row.

In any event, your Honor, I will conclude my statements and would ask for the opportunity to brief the Court. I think we could do it both quickly. It's not -- There are narrow issues. The issues have been narrowed here as to what these facts -- I mean, if we apply what Brady and Giglio are today and were at the time of this trial to these facts, I am quite hopeful that it would be helpful to the Court and helpful to Mr. Jiminez's position.

THE COURT: I don't think additional briefing is necessary. I will give you this. I think that the report concerning John Johnson should have been disclosed to defense counsel. Not necessarily because I find it to be Brady

material. I'm not sure that it is. But it is certainly other suspect information that was contained within the police department's file under the same DR Number. I don't know why it wasn't disclosed. It might have been simply an error in Xeroxing. Probably that's what it was.

I don't find any intentional concealment by police. But it's something that should be disclosed, in part, because we have in this jurisdiction an open file policy. And that means that when defense counsel goes to the law enforcement or goes to the district attorney, the district attorney is suppose to disclose to defense counsel everything that the police have. That presumes that the district attorney has everything that the police have. And they usually do, and they should, and, if they don't, that's an error.

The question is, do we grant a new trial every time that doesn't occur? You know, and this is true of the Billy Ray Thomas matter. In my mind, having picked two juries and heard this case over and over again, there is no reasonable doubt that Mr. Jiminez was one of the individuals that participated in this murder.

I personally believe that there was another one. I think maybe even Mr. Harmon would concede that Jiminez didn't do this by himself. But Jiminez was one of the two or more persons that did. And the admissibility of what you're

talking about, Billy Ray Thomas having been NCF'd subsequently, and even if John Johnson's hearsay statements became admissible, and I don't think that they are, would not create a doubt that is reasonable. That is not going to change.

Mr. Jiminez was guilty of this. He was tried fairly. Maybe not perfectly, but, I think, fairly. And I think his conviction should stand.

I'm going to ask Mr. Harmon to prepare some proposed findings for me.

MR. HARMON: I'll do that, your Honor. Thank you.

MS. FITZSIMMONS: Your Honor, might I make an oral request for the transcription of these proceedings and for the December 18th proceedings?

THE COURT: The only problem we have in granting your requests are that you're not appointed by me --

MS. FITZSIMMONS: Yes.

THE COURT: -- and I think that the Federal Government is supposed to pay for these, or something.

MS. FITZSIMMONS: Your Honor, I am appointed by you.

THE COURT: I appointed you?

MS. FITZSIMMONS: Yeah. I made a motion to be appointed in these proceedings and you appointed me.

THE COURT: Oh, okay.

MS. FITZSIMMONS: You've even paid me, your Honor.

THE COURT: Have I?

MS. FITZSIMMONS: Yeah. Well, a long time ago.

THE COURT: Adequately?

MS. FITZSIMMONS: Well, it's never adequate. But it was something.

THE COURT: I didn't know that I appointed you. I thought I had appointed somebody else.

MS. FITZSIMMONS: Well, they haven't done much. If they have, Judge, I haven't seen it.

THE COURT: Well, okay. Then I'm happy to have you make application for a transcript. That's no problem.

MS. FITZSIMMONS: Thank you.

THE COURT: I thought you were appointed by the Federal Court.

MS. FITZSIMMONS: I was, your Honor. And then what happens is the Federal Court -- This was an odd situation, because Mr. Jiminez filed a Pro Per Petition in Federal Court. We did most of the work there. So you saved a bunch of money --

THE COURT: The Federal Court sent it back, I know, to exhaust the State remedies.

MS. FITZSIMMONS: And sent it back to exhaust. And I made a motion for my appointment and for payment of fees and

costs.

THE COURT: I remember ordering a lot of money for you, but I don't remember ordering an appointment.

MS. FITZSIMMONS: Thank you, your Honor.

THE COURT: Well, let's put it this way. It was more money than I've ever ordered in any other case.

MS. FITZSIMMONS: Oh, on the investigation?

THE COURT: On the investigation.

MS. FITZSIMMONS: That's correct, your Honor. You told me that. Thank you.

THE COURT: All right.

MR. HARMON: Thank you, Judge.

(Whereupon the proceedings concluded)

* * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the sound recording of the proceedings in the above-entitled case.

Arlene M. Blazi

ARLENE M. BLAZI
Transcriber/Special Reporter

EXHIBIT V

EXHIBIT V

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ORIGINAL

—FILED IN OPEN COURT—
JUL 31 1996 19
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By Josephine Lee Deputy

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. LARRY DARNELL BAILEY, #0411509 Defendant.	)	Case No. C129217 Dept. No. IV Docket No. C

Before the Honorable James A. Brennan

Tuesday, July 30, 1996, 10:00 a.m.

Reporter's Transcript of Proceedings

JURY TRIAL

VOLUME X

APPEARANCES:

(See separate page)

REPORTED BY: Renee Silvaggio, C.C.R. No. 122

CE

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I N D E X

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opinion on any matter connected with the case until it's finally submitted to you.

We'll take a ten minute recess.

MR. ORAM: Your Honor --

THE BAILIFF: For the benefit of the bailiff.

THE COURT: All right. Go ahead. It might be a little longer. We've got some legal matters. But stand by.

(The following proceedings were had in open court outside the presence of the jury:)

THE COURT: Let the record show the jury has left the courtroom.

Go ahead, counsel -- who?

MR. ORAM: Your Honor, I have a motion for a mistrial.

I don't know if I'm just wasting my time anymore. I talked to both of these prosecutors up in their office before this case started. I asked them were any promises or any -- were you offered -- did you offer anything to the snitch? No.

I asked today for Giglio material. This morning, I said have any offers been made?

And now, what I find out, is that an offer to go to the parole board or write a letter to the parole board or anything before the parole board has been made.

Why don't they tell us these things, Judge? Why can't they just give us that simple courtesy?

I think, Judge, that we've been courteous. We've tried to try this case as fairly as the defense can without throwing constant low blows.

I am starting to feel that Mr. Mitchell is just constantly coming out and throwing low blows. He could have told us, look, all I did was tell him I'd send a letter to the parole board and I would be happy and I wouldn't be complaining at this point. But they can never just tell us that, can they?

And, Judge, I asked for that. I asked for Giglio material right before that man got on the witness stand, and they don't tell us.

Why, Judge?

I move for a mistrial.

THE COURT: I don't know why.

MR. MITCHELL: Judge, I don't know what he's talking about. I -- when he first asked us for Giglio

material was long before anything was said to this witness about us going to the parole board. He didn't ask me for anything before this man took the stand.

THE COURT: Well, counsel, he doesn't have to ask you every other day.

MR. MITCHELL: No, that's true, Judge.

But the promise this witness has testified to, to write a letter to the parole board was made on, what -- on Friday; and it's true, I did not immediately call up counsel, nor think to, to say I just told this guy that because of this Larry Bailey incident, where he was in the same cell, we would write a letter to the parole board and tell them what he has done, in testifying for us.

I omit -- I omitted that. I made that mistake. But where is the prejudice here?

He does know about it. He was able to cross-examine regarding it; and he knows about it now, and he can do -- he can exploit it. I didn't intentionally withhold it, but I -- I -- I wasn't asked about that before we began with this witness. Mr. Oram did not ask me that question.

I have never withheld intentionally anything like that.

MR. ORAM: Your Honor, I asked this morning for Giglio material.

Now, maybe Mr. Mitchell doesn't know what Giglio material is. But I am -- am I in the same courtroom? I asked for Giglio material this morning before that man came near that witness stand.

THE COURT: I agree, counsel. I think you did, too; but as Mr. Mitchell says, where is the prejudice?

You are going -- where is the prejudice?

MR. ORAM: Your Honor, where is the prejudice?

THE COURT: How has it affected your defense?

MR. ORAM: It -- we are entitled to that before. When we request it, we request it in motions. We ask them, when they represent to the Court that it's not true, now I'm trying to wing it as the guy is saying this.

I'm -- he's saying that they're going to write a letter. Now I'm trying to think, okay, I've got about 10 minutes or 20 minutes while this is going on, to try to think of an attack.

Your Honor, I sit up every night thinking about questions that I'm going to ask these

witnesses. I don't go to bed and just watch T.V. or watch the Olympics. I sit here and work on this case.

Now, when I ask Mr. Mitchell for something, I expect an honest answer, not one of what is now becoming consistently a Mr. Mitchell answer, Your Honor.

The prejudice is there because I have a right to proper cross-examination. I have a right to proper preparation. And how can I do that?

I took this home last night to go through it and go through my questions. The Court can see that I have my questions. (Indicating). And they should tell us these things. When I ask, why don't they just tell me the truth and stop lying.

THE COURT: Well, you want to put something on the record too?

Go ahead.

MR. WOLFBRANDT: I was going to help you out with your question about the prejudice of it.

The first time we hear about this offer to write a letter to the parole board is when it comes out of the witness' mouth.

We then explore it on cross-examination. The State then felt compelled to have to give an explanation as to why they made that offer, which is

why we approached the bench, which is why I made the objection; Your Honor gave us a continuing objection, because then they delved into the fact that Mr. Zanghi, as late as last Thursday, was housed -- or was placed in a same cell -- cell, where now Mr. Bailey is -- to this jury, is now known to be in custody; and that he's placed together with Mr. Zanghi shackled, Mr. Bailey not shackled, and that he was just deathly afraid because of all these threats he's been getting up at the prison.

And all that stuff is so inflammatory and absolutely prejudicial to Mr. Bailey and has absolutely nothing to do with whether or not the State or why the State offered to write a letter to the parole board.

And I don't think any of that needed to come in. We objected to it and there is the prejudice.

MR. MITCHELL: Judge, can counsel represent honestly that had they had this information on Friday, that they would not have asked all the same questions of our witness when he's sitting on the stand?

If they knew that I had offered that, would not they have asked him all the same questions?

I mean, it came out because of

their questions, which were the same ones they would have asked anyway. There is no prejudice here.

THE COURT: Does anyone else want to put anything on the record?

All right. I find no prejudice. I find there was no request for a continuance after he so testified. The motion is denied.

MR. ORAM: Your Honor, do we have ten minutes?

MR. SCHWARTZ: Your Honor, just with regard to the time, we had -- our next two witnesses will be very long, and I don't -- one is not in the courtroom -- or in the courthouse right now. The other one is outside somewhere.

If we could break for lunch now, we could -- it would be easier for us to put it together for this afternoon. They are very lengthy.

MR. ORAM: We have no objection to this.

THE COURT: All right. 1:15?

MR. SCWHARTZ: That's fine.

THE COURT: 1:15?

MR. ORAM: Yes, Your Honor.

THE BAILIFF: Bring them in?

THE COURT: No. We're breaking for lunch.

THE BAILIFF: You've admonished them?

THE COURT: I've already admonished them. Just tell them to come back at 1:15. It's lunch hour now. Okay?

Thank you.

(Proceedings recessed.)

Las Vegas, Nevada, Tuesday, July 30, 1996, 1:20 p.m.

* * * * *

(The following proceedings were had in open court outside the presence of the Jury:)

THE COURT: Let the record show the continuation of trial in Case C129217, State of Nevada versus Larry Darnell Bailey.

Show the presence of counsel and the presence of the defendant.

Do you have something outside the presence of the Jury?

MR. ORAM: Yes, Your Honor.

This is a continuation of our arguments that we were making before the break.

THE COURT: All right.

MR. ORAM: I went and researched the Giglio, I read the case. I also have -- and I will be citing to -- the Alabama Capital Defense Trial Manual.

THE COURT: What's the citation on the Giglio case?

MR. ORAM: The citation on Giglio is 405 U.S. 150. It's a 1972 case.

Giglio, Your Honor, if I can just inform the Court, deals with the fact that the snitch in that case or the person who is testifying, they never actually brought out any promises, and the defense attorney later finds out that there were promises made; and that was the sole issue before the Court.

However, it has come to me, the Giglio standards, that a defendant has a right to all promises or potential promises of leniency that a witness may receive.

Now, according to the Alabama Capital Defense Trial Manual, it says:

"Under Giglio versus United States, a defendant's discovery rights include any impeachment information, including agreements or arrangements with the State -- with the State witnesses whose testimony is material to the proceedings."

Your Honor, I think that what we've done is we've applied a different standard here.

We don't need to show that there was any type of prejudice. Prejudice is presumed.

And what I mean by that is, let's say, this gentleman, Mr. Zanghi, had been offered a

million dollars and the promise that as soon as he's done testifying, he'll be released.

Now, the State can make the argument that I asked for Giglio; we didn't tell him anything about Giglio; then he gets up here and he says I'm going to get a million bucks and I'm going to get released immediately.

Well, I'm entitled to cross-examine him. So I could ask him any question I wanted to; therefore, there is no prejudice.

And so my point here, Your Honor, is: It doesn't matter what that gentleman said was the promise; could be anything. They can still make the same argument that we have the right to cross-examine him and -- and I believe, as one prosecutor said, in all honesty, would the questions have been different?

That's not the point. What we have here is a blatant discovery violation. We asked for it in my -- I filed a motion on September 11th, 1995, entitled Motion for Discovery.

On page nine of that, we specifically discuss, under the points and authorities, Giglio, and we asked for this pronouncement of the scope of discovery as being reiterated by the United States Supreme

Court:

"The scope of discovery has been reiterated by the United States Supreme Court with reference to evidence that goes to the innocence or guilt of the defendant in situations wherein the credibility of a witness is in issue."

It then goes on, next paragraph:

"Credibility is an issue when a suggestion of leniency has been made to a witness," citing Giglio.

Now, we asked for that. We were entitled to that.

Now, their argument is going to be, well, when -- at the time that we heard that motion, we had not made a promise.

So what I did was I asked this morning, again, Giglio material. I want Giglio material.

They said we'll give it to them if there is any.

They then call a witness and we find out there is Giglio material, and the whole argument that's being made is that there is no prejudice.

Well, of course, there is

prejudice. It's presumed. Because if that's not the case, Judge, then the logic behind it would be that they might as well -- let me give you an example.

There is a second snitch coming in that may come up. I asked for Giglio. They told me that they'd give it to me.

So, they don't give it to me; they call him up and he says I got a million bucks for my testimony; and then the State can argue, well, Mr. Oram, Mr. Wolfbrandt could have cross-examined him. There is no prejudice here. It came right out.

That's not the point. The point is they don't have trial -- there is no right to a trial by ambush.

The Supreme Court says you have to give it to them. They have to give me this material. When I ask for it and they make an affirmative statement essentially denying that there is Giglio, and that's what exactly happened this morning, Your Honor.

I asked for it. I did not receive it, and it came in. And now their whole contention -- and the Court's ruling is that we didn't suffer prejudice.

But, again, Your Honor, that's

not the issue. The issue is there is a discovery violation, that the State needs to be punished and taught a lesson, that essentially they have to give up this evidence when it's rightfully requested.

It is Mr. Bailey's right to have that before that witness got on the stand. Otherwise, we might as well throw Giglio out the window and just say that all they've got to do so is put on anybody and make sure that they talk about any promise of leniency that they may receive and that's sufficient.

So what was the point in me filing this motion? What was the point in me trying to be effective in this case?

Essentially, they've rendered us incompetent.

With that, Your Honor, I know Mr. Wolfbrandt has matters to add; but with that, I'd submit it.

And, also, Your Honor, I think that, at this point, that we would like a hearing. We want Mr. Mitchell to take the witness stand and be -- and I would like to question Mr. Mitchell as to whether there is any more Giglio material in this case.

And I think it's insufficient

at this point for Mr. Mitchell to stand up and tell us whether there is, because last time I asked Mr. Mitchell to do that, he didn't tell us that there was.

And I -- I'm just not going to take it at face value anymore that what Mr. Mitchell is telling us is forthright.

With that, I'd submit it.

THE COURT: Did you want to add something?

MR. WOLFBRANDT: Well, Judge, I think that Just to reiterate as to what I said before that -- that I think the prejudice did attach in this case because the State suggested that had we known earlier that they had made this promise to Mr. Zanghi, because he was afraid of being in the same cell with -- with Mr. Bailey.

We knew that he had been in the same cell with Mr. Bailey. It was Mr. Bailey that contacted the guards and said get him out of here, this guy is a witness in the case, so we knew that had happened.

We made a point of bringing that to the Court's attention.

The State, I am sure, did talk with the Jail and ask that it not happen again, and, yet it did.

When it happened again -- well,

last week when it happened, when supposedly the witness was so terrified and so afraid, that the State then made that offer of a letter to the parole board.

Now, it's a little different than saying, okay, if you testify here, that we will dismiss or not pursue any pending felonies against you. It's a little different than saying we'll go ahead and release you from custody, but that's only a matter of degree. They still made a promise to him. They still tried to satisfy his -- his fears.

And then, when it comes out, in front of the jury, that a promise has been made, and we're forced at that point in front of the jury, to delve into that, then the State says, well, we need to go into the reasons why we made that promise, and the reasons why they made the promise is because he felt in fear of Larry Bailey because he had been put in the same cell with Larry Bailey last Friday -- or last Thursday.

That becomes the prejudice that now the jury has heard; that he is, for one, afraid of Larry Bailey; that Larry Bailey was unshackled and he's still afraid of him; and that he was so petrified because he had had these threats from something that has no connection to Larry Bailey whatsoever; that because of the code of the

prison, he had been threatened to get stuck or stabbed or something up in the prison because he was going to testify for the State.

Now, the Jury knows that Larry Bailey has been in -- or the only inference they can draw is that Larry Bailey has been in custody ever since he was arrested in May, right up until today as he sits here.

And, so for that, I think that it violates -- the prejudice is there. It violates Larry's Fourteenth Amendment right to due process and to have a fair trial; and it really and truly affects Mr. Oram's and my ability to be totally effective for Mr. Bailey.

THE COURT: That's all part and parcel of the offer of the State to write a letter. That's the reason why the State made the offer to write the letter. And I don't think then that -- if you are going to allow the offer to do something for the witness, and that you don't explain the circumstances, why did you offer to write the letter?

And it's -- obviously, as the witness testified, he's jumping up and down that you are really not doing anything for me, in essence, is what it is. And you put me in with the defendant and I'm getting threats out of the prison and so forth and so on.

I don't know as you can just

leave it hanging, to say that, yeah, Mr. Mitchell offered to write a letter to the parole board for me, and then just leave it hanging there?

MR. WOLFBRANDT: But, see, we're not given that opportunity to make that decision or make that choice or an informed decision on that.

It just comes out -- if we knew -- even an hour before he goes on and testifies, that he got the letter, and that the reason that he got the offer to make -- or that the State was going to offer to write that letter -- I mean, I've had that happen routinely in trials where a snitch is offered a letter for the parole board, and they all say, it doesn't really matter anyway, the parole board is going to do what they're going to do -- I've never really been much comfortable with that -- we would have just let it go.

But once it comes out and we ask them about it, when did you get this, now all of a sudden it comes up that there is a reason why. We wouldn't have gone into that.

THE COURT: You haven't -- you haven't really shown what you would do any different.

Of course, I understand that it's Mr. Oram's contention that I guess it's prosecutorial

misconduct; and, therefore, the penalty is to grant a mistrial. I don't know as though that's really the penalty in a matter such as that.

I don't know as though the plaintiff should suffer such a harsh sanction over that type of thing. It's not as though it didn't come out. It's not like the Giglio case.

MR. WOLFBRANDT: Well, but, see, when you say it doesn't make a difference or -- how do we know?

We didn't know the guy even had a promise. That came out on direct examination when the State mentioned it. That's the first time we know about it.

If the State doesn't even ask about it, we still don't know about it and it's irrelevant whether he was housed with Larry Bailey.

But the State created the problem.

THE COURT: Well, all right. Let's suppose you knew about it Friday or you knew about it earlier this morning; then you would have known about it timely.

MR. WOLFBRANDT: Right.

THE COURT: And if you don't know about it timely, when it comes up, you can ask for a continuance, if you are asking for the same amount of time, which you didn't

do.

You have previously asked for a continuance in these proceedings, which I denied, because you had about a week or so before the witness came on to ascertain or discover whatever you wanted to.

MR. WOLFBRANDT: Which is exactly what we're doing. We're investigating that individual.

THE COURT: Well, but you didn't need a half a day of continuance either on that individual, and it was a -- a non-meritorious motion and a spurious motion and a motion to delay.

And -- and so -- I can understand why you are making all these motions for mistrials. You are protecting the record. But you still haven't shown me anything of any substance in this case to grant a mistrial.

MR. ORAM: Your Honor, the fact that the prosecution -- I asked for Giglio material. I asked the Court for it. The Court said that would be granted. I think the Court said that. Okay?

THE COURT: Yes.

MR. ORAM: They don't tell you. They don't tell this Court the truth, that --

THE COURT: Counsel, I understand that. But

I don't think that's the sanction. I don't think a mistrial is the sanction unless there is some prejudice.

MR. ORAM: What's the sanction then? No sanction?

THE COURT: I don't know. Maybe take it up with the bar association or something. I don't know.

MR. ORAM: How does that help --

THE COURT: But I don't think that it's that severe that you grant a mistrial into the third week of trial.

MR. ORAM: Your Honor, if I stand here before you and begin to tell you things that aren't forthright, then I'm not being truthful with you, Judge.

THE COURT: Your client doesn't lose the case necessarily. You get reported to the bar association.

MR. ORAM: Well --

MR. MITCHELL: Judge, just my silence --

THE COURT: Let me hear from you. Go ahead.

MR. MITCHELL: I wanted to say my silence should not be interpreted as adopting as true what Mr. Oram was saying. I would be very happy to take the witness stand and this is what I would say:

First off --

THE COURT: Well, why don't you raise your

hand and make a sworn statement. Do you want to do that?

MR. MITCHELL: I will. I will.

THE COURT: Swear him in.

Whereupon,

SCOTT MITCHELL

having been called as a witness by the Plaintiff and having been first duly sworn to tell the truth, the whole truth and nothing but the truth, gave a sworn statement as follows:

MR. MITCHELL: Your Honor, the events of this morning -- I -- I challenge Mr. Oram on whether or not he had even asked me for Giglio material.

First of all, let me say this: The term Giglio material means nothing to me. I have never heard of the case.

Now, maybe I'm admitting something that I should be embarrassed to admit, but I -- I welcome Mr. Oram going up on the seventh floor where I work and going down the hall and asking everybody if they know what Giglio material is.

Most of them, I anticipate, will say no. I have asked a team chief this afternoon,

after this accusation was made, if he knew what Giglio material was. He'd never heard of it. I don't know what that is.

But when Mr. Oram said that he had specifically asked for this information of what inducements were given to Charles Zanghi, I said he had not, because nothing he said clued me in to that that's what he was asking for.

But Mr. Schwartz told me that he told me to tell Chris Oram about the inducements. Now, what I did -- and Mr. Schwartz told me that he saw me lean over and speak with Chris Oram and assumed that that's what I was doing.

And what I was doing, at that moment, and Mr. Oram hasn't said this, but I was explaining to him about James Like, because that's what we had been talking about, and that's what I thought everything that the motion was about had to do with.

And so I turned to Mr. Oram, and he will -- he will back me up on this -- I said, Chris, James Like has at least 12 felony convictions. He may have more. He's awaiting trial. He is no one that you need to worry about. I said those words to Chris Oram.

And whatever motions he made,

whatever he said to the Court, I thought we were talking about James Like, and I wouldn't have recognized the term Giglio material.

But I was trying to give him everything I thought he wanted because that's what the hearing was about. We talked all about James Like and whether or not we were going to use him.

Again, if I was trying to cover up this information, I would not have adduced on direct examination the specific information about us offering to write a letter to the parole board. I -- I didn't try to cover that up. I brought it out on direct examination.

And I think it's important to realize too that before I began cross-examination -- redirect, I asked to approach the bench, and I asked -- with all four attorneys there, I made it known to the Court and to the defense counsel that I planned to go into this because I thought they had opened the door.

I didn't just willy-nilly elicit that information. I tried to be fair. I knew that they might object, and so I wanted a ruling before it happened.

I am not trying to conceal anything. I am revealing some of my own ignorance. I've

never heard of the Giglio case. Until he said so, I didn't know that it was a United States Supreme Court case.

There are terms like Brady material, Feretta canvass. There's all these buzz words we have in the law. Giglio is one that I haven't learned until today, and I apologize.

And Mr. Schwartz apparently thought that I was conveying that information to Mr. Oram, but what I was telling him was about James Like. I thought that that's what we were talking about.

THE COURT: Other than what Mr. Zanghi testified to this morning, have you, anyone on your behalf, or the State or anyone in your office, to your knowledge, made any other promises to Mr. Zanghi of any rewards, special treatment, benefits, anything to benefit him in any manner whatsover?

MR. SCHWARTZ: Your Honor, it's my understanding, that, due to his situation, he may be housed in protective custody. That would be the only thing that would be distinguished between him and anybody else in the county jail, perhaps.

But I'm not even sure how that -- if they do that routinely when they realize somebody from the prison is coming down as a witness for the State.

So other than for his own protection --

THE COURT: He indicated that on the stand, that when he got back there, he would probably be separated from the general population.

MR. SCHWARTZ: That's the only thing that I can think of that's distinguished from any other inmate.

MR. MITCHELL: Your Honor, when I made the promise to write a letter for him, Pat Malone was the investigator from our office that was with me.

If Pat Malone has made any other guarantees, other than that -- not guarantees -- promises, anything of that nature, I don't know about it, but he would be the one to ask, because the full extent of what I'm aware of has already come out in court today.

THE COURT: You know, it's funny. Can you contact Pat Malone and find out whether or not Pat Malone has made any such promises?

MR. MITCHELL: Yes, I can.

And it was Pat Malone who originally told him that they could -- we could request the Jail to put him in P.C. so that he would be protected from other inmates.

And, you know, that was the

first thing said; and then I said that we could write a letter to the parole board. So that's all I know about that.

THE COURT: Mr. Schwartz answered my question, but you haven't answered my question.

Other than as Mr. Zanghi has testified to, have you or any of your agents or anyone in your office, to your knowledge, or anyone else made any promises to Mr. Zanghi of any -- anything of a beneficial nature, leniency, special treatment, any types of promises, rewards or anything of that nature, other than as he's testified to, to your knowledge --

MR. MITCHELL: No.

THE COURT: -- and other than possibly Pat Malone?

MR. MITCHELL: No.

THE COURT: What about Like?

MR. MITCHELL: Like had specifically requested promises from us, and I have personally declined to give him any promise whatsoever.

In fact, when I spoke with him the first time, it was before he went to trial, and I believe he went to trial in February of '96, and Teresa Lowry of our office was prosecuting him. And I spoke with

her about what the charges were. She told me he was a 12 time felon and that he was facing several charges, including sexual assault, I believe, and I declined to give him any sort of promise whatsoever.

THE COURT: You say you personally declined.

MR. MITCHELL: Right.

THE COURT: Do you know of anyone else who might have made him any offers?

MR. MITCHELL: Well, to my knowledge, I'm the only deputy that's ever talked to him and I don't know of any offers that have been made by anybody.

I know Teresa Lowry never made one and she's the only one that I can think of that ever would have spoken with him. I don't think Mr. Schwartz has ever met him. So I know of nothing that's ever been made in the way of a promise of anything to James Like.

And indeed, we didn't intend to call him, so --

THE COURT: And at this point in time, I assume you still don't?

MR. MITCHELL: No, we do not.

We're not going to call him in our case in chief, and it's very doubtful that we would ever call him as a rebuttal witness.

THE COURT: Anything else?

MR. WOLFBRANDT: All I can say, Judge, is that if -- Mr. Mitchell is quite candid that he didn't understand what Giglio material was, but certainly Mr. Schwartz did, and by Mr. Mitchell's own admission, Mr. Schwartz leaned over and told him to tell -- if I heard him correctly -- tell him about the promise -- or tell him about the letter you are going to write for Mr. Zanghi. And Mr. Mitchell didn't do that.

So, whether anybody else up in the D.A.'s Office knows what that means or not, certainly there was enough here that Mr. Mitchell should have told us.

MR. SCHWARTZ: Perhaps, just to put this metter to rest, what I recall happening was, for the first time, I guess, sometime this morning, I saw Charles Zanghi up in our office, and just before we came down to court, I was in the room where Mr. Mitchell, he and the investigator were sitting.

And I think they were talking about: Have any promises been made? And this guy said basically no.

And then Scott mentioned to me that he had offered this witness to write a letter. It wasn't solicited, but he had offered that.

And to be quite frank, you know, I basically said: Why did you do that for? If you didn't want anything, why give him anything?

But Mr. Mitchell committed himself to the letter. And when Mr. Oram was -- was asking for Giglio material here, I did lean over and said tell him about the letter, and that's all remember happening.

And, apparently, it was at the same time he was talking about James Like, and any perhaps inducements we had made to Mr. like. So, that's probably where all this confusion did arise.

But there is certainly, as far as I'm concerned, never any intent to deprive Mr. Oram of any Giglio material. I first learned of it this morning at ten o'clock.

Mr. Oram wanted it at about 10:15 when he had the motion outside the presence of the Jury. And we thought we had made it clear. But there was -- Mr. Mitchell neglected to mention that.

Additionally, I think what's important to recognize is what the Supreme Court frowns upon is when we call witnesses, who we have extended some type of a promise to, no matter how innocuous it may be, and we keep that from the Jury, and we get hit over the head for that,

because we shouldn't do that.

Here it was brought out, and I still feel, although I did apologize to Mr. Oram shortly before lunch about what had happened, I just don't see how they are prejudiced by what happened.

THE COURT: Okay. Anything else?

MR. ORAM: Yes, Your Honor, just very briefly.

I -- I think Mr. Schwartz has come forward and he is being very forthright in this case.

My concern is that if he has nudged him on the shoulder or nudged him in any manner and told him to tell us and then he doesn't tell us, and stands up before the Court and claims, well, I did tell him that this other second snitch has 12 or 14 or whatever, convictions, why isn't he telling us, Judge?

When one prosecutor is telling the other prosecutor you better tell him, he's asking for it, but now the prosecutor, Mr. Mitchell, is saying, well, I didn't know what Giglio was.

THE COURT: Well, it's obvious he didn't tell the witness not to tell.

Anyway, for the record, your motion is denied.

18 opinion on any matter connected with this case until it is finally submitted to you.

10:30 tomorrow. Bad calendar.

(Proceedings recessed until Wednesday, July 31, 1996, at 10:30 a.m.)

e * * * * *

ATTEST: Full, true and accurate transcript of proceedings.

RENEE SILVAGGIO, C.C.R. NO. 122
OFFICIAL COURT REPORTER

EXHIBIT W

EXHIBIT W

COPY

DISTRICT COURT

CLARK COUNTY, NEVADA

The State of Nevada, Plaintiff, vs. Michael Damon Rippo, #0619119 Defendant.	)	Case No. C106784 Dept. No. IV Docket No. "C"

Before the Honorable Gerard J. Bongiovanni

Thursday, February 8, 1996, 10:15 o'clock a.m.

Reporter's Transcript of Proceedings

VOLUME I

REPORTED BY: Renee Silvaggio, C.C.R. No. 122

11

CROSS-EXAMINATION

BY MR. SEATON:

Q Based on the examination just conducted by Mr. Dunleavy, is there anything else you wish to explain, Mr. Harmon?

MR. DUNLEAVY: Talk about an objection to an open ended question.

THE WITNESS: I thought you were after the truth.

Well, the truth is, in the absolute sense -- and I think, after my years of practice, I have a good grasp of what is implied by Brady and Giglio and Kyles -- that there has been no suppression of exculpatory evidence.

An oral statement made in the context of a pretrial conference by a witness, who is telling me what the defendant said to him outside of the courtroom, is not covered by our statutes on discovery, nor is it mandated by any case authority whatsoever in this state.

The Brady case is two pronged. It makes discoverable anything which is, A, exculpatory, or, B, which is material. And material means was there a reasonable probability that had it not been disclosed, the

outcome of the case would have changed?

I cannot imagine that it would ever affect the outcome of this case where the State has alleged various theories. We have alleged that Mr. Rippo may have been the actual physical murderer of two young women; or, in the alternative, that he aided someone else in the commission of these murders; or that the killings occurred as part of a felony murder, in which case if it's robbery-murder, it's murder of the first degree, whether the killings were accidental, intentional or unintentional.

And in the context of this case, where there are two victims, and where we have photographs which eloquently address the manner of death, and there are ligature marks around the necks and the arms and the ankles, I'll never be persuaded, nor do I think there is ever a chance that a jury is somehow going to be persuaded, that the statement by Mr. Rippo, that the first time he killed, the first time -- the first victim he killed was an accident, and so he had to kill the other victim.

That's just not exculpatory in the sense contemplated by our cases. That's a very inculpatory statement, very inconsistent with the position he has to be taking in this trial, which is that he not only was not present, but was not an aider in any way in a

(Whereupon, a sotto voce at this time.)

BY MR. DUNLEAVY:

Q Could it have been last Wednesday or Thursday?

A It may very well have been.

Q It was while we were going through jury selection?

A I don't distinctly remember that, Mr. Dunleavy.

Q We started jury selection last Wednesday.

MR. WOLFSON: No, I'm sorry. As an officer of the Court, let me just make a representation. I believe it was the preceding Thursday before we started the trial.

THE WITNESS: That would be more consistent with my recollection.

BY MR. DUNLEAVY:

Q I didn't know what would you say to the context in case it says the State is held to disclosure standards based on what all State officers knew at the time.

A Well, I would say that's very fine for judges to write about that, but it's a legal fiction because just because Cabrales knew it and just because Captain Connett knew it, that doesn't mean that Seaton and Harmon know it.

when we believed these murders occurred -- in fact, within an hour or so -- he appeared at the business of Mr. Sims.

Now, there may be no direct evidence that he drove the victim's car there, but there is really no other reasonable inference. He came in there and he wanted to borrow money to leave town and he wanted Sims to look at a car. And he mentioned then, in those initial declarations, that the defendant said to him somebody died for this car.

It's very devastating information. Now, I highlight that, Judge, and I know that different counselors have a different approach to trial preparation. But, Judge, Mr. Sims gave a statement March the 2nd the defense had; they knew what he said then. He testified before the Grand Jury in June 1992. He was on the witness list that we filed on March the 17th, 1994. He was on the short continued list. We didn't own him in 1992 and we don't own him now.

And the fact is, I did not know -- I mean, the U.S. Supreme Court, the Nevada Supreme Court, district courts, Justice courts can trumpet this legal fiction that what one person in a large office knows is imputed to others, but, Judge, in all candor, Mr. Seaton and I did not know until we talked with John Lukens, after

EXHIBIT X

EXHIBIT X

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

FREDERICK PAINE, Petitioner, vs. E. K. McDANIEL, et al., Respondents.	**Case No. CV-S-00-1082-KJD(PAL)** **ORDER REGARDING DISCOVERY**

Petitioner has filed a motion for leave to conduct discovery. Docket #16. By means of this motion, petitioner seeks leave to conduct several discrete categories of discovery. These include: 1) the records of petitioner's and his family's numerous contacts with various child welfare and social service agencies throughout the country; 2) the Clark County District Attorney's "open file" process as it relates to the petitioner; and 3) various records and documents regarding the three judge selection process employed by the State of Nevada pursuant to NRS 175.558. As set forth below, some of these requests are proper; others are not. The Court will treat with each discrete discovery request *seriatim*.

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1. Petitioner's Personal and Familial Records

"Good cause" is the threshold a petitioner must meet to be entitled to conduct discovery in a federal habeas corpus proceeding. Rule 6, Rules Governing § 2254 Cases (herein the "Habeas Rules); *Bracy v. Gramley*, 520 U.S. 899, 908-909 (1997) (*quoting Harris v. Nelson*, 394 U.S. 286, 300 (1969). Before delving deeply into the existence of good cause for all of the requests, however, the Court concludes that petitioner is not obliged to show good cause in order to secure his own records (medical, educational, social welfare, previous incarcerations, etc.) or those of his family. In the Court's view, a habeas petitioner is entitled to secure his own records without leave of Court to do so, for several reasons.

Initially, the Court observes that its own standardized scheduling orders entered in this case **require** petitioner and his counsel to assemble the "record" of petitioner's previous litigation. *See* Dockets #4 and #12 (first and second standardized scheduling orders); *see also* Nevada Supreme Court Rule 250(3)(a) and (b) (regarding duties of counsel to gather and maintain petitioner's records). To the extent that petitioner's own and his family's documents are part of the "official" record in this case, the Court has already ordered petitioner's counsel to assemble them, and the Court will support that order with whatever orders may be required to accomplish that task.

The Court is aware that many, if not all, of the entities from which petitioner's counsel seeks discovery are governed by state

statutes or their own internal rules. Those statutes or internal rules (or, for that matter, an opinion of counsel) may require a court order or subpoena in order for petitioner to have access to the documents at issue here. Although the agencies may have such a requirement, the Court's ruling herein nonetheless obliges petitioner first to attempt to secure his own personal records and those of his family first by means of a signed release. If the documents are not forthcoming following that procedure, petitioner should then apply to the Court, by means of a motion, supported with an affidavit specifying that the indicated agency has refused to honor petitioner's request for release of records, and that an order is needed in order to dislodge them. Accordingly, the Court does not consider that a showing of "good cause" is necessary for petitioner to have access to his own records and documents, for they are the sort of documents to which petitioner ought to have access without leave of Court.[1]

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[1] In the alternative, if these documents are considered "discovery," residing within the ambit of Habeas Rule 6, the Court concludes that petitioner has demonstrated good case, and that he is entitled to have discovery of them. *See* discussion of "good cause," *infra*. Petitioner claims that his trial counsel rendered him ineffective assistance of counsel for, among other things, failing to prepare adequately for the penalty phase of his trial. Part and parcel of any penalty phase defense includes the assembly of all of petitioner's records: his educational records (or lack thereof), records of previous arrests and incarcerations, family history (including child and social welfare agency records), medical and psychological/psychiatric records. In this case in particular, it appears that the petitioner's child welfare and social services records would be particularly important. If, as suggested by current counsel, the level of depravity which petitioner and his bothers endured is accurate, counsel may have rendered ineffective assistance for failing to make adequate inquiries into those records and data. Whether trial counsel reviewed these records and what these records contain may therefore be a critical portion of any ineffective assistance of counsel claim in a capital case. Even if these documents were found to be the subject of adverse discovery, petitioner in this case would have shown good cause to conduct discovery of them. *See Eddings v. Oklahoma*, 455 U.S. 104 (1982)(sentencer must

Respondents' objections to this category of discovery are two-fold. First, they contend that petitioner has not proper pleaded a claim for relief which would support the requested material. Without a claim, properly pleaded in the petition (or amended petition), respondents assert that petitioner cannot make the required showing of good cause under *Bracy*. Second, respondents object to the discovery for the fact that petitioner allegedly did not seek this discovery in state court. Drawing upon case law establishing principles for evidentiary hearings in federal habeas corpus cases, *see Michael Williams v. Virginia*, ___ U.S. ___, 120 S. Ct. 1479 (2000), respondents claim that petitioner's failure to seek discovery of this information in state court is fatal to his attempt at make such discovery here. Neither contention has merit.

As discussed above, the **one** question of relevance in resolving a habeas corpus petitioner's discovery motion under Habeas Rule 6 is whether petitioner has demonstrated good cause to conduct the requested discovery. There is some judicial gloss establishing rules for the manner in which the court's discretion is to be exercised on Rule 6 motions. The Supreme Court has found, for example, that if through "specific allegations before the court," the petitioner can "show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is ... entitled to relief, it is the duty of the court to provide the

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consider family history evidence in mitigation). In either event, therefore, petitioner should have access to the documents which he requests.

necessary facilities and procedures for an adequate inquiry." *Bracy v. Gramley*, 520 U.S. 899, 908-909 (1997) (*quoting Harris v. Nelson*, 394 U.S. 286, 300, (1969). The Court further noted in *Bracy* that "habeas corpus Rule 6 is meant to be 'consistent' with *Harris*." *Id; (citing* Advisory Committee's Note on Habeas Corpus Rule 6, 28 U.S.C. § 2254, p. 479).

The Court's inquiry in determining whether good cause exists for allowing discovery focuses upon whether the petitioner has sufficiently alleged a constitutionally based claim which, if proven, would entitle him to relief. That the claim may currently lack complete factual support is not sufficient grounds to deny the requested discovery. After all, the discovery process is designed to allow the litigant to seek out the facts which support his claim. It would make little sense to require the petitioner to have complete and detailed knowledge of the facts proving his claim prior to the institution of the discovery process. On the other hand, a purely speculative claim, one without any legal or factual structure whatever, cannot give rise to "good cause" for discovery. Therefore, an unproven, yet plausible theory, which has been sufficiently alleged, and which would cause the petitioner to be retried if factually proven, is sufficient for good cause. *C.f. McDaniel v. United States District Court (Jones)*, 127 F.3d 886, 888 (9th Cir. 1997) (court refusing to issue mandamus against district court order allowing discovery, where claims were not purely speculative and had

basis in the record)(*citing Harris v. Nelson*, 394 U.S. 286, 299 (1969)).

There is no reported case as of the date of this order which demands that the "claim" at the root of the requested discovery be a pleaded claim in the petition or the amended petition. Certainly, if the Supreme Court had wanted to limit discovery requests to only that material directly related to pleaded claims in the petition, it could have done so in *Bracy*. The fact that it did not suggests to the Court that good cause was meant to focus more broadly than purely those matters within the four corners of the petition.

General principles of discovery support this conclusion. Under Fed.R.Civ.P. 26(b), "relevance" for discovery purposes is generally defined as those materials generally calculated to lead to the discovery of admissible evidence. Fed.R.Civ.P. 26(b). Although the Court is aware that Rule 26(b) is applicable only through the filter of good cause, it seems that the breadth of that rule ought not to be overlooked. Even beyond this, it makes little sense to the Court to limit discovery strictly in this case to that which is contained in the present petition. Part of the entire process in which the parties and the Court are engaged is the identification of all claims in the case, in order that a *McCleskey* petition might be filed. Curtailing good cause to only those matters currently pleaded in the petition runs contrary to the entire goal of this process. Petitioner can only root out all of his potential claims if he is allowed to seek discovery into claims which may ultimately cause the

petition to be granted. That means that he ought to be allowed to propose a viable theory (even one not yet pleaded), and be allowed to conduct discovery, as *Bracy* mandates.

That is not to say that petitioner has free reign. The Court notes that petitioner has identified in the motion for leave to conduct discovery, his potential claims of ineffective assistance of counsel regarding the petitioner's and his family's records. Because there is no case law mandating the claims be set forth in the petition, it seems that the "theory," which is the most critical component of the good cause analysis, may be set forth in any appropriate document before the Court, such as a motion for leave to conduct discovery. For purposes of establishing "good cause," the Court finds this to be sufficient.

Respondents' other argument is likewise without merit. The rules and limitations which the Supreme Court set up in *Michael Williams v. Taylor*, ___ U.S. ___, 120 S. Ct. 1479 (2000), did not limit discovery, but, instead, set guideline for the federal court's in allowing evidentiary hearings. As such, the Williams rules apply only to the petitioner's attempt to secure an evidentiary hearing, which is not the issue here. Whether petitioner did or did not seek discovery of these issues below is not relevant. Petitioner shall be allowed to proceed with the discovery regarding his and his family's welfare and social service agency records.

2. "Open File" Records.

The major portion of petitioner's discovery requests are part of an ongoing dispute between the Clark County District Attorney/Las Vegas Metro and the Federal Public Defender which the Court has chosen to call (for lack of a better alternative) the "open file" debate. At the outset, the Court observes the fact that the same discovery fight is being waged on at least four separate capital habeas fronts: in this case; in *Doyle v. McDaniel*, CV-N-00-101-HDM; in *McNelton v. McDaniel*, CV-S-00-284-LRH; and in *Riley v. McDaniel*, CV-N-01-0096-DWH[2]. The issues and allegations in all four cases are virtually identical. All that changes are the names of the litigants and those of the witnesses, co-defendants and victims.

Petitioner's argument, in short, is as follows. The Clark County District Attorney (hereinafter the "CCDA") generally maintains an "open file" policy with respect to all capital murder cases. What this means precisely is not entirely clear, but petitioner contends that the term "open file" is meant to convey to trial counsel that the CCDA's file is a complete representation of law enforcement's files and documents regarding the petitioner and the case against him. In other words, petitioner claims that because his case was "open file," trial counsel was not obliged to look any further than the CCDA's file

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[2] The Court takes judicial notice of its own docket and the records on file in other capital habeas cases. Based upon that review, it is apparent that this precise issue (i.e., the extent to which the CCDA's file is truly "open file") will be litigated in several other capital habeas cases. While the Court will not speculate regarding how many more cases there are in which the precise issue will be at bar, there is no doubt that the issue will see the light of day in more than just these four cases.

for documents and evidence, the sort of which a prosecutor is compelled by law to disclose to the accused. Based upon the prosecution's alleged comments regarding the "open file," petitioner asserts that trial counsel ought to have been able to rely implicitly on the completeness of that file.

That reliance may have been misplaced. Petitioner alleges numerous ineffective assistance of counsel claims, based upon his attorneys' failure to conduct adequate investigation into a vast number of matters, including, but not limited to, mitigation evidence available from county and state records, and potential *Brady*, *Giglio* and *Kyles* material. The particular twist which makes all of this difficult is as follows.

Because the petitioners' lawyers were informed that their cases were "open file," they may (or may not) have been within their rights to assume that all of the information which law enforcement officials should have disclosed to them (particularly *Brady*, *Giglio* and *Kyles* material) would be located in the files of the district attorney. The FPD has provided fairly substantial evidence suggesting that the "open file" policy of the CCDA may be quite illusory, much to the petitioner's detriment. This evidence consists of various other capital cases from our district, in which Nevada courts have found that the CCDA's office had failed to comply with its duties of disclosure.

State v. Butler, Case No. C155791, Eighth Judicial District Court, is instructive. In that case, a capital sentence was vacated

because of a prosecution's failure to disclose evidence. This incident was preceded by another case in which the state had deliberately failed to disclose documents, despite a pending request for complete discovery. Petitioner has cited almost ten other cases in which courts have either vacated capital sentences for failure to disclose by the CCDA, or in which members of the CCDA's office have admitted to serious defaults regarding their obligations when it comes to disclosure of documents. *See e.g., Jiminez v. State,* 112 Nev. 610, 620-21, 918 P.2d 687 (1996)(court finding that CCDA failed to comply with disclosure obligations regarding *Giglio* material and exculpatory evidence; *Miranda v. McDaniel,* Clark County Case No. C057788, findings of fact and conclusions of law (2/13/96)(finding ineffective assistance of counsel for failure to investigate inconsistencies in testimony of key prosecution witnesses, where inconsistences known to prosecution and information was disclosed partially by prosecution); *Haberstroh v. McDaniel,* Clark County Case No. C076013 (prosecution devoted much of the penalty phase in this death penalty case to the evidence suggesting petitioner had made a "shank" [a jail made stabbing weapon]; prosecution failed to disclose evidence in possession of Clark County Detention Center that suggested the "shank" was in fact a digging tool, used by another inmate in an escape attempt, and which had then allegedly been hidden in

petitioner's cell without his knowledge; prosecutor did not disclose this evidence to defense, because he was himself unaware of it.)[3]

This particular alleged failing may be critical. The records custodians of the District Attorney's office and of the LVMPD (herein "Metro") have given sworn testimony in the *Haberstroh* case to the effect that no institutional procedure exists by means of which Metro assures that all *Kyles* material in its possession is forwarded to the CCDA's office for review. Further, the testimony in *Haberstroh* also suggested that the CCDA's office also lacks an institutional procedure or policy by means of which it may ensure that its "open file" contains everything which it is required to disclose. This testimony is certainly relevant to the issue at hand, insofar as it demonstrates a pattern of organizational behavior under Fed. R. Evid. 406. *See generally Bouchat v. Baltimore Ravens, Inc.*, 226 F.3d 489, 493 (4th Cir. 2000). An "open file" which does not contain all of the material it is supposed to have is not only misleading in the extreme, it may also violate the requirements of *Kyles* and its progeny. *See generally Smith v. Secretary, New Mexico Dept. of Corrections*, 50 F. 3d 801, 828 (10th Cir.), *cert. denied*, 516 U.S. 905 (1995).

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[3] The Court is fully aware that the cases cited herein and by petitioner in his brief are not reported authorities. As such, they may not be cited for their precedential value. Petitioner has has not cited them for that purpose, nor has the Court relied on them in that role. Instead, petitioner has cited these cases as *evidence* of the alleged problems in transmission of critical documents between the outlying police enforcement agencies in Las Vegas and the Clark County District Attorney's office. Insofar as the cases are cited as evidence, they are not precedential, and do not violate any of the Court's or the Ninth Circuit's proscriptions against citation of unpublished authorities.

Petitioner has alleged in this case that his own counsel rendered him constitutionally ineffective assistance of counsel, because he was apparently duped by the allegedly illusory "open file" policy. In reality, counsel arguably ought to have conducted a "house-to-house" search of all of the various outlying law enforcement agencies in Las Vegas in order to assure himself that he had gathered all of the evidence and documents which the defense of his client required. Because trial counsel did not make this exhaustive survey, according to petitioner, there is no means by which he may be assured that documents critical to the litigation of this case have been found and reviewed by the petitioner's counsel. And, as a result, petitioner claims that there is simply no way to tell whether critical *Brady, Giglio* and *Kyles* material has gone unnoticed as in *Haberstroh* and cases like it.

Of particular note in this case is the fact that petitioner has not located information in his "open file" relating to his-co-defendant: Marvin Doleman. Information regarding petitioner's co-defendant is relevant and discoverable under *Brady, Giglio, Kyles* and numerous other cases, and yet, there appears to be scant little in the files which counsel has obtained. Given the fact that Doleman may have actually carried out a more significant role in the murder than has previously come to light, it seems logical to expect a greater deal of information in the files than currently exists.

Petitioner has made the required showing of good cause with respect to the "open file" discovery. There is significant evidence

which demonstrates literally that the "right hand does not know what the left hand is doing," when it comes to the CCDA's obligation to assure the prompt and proper disclosure of *Brady, Giglio* and *Kyles* material. Petitioner has provided evidence that the CCDA and the other "outlying" law enforcement agencies have routinely failed to disclose these critical documents, and, indeed, even if disclosure did take place, no means exists by which counsel may review the record to assure themselves that all of the documents in any particular given case have been identified, reviewed, and transmitted to the appropriate entity. The lack of any effective means of assuring compliance with *Brady, Giglio, Kyles,* and cases of their stripe is possibly the most troublesome feature of this entire situation. For without that mechanism, a Court, such as this one, sitting in post-conviction, has no effective way of assuring itself that the proper methods were followed by counsel for both petitioner and respondents.

These apparent facts militate strongly with several claims for relief which petitioner has asserted. For example, petitioner has denounced his trial counsel's performance for failure to assemble all of the information which ought to have been present in the "open file." Petitioner contends that, irrespective of the "open file" policy, his trial counsel had a duty to perform in a constitutionally adequate manner, and that counsel's failure to beat the bushes to flush out all of the potentially critical records and documents constitutes ineffective assistance of counsel.

Even beyond the ineffectiveness claim, however, is the petitioner's claim that the apparent illusory functioning of the "open file" policy gives rise to substantive claims for *Brady*, *Giglio* and *Kyles* violations under the Fifth, Sixth and Fourteenth amendments. Should petitioner's version of the facts ultimately prove true, there is a possibility that petitioner has been convicted in violation of the United States Constitution. Allegations of this sort are all that is required by *Bracy*, and the Court finds that petitioner is entitled to conduct the discovery he seeks in the "open file" requests.

In spite of this finding, the Court is concerned about the breadth of the discovery which petitioner now seeks. As noted above, he seeks to conduct either document discovery from or take the deposition of a document custodian in virtually every law enforcement agency and sub-agency in the greater Las Vegas metropolitan area. If the Court were to allow the service of every subpoena now, the sheer amount of discovery might be overwhelming. It appears to the Court that an objection on grounds of breadth and relevance might be raised, and that the Court might be constrained to consider such an objection very seriously.

In order to ward off any potential objection on this score, the Court will allow petitioner to conduct the discovery he desires, but only after compliance with the following conditions. First, petitioner must file and serve points and authorities in which he describes in specific terms those documents which he has already received from the district attorney through the "open file" procedure.

Then, he must describe in detail those documents and categories of documents which he expects he ought to have received from the CCDA by means of the "open file" policy. For example, if petitioner believes that he ought to have found records from the Clark County Detention Center in the "open file," he must first state what records he has received through the "open file" system which he believes came from the detention center. Then, he must identify those records or categories of records which he believes ought to have received from the detention center, but which he has found neither in his file nor anywhere else.

The Court's goal in following this procedure is to minimize the intrusion of the discovery process into the daily law enforcement operations in Las Vegas, while, at the same time, conducting the allowed discovery as quickly as possible. Therefore, petitioner should do his best to identify with particularity those documents and records which he believes he should have, but which he never received through the "open file" process.

Following the filing and service of petitioner's brief, respondents shall have an opportunity either to assist the petitioner in procuring the identified records, or to file objections to the production of the identified documents. Thus, if respondents concur that petitioner is entitled to the documents he has identified in his brief, they should contact the appropriate agency through appropriate means, in an effort to dislodge the documents to petitioner for review without further delay. In the alternative, respondents may object to

the disclosure of certain documents, but only on grounds other than whether "good cause" exists to allow the discovery. That issue has+- been resolved by the Court and is now law of the case.

The parties should not lose sight of the Court's ruling while delving into to fine detail of the discovery process. Petitioner has shown good cause for this discovery, and he shall be allowed those documents which he ought to have been given prior to and during his trial according to law. Respondents and petitioner may assist the Court in expediting this process, but they ought not to waste time attempting to relitigate matters already decided.

3. Three Judge Panel Documents.

Petitioner lastly seeks leave to serve subpoenas to relevant state agencies regarding the various means and methods by which a three-judge panel is selected following a guilty plea in Nevada under NRS 175.558. A recent case from the Supreme Court suggests strongly that this category of discovery is no longer relevant, however, for it appears to the Court that the entire three judge selection procedure itself may be constitutionally infirm.

In *Ring v. Arizona*, 122 S. Ct. 2428 (2002), the Supreme Court held Arizona's capital sentencing structure unconstitutional. In so holding, the Court observed that a jury, not a judge or other entity, must find the existence of any and all aggravating factors in a capital sentencing scheme. To the extent that Arizona's capital sentencing structure did not allow for the existence of the

aggravating factors to be found by a jury, the entire statute was held unconstitutional. *Id.*, at 2432.

It appears to the Court that Nevada's capital sentencing structure may also be constitutionally infirm, on the same grounds as was Arizona's in *Ring*. In petitioner's case, he pleaded guilty, thereby avoiding a guilt phase of his trial. By pleading guilty, however, petitioner also waived his right to a jury trial under NRS 175.558. Instead, petitioner's penalty phase was heard by a three judge panel as the Nevada statute requires. That panel found that aggravating circumstances existed, and, further, that they outweighed whatever evidence petitioner presented in mitigation. As a result, the three judge panel imposed a sentence of death upon petitioner.

It appears to the Court that the *Ring* issue in this case trumps all requests for discovery into the mechanism of the three judge panel selection process. Certainly, the Court is attuned to the various theories which petitioner has identified regarding the means by which the three judge panels have been constituted in Nevada. Given the new tone sounded by *Ring*, however, it seems unharmonious to continue inquiries into the panel selection methodology, when the entire concept of judicial penalty phase sentencing is itself greatly in question.

As a result, the Court will order the parties to brief the following issues: 1) is a *Ring* claim pleaded in this case already, or, if not, is one in the process of exhaustion? 2) should the Court continue into the discovery process into the mechanism of the three

judge panel process in light of *Ring*? 3) if a *Ring* claim has been stated but remains unexhausted, should this Court immediately stay this case in favor of a swift return to state court for exhaustion of that claim? 4) if no *Ring* claim has yet been filed in state or federal court, should the Court stay these proceedings in order to accommodate the filing and litigation of such a claim? 5) is the Supreme Court's holding in *Ring* retroactive? Further, the parties may bring to the attention of the Court any *Ring*-related issue (particularly if discovery is involved) in this briefing process. Petitioner shall file an opening brief, followed by respondents' points and authorities in opposition. Once the briefs are presented to the Court for decision, the Court shall consider whether the discovery requested here should be allowed. For the present, however, the Court shall hold the issue of discovery into the three judge panel selection procedure in abeyance, pending resolution of the questions identified above.

IT IS THEREFORE ORDERED that petitioner's motion for leave to conduct discovery (Docket #16) is **GRANTED IN PART AND DENIED IN PART**.

IT IS FURTHER ORDERED that petitioner may proceed forthwith with the discovery regarding his personal and familial records.

IT IS FURTHER ORDERED that petitioner shall be allowed to conduct discovery into the "open file" policy of the Clark County District Attorney and the Clark County Coroner's office; provided, however, that petitioner's ability to conduct the requested discovery

shall be limited as follows. Petitioner shall, within thirty days of the date of the entry of this order on the record, provide the Court with a pleading in which he sets forth in detail a description of all documents which he believes that he has received by means of the "open file" policy of the CCDA. He then also must set forth in detail those documents and categories of documents which he expects he ought to have received from the CCDA by means of the "open file" policy.

IT IS FURTHER ORDERED that respondents shall have thirty days following the filing and service of petitioner's brief within which to either 1) assist petitioner in securing the release of the identified documents from the appropriate agency; or 2) file any objections to the discovery requested by petitioner. Specifically, respondents may object to the nature and scope of discovery as irrelevant, over broad, or as violative of the attorney client privilege. Respondent shall not, however, be allowed to reargue the *Bracy* issues which the Court has resolved herein.

IT IS FURTHER ORDERED that the issues regarding the discovery into the three judge selection procedure in Nevada is **STAYED AND HELD IN ABEYANCE**. Petitioner shall have thirty days from the date of the entry of this order on the record within which to file points and authorities (preferably in the same document as in the "open-file" matter above) which address at least the following issues: 1) is a *Ring* claim pleaded in this case already, or, if not, is one in the process of exhaustion? 2) should the Court continue into the discovery process into the mechanism of the three judge panel process in light

of *Ring*? 3) if a *Ring* claim has been stated but remains unexhausted, should this Court immediately stay this case in favor of a swift return to state court for exhaustion of that claim? 4) if no *Ring* claim has yet been filed in state or federal court, should the Court stay these proceedings in order to accommodate the filing and litigation of such a claim? 5) is the Supreme Court's holding in *Ring* retroactive? Respondents shall have thirty days following the filing and service of petitioner's brief within which to file and serve their points and authorities in opposition. There shall be no reply filed or considered by the Court.

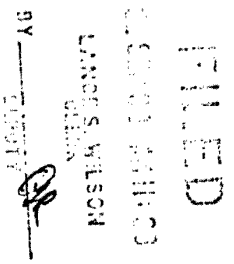
IT IS FURTHER ORDERED that upon the filing of all briefs as ordered by the Court herein, the Clerk of Court shall resubmit these matters for resolution.

Dated, this 27th day of September, 2002.

UNITED STATES DISTRICT JUDGE

EXHIBIT Y

EXHIBIT Y



UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BILLY RAY RILEY,
Petitioner,
vs.
E. K. McDANIEL, et al.,
Respondents.

Case No. CV-N-01-0096-DWH(VPC)

ORDER REGARDING DISCOVERY

Petitioner has filed a motion for leave to conduct discovery. Docket #14. By means of this motion, petitioner seeks leave to conduct several discrete categories of discovery. These include: 1) the records of petitioner from various juvenile agencies in the Las Vegas area; 2) the Clark County District Attorney's "open file" process as it relates to the petitioner; 3) the deposition of Angela Shanks ; 4) the records of the autopsy of the victim by the Clark County Coroner and 5) the Clark County Public Defender's file regarding Darrell Jackson. The Court will treat with each discrete discovery request *seriatim*.

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1. Petitioner's Juvenile Records

"Good cause" is the threshold a petitioner must meet to be entitled to conduct discovery in a federal habeas corpus proceeding. Rule 6, Rules Governing § 2254 Cases (herein the "Habeas Rules); *Bracy v. Gramley*, 520 U.S. 899, 908-909 (1997)(*quoting Harris v. Nelson*, 394 U.S. 286, 300 (1969). Before delving deeply into the existence of good cause for all of the requests, however, the Court concludes that petitioner is not obliged to show good cause in order to secure records regarding his interaction with the Las Vegas juvenile authorities. In the Court's view, a habeas petitioner is entitled to secure his own records without leave of Court, for several reasons.

Initially, the Court observes that its own standardized scheduling orders entered in this case **require** petitioner and his counsel to assemble the "record" of petitioner's previous litigation. *See* Docket #9 (first standardized scheduling order); *see also* Nevada Supreme Court Rule 250(3)(a) and (b) (regarding duties of counsel to gather and maintain petitioner's records). To the extent that petitioner's own and his family's documents are part of the "official" record in this case, the Court has already ordered petitioner's counsel to assemble them, and the Court will support that order with whatever orders may be required to accomplish that task.

The Court is aware that many, if not all, of the entities from which petitioner's counsel seeks discovery are governed by state statutes or their own internal rules. Those statutes or internal rules (or, for that matter, an opinion of counsel) may require a court order or subpoena in order for petitioner to have access to the documents at issue here. Although the agencies may have such a requirement, the Court's ruling herein nonetheless obliges petitioner first to attempt to secure his own personal records and those of his family first by means of a signed release. If the documents are not forthcoming following that procedure, petitioner should then apply to the Court, by means of a motion, supported with an affidavit specifying that the indicated agency has refused to honor petitioner's request for release of records, and that an order is needed in order to dislodge them. Accordingly, the

Court does not consider that a showing of "good cause" is necessary for petitioner to have access to his own records and documents, for they are the sort of documents to which petitioner ought to have access without leave of Court.[1] If petitioner has already sought to gain access to the documents by informal means (and it appears that he has done so), then he may proceed with service of the subpoenas regarding his juvenile records without delay.

2. "Open File" Records.

The major portion of petitioner's discovery requests are part of an ongoing dispute between the Clark County District Attorney/Las Vegas Metro and the Federal Public Defender which the Court has chosen to call (for lack of a better alternative) the "open file" debate. At the outset, the Court observes the fact that the same discovery fight is being waged on at least four separate capital habeas fronts: in this case; in *Doyle v. McDaniel*, CV-N-00-101-HDM; in *McNelton v. McDaniel*, CV-S-00-284-LRH; and in *Paine v. McDaniel*, CV-S-00-1082-KJD[2]. The issues and allegations in all four cases are virtually identical. All that changes are the names of the litigants and those of the witnesses, co-defendants and victims.

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[1] In the alternative, if these documents are considered "discovery," residing within the ambit of Habeas Rule 6, the Court concludes that petitioner has demonstrated good case, and that he is entitled to have discovery of them. *See* discussion of "good cause," *infra*. Petitioner claims that his trial counsel rendered him ineffective assistance of counsel for, among other things, failing to prepare adequately for the penalty phase of his trial. Part and parcel of any penalty phase defense includes the assembly of all of petitioner's records: his educational records (or lack thereof), records of previous arrests and incarcerations, family history (including child and social welfare agency records), medical and psychological/psychiatric records, and juvenile agency records, to the extent that such exist. In this case in particular, it appears that the petitioner's juvenile could be critical. Such records could be used by defense counsel to show petitioner's ability to adjust to a sentence of imprisonment, and could also be used to demonstrate the comparatively mitigated features of petitioner's previous offense. *See Skipper v. South Carolina*, 476 U.S. 1, 7 (1986)(mitigating evidence with respect to prior offenses introduced in aggravation). In either event, therefore, petitioner should have access to the documents which he requests.

[2] The Court takes judicial notice of its own docket and the records on file in other capital habeas cases. Based upon that review, it is apparent that this precise issue (i.e., the extent to which the CCDA's file is truly "open file") will be litigated in several other capital habeas cases. While the Court will not speculate regarding how many more cases there are in which the precise issue will be at bar, there is no doubt that the issue will see the light of day in more than just these four cases.

Petitioner's argument, in short, is as follows. The Clark County District Attorney (hereinafter the "CCDA") generally maintains an "open file" policy with respect to all capital murder cases. What this means precisely is not entirely clear, but petitioner contends that the term "open file" is meant to convey to trial counsel that the CCDA's file is a complete representation of law enforcement's files and documents regarding the petitioner and the case against him. In other words, petitioner claims that because his case was "open file," trial counsel was not obliged to look any further than the CCDA's file for documents and evidence, the sort of which a prosecutor is compelled by law to disclose to the accused. Based upon the prosecution's alleged comments regarding the "open file," petitioner asserts that trial counsel ought to have been able to rely implicitly on the completeness of that file.

That reliance may have been misplaced. Petitioner alleges numerous ineffective assistance of counsel claims, based upon his attorneys' failure to conduct adequate investigation into a vast number of matters, including, but not limited to, mitigation evidence available from county and state records, and potential *Brady*, *Giglio* and *Kyles* material. The particular twist which makes all of this difficult is as follows.

Because the petitioners' lawyers were informed that their cases were part of an "open file," they may (or may not) have been within their rights to assume that all of the information which law enforcement officials should have disclosed to them (particularly *Brady, Giglio* and *Kyles* material) would be located in the files of the district attorney. The FPD has provided fairly substantial evidence suggesting that the "open file" policy of the CCDA may be quite illusory, much to the petitioner's detriment. This evidence consists of various other capital cases from our district, in which Nevada courts have found that the CCDA's office had failed to comply with its duties of disclosure.

The most recent of these cases, in petitioner's view, is *Bennett v, Warden*, Clark County Case No. C83143. There, the state district court vacated a capital sentence in part because the CCDA had failed to disclose mitigating evidence of the co-defendant's culpability that it had obtained from

a jail informant. Likewise, in *State v. Butler*, the Eighth Judicial District Court vacated another capital sentence because of a prosecution's failure to disclose evidence, after a previous instance in which the state had deliberately failed to disclose evidence, disregarding the court's order for complete and open discovery. Petitioner has cited almost ten other cases in which courts have either vacated capital sentences for failure to disclose by the CCDA, or in which members of the CCDA's office have admitted to serious defaults regarding their obligations when it comes to disclosure of documents. *See e.g., Jiminez v. State*, 112 Nev. 610, 620-21, 918 P.2d 687 (1996)(court finding that CCDA failed to comply with disclosure obligations regarding *Giglio* material and exculpatory evidence; *Miranda v. McDaniel*, Clark County Case No. C057788, findings of fact and conclusions of law (2/13/96)(finding ineffective assistance of counsel for failure to investigate inconsistencies in testimony of key prosecution witnesses, where inconsistences known to prosecution and information was disclosed partially by prosecution); *Haberstroh v. McDaniel,* Clark County Case No. C076013 (prosecution devoted much of the penalty phase in this death penalty case to the evidence suggesting petitioner had made a "shank" [a jail made stabbing weapon]; prosecution failed to disclose evidence in possession of Clark County Detention Center that suggested the "shank" was in fact a digging tool, used by another inmate in an escape attempt, and which had then allegedly been hidden in petitioner's cell without his knowledge; prosecutor did not disclose this evidence to defense, because he was himself unaware of it.)[3]

This failing, if proved true, may be very harmful to respondents. The records custodians of the District Attorney's office and of the LVMPD (herein "Metro") have given sworn testimony in the *Haberstroh* case to the effect that no institutional procedure exists by means of which

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[3] The Court is fully aware that the cases cited herein and by petitioner in his brief are not reported authorities. As such, they may not be cited for their precedential value. Petitioner has has not cited them for that purpose, nor has the Court relied on them in that role. Instead, petitioner has cited these cases as *evidence* of the alleged problems in transmission of critical documents between the outlying police enforcement agencies in Las Vegas and the Clark County District Attorney's office. Insofar as the cases are cited as evidence, they are not precedential, and do not violate any of the Court's or the Ninth Circuit's proscriptions against citation of unpublished authorities.

Metro assures that all *Kyles* material in its possession is forwarded to the CCDA's office for review. Further, the testimony in *Haberstroh* also suggested that the CCDA's office also lacks an institutional procedure or policy by means of which it may ensure that its "open file" contains everything which it is required to disclose. This testimony is certainly relevant to the issue at hand, insofar as it demonstrates a pattern of organizational behavior under Fed. R. Evid. 406. *See generally Bouchat v. Baltimore Ravens, Inc.*, 228 F.3d 489, 493 (4th Cir. 2000). An "open file" which does not contain all of the material it is supposed to have is not only misleading in the extreme, it may also violate the requirements of *Kyles* and its progeny. *See generally Smith v. Secretary, New Mexico Dept. of Corrections*, 50 F. 3d 801, 828 (10th Cir.), *cert. denied*, 516 U.S. 905 (1995).

Discovery conducted in another federal capital habeas pending in the district has disclosed the fact that benefits conferred on a testifying prosecution witness may not be found in the CCDA's "open file," or disclosed to the defense through any other means. In *Jones v. McDaniel*, CV-N-96-633-ECR, counsel located evidence of assistance rendered to a prosecution witness during a clemency hearing. That evidence, however, was not found in the "open file," which one might expect it to be, given the nature and function of the "open file" process. Instead, counsel located this material in the files of the Major Violators Unit ("MVU"), a Metro unit that maintains its files independently from those found in the "open file." The chief deputy district attorney submitted a declaration in Jones that admitted the clemency assistance to the witness was not to be found in the "open file." And, although the witness testified explicitly that he had been made no promises in return for his testimony against the petitioner, he did in fact receive an exceptionally favorable plea bargain in his own case in return for his assistance, a fact which both his own counsel and counsel for the state acknowledged during his sentencing.

Evidence exists in petitioner's own case that the CCDA has failed to disclose evidence. For example, Kim Johnson and Darrell Jackson were arrested contemporaneously with petitioner. Even though he was identified as an actor in the crime, and had a lengthy criminal record, Jackson was

never charged with any crime, nor were Johnson and Leotis Gordon, the principal resident of the crack house in which the murder took place. All three testified against petitioner at trial.

Yet nothing in the files petitioner's counsel has secured reflects any disclosure of the reason that these three were not prosecuted, or of any sort of understanding that they would not be prosecuted in exchange for giving testimony against petitioner. Given the potential criminal exposure of these individuals (all reported crack house denizens), the absence of information in the file regarding how or why they were not prosecuted (which would have been critical information for the jury in assessing their credibility), gives rise to at least an inference of the lack of disclosure on the CCDA's part. Especially if the CCDA had entered into some unwritten form of agreement (i.e., a "wink and nod" deal) with these individuals, that information would be just as critical and subject to disclosure as a fully typed up plea agreement. *See Gilday v. Callahan*, 59 F.3d 257, 269 (1st Cir. 1995)(duty to disclose includes "wink and nod" expectation of benefit).

The lack of such information in petitioner's file is all the more curious given the petitioner's suggestion that Darrell Jackson was actually responsible for the murder. As seen more fully below, petitioner has an entire theory of innocence based around his claim that Darrell Jackson actually fired the shots that killed the victim. That evidence, coupled with the utter lack of any evidence regarding the "deals" struck between these three witnesses and the CCDA, suggests that a pattern of non-disclosure of critical information may exist in this case as well.

Petitioner has alleged in this case that his own counsel rendered him constitutionally ineffective assistance of counsel, because he was apparently duped by the allegedly illusory "open file" policy. In reality, counsel arguably ought to have conducted a "house-to-house" search of all of the various outlying law enforcement agencies in Las Vegas in order to assure himself that he had gathered all of the evidence and documents which the defense of his client required. Because trial counsel did not make this exhaustive survey, according to petitioner, there is no means by which he may be assured that documents critical to the litigation of this case have been found and reviewed by the petitioner's

counsel. And, as a result, petitioner claims that there is simply no way to tell whether critical *Brady, Giglio* and *Kyles* material has gone unnoticed as in *Haberstroh* and cases like it.

Petitioner has made the required showing of good cause with respect to the "open file" discovery. There is significant evidence which demonstrates literally that the "right hand does not know what the left hand is doing," when it comes to the CCDA's obligation to assure the prompt and proper disclosure of *Brady, Giglio* and *Kyles* material. Petitioner has provided evidence that the CCDA and the other "outlying" law enforcement agencies have routinely failed to disclose these critical documents, and, indeed, even if disclosure did take place, no means exists by which counsel may review the record to assure themselves that all of the documents in any particular given case have been identified, reviewed, and transmitted to the appropriate entity. The lack of any effective means of assuring compliance with *Brady, Giglio, Kyles,* and cases of their stripe is possibly the most troublesome feature of this entire situation. For without that mechanism, a court, such as this one, sitting in post-conviction, has no effective way of assuring itself that the proper methods were followed by counsel for both petitioner and respondents.

These apparent facts resonate strongly with several claims for relief which petitioner has asserted. For example, petitioner has denounced his trial counsel's performance for failure to assemble all of the information which ought to have been present in the "open file." Petitioner contends that, irrespective of the "open file" policy, his trial counsel had a duty to perform in a constitutionally adequate manner, and that counsel's failure to beat the bushes to flush out all of the potentially critical records and documents constitutes ineffective assistance of counsel.

Even beyond the ineffectiveness claim, however, is the petitioner's claim that the apparent illusory functioning of the "open file" policy gives rise to substantive claims for *Brady, Giglio* and *Kyles* violations under the Fifth, Sixth and Fourteenth amendments. Should petitioner's version of the facts ultimately prove true, there is a possibility that petitioner has been convicted in violation of the United States Constitution. Allegations of this sort are all that is required by *Bracy,*

and the Court finds that petitioner is entitled to conduct the discovery he seeks in the "open file" requests.

In spite of this finding, the Court is concerned about the breadth of the discovery which petitioner now seeks. As noted above, he seeks to conduct either document discovery from or take the deposition of a document custodian in virtually every law enforcement agency and sub-agency in the greater Las Vegas metropolitan area. If the Court were to allow the service of every subpoena now, the sheer amount of discovery might be overwhelming. It appears to the Court that an objection on grounds of breadth and relevance might be raised, and that the Court might be constrained to consider such an objection very seriously.

In order to ward off any potential objection on this score, the Court will allow petitioner to conduct the discovery he desires, but only after compliance with the following conditions. First, petitioner must file and serve points and authorities in which he describes in specific terms those documents which he has already received from the district attorney through the "open file" procedure. Then, he must describe in detail those documents and categories of documents which he expects he ought to have received from the CCDA by means of the "open file" policy. For example, if petitioner believes that he ought to have found records from the Clark County Detention Center in the "open file," he must first state what records he has received through the "open file" system which he believes came from the detention center. Then, he must identify those records or categories of records which he believes ought to have received from the detention center, but which he has found neither in his file nor anywhere else.

The Court's goal in following this procedure is to minimize the intrusion of the discovery process into the daily law enforcement operations in Las Vegas, while, at the same time, conducting the allowed discovery as quickly as possible. Therefore, petitioner should do his best to identify with particularity those documents and records which he believes he should have, but which he never received through the "open file" process.

Following the filing and service of petitioner's brief, respondents shall have an opportunity either to assist the petitioner in procuring the identified records, or to file objections to the production of the identified documents. Thus, if respondents concur that petitioner is entitled to the documents he has identified in his brief, they should contact the appropriate agency through appropriate means, in an effort to dislodge the documents to petitioner for review without further delay. In the alternative, respondents may object to the disclosure of certain documents, but only on grounds other than whether "good cause" exists to allow the discovery.

The parties should not lose sight of the Court's ruling while delving into to the details of the discovery process. Petitioner has shown good cause for this discovery, and he shall be allowed those documents which he ought to have been given prior to and during his trial according to law. Respondents and petitioner may assist the Court in expediting this process, but they ought not to waste time attempting to relitigate matters already decided.

3. Deposition of Angela Shanks

Petitioner further seeks to take the deposition of Angela Shanks. Ms. Shanks allegedly saw Darrell Jackson discard a bloody shirt sometime after the murder. Ms. Shanks will apparently not sign a declaration out of concerns about becoming involved in a case arising from a murder in a neighborhood crack house.

Petitioner maintains that Jackson was the actual killer in this case, and bases his claim, in part, upon the allegation that Jackson's account of the killings was inconsistent with the physical evidence. In particular, petitioner claims that Jackson's t-shirt was stained with blood, and that blood spatter from a shotgun wound is more likely to have hit the person firing the shot than someone else across the room. If Ms. Shanks had been interviewed, she apparently would have testified having observed Jackson discarding a bloody shirt, which suggests that Jackson may have ended up with far more blood on him that he originally let on.

Though less than overwhelming, petitioner has shown good cause for this discovery. Certainly, if Jackson had been seen discarding a bloody shirt, such fact would have tended to support a claim for actual innocence on petitioner's part. More to the point, however, is the reason why petitioner's counsel did not interview Shanks prior to trial. This evidence may very well support petitioner's claim to ineffective assistance of counsel. *See e.g., Hart v. Gomez*, 164 F.3d 1067, 1071 (9th Cir. 1999)(ineffective assistance of counsel rendered by failing to introduce corroborating witness testimony); *Turner v. Duncan*, 158 F.3d 449, 456-57 (9th Cir. 1998)(failure to investigate and obtain evidence to corroborate psychiatric testimony). Petitioner shall therefore be allowed to serve the deposition subpoena as he has requested.[4]

4. Coroner's Records

In concert with the deposition of Angela Shanks, petitioner also seeks the entire coroner's report with respect to the victim, "Ramrod" Bolin. Petitioner contends that the physical evidence associated with Bolin's murder cannot be reconciled with the version of events as related by Darrell Jackson, a major witness in the prosecution's case. Petitioner has expert analysis which suggests that the presently available physical evidence cannot be squared with Jackson's account, and that the complete coroner's file would provide a much fuller basis for analysis.

It appears that goos cause is present on multiple levels here. First, the information is certainly relevant to the claim of ineffective of assistance of counsel, for the contents of this report are singularly relevant to the question of whether trial counsel rendered ineffective assistance. Further, it appears that this information also functions on the level of actual innocence. What information may be contained within the coroner's file may, as indicated above, tend to point the culpability finger in

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[4] This evidence is also relevant to the question of the petitioner's actual innocence. Under *Carriger v. Stewart*, 132 F.3d 463, 478 (9th Cir. 1997), a petitioner can show that evidence not presented at trial can so undermine the confidence in the verdict that substantive constitutional claims arise. In combination with the inadequate presentation of expert testimony showing that Jackson's account of the killing was false, the evidence showing that Jackson had blood on his clothes may have prevented a reasonable jury from having found petitioner guilty and sentencing him to death.

Jackson's direction, and away from petitioner. Petitioner has therefore demonstrated "good cause" for making this discovery, and he may serve the subpoena required to access the files as requested.

5. Clark County Public Defender's Files

Lastly, petitioner seeks leave to conduct discovery into the files of the Clark County Public Defender, regarding its previous representation of Darrell Jackson. The Clerk County Public Defender (herein "CCPD") had apparently represented Jackson in another matter prior to this case. The existence of this conflict was not disclosed to petitioner or the trial court. As such, petitioner contends that a conflict of interest existed, and that he has therefore good cause to review the CCPD's file regarding it representation of Jackson.

Certainly, the existence of an undisclosed conflict of interest suggests good cause for discovery, for the tacit assumption exists that counsel will favor one client over the other, and will therefore act more aggressively in that client's favor, to the detriment of the other.

Nonetheless, a similarly large, intervening legal principle prevents the Court from allowing this discovery in it current form. The Court presumes that the attorney-client privilege still exists between the CCPD and Darrell Jackson, and that no waivers have been signed. If that is the case, and there is every reason to expect that it is, the entry of an order allowing discovery by the Court would be a futile exercise; petitioner would serve his subpoena, the CCPD would object on the grounds of the privilege, and the issue would then have to be litigated before the Court. Rather than wait for the preliminaries to be conducted, the Court shall adopt the following procedure: 1) petitioner shall have thirty days from the date of the entry of this order on te record within which to file points and authorities, together with such evidence as he may have, demonstrating the attorney-client privilege does not exist in this case. The Court shall then order that this order and petitioner's opening brief be served on the Clark County Public Defender's office. The CCPD shall be given an appropriate period of time within which to record its opposition to the FPD's brief. Respondents shall likewise be invited to provide the Court with their position. After briefing is completed, the matter shall be

submitted to the Court for resolution. Until that time, however, petitioner's request for this discovery shall be held in abeyance.

IT IS THEREFORE ORDERED that petitioner's motion for leave to conduct discovery (Docket #14) is **GRANTED IN PART AND DENIED IN PART**.

IT IS FURTHER ORDERED that petitioner may proceed forthwith with the discovery regarding his personal juvenile records; provided, however, that petitioner should first seek release of those documents by means of a signed release. If such a release has already been used to no avail, petitioner may proceed with service of the proposed discovery.

IT IS FURTHER ORDERED that petitioner shall be allowed to conduct discovery into the "open file" policy of the Clark County District Attorney and the Clark County Coroner's office; provided, however, that petitioner's ability to conduct the requested discovery shall be limited as follows. Petitioner shall, within thirty days of the date of the entry of this order on the record, provide the Court with a pleading in which he sets forth in detail a description of all documents which he believes that he has received by means of the "open file" policy of the CCDA. He then also must set forth in detail those documents and categories of documents which he expects he ought to have received from the CCDA by means of the "open file" policy.

IT IS FURTHER ORDERED that respondents shall have thirty days following the filing and service of petitioner's brief within which to either 1) assist petitioner in securing the release of the identified documents from the appropriate agency; or 2) file any objections to the discovery requested by petitioner. Specifically, respondents may object to the nature and scope of discovery as irrelevant, over broad, or as violative of the attorney client privilege. Respondent shall not, however, be allowed to reargue the *Bracy* issues which the Court has resolved herein.

IT IS FURTHER ORDERED that petitioner's motion relating to the deposition of Angela Shanks and the Clark County Coroner's office are both **GRANTED**. Petitioner may serve these subpoena's forthwith.

IT IS FURTHER ORDERED that the discovery requests regarding the Clark County Public Defender's Files are hereby **STAYED AND HELD IN ABEYANCE,** pending further resolution by the Court. Petitioner shall have thirty days from the date of the entry of this order no the record within which to file and serve his points and authorities demonstrating why the attorney-client privilege does not apply and bar the discovery e has requested.

IT IS FURTHER ORDERED that the Clerk of Curt shall serve a copy of this order, as well as a copy of petitioner's points and authorities regarding the privilege on the Clark County Public Defender. Following the filling and service of petitioner's opening brief, the Clark County Public may, if it chooses, file and serve any appropriate response within thirty days. Respondents shall likewise have thirty days following the filing and service of petitioner's points and authorities within which to file and serve their opposing points and authorities.

IT IS FURTHER ORDERED that upon the filing of all briefs as ordered by the Court herein, the Clerk of Court shall resubmit these matters for resolution.

IT IS FURTHER ORDERED that the Clerk of Court shall submit Docket #24 and #25 to the Court for resolution forthwith.

Dated, this 30th day of September, 2002.

UNITED STATES DISTRICT JUDGE

EXHIBIT Z

EXHIBIT Z

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CHARLES McNELTON,
Petitioner,
vs.
E. K. McDANIEL, et al.,
Respondents.

Case No. CV-S-00-284-LRH(LRL)

ORDER REGARDING DISCOVERY

Petitioner has filed a motion for leave to conduct discovery. Docket #16. By means of this motion, petitioner seeks leave to conduct several discrete categories of discovery. These include: 1) the Clark County District Attorney's "open file" process as it relates to the petitioner; 2) the Interstate Agreement on Detainers documents regarding petitioner; 3) petitioner's records of incarceration, both in Nevada and California; 4) records of the California Franchise Tax Board and other tax records as they relate to petitioner's alibi witnesses; and 5) the records of the Clark County Coroner. As set forth below, some of these requests are proper; others are not. The Court will treat with each discrete discovery request *seriatim*.

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1. Petitioner's Incarceration Records

"Good cause" is the threshold a petitioner must meet to be entitled to conduct discovery in a federal habeas corpus proceeding. Rule 6, Rules Governing § 2254 Cases (herein the "Habeas Rules); *Bracy v. Gramley*, 520 U.S. 899, 908-909 (1997)(*quoting Harris v. Nelson*, 394 U.S. 286, 300 (1969). Before delving deeply into the existence of good cause for all of the requests, however, the Court concludes that petitioner is not obliged to show "good cause" in order to secure his own records (medical, educational, previous incarcerations, etc.) or those of his family. In the Court's view, a habeas petitioner is entitled to secure his own records without leave of Court to do so, for several reasons.

Initially, the Court observes that its own standardized scheduling orders entered in this case **require** petitioner and his counsel to assemble the "record" of petitioner's previous litigation. *See* Dockets #7 and 14 (first and second standardized scheduling orders); *see also* Nevada Supreme Court Rule 250(3)(a) and (b) (regarding duties of counsel to gather and maintain petitioner's records). To the extent that petitioner's own and his family's documents are part of the "official" record in this case, the Court has already ordered petitioner's counsel to assemble them, and the Court will support that order with whatever orders may be required to accomplish that task.

The Court is aware that many, if not all, of the entities from which petitioner's counsel seeks discovery are governed by

state statutes or their own internal rules. Those statutes or internal rules (or, for that matter, an opinion of counsel) may require a court order or subpoena in order for petitioner to have access to the documents at issue here. Although the agencies may have such a requirement, the Court's ruling herein nonetheless obliges petitioner first to attempt to secure his own personal records and those of his family first by means of a signed release. If the documents are not forthcoming following that procedure, petitioner should then apply to the Court, by means of a motion, supported with an affidavit specifying that the indicated agency has refused to honor petitioner's request for release of records, and that an order is needed in order to dislodge them. Accordingly, the Court does not consider that a showing of "good cause" is necessary for petitioner to have access to his own records and documents, for they are the sort of documents to which petitioner ought to have access without leave of Court.[1]

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[1] In the alternative, if these documents are considered "discovery," residing within the ambit of Habeas Rule 6, the Court concludes that petitioner has demonstrated "good case," and that he is entitled to have discovery of them. *See* discussion if "good cause," *infra*. Petitioner claims that his trial counsel rendered him ineffective assistance of counsel for, among other things, failing to prepare adequately for the penalty phase of his trial. Part and parcel of any penalty phase defense includes the assembly of all of petitioner's records: his educational records (or lack thereof), records of previous arrests and incarcerations, family history, medical and psychological/psychiatric records, but particularly any records of past incarceration. Whether petitioner did well in a prison environment is a critical mitigating circumstance, which may prompt a sentencing jury to choose life in prison rather over death. Whether trial counsel reviewed these records and what these records contain is therefore a critical portion of any ineffective assistance of counsel claim in a capital case. Even if these documents were found to be the subject of adverse discovery, petitioner in this case would have shown "good cause" to conduct discovery of them. In either event, therefore, petitioner should have access to the documents which he requests.

Respondents main objection to this category of discovery relates not so much to the type of discovery being sought, but to the individuals' records petitioner desires to see. To this end, respondents contend that petitioner seeks the incarceration records not only of himself, but of his co-defendants, testifying witnesses, and of other parties involved in this case. While favorable incarceration records may be particularly useful in swaying a jury from death in favor of life imprisonment, the records of other parties have no similar effect on the jury. As such, respondents contend that petitioner has not demonstrated "good cause" for discovery of the prison records of individuals other than himself.

The Court agrees. The basis upon which petitioner has secured this discovery is essentially two-fold: first; that the documents he seeks are not really "discovery" as such, but his own records; and second, that "good cause" exists for such discovery by virtue of the potentially significant impact such records might have on the sentencing jury. Neither factor bears any weight when the Court's focus is directed at prison records of other individuals. Petitioner shall be allowed to conduct the discovery he seeks; provided however, that he shall no be allowed to serve subpoena for the discovery of prison records for any person other than himself.

2. "Open File" Records.

The major portion of petitioner's discovery requests are part of an ongoing dispute between the Clark County District

Attorney/Las Vegas Metro and the Federal Public Defender which the Court has chosen to call (for lack of a better alternative) the "open file" debate. At the outset, the Court observes the fact that the same discovery fight is being waged on at least four separate capital habeas fronts: in this case; in *Doyle v. McDaniel*, CV-N-00-101-HDM; in *Paine v. McDaniel*, CV-S-00-1082-KJD; and in *Riley v. McDaniel*, CV-N-01-0096-DWH[2]. The issues and allegations in all four cases are virtually identical. All that changes are the names of the litigants and those of the witnesses, co-defendants and victims.

Petitioner's argument, in short, is as follows. The Clark County District Attorney's (hereinafter the "CCDA") generally maintains an "open file" policy with respect to all capital murder cases. What this means precisely is not entirely clear, but petitioner here contends that the term "open file" is meant to convey to trial counsel that the CCDA's file is a complete representation of law enforcement's files and documents regarding the petitioner and the case against him. In other words, petitioner claims that because his case was "open file," trial counsel was not obliged to look any further than the CCDA's file for documents and evidence, the sort of which a prosecutor is compelled by law to

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[2] The Court takes judicial notice of its own docket and the records on file in other capital habeas cases. Based upon that review, it is apparent that this precise issue (i.e., the extent to which the CCDA's file is truly "open file") will be litigated in several other capital habeas cases. While the Court will not speculate regarding how many more cases there are in which the precise issue will be at bar, there is no doubt that the issue will see the light of day in more than just these four cases.