IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 77345

MARLO THOMAS

Appellant,

v.

WILLIAM GITTERE, et al.,

Respondents.

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

APPELLANT'S REPLY BRIEF

RENE L. VALLADARES
Federal Public Defender
Nevada State Bar No. 11479
JOANNE L. DIAMOND
Assistant Federal Public Defender
Nevada State Bar No. 14139C
411 E. Bonneville Avenue, Suite 250
Las Vegas, Nevada 89101
Telephone: (702) 388-6577

*Counsel for Appellant Marlo Thomas

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I. INTRODUCTION

Marlo Thomas's opening brief alleged constitutional violations that, considered singularly and cumulatively, deprived him of a fair capital trial. To avoid unnecessary repetition, this reply brief only addresses those aspects of the answering brief Thomas believes necessary for this Court's resolution of his appeal. Thomas otherwise continues to rely on the arguments raised in his opening brief.

The State seeks to bar Thomas from presenting his claims by arguing they are procedurally defaulted. However, Thomas establishes cause and prejudice to overcome procedural bars to all his claims because of the ineffective assistance of his counsel during all prior phases of the case. Thomas's trial and penalty retrial were infected with constitutional error; his convictions and death sentences are unreliable. The State's answering brief fails to rebut Thomas's meritorious claims. Accordingly, this Court should reverse the district court's order and grant him a new trial, or, in the alternative, remand his case for an evidentiary hearing.

II. THE STATE'S ARGUMENTS CONCERNING CAUSE AND PREJUDICE ARE LEGALLY AND FACTUALLY INCORRECT

The State incorrectly argues that Thomas is not entitled to relief of his guilt-phase claims because those claims are procedurally defaulted. But in his opening brief, Thomas demonstrated cause and prejudice to overcome procedural bars on all his claims—guilt phase, penalty phase, counsel's ineffectiveness, and substantive claims. The State's arguments challenging cause and prejudice are legally and factually infirm.

At the outset, the State misrepresents Thomas's arguments on cause and prejudice. Because Thomas obtained penalty-phase relief during post-conviction proceedings from his first trial, and was subsequently sentenced to death at a penalty-phase retrial, his guilt-phase claims and penalty-phase claims were addressed by different post-conviction counsel. The opening brief is clear that cause and prejudice to overcome default of any guilt-phase claims is provided by the ineffective assistance of guilt-phase post-conviction counsel, David Schieck; cause and prejudice to overcome default of any penalty-retrial claims is provided by the ineffective assistance of penalty-retrial

counsel, Bret Whipple.[1] The State incorrectly suggests Thomas "is alleging that Mr. Whipple's alleged ineffectiveness serves as good cause for raising all claims, both guilt- and penalty-phase."[2] In fact, the contrary is true: the opening brief specifically states Whipple was *not* responsible for raising previously defaulted guilt-phase claims.[3]

A. Cause and prejudice as to Thomas's guilt-phase claims are timely alleged under *Rippo*.

In his opening brief, Thomas argued that ineffectiveness from guilt-phase post-conviction counsel, Schieck, established cause and prejudice to overcome any procedural default of his guilt-phase claims.[4] In its answering brief, the State contends Thomas is raising these claims too late, and is therefore, procedurally barred from raising them.[5] The State is incorrect.

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[1] *See* AOB at 21-52. Schieck continued to represent Thomas during his second penalty hearing through January 2008. For clarity, throughout this section, Thomas refers to Schieck's ineffectiveness only during his role as Thomas's guilt-phase post-conviction counsel.

[2] Ans. Br. at 21; *see also id.* at 41.

[3] *See* AOB at 44-52.

[4] *See* AOB at 27-41, 124-40.

[5] *See* Ans. Br. at 6,10-11, 22, 34, 41.

There are three conceivable points at which Thomas could have argued Schieck was ineffective in order to overcome procedural default on his guilt-phase claims under *Crump*:[6]

March 9, 2005	January 28, 2009	October 27, 2017
Within one year of remittitur following Thomas's guilt-phase post-conviction proceedings	Within one year of remittitur following direct appeal of Thomas's penalty retrial	Within one year of remittitur following Thomas's penalty-retrial post-conviction proceedings

The State asserts Thomas should have raised his guilt-phase claims and alleged Schieck's ineffectiveness by the second option, January 28, 2009.[7] And the State alleges penalty-retrial post-conviction

[6] *See Crump v. Warden*, 113 Nev. 293, 934 P.2d 247 (1997).

[7] The State notes that Thomas "had until October 26, 2000, to file a timely petition arguing guilt-phase claims." Ans. Br. At 6. But that date is irrelevant to the discussion at issue here, i.e., when Thomas was required to raise guilt-phase claims that were not raised on account of the ineffectiveness of his post-conviction counsel. The State does not repeat this date in its briefing as it is wholly irrelevant to the issue before the Court.

counsel, Whipple, timely raised the ineffectiveness of Schieck after direct appeal of Thomas's penalty retrial.[8]

Thomas first notes that the State misrepresents the record to the Court. The State alleges that Whipple raised guilt-phase ineffective assistance of counsel claims against Schieck in the March 6, 2008, *pro per* petition, and the supplements filed on July 12, 2010, and March 31, 2014.[9] A review of these pleadings, however, shows that guilt-phase claims were not raised. And, unsurprisingly, Whipple did not allege that Schieck's ineffectiveness as post-conviction counsel excused any procedural default to guilt-phase claims that were not raised.

Thomas's March 6, 2008, *pro per* petition raised two claims of ineffective assistance of counsel related to his "remanded penalty hearing."[10] In the two supplements, Whipple noted Thomas filed his 2008 *pro per* petition "to raise issues of ineffective assistance of counsel on behalf of Mr. Schieck and Mr. Albregts *at his second Penalty*

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[8] *See* Ans. Br. at 10-11, 22.

[9] *See* Ans. Br. at 11, 22.

[10] 6 AA 1421–22.

Hearing,"[11] and that Whipple was appointed to "investigate and file Mr. Thomas' state post conviction petition related to his *second penalty phase trial*."[12] To that end, Whipple only raised ineffective assistance of penalty-retrial counsel claims.[13]

Although Whipple's July 12, 2010, petition included claim *headings* alleging the invalidity of Thomas's "conviction and sentence" and referring generally to the failures of "prior counsel," and "[t]rial counsel," all transcript citations in the body of those claims are to Thomas' 2005 penalty retrial, rather than his first trial in 1997.[14] The context and content of the claims clearly demonstrates the penalty retrial was the only proceeding Whipple took responsibility for reviewing. Indeed, Whipple expressly stated he did not consider guilt-phase claims or Schieck's earlier performance as post-conviction counsel within the scope of his representation.[15]

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[11] *Id.* at 1453 (emphasis added).

[12] *Id.* at 1434 (emphasis added).

[13] *Id.* at 1435–1442, 1454–59.

[14] *Id.* at 1435-42; *see id.* at 1440–44, 1446.

[15] 30AA7436-7438, at ¶ 3.

Second, the State's reliance on January 28, 2009, as the proper date by which Thomas had to argue ineffective assistance of post-conviction counsel in order to raise guilt-phase claims misconstrues the law. This Court held in *Rippo v. State* that petitions raising *Crump* arguments must be filed within one year of remittitur following a previous post-conviction petition, *not* direct appeal.[16] Specifically, this Court explained "that a necessary basis for a claim of ineffective assistance of postconviction counsel depends on the conclusion of postconviction proceedings in which the ineffective assistance allegedly occurred. Consistent with that determination, we conclude that the postconviction-counsel claim becomes available at the conclusion of those proceedings."[17] In arguing for the second option, January 28, 2009, the State has chosen a date divorced from practice or precedent at which counsel should have known to assert guilt-phase *Crump* claims. Indeed, this Court would have to overturn *Rippo* to conclude, as the

[16] *Rippo v. State*, 134 Nev. 411, 420–21, 423 P.3d 1084, 1096 (2018).

[17] *Rippo*, 134 Nev. at 420, 423 P.3d at 1096.

State asserts, that Whipple was required to raise guilt-phase *Crump* claims after the direct appeal of Thomas's second penalty hearing.

Pursuant to the State's argument, Whipple was required to act as both post-conviction counsel with respect to penalty-phase claims and *Crump* counsel with respect to guilt-phase claims. Requiring an attorney to raise claims in a petition that are in two different procedural phases does not comport with this Court's goal of preventing "piecemeal litigation that would further clog the criminal justice system."[18] Moreover, a court would have to apply different standards depending on whether the attorney was acting as a post-conviction attorney or *Crump* attorney for each claim raised in a petition. This second option has no basis in law; therefore, the Court should reject the State's argument.

In cases where a petitioner obtained penalty-phase relief during post-conviction proceedings and the same post-conviction attorney represented the petitioner at the subsequent retrial, the Court is

[18] *Id.* at 420–21; *Johnson*, 133 Nev. at 574–75, 402 P.3d at 1272–73.

presented with two options to interpret its precedent consistently. Either (1) Thomas had to allege Schieck's ineffectiveness as post-conviction counsel to revive his defaulted guilt-phase claims by March 9, 2005, one year after remittitur issued following his guilt-phase post-conviction proceedings; or (2) the claims alleging Schieck's ineffectiveness in order to overcome procedural default are timely now because they were raised within one year after the conclusion of all post-conviction proceedings.

In light of the district court's disposition of Thomas's guilt-phase claims in the instant petition, it appears the court believed that Thomas should have pled Schieck's ineffectiveness by March 9, 2005—within one year of remittitur following Thomas's guilt-phase post-conviction petition. However, there are at least three major problems with that deadline.

First, Thomas did not have notice that he was required to litigate Schieck's ineffectiveness to save his guilt-phase claims, because this Court has not yet determined what a petitioner in Thomas's position must do to challenge the effectiveness of post-conviction counsel raising guilt-phase claims when this Court remands a case during those post-

conviction proceedings for a penalty retrial. Thomas could not comply with law that was not settled. The failure to provide Thomas with notice that he had to allege Schieck's ineffectiveness by March 9, 2005, to save his guilt-based claims was "[a]n impediment external to the defense," which itself provides good cause for overcoming the procedural default.[19] Accordingly, even if March 9, 2005, was the applicable deadline, Thomas can still demonstrate good cause to overcome any procedural default to consideration of his guilt-phase claims.

Second, Schieck was still representing Thomas at his penalty retrial, and would continue to do so until 2008. Indeed, on March 9, 2005, Thomas had not even been formally sentenced.[20] As explained below, a March 9, 2005, deadline would have required Schieck to argue his own ineffectiveness while simultaneously litigating Thomas's penalty retrial.

Courts universally agree that counsel cannot be expected to argue their own ineffectiveness. As this Court held in *Nika v. State*, requiring

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

[20] 26AA6262, 6267 (Thomas was sentenced November 2, 2005).

counsel in an ongoing representation to simultaneously "defend [his] own conduct" in earlier proceedings places both counsel and client "in an untenable position."[21] Schieck could not, then, have raised his own ineffectiveness while continuing to represent Thomas at his penalty retrial. If Schieck's performance as post-conviction counsel had to be challenged by March 9, 2005, separate counsel should have been appointed to initiate a *Crump* petition raising guilt-phase claims—and alleging Schieck's ineffectiveness as post-conviction counsel as good cause and prejudice to overcome the procedural bars. Because separate counsel was not appointed, Schieck's conflict provides good cause to overcome procedural bars.[22]

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[21] *Nika v. State*, 120 Nev. 600, 606–07, 97 P.3d 1140, 1145 (2004); *see also Christeson v. Roper*, 135 S. Ct. 891, 894 (2015) (explaining that counsel cannot reasonably be expected to "denigrate their own performance," as that action "threatens their professional reputation and livelihood"); *United States v. Del Muro*, 87 F.3d 1078, 1080–81 (9th Cir. 1996) (describing conflict as "actual" and "irreconcilable" when counsel had to present evidence of his own ineffectiveness).

[22] *See Manning v. Foster*, 224 F.3d 1129, 1134–35 (9th Cir. 2000) (holding that attorney's conflict can provide good cause to overcome procedural default).

Thomas recognizes that in this scenario, he would still be required to raise his *Crump* arguments against Schieck at the first available opportunity. And he did so, with his 2017 post-conviction petition. Thomas could not raise guilt-phase claims in the post-conviction petition from his penalty retrial as his attorney, Whipple, was clearly ignorant of any responsibility on his part to raise guilt-phase claims.[23] As Thomas argued in his opening brief, if this Court finds Whipple's appointment included acting as *Crump* counsel for the Schieck post-conviction proceedings, his failure to recognize and fulfill this role constitutes an abandonment of Thomas, providing good cause to overcome any procedural default of his guilt-phase claims.[24]

Third, it would be unduly problematic to require petitioners who receive penalty relief during initial post-conviction proceedings to raise guilt-phase *Crump* arguments while also litigating their penalty retrials. There are at least three obvious problems. First, and perhaps

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[23] *See* AOB at 50-52.

[24] *See id.* at 51-52 (citing *Maples v. Thomas*, 565 U.S. 266, 281 (2012)).

most importantly, until the jury returns the verdict from the penalty retrial, there is no final judgment to challenge in a post-conviction petition.[25] Second, relatedly, because Thomas was not under a sentence of death as of March 9, 2005, it is unclear if the rules governing capital cases or non-capital cases—including the rules concerning appointment of counsel—would apply to him.[26] Third, simultaneous trial proceedings and post-conviction proceedings would be complicated in practice, with two sets of attorneys, experts, and investigators examining many of the same issues.[27]

Thus, the most reasonable deadline in this case to raise *Crump* arguments is October 27, 2017. That date marks the end of the initial state post-conviction proceedings and is the most reasonable reading of *Rippo*. Moreover, this date aligns most closely with this Court's goal in *Rippo* and *Johnson* to bring clarity and simplicity to Nevada's system

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[25] *See Johnson v. State*, 133 Nev. 571, 574, 402 P.3d 1266, 1272 (2017), *reh'g denied* (Jan. 19, 2018).

[26] *See id.* at 574–75, 402 P.3d at 1272–73 (explaining that bifurcated post-conviction proceedings would be "unworkable in practice, particularly in capital cases").

[27] *See id.*

for challenging death sentences in post-conviction proceedings.[28] And it prevents "piecemeal litigation that would further clog the criminal justice system," which this Court in *Rippo* and *Johnson* also sought to avoid.[29]

March 9, 2005	January 28, 2009	October 27, 2017
Within one year of remittitur following Thomas's guilt-phase post-conviction proceedings	Within one year of remittitur following direct appeal of Thomas's penalty retrial	Within one year of remittitur following Thomas's penalty-retrial post-conviction proceedings
		
Inconsistent with *Rippo*; unnecessarily complex for reviewing court	Inconsistent with *Nika* and *Rippo*; piecemeal litigation	Consistent with Rippo and *Johnson*; simple rule for litigants and reviewing courts

[28] *Rippo*, 134 Nev. at 420–21, 423 P.3d at 1096; *Johnson*, 133 Nev. at 574–75, 402 P.3d at 1272–73.

[29] *Id.*

1. Thomas has proven prejudice from post-conviction counsel's failure to raise guilt-phase claims.

The State argues there was no prejudice from post-conviction counsel's failure to raise guilt-phase claims because this Court, in affirming the dismissal of Schieck's post-conviction petition, held the district court did not err in denying the guilt-phase claims raised in that petition.[30] The State misses the point. The focus of an ineffective assistance of counsel claim is not necessarily on what counsel *did*, but also what they *failed* to do. It is precisely because Schieck failed to raise all meritorious guilt-phase claims that Schieck, himself, was ineffective.

a. Thomas was prejudiced by Schieck's failure to raise a state-of-mind defense claim.

In Claim Thirteen B, Thomas argued trial counsel were ineffective for failing to present any evidence in support of a state-of mind defense during the guilt phase.[31] This Court has never considered this aspect of guilt-phase counsel's ineffectiveness because Schieck failed to present it in the guilt-phase post-conviction proceedings.[32] Thomas was clearly

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[30] *See* Ans. Br. at 22-23.

[31] *See* AOB at 124-37; *see also* 4AA756-65.

[32] *See* AOB at 27-41.

prejudiced by Schieck's failure to raise this ineffective assistance of trial counsel claim. On trial counsel's motion, the court instructed the jury on second degree murder.[33] The evidence developed and presented in Claim Thirteen B supported a verdict of second degree murder.[34]

The State argues, "because Appellant has never argued that he could have pleaded not guilty by reason of insanity, or guilty but mentally ill," evidence of Thomas's impaired mental state at the time of the offense "would have been irrelevant during the guilt phase."[35] The State is wrong. Thomas's jury was instructed: "Murder in the Second Degree is murder with malice aforethought, but without the admixture of premeditation."[36] The expert reports underlying claim Thirteen B support a finding that, based on his state of mind, Thomas never premeditated or intended to kill anybody.[37]

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[33] *See* 22AA5495; 14AA3287.

[34] *See* AOB at 133-36.

[35] Ans. Br. at 40, n.5.

[36] 14AA3287.

[37] *See* 4AA759-62.

Thomas was prejudiced by Schieck's failure to raise this claim of trial counsel's ineffectiveness. Effective trial counsel would have presented the evidence in Claim Thirteen B. There is a reasonable probability Thomas would not have been convicted of first degree murder if such evidence had been presented.

b. Thomas was prejudiced by Schieck's failure to raise juror bias claims.

In Claim Twenty-Eight, Thomas alleged biased jurors were seated at his guilt-phase trial.[38] Juror Joseph Hannigan's bias stemmed from his concealment on voir dire of his close relationship with members of a violent criminal enterprise, in particular his ongoing fear of one member of the group who was a convicted murderer.[39] Juror Sharyn Brown's bias stemmed from the circumstances of a home-invasion robbery, during which she was duct-taped and held at gunpoint; her familiarity with the crime scene; and her prior knowledge of the case.[40] The State argues these claims should have been raised during direct

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[38] *See* AOB at 64-86.

[39] *See* AOB at 64-82.

[40] *See* AOB at 82-86.

appeal from Thomas's first trial.[41] But these claims rely on evidence outside the record of Thomas's trial. When reviewing a case on direct appeal, this Court "refuse[s] to consider any matter outside the record."[42] These claims could not, then, have been raised on direct appeal.

The extra-record evidence relied on to support this claim consists of declarations from jurors Hannigan and Brown and undersigned counsel's investigator, and newspaper reports and cases relating to the prosecution of the criminal enterprise with which Hannigan was affiliated.[43] The State concedes these claims should have been investigated and raised by Schieck during the guilt-phase post-conviction proceedings.[44]

Schieck was on notice of the need to interview Brown. It was clear from the voir dire transcript that Brown should have been questioned

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[41] *See* Ans. Br. at 38.

[42] *Anderson v. State*, 81 Nev. 477, 482, 406 P.2d 532, 534 (1965); *see* NRAP 30 (listing required contents of the record on appeal).

[43] *See* 4AA875-82; 29AA7140-45; 29AA7149-53; 30AA7453-55.

[44] *See* Ans. Br. at 39.

further about the circumstances of her home invasion robbery and her ability to be a fair and impartial juror for Thomas.[45] If this Court finds there was nothing in the record to alert Schieck to the possibility of Hannigan's misconduct, Thomas is still entitled to relief because any underdevelopment of Hannigan's juror bias claim was attributable to Hannigan, not Thomas.[46]

The State notes that the opening brief alleges Thomas can overcome the procedural default of these claims because of *Whipple*'s ineffectiveness.[47] This was a typographical error on the part of undersigned counsel. As discussed in detail above, the opening brief clearly delineates that any guilt-phase claims should have been raised by Schieck, and any penalty-retrial claims should have been raised by Whipple. And, as a review of the district court's order dismissing the

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[45] *See* AOB at 82-83.

[46] *See Williams v. Taylor*, 529 U.S. 420, 442-43 (2000); AOB at 81-82 n.248.

[47] *See id;* AOB at 81-82 and n.248.

instant petition demonstrates, the State is wrong that this misstatement contributed to the district court's denial of this claim.[48]

B. Thomas has proven prejudice from post-conviction counsel's failure to raise penalty-phase claims.

The State claims Whipple's ineffectiveness cannot excuse the procedural default of any penalty-retrial based claim other than Claim Fourteen—ineffective assistance of counsel at the penalty retrial.[49] The State's claim is misdirected. This Court has held ineffective assistance of state post-conviction counsel constitutes good cause and prejudice to overcome the procedural bars to any claim of constitutional error that is appropriate to raise in post-conviction proceedings.[50]

Whipple failed to present substantial claims of penalty-retrial counsel's ineffectiveness, penalty-retrial direct appeal counsel's ineffectiveness, prosecutorial misconduct, and trial court errors. Thomas made specific allegations of constitutional error and supported his allegations with new, reliable evidence that was not presented in

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[48] *See* 35AA8590-99.

[49] *See* Ans. Br. at 25-26.

[50] *Crump*, 113 Nev. at 304-05, 934 P.2d at 254.

the penalty-retrial post-conviction proceedings because of Whipple's ineffectiveness. Thus, Thomas can establish cause and prejudice to overcome the procedural default of any of his underlying claims.

1. Whipple was ineffective for failing to investigate and present mitigation evidence.

In his opening brief, Thomas alleged penalty-retrial post-conviction counsel was ineffective for failing to investigate, develop, and present available mitigation evidence in support of a claim that penalty-retrial counsel were ineffective under *Strickland*.[51] The mitigation case underlying this allegation was presented as Claim Fourteen B of the instant petition ("Retrial counsel's mitigation investigation and presentation were deficient.").[52] The petition alleged Whipple's failure to develop that mitigation evidence was good cause for Thomas's failure to present Claim Fourteen B earlier.[53] The State concedes, as it must, that *Crump* claims challenging Whipple's performance are properly

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[51] *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See* AOB at 22-27.

[52] *See* AOB at 87-116.

[53] *See* AOB at 21-22 (citing *Crump v. Warden*, 113 Nev. 293, 304-05, 934 P.2d 247, 254 (1997)).

raised at this time.[54] The State argues, however, that Thomas "has utterly failed to show" there was "any indication" Whipple should have undertaken the investigations that produced the mitigation evidence in Claim Fourteen B.[55] The State is wrong.

Whipple's initial state post-conviction petition included a claim that penalty-retrial counsel were ineffective for failing to investigate Thomas's social history and present available mitigation evidence.[56] That claim—which spanned less than one page of the petition—relied exclusively on the testimony of neuropsychologist Dr. Thomas Kinsora at Thomas's first penalty trial.[57] After filing the initial petition, Whipple arranged for neuropsychologist Dr. Jonathan Mack to evaluate Thomas. After evaluating Thomas, Mack mailed a draft report to Whipple.

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[54] Ans. Br. at 13.

[55] *See* Ans. Br. at 24.

[56] *See* 6AA1438-39.

[57] *Id.* The State's contention that in this one page, record-based claim, Whipple "already raised the arguments" contained in Claim Fourteen B—which spans 29 pages and references multiple exhibits and declarations— is wholly without merit. *See* Ans. Br. at 61.

In addition to discussing Thomas's impaired intellectual functioning, Mack's draft report referenced a wealth of mitigation leads concerning Thomas's social history. Whipple subsequently filed a supplemental petition and attached Mack's draft report as the only exhibit.[58] Yet the supplemental petition neither mentioned nor further developed the claim that penalty-retrial counsel failed to investigate and present mitigating evidence from Thomas's childhood.[59]

The social history documents Mack reviewed and summarized in his draft report were replete with "red flags" pointing up the need for Whipple to investigate further.[60] The report referenced:

- Prenatal assaults to Thomas's brain from his mother's drinking, exposure to work-related toxins, and beatings from his father;[61]
- Thomas witnessed violence between his parents;[62]

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[58] *See* 6AA1498.

[59] *Id.*

[60] *See Rompilla v. Beard*, 545 U.S. 374, 392 (2005).

[61] *See* 6AA1477.

[62] *Id.*

- Thomas was emotionally and physically abandoned by his parents;[63]
- Thomas attended 10 different schools by fourth grade;[64]
- By the age of 11, Thomas was considered an educationally handicapped student because of his aggressive and acting out behaviors;[65]
- Thomas had bladder incontinence almost daily until he was 12, which "may have been an indication of childhood anxiety";[66]
- Thomas began using marijuana and drinking beer at around the age of 14; from 14 to 21, he used PCP and cocaine daily;[67]
- When Thomas was a child, his father was sentenced to life in prison for kidnaping, burglary, use of a deadly weapon, and sexual assault.[68]

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[63] *Id.*

[64] *See* 6AA1474.

[65] *See* 6AA1464-65.

[66] 6AA1466, 1495.

[67] *See* 6AA1483.

[68] *Id.*

If Whipple had investigated these leads, he would have developed the ineffective assistance of penalty-retrial counsel claim presented as Claim Fourteen B. Claim Fourteen B details, *inter alia*, retrial counsel's failure to investigate Thomas's abusive and neglectful childhood, and their failure to even consult with an expert to learn the significance of that traumatic upbringing on Thomas's mental health and moral culpability. The Ninth Circuit recently emphasized how "[e]vidence of abuse inflicted as a child is especially mitigating, and its omission is thus particularly prejudicial. . . . A jury's consideration of abuse and disadvantage suffered during this formative time is especially critical."[69] The Court similarly faulted trial counsel for "fail[ing] to take the routine step of having [the petitioner] examined by a psychologist, psychiatrist, or any other mental health professional."[70]

Claim Fourteen B thus presents a compelling case that Thomas was denied the effective assistance of counsel at his penalty retrial. But instead of following the leads, identified above, to develop that claim,

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[69] *Andrews v. Davis*, __F.3d__, 2019 WL6835602 at *18 (9th Cir. 2019).

[70] *Id.* at *14

Whipple did nothing. The State attempts to justify Whipple's failure to investigate on the basis that "similar" evidence was presented at Thomas's first penalty trial, thus penalty-retrial counsel made a strategic decision to take a different approach.[71] The State's position is wrong for two reasons.

First, the only way for Whipple to determine whether penalty-retrial counsel's assumed strategy was reasonable was for *him* to conduct a reasonable investigation and compare its results with the mitigation presentation at Thomas's penalty retrial. A reasonable investigation would have also included a discussion with trial counsel to determine whether they made such a strategic decision. Had he done so, Whipple would have learned penalty-retrial counsel had no strategic reason for failing to investigate and present the evidence in Claim Fourteen B.[72] But Whipple never contacted penalty-retrial counsel and never conducted a constitutionally adequate mitigation investigation.[73]

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[71] Ans. Br. at 24-25.

[72] *See* 26AA6414 at ¶7; 28AA6958 at ¶2.

[73] *See* 26AA6414 at ¶9; 28AA6958 at ¶9.

Almost two years passed between Whipple receiving Mack's draft report and filing the supplemental petition. In all that time, Whipple conducted no investigation whatsoever.[74] *Strickland* is clear: "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."[75] Whipple's failure to investigate was not an exercise of reasonable professional judgment; it was a textbook example of deficient performance under *Strickland*.[76]

Second, if Whipple had conducted a constitutionally adequate mitigation investigation, he would have discovered the evidence presented at Thomas's first penalty trial was not "similar" at all to the mitigation case effective trial counsel could have developed.[77]

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[74] *See* AOB at 26.

[75] *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984)

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

[77] *Compare* AOB at 112-15 *with* AOB at 90-102.

a. Whipple's deficient performance prejudiced Thomas.

The State argues there was no prejudice from Whipple's failure to develop Claim Fourteen B because this Court, in affirming the dismissal of Whipple's post-conviction petition, held Thomas was not prejudiced by penalty-retrial counsel's failure to develop mitigating evidence of Thomas's impaired intellectual functioning.[78] Rather than defeating Thomas's claim, however, the State's argument and this Court's opinion *support* a finding that Whipple was ineffective.

"To determine whether prejudice has been established," a reviewing court "compare[s] the actual trial with the hypothetical trial that would have taken place had counsel competently investigated and presented the . . . defense."[79] Whipple's responsibility was to show the post-conviction court what a competent mitigation investigation by penalty-retrial counsel would have produced. But because Whipple only presented evidence of Thomas's impaired intellectual functioning, the post-conviction court—and this Court, in turn—believed that was the

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[78] *See* Ans. Br. at 23-25, quoting 7AA1538.

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

only available mitigation evidence trial counsel failed to develop. This Court found the proffered mitigation evidence insufficient to establish ineffective assistance of penalty-retrial counsel precisely because Whipple's investigation was deficient.

Because both penalty-retrial counsel and Whipple were ineffective, this Court has never considered the complete picture of Thomas's mitigation evidence. This Court's finding that the evidence proffered by Whipple was insufficient to establish prejudice from any deficient performance by penalty-retrial counsel does not preclude a finding that Thomas was prejudiced by penalty-retrial counsel's failure to develop and present the mitigation evidence offered for the first time in Claim Fourteen B.

b. Thomas can overcome any default of Claim Fourteen B.

The State claims Thomas has not met his burden of showing good cause for any procedural default of Claim Fourteen B because the claim discusses only the ineffective assistance of penalty-retrial counsel, not ineffective assistance by Whipple.[80] Claim Fourteen B is titled "Retrial

[80] *See* Ans. Br. at 59-60.

counsel's mitigation investigation and presentation were deficient," and that is what it discusses. However, the procedural default section of the opening brief specifically alleged Whipple's failure to investigate and present available mitigation evidence was good cause to overcome any default of Claim Fourteen B.[81]

2. Whipple was ineffective for failing to develop and present juror bias and misconduct claims.

In Claim Twenty-Six, Thomas alleged jurors at his penalty retrial were biased and engaged in juror misconduct.[82] The State again argues these claims should have been raised during direct appeal, this time from Thomas's penalty retrial, despite acknowledging the claim relies on extra-record evidence by discussing "the affidavits upon which Appellant relied."[83]

The most prejudicial claim of juror misconduct was based on the declarations of five jurors who stated they learned that Thomas had

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[81] *See* AOB at 22-27.

[82] *See* 4AA859-70; AOB at 8-19, 154-63.

[83] *See* Ans. Br. at 65-68.

been previously sentenced to death by another jury.[84] The district court relied on NRS 50.065(2), and this Court's application of that provision in *Echavarria v. State*, to find the declarations inadmissible.[85] In the opening brief, Thomas cited to this Court's decision in *Meyer v. State* and explained that the district court's reliance on NRS 50.065 and *Echavarria* were misplaced because the juror declarations here described extraneous prejudicial information improperly brought before the jury's attention.[86]

The State argues the information is not extraneous because the jurors learned of Thomas's prior death sentences "during the trial itself."[87] The State misrepresents the record and misunderstands the meaning of "extraneous." First, although the declarations vary as to whether jurors learned about the prior death sentences from the judge

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[84] *See* 16AA3768-72; 26AA6419-21; 28AA6779-85; 28AA6812-17; 28AA6836-38.

[85] *See* 35AA8597-98 (citing *Echavarria v. State*, 108 Nev. 734, 741-42, 839 P.2d 589, 594 (1992)).

[86] *See* AOB at 11 (citing *Meyer v. State*, 119 Nev. 554, 562, 80 P.3d 447, 454 (2003)).

[87] *See* Ans. Br. at 67.

or one of the attorneys, the State agrees this information was never disclosed on the record.[88] The jurors did not, then, learn about the prior death sentences "during the trial itself." Second, the information is by its very nature extraneous because it came from a source outside the jury.[89]

Finally, the State argues the failure of penalty-retrial post-conviction counsel to interview the jurors was not objectively unreasonable.[90] But juror misconduct claims typically rely on evidence developed outside the record. The first opportunity for a death-sentenced petitioner in Nevada to develop extra-record claims is during state post-conviction proceedings. Whipple's failure to interview the jurors was both objectively unreasonable and subjectively unreasonable under the particular facts of this case.

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[88] *See* AOB at 9; 35AA8585.

[89] *See Meyer*, 119 Nev. at 562, 80 P.2d at 454; *Warger v. Shauers*, 574 U.S. 40, 51 (2014).

[90] Ans. Br. at 68.

As discussed in Section I.C.2., below, Whipple raised a claim of trial court error for failing to remove Thomas's shackles.[91] Reasonably effective counsel would have interviewed the jurors to ask if any of them saw Thomas's shackles.[92] During this juror investigation, reasonably effective counsel would have uncovered the evidence of juror bias and misconduct underlying Claim Twenty-Six. Whipple's failure to interview the jurors constitutes deficient performance that prejudiced Thomas, thus Thomas overcomes any default of Claim Twenty-Six.

3. Whipple was ineffective for failing to allege Thomas's ineligibility for the death penalty.

In Claim Three, Thomas alleged the State's reliance at the penalty retrial on his juvenile robbery conviction and other juvenile bad acts was unconstitutional under *Roper v. Simmons*.[93] The State argues Thomas cannot show prejudice from Whipple's deficient performance

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[91] *See* 6AA1444-45.

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

[93] *Roper v. Simmons*, 543 U.S. 551 (2005); *see* 3AA668-77; AOB at 117-20, 150-54.

because this claim was raised on direct appeal from Thomas's penalty retrial.[94] The State is wrong.

This Court did not consider Claim Three on direct appeal. It considered an entirely different claim: the improper admission of statements about Thomas's juvenile behavior on the basis they were not proper rebuttal.[95] The Court's finding that this unrelated error was minimal is irrelevant to this Court's review of Claim Three.

C. The State's other contentions lack merit.

1. Thomas demonstrated good cause to re-raise his *Batson* claim.

In Claim One of his underlying petition, Thomas alleged the State's exercise of a peremptory challenge at his first trial violated *Batson v. Kentucky*.[96] Although a similar claim was raised on direct appeal, Thomas alleged good cause to re-raise his *Batson* claim because, *inter alia*, appellate counsel was ineffective for failing to argue the trial

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[94] *See* Ans. Br. at 48.

[95] *See* 6AA1386.

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

court misapplied *Batson*'s third step.[97] The State accuses Thomas of attempting to avoid the procedural bars with a "more detailed argument."[98] But the trial court's misapplication of step three is a qualitatively different basis for challenging the *Batson* ruling than that raised on direct appeal.

As Thomas argued in his opening brief, this Court's opinion in *Williams v. State* emphasized the weight a reviewing court should place on a district court's failure to properly engage the *Batson* inquiry.[99] When it appears more likely than not the State struck a prospective juror because of his or her race, a trial court's misapplication of *Batson* entitles a petitioner to a new trial.[100] The Supreme Court's recent decision in *Flowers v. Mississippi*, issued one week after Thomas filed

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[97] *See* AOB at 140-41.

[98] *See* Ans. Br. at 36.

[99] *See* AOB at 140-41 (citing *Williams v. State*, 134 Nev.__, 429 P.3d 301 (2018)).

[100] *See id.*

his opening brief, compels a finding that prospective juror Kevin Evans was, more likely than not, struck because of his race.[101]

The record is clear that Thomas's prosecutor singled out Evans for particular scrutiny and disparate questioning to which no white prospective juror was subjected. The prosecutor admitted watching Evans during the voir dire process before he was even called to the jury box.[102] The prosecutor investigated Evans's employer, Silver State Disposal, and learned it did not pay employees for jury service.[103] The prosecutor then questioned Evans extensively about his financial ability to sit, unpaid, through a two-week trial.[104] When Evans did not take the bait, and insisted his employer's policy would not affect his ability to sit, the State manufactured pretextual reasons to strike him.[105]

Supreme Court precedent explains how "disparate questioning and investigation of prospective jurors on the basis of race can arm a

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[101] *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019).

[102] *See* 22AA5425; AOB at 147.

[103] *See* 22AA5422-23; AOB at 147-48.

[104] *See id.*

[105] *See* 22AA5422-23; 22AA5429-30.

prosecutor with seemingly race-neutral reasons to strike the prospective jurors of a particular race."[106] The Court in *Flowers* reiterated the significance of disparate questioning and investigation of African-American prospective jurors as evidence of discriminatory intent: "by asking a lot of questions of [ ] black prospective jurors or conducting additional inquiry into their backgrounds, a prosecutor can try to find some pretextual reason—any reason—that the prosecutor can later articulate what is in reality a racially motivated strike."[107] Thus, "[t]he lopsidedness of the prosecutor's questioning and inquiry can itself be evidence of the prosecutor's objective."[108]

Here, the trial court's misapplication of *Batson*'s third step, viewed alongside the prosecutor's disparate treatment of Evans, supports a finding that direct appeal and guilt-trial post-conviction counsel were ineffective, overcoming any procedural default of Claim One.

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[106] *Flowers*, 139 S. Ct. at 2247-48.

[107] *Id.* at 2248.

[108] *Id.*

2. Thomas pled specific factual allegations to support his excessive security measures claim.

Thomas alleged, in Claim Two, his death sentences are unconstitutional because he and his witnesses appeared shackled before the jury, and because the overwhelming presence of uniformed correctional officers was prejudicial.[109] The State argues these claims could have been raised on direct appeal from the penalty retrial.[110] Schieck, as penalty-retrial direct appeal counsel, should have raised the claim relating to Thomas's shackling, and Whipple should have alleged Schieck's ineffectiveness for failing to do so. Instead, Whipple raised only a trial court error claim for refusing to remove Thomas's shackles.[111] The claims related to the shackling of Thomas's witnesses, however, depend on extra-record evidence that could have only been developed and presented in the penalty-retrial post-conviction proceedings.

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[109] *See* 3AA663-67; AOB at 164-72.

[110] *See* Ans. Br. at 42.

[111] *See* 6AA1444-45.

The State argues the claims related to witness-shackling and excess security presence should be rejected as "bare and naked" because the opening brief "does not even allege which or how many witnesses were shackled or which security officers were present and allegedly should not have been."[112] The State misrepresents the opening brief, claiming Thomas "does not even name—let alone offer a record citation of—any witnesses who were allegedly shackled."[113] But the opening brief specifically cites to the statement in the declaration of juror Adele Bayse that "[t]he inmates who testified on behalf of the defendant were all in jumpsuits and shackles."[114] The names and number of inmate witnesses are readily identifiable from the transcript of the penalty retrial.[115] The State is wrong that the opening brief supported this claim with only the declaration of another juror, Don McIntosh.[116]

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[112] *Id.* at 45-46.

[113] *Id.* at 46.

[114] *See* AOB at 168 (citing 16AA3768-72 at ¶7).

[115] *See* 3AA552-63 (testimony of Damian Rivero, Ronnie Sellers, Jaime Jackson, and Floyd Anthony).

[116] *See* Ans. Br. at 46.

McIntosh's statement that "inmates were in shackles" does, however, add further evidentiary support for the claim.[117]

The State argues the juror declarations are inadmissible under NRS 50.065(2) because they indicate the effect on their deliberations of seeing the witnesses shackled.[118] They do not: they are objective factual statements that the witnesses were shackled.[119] Even McIntosh's statement that it "would have been more believable" if Thomas's witnesses were not shackled does not concern his mental processes or its effect on the verdict and is admissible.

Finally, the claim of excess security personnel is not supported by a juror declaration as the State represents. It is supported by the declaration of retrial counsel's investigator, Maribel Yanez, and NRS 50.062(2) has no impact on its admissibility.[120]

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[117] *Id.* (citing 28AA6779-85).

[118] *Id.*

[119] *See*, *e.g.*, *Vanisi v. Baker*, 405 P.3d 97, 2017 WL 4350947 at *6 n.6 (Nev. 2017) ("in evaluating prejudice, courts use an objective measure and do not consider the deliberative process of the sitting jury.").

[120] *See* 26AA6422-26 at ¶¶11-12.

Thomas pled specific factual allegations, supported by admissible declarations, demonstrating that excess security measures prejudiced the fairness of his penalty retrial. The State has offered nothing to rebut this prima facie evidence. Because this Court cannot be confident that these excess security measures did not influence the jurors' verdict of death, it should remand for an evidentiary hearing.

3. The use of an invalid aggravator to obtain Thomas's death sentence is not "irrelevant."

One of the aggravating circumstances found against Thomas was the murder was committed by a person who was previously convicted of a felony involving the use or threat of violence against another person, specifically an attempted robbery conviction from 1990.[121] The opening brief claimed this aggravating circumstance was improperly put to and found by Thomas's jury, because the State failed to produce sufficient evidence that the overt act in that conviction established the use or threat of violence.[122]

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[121] *See* 21AA5189-92, 26AA6257-67; NRS 200.033(2)(b).

[122] *See* AOB at 54-56.

The State's arguments against this claim are difficult to follow. The State appears to argue this claim is barred by the law of the case doctrine.[123] But that doctrine does not apply because this issue was never previously presented to this Court. Then, without explanation, the State simply declares, because another prior violent felony aggravating circumstance was found against Thomas, the improper use of the 1990 conviction "is irrelevant."[124] Reducing four aggravating circumstances to three is far from irrelevant.[125]

In a weighing state like Nevada, it is constitutional error to give weight to an improper aggravating circumstance, even if other aggravating circumstances remain.[126] And because a prerequisite to death-eligibility is a finding that there are no mitigating circumstances sufficient to outweigh the aggravating circumstances, if this Court

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[123] *See* Ans. Br. at 29.

[124] *Id.*

[125] *See State v. Haberstroh*, 119 Nev. 173, 184 , 69 P.3d 676, 683-84 (2003).

[126] *See Rippo v. State*, 122 Nev. 1086, 1093, 146 P.3d 279, 283-84 (2006); *Bejarano v. State*, 122 Nev. 1066, 1081-82, 146 P.3d 265, 266-76 (2006); *McKenna v. McDaniel*, 65 F.3d 1483, 1489 (9th Cir. 1995); AOB at 53-54.

agrees the use of Thomas's 1990 armed robbery conviction was improper, only a jury may determine if Thomas is still eligible for the death penalty. This Court must also consider the invalidity of this aggravating circumstance when assessing prejudice from penalty-retrial counsel's ineffectiveness under *Strickland*, as alleged in Claim Fourteen.[127]

4. Thomas's claim that he is exempt from the death penalty under *Roper* and *Atkins* is new.

In Claim Twenty-Seven of the petition, Thomas alleged his borderline intellectual functioning and youth at the time of the offense exempt him from the death penalty under *Atkins v. Virginia* and *Roper v. Simmons*.[128] This ineligibility rendered him actually innocent of the death penalty such that failure to consider Claim Twenty-Seven would constitute a fundamental miscarriage of justice, excusing any

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[127] *See* AOB at 86-140; *see*, *e.g.*, *State v. Bennett*, 119 Nev. 589, 604-05, 81 P.3d 1, 11-12 (2003).

[128] *Atkins v. Virginia*, 536 U.S. 304, 320-21 (2002); *Roper v. Simmons*, 543 U.S. 551, 569 (2005). *See* 4-5AA991-1019, 13-14AA3248-3253; AOB at 58-64.

procedural default of that claim.[129] The State argues Thomas's ineligibility for the death penalty cannot serve as good cause to overcome the procedural bars because it was previously raised in Thomas's penalty-retrial post-conviction proceedings.[130] The State misrepresents the record.

As summarized in this Court's opinion affirming the denial of the penalty-retrial post-conviction petition, Whipple alleged variously that Thomas might be intellectually disabled; retrial counsel were ineffective for not developing and presenting intellectual disability as mitigation; and retrial counsel were ineffective for not presenting evidence of borderline intellectual functioning.[131] Whipple never argued Thomas's impaired intellectual functioning, youth at the time of the offenses, or a combination of those factors, exempted him from the death penalty.

Whipple should have raised Claim Twenty-Seven, and argued penalty retrial and second direct appeal counsel were ineffective for

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[129] *See* AOB at 52-53.

[130] *See* Ans. Br. at 30-31.

[131] *See* 7AA1534-35; *see also* 6AA1437, 6AA1454-59, 7AA1520-27.

failing to raise it. Because all prior state counsel were ineffective, Claim Twenty-Seven has not been presented previously to this Court.

5. Laches does not bar this Court's consideration of Thomas's claims.

The State pled laches in its motion to dismiss Thomas's petition. The answering brief alleges Thomas cannot overcome the rebuttable presumption of prejudice, because the ineffectiveness of post-conviction counsel is not "external to the defense."[132] The State's reasoning ignores this Court's holdings. In fact, the State's argument would render *Crump*'s protections meaningless, and conflicts with *Rippo*'s holding that petitioners have one year to file a petition challenging the effectiveness of their initial post-conviction counsel.[133]

Thomas's allegations under *Crump* are filed within "a reasonable time after [they] became available" and the relevant time period in such circumstances begins running "after the remittitur issued in the appeal

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[132] Ans. Br. at 7-9 (citing NRS 34.800(2); *Clem v. State*, 119 Nev. 618, 621, 81 P.3d 521, 525 (2003)).

[133] *See Crump v. Warden*, 113 Nev. 293, 304-05, 934 P.2d 247, 254 (1997); *Rippo v. State*, 132 Nev. 95, 109, 368 P.3d 729, 739 (2016).

from the denial" of his post-conviction habeas petition.[134] There are two procedural bars to filing a petition: "the petition must be filed within a certain period of time unless the petitioner shows cause for the delay; and the petitioner is limited to one petition absent a demonstration of good cause and actual prejudice."[135] Thomas argued in his opening brief he could overcome laches by the showing of good cause and prejudice demonstrated throughout his petition and opening brief.

This Court has determined that delays which occur after the appointment of counsel in a capital habeas case cannot be imputed to the petitioner under NRS 34.800.[136] This rationale is applied to the statutory laches bar because the delay—caused by the ineffective assistance of prior counsel in failing to timely raise meritorious claims—is attributable to the State, and the State cannot profit from a

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[134] *Lisle v. State*, 131 Nev. 356, 361, 351 P.3d 725, 729 (2015) (citations omitted).

[135] *Lisle*, 131 Nev. at 357, 351 P.3d at 727.

[136] *Bennett v. State*, 111 Nev. 1099, 1103, 901 P.2d 676, 679 (1995) (declining to apply NRS 34.800 when the petitioner "filed his initial petition in a timely manner, and it was only after counsel was appointed that the three-year delay transpired"); *State v. Powell*, 122 Nev. 751, 758-59, 137 P.3d 453, 458 (2006).

delay for which it is responsible.[137] If this Court applied laches to bar Thomas's *Crump* petition, there would be no avenue for relief from the ineffective assistance of his post-conviction counsel and *Crump*'s protections would be meaningless.

Therefore, "[e]specially strong circumstances must exist to sustain the defense of laches when the statute of limitations has not run."[138] Such circumstances are not present here. Thomas has been actively litigating his claims of error since his conviction became final. As applied to Thomas, this means NRS 34.800(2) cannot pose an absolute bar to his petition when he has timely asserted good cause based on the ineffective assistance of state post-conviction counsel under *Crump*.

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[137] *Crump*, 113 Nev. at 302-05, 934 P.2d at 252-54. *Cf. Coleman v. Thompson*, 501 U.S. 722, 754 (1991) ("Where a petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the state, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default and the harm to state interests that federal habeas review entails.") Thomas recognizes that *Coleman* discusses circumstances where there is a constitutional right to counsel; whereas, *Crump* concerns a statutory right to counsel under NRS 34.820(1).

[138] *Langir v. Arden*, 82 Nev. 28, 36, 409 P.2d 891, 895 (1966).

III. CONCLUSION

The State fails to rebut any of Thomas's arguments. For the reasons stated here and in his opening brief, this Court should grant him relief and reverse his convictions and death sentences. In the alternative, this Court should reverse and remand for an evidentiary hearing for Thomas to demonstrate cause and prejudice and the merit of his claims.

DATED this 19th day of December, 2019.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

/s/ *Joanne L. Diamond*
Assistant Federal Public Defender

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Respectfully submitted,

/s/ *Joanne L. Diamond*
Assistant Federal Public Defender

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I hereby certify that this document was filed electronically with the Nevada Supreme Court on December 19, 2019. Electronic Service of the foregoing APPELLANT'S REPLY BRIEF shall be made in accordance with the Master Service List as follows:

Alexander G. Chen
Alexander.Chen@clarkcountyda.com

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