IN THE SUPREME COURT OF THE STATE OF NEVADA

SALLY VILLAVERDE,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 77563

APPELLANT'S OPENING BRIEF

Appeal From Judgment of Conviction Eighth Judicial District Court,
Clark County, Nevada

19-17068

TABLE OF CONTENTS

TABLE AUTHORITIES

CASES.

STATUTES

OTHER AUTHORITIES

UNITED STATE CONSTITUTION. VI AMENDMENT AND XIV AMENDMENT

STATEMENT OF THE FACTS RELEVANT TO THE ISSUES PRESENT FOR REVIEW

On August, 28, 2018 Appellant, SALLY D VILLAVERDE filed a writ of habeas corpus post-conviction, IN THE EIGHT JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA FOR COUNTY OF CLARK, the petition was filed in support, of Newly Discovered evidences and/or information, that appellant stumble upon, mere coincidences, the facts and allegations newly discovered, revealed that appellant is "ACTUAL INNOCENT" of crimes, he got convicted for, nearly 15 years ago. The newly discovered information was filed by the Government (STATE) 8 months, after appellant, was tried, convicted and sentenced. THE DOCUMENTATION came into evidence during a plea-arrangement hearing held on January 31, 2005 of his co-defendant Roberto Castro, were co-defendant confessed and admitted guilt of the crime of VOLUNTARY MANSLAUGHTER, at THE SAME HEARING, THE STATE CONCEDED to drop major charges and filed a new theory by amending information vital, and exculpatory to appellant's case. The district court scheduled a hearing, for appellant's petition to be heard on November, 1, 2018, and further ordered that respondent shall have within 45 day to file a response pursuant NRS 34.360 to 34.830 inclusive. Appellant Never received a response from respondent. And notified the court previous to the hearing in a "MOTION TO EXTEND THE HEARING 15 DAYS BEYOND PROOF OF RECEIVE THE ANSWER" (see case summary as exhibit attach herein), the district court scheduled a hearing for the motion to be heard on late November,27,2018 and was denied. Respondent filed its

response late two days before the evidentiary hearing in October, 29, 2018 the hearing was held on November, 15t, 2018 without the appellant being present, and his petition was denied without finding of facts and conclusion of law, subsequently appellant filed a timely notice of appeal, and this matter is set to be heard in the SUPREME COURT OF THE STATE OF NEVADA.

STATEMENT OF CASE

a.NATURE OF THE CASE:

This is an appeal from an order issued by the DISTRICT COURT denying appellant's petition for writ of habeas corpus (post-conviction). Appellant is challenging a judgment of conviction in a criminal case. Appellant was found guilty by a Jury of first degree murder with the use of a deadly weapon, Robbery with the use of a deadly weapon, and Burglary. The appellant was sentenced to two consecutive terms of life without the possibility of parole, as well as a concurrent sentence of 22 to 96 months and two consecutive sentences of 35 to 156 months.

b,Course of Proceeding.

A criminal complaint was filed against the appellant, SALLY VILLAVERDE AND CO-DEFFENDANTS RENE GATO AND ROBERTO CASTRO. In the Las Vegas Justice Court (03F 02357). At the time of the preliminary hearing, appellant and his co-defendants were held to answer on the charges of murder, Robbery with the use of a deadly weapon, and Burglary.

On March 25, 2003 appellant and co-defendants appeared in District Court and entered pleas of not guilty (03-C-191012-C) THE COURT GRANTED THE APPELLANT'S motion to severe the trials, and the instant appellant was the first of the thee-co-defendants to proceed to trial. The co-defendants had a pending trial date in 2005.

At the time of the trial, appellant was represented by Co-counsel Randall Pike and Andrew Wentworth. At the conclusion of the trial, appellant was convicted by the Jury as to all counts VILLAVERDE appealed from these convictions and the sentence imposed, trial counsel filed a timely notice of appeal and a direct appeal to the Supreme Court, which subsequently affirmed his convictions, while his direct appeal was pending, co-defendant RENE GATO proceed to trial, and was convicted in all counts, first degree w/use of the deadly weapon, Robbery w/use of a deadly weapon and burglary.in the day that he was sentenced, THE STATE prosecution held a

PLEA ARRAGEMENT hearing date January, 31, 2005, where c0-defendant ROBERTO CASTRO pled guilty of the lesser offense of murder "VOLUNTARY MANSLAUGHTER", admitted and confessed to have committed the crime, THE STATE CONCEDED TO DROP THE USE OF THE DEADLY WEAPON and/or tear gas, (disposition #2), the Robbery (disposition #3), and dismissed the Burglary charge. THE STATE NEVER NOTIFY ANY DEFENDANTS OF THE CHANGES ON THEORY, OF THE CASE, ROBERTO CASTRO'S admission of Guilt and confession, and/or major charges were dropped.

ARGUMENTS

WHETHER APPELLANT SHOW GOOD CAUSE AND PREJUDICE TO OVERCOME PROCEDURAL DEFAULTS

A Showing of good cause and prejudice may overcome procedural bars to show good cause for delay UNDER NRS 34.726 (1) a petitioner must demonstrate the following:

1-)"That the delay is not the fault of the petitioner" and (2) that the petitioner will be "UNDULY PREJUDICED" if the petitioner is dismissed as untimely.

Appellant allege that the district court and THE STATE, erred by claiming that appellant (VILLAVERDE) do not show good cause and prejudice in his petition's claims of actual innocent in the order filed denying the petition, the district court state the following:

"As alleged good cause, defendant claims that he is innocent of the charges. However, to support this allegation of actual innocence, defendant challenges the jury instructions, claims that the state committed prosecutorial misconduct during closing argument, and other aspects of his trial. Not only is this not a claim of actual innocence it is insufficient and completely without merit." (See court order attach as Exhibit #10)

APPELLANT'S SHOW OF PREJUDICE

To the above comments appellant disagree, first , in page 5 of APPELLANT'S PETITION TITLE LEGAL ARGUMENTS, his first allegation is, that he is Presenting Newly Discovered Evidences and/or Information in Support of his claims of actual innocent which were produced by the STATE POST TRIAL. And that this new development will show clear and convincing evidences of appellant's innocence. Plus constitutional errors committed by the State prosecution at VILLAVERDE'S trial rendered the procedure unfair, the newly discovered information reveals several actions taken by the prosecution during his co-defendant's ROBERT CASTRO plea agreement,

arrangement hearing held in open court, on January; 31, 2005, at exactly 8 months after appellant's trial, conviction and sentencing. VILLAVERDE, presented in chronological and numerical order, several documentation, unknown to him, which exposed factual allegations produced by the state, showing that VILLAVERDE was wrong-fully convicted of FIRST DEGREE MURDER WITH THE USE OF A DEADLY WEAPON, ROBBERY with the use of a deadly weapon and burglary.

Among the documents and/or evidence asserted by appellant as a recent discovery is "1-) AN AMENDED INFORMATION. Attached as exhibit #1 to co-defendant ROBERT CASTRO'S plea agreement, which factual pleadings based on this case, described a theory that is INCONSISTENT with the THEORY PROVIDED by the STATE AT VILLAVERDE'S trial, the following facts and allegations are not belied by the record and further show that a FUNDAMENTAL MISCARRIAGE OF JUSTICE occurred rendering VILLAVERDE'S convictions invalid, if THE CASE ISPROPERLY REVIEW IN ITS merits, jurists of reason will find this issues debatable.

DOCUMENT #1

"AMENDED INFORMATION" Filed on January, 31, 2005; STATING THE FOLLOWING:

"DAVID ROGER, DISTRICT ATTORNEY WITHIN AND FOR THE COUNTY OF CLARK, STATE OF NEVADA. INFORMES THE COURT:

THAT ROBERTO CASTRO, ROBERT RANCE CASTRO MONTALVO, THE DEFENDANT ABOVE NAMED, having committed the crime of voluntary manslaughter (FELON NRS 200.040, 200...050, 200.080) on or about the 6th day of March, 2002 within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the STATE OF NEVADA, did together with SALLY VILLAVERDE and/or RENE GATO, then and there without Authority of Law, willfully, unlawfully and feloniously, without malice and without deliberation kill ENRIQUE CAMINERO Jr, a human being by MANUAL

STRANGULATION and/or by inflicting multiple blunt force trauma upon his body, said defendant being liable under one or more of the following principles of criminal liability to wit (1) by defendant and/or SALLY VILLAVERDE and/or RENE GATO directly committing the acts constituting the offense, and/or (2) by said defendant and/or SALLY VILLAVERDE and/or RENE GATO aiding or abetting each other in its commission by directly or indirectly counseling, encouraging, commanding or procuring the other to commit the offense, as evidenced by the conduct of the defendant and/or SALLY VILAVERDE and/or RENE GATO to commit the offense of Robbery and/or murder whereby each is vicariously liable for the foreseeable acts of the other made in furtherance of the conspiracy." attach as exhibit #1) herein).

THE ABOVE DOCUMENT WAS DRAFTED, PRODUCED AND FILED BY THE STATE, AND ACCEPTED AS A THEORY AND EVIDENCE OF THE CASE AGAINTS CO-DEFENDANT ROBERTO CASTRO AND APPELLANT (VILLAVERDE), this amended information /or new information came into light around 8 to 9 months after appellant's trial, conviction and sentencing. Appellant did not know of the existent of the above document until recent discovery, by mere coincidence this document was wrongfully sent to VILLAVERDE by THE CLERK OF THE COURT AT CLARK COUNTY. (See letters and exhibits attach herein and appellant's petition marked as exhibits #9). Appellant, diligently sought to obtain additional documentation regarding the plea arrangement hearing held 8 months after his conviction and sentence, on January, 31, 2005, where several events, dispositions, filings, etc. took place, for example:

a) A TRANSCRIPT where co-defendant ROBERT CASTRO, admitted and confessed Guilt, of the lesser offense of "voluntary manslaughter". b) STATE'S DISPOSITIONS WHICH SHOW THE PROSECUTION'S DECISION TO DROP SEVERAL CHARGES, TO WIT, USE OF THE DEADLY WEAPON, ROBBERY AND BURGLARY. In appellant attempt to obtain the aforementioned documents, he received a letter from the clerk of the court (Steven D Grierson informing the following: TRANSCRIPTS FOR CASE NUMBER C 191012-3 date Jan, 31 2005 and March 22, 2005 have not been filed in EIGHT JUDICIAL COURT.

Please contact DEPT reporter recorder", accordingly appellant did not had any choice but to provide the court/or state with copies of the court minutes of co-defendant CASTRO'S plea arrangement hearing and the case summary showing the date (1/31/05) where the state filed its dispositions (2),(3) dropping the charges, this are the documentation filed by appellant in support of his claims of actual innocent in his petition for writ of HABEAS CORPUS (post-conciction).

VILLAVERDE explain that this newly discovered information, contain vital evidences and factual allegations that proved that he was prejudiced at his trial, and colorable showing that he is actual or factual innocent of the crimes he was convicted, and will be a MISCARRIAGE OF JUSTICE if his claims are not considered in their merits. For example the first document in dispute, describe a total different theory, than the one, the state applied at VILLAVERDE'S trial. "THE AMENDED INFORMATION" attached as exhibit #1 of Roberto CASTRO'S Plea agreement, contended. That he committed the crime of the lesser offense of "voluntary manslaughter," did together with SALLY VILLAVERDE and/or RENE GATO, without malice and without deliberation kill ENRIQUE CAMINERO Jr a human being by MANUAL STRANGULATION."

a)This theory is inconsistent with the one used at VILLAVERDE'S trial where the state, ARGUED AND INSTRUCTED, the opposite, the state prosecutor alleged that Roberto Castro and Rene Gato conspired together "to ROB AND KILL" The victim for his drugs and money and that VILLAVERDE was criminal liable for his co-defendant's actions, the state instructed the following:

"Because a Robbery was taking place and as a result of that felony, the Robbery or the burglary, the act of going into the room with-excuse-me felonious intent, as a natural result of either one of either one of those two crimes the killing took place, that is a theory of criminal liability that covers MR. VILLAVERDE (SEE ARG VII pg. 28 appellant's brief) (and Exhibit #5 attach herein)

b)The state prosecutor falsely stipulated the use of a deadly weapon in the commission of the crime upon which also held appellant accountable and/or

liable for his co-defendant Robert Castro's actions and instructed the jury to the following:

"ENRIQUE CAMINERO died from ligature strangulation so clearly under the law the ligature was a deadly weapon.

And the next question in turn actually follows, can the defendant be held responsible for the use of the ligature by Roberto Castro? Clearly under the law the defendant is equally accountable, equally responsible for the use of that ligature by one of his co-conspirators. (SEE ARGUMENT VI at pg., 25 of petition also SEE EXHIBIT #5 attach here in)

As previously stated this theories, arguments and instructions supplied to VILLAVERDE'S jury are inconsistent with the terms, facts and allegations of the charge document and/or AMENDED INFORMATION produced by the state in support of co-defendant Roberto Castro's plea agreement. This court had previously held that "prosecutors may rely on alternative theories, provided that there are no inconsistencies at the "core of their presentations where they try two defendants separately for the same offense Smith V. Grosse, 205 F.3d 1045, 1052 (8th Cir 2000) however, inconsistent prosecutorial theories will rise to the level of a due process violation when the prosecutor manipulates evidence and witness and argues inconsistent motives." THOMPSON V. CALDERON 120 F 3ed 1045, 1057-59 (9th Cir 1997), 523 U.S 538 118 S.C.T. 1489, 140 L. Ed 2d 728 (1998) also see FIELDS V STATE 381 P.3d 665 (2012) NEV. UNPUB Lexis 890.VILLAVERDE was extremely prejudiced by the state bare allegations during his trial, falsely introduced evidences of his co-defendant Castro, despite the case being severe for trial purpose; the prosecution did not ceased their endeavor to obtain a conviction, feeding VILLAVERDE jury with false and inconsistent arguments, instructions, etc. which was proved by the state's decision to drop major charges, in co-defendant Castro after VILLAVERDE'S trial.

c)The events of January, 31, 2005, also depicted actions taken by the state at Castro's plea arrangement hearing, which connoted further constitutional violations of VILLAVERDE'S constitutional rights, when the state conceded to

dispose the Robbery charge after the prosecution stipulated at VILLAVERDE'S trial that this was the motive of Roberto Castro's to commit murder, its undeniable that a fundamental miscarriage of justice occurred, in fact the prosecution went as far to Orally instruct the jury as follow:

"And instruction number 47 particularly defines it and simply lays out that a Robbery is taking property from another person by force or by threat of force, and just as in count 2, murder with use of a deadly weapon, when it comes to count 3, Robbery with use of a deadly weapon, the same theories apply. The defendant in this case should be held accountable for the Robbery of Enrique Caminero, even if he didn't take the property from him. (See exhibit #5 attach to appellant's brief).

How unfair is for VILLAVERDE to be held accountable for countless crimes committed for his co-defendant Castro, yet the state decided months after his trial to drop the charges? As previously mentioned, the evidences of miscarriage of justice are over whelming, and this Honorable Court should apply this exception, to the appellant, in the case that he cannot show cause.

d) The next document that appellant, presented as a newly discovered evidences is ROBERTO CASTRO'S admission of guilt and confession of the crime made in open court at his plea arrangement hearing held on January, 31, 2005 and sentencing hearing of Mach, 22. 2005. This documents are unavailable, the clerk of the court, indicated that this are not in files in the eight JUDICIAL DISTRICT COURT. So appellant, did not have any other choice but to include the court minute s of the above dates, showing that statements were provided by his co-defendant Castro in open court regarding the case (See exhibit #1 and #2 attached to the appellant's brief).

The transcripts are significant and relevant to this case, just for the fact, that the admission of guilt and confession of the lesser include offense of voluntary manslaughter, was voluntary made. "In open court", and admissible under BRADY V. MARYLAND. Which VILLAVERDE'S jury did not had the opportunity to hear and is entitled to hear because at trial VILLAVERDE was held criminally liable for his co-defendant Castro's actions", this is

undeniable MATERIAL EVIDENCE EITHER TO GUILT OR TO PUNISHMENT.

VILLAVERDE has been unsuccessfully trying to obtain the transcripts and the letter signed and dated April 13 2008 by Cela G. (Deputy Clerk) explained as follow: "TRANSCRIPTS FOR CASE number (191012-3 date January, 31, 2005 and March 22, 2005 have not been filed in Eight Judicial Court. Please contact department REPORTE RECODER." (See exhibit # 9)

Appellant had diligently pursued this documentation by filing also a motion to obtain transcripts at state expense which was also denied twice. (See exhibit # 9 appellant's brief) it can be noteworthy that this could be "good cause" as an external impediment to the defense.

An actual innocence exception to the limitations provisions does not foster abuse or delay, but instead recognizes that in extraordinary case, the societal interest of finality comity and conserving Judicial resources "must yield to the imperative of correcting a fundamentally UNJUST INCARCERATION.

This is one of the extraordinary and unique case where the exculpatory evidences relevant to the appellant's innocence are provided and produced by the state itself, from the moment that the prosecution decided to change the theory of the case, and gave a deal dropping major charges, to Robert Castro, that information about the contents and structure of the deal became a BRADY ISSUE, and should have been disclose to VILLAVERDE, The fact is that VILLAVERDE should have reap of the benefits given to his co-defendant, since the amended information, mentioned his name several times, in other words, if the state stipulated that Castro committed voluntary manslaughter, "in the heat of passion, then, under the different theories of criminal liability, stated there in, by law, VILLAVERDE cannot be guilty of first degree murder w/use of a deadly weapon. One way a petitioner can demonstrate actual innocence is to show in light of subsequent case law that he cannot, as a legal matter, have committed the alleged crime. VOSGIEN V. PERSSON 742 F 3d 1131, 2014 U.S APP. LEXIS 2746. IN DRAKE V. KEMP 762 F2d 1449 (11th Cir 1985) A Judge of Eleven Circuit en banc panel commented

that the use of inconsistent theories to obtain conviction against two co-defendants can violate due process: "THE STATE CANNOT DIVIDE and conquer in this manner such actions reduce criminal trials to mere gamesman-ship and rob them of their supposed purpose of a search for truth in prosecuting the co-defendants for murder the prosecutor changed his theory of what happened to suit the state. This distortion rendered the petitioner's trial fundamentally unfair.id at 1478 (J. Clark concurring).the Judge is correct, the same can be said on this case, when the state went from Castro allegedly committing murder during a perpetration of a felony, Robbery and Burglary. To Castro having committed the lesser offense of Voluntary manslaughter, in the "heat of passion," without malice, without deliberation, Robbery and Burglary dropped and/or dismissed, from one crime to the other, the disparity is enormous, and the facts that the state, falsely introduced different evidences and theories at trial, affected and prejudiced VILLAVERDE in violation of his XIV Amendment right to receive a fair trial. Satisfying the second prong of showing prejudice to overcome any procedural bars. Appellant's petition is supported by a convincing schlup gateway showing sufficient doubt about his guilt to undermine confidence in the result of the trial without the ASSURANCE that was untainted by constitutional error, a review of the merits of the constitutional claims is justified. "House V. Bell, 547 U.S 518, 537, 126 .C.T 2064, 165 L. Ed 1 (2006)(quoting schlup 513 U.S at 317) Additionally VILLAVERDE is also challenging the dismissal of the crime of burglary upon which he was held "VICARIOUSLY LIABLE" And was convicted under an illegal theory of criminal liability, instructed to the jury by the prosecution in closing arguments, yet after the state obtained this conviction, resolved to dismiss the charge on co-defendant Roberto Castro, and the legal question is? If Castro did not committed Burglary, where he committed the crime of voluntary manslaughter? Its obvious that this case have more questions than answer, AND THE ONLY REASON, WHY VILLAVERDE GOT CONVICTED, was through the inexorable behavior and/or misconduct of the prosecution that riddled the proceeding with numerous constitutional violations, for example,the above theory of vicarious coconspirator, which is erroneous to instruct the jury on

on this theory for the SPECIFIC INTENT CRIME OF BULGLARY, because erase the STATUTORY men's rea element required for this specific intent offense.ROBERTO CASTRO'S Judgement of conviction (JOC) presented as exhibit #1 at appellant's brief , shows that this crime was also dropped and/or dismissed, so VILLAVERDE contend, that since he was convicted under on erroneous and unconstitutional jury instruction of vicarious co-conspirator liability, and the burglary charge was dismissed by the government, post-trial, he is also "ACTUAL INNOCENT" of the crime of burglary and this Honorable Court shall Reverse and/or Dismiss this charge.

II- WHETHER APPELLANT SHOW GOOD CAUSE FOR THE DELAY

The district court erred in his analysis, regarding appellant's SHOWN OF GOOD CAUSE FOR DELAY by claiming, that "appellants cannot attempt to manufacture good cause"; its opinion was based in Clem V. State, 119 Nev. 615, 621, 81 P 3d 521, 525 (2003).

To the comment, appellant disagree, the discussion in Clem's case was about whether the law of a first appeal is the law of the case all subsequent appeals in which the facts are substantially the same. The SUPREME COURT OF NEVADA concluded, "We ruled that appellant's sentence enhancements for the USE of deadly weapon were valid, in Bridgewater, we decided that Zombie's new narrower definition of "deadly weapon" was not retroactive. These prior decisions now stand as the law of the case.

It's pretty obvious that Clem's case is distinct to VILLAVERDE'S case, whom is clearly, challenging, that the factual information, newly discovered and produced by the State post-trial, revealed, that he was wrongfully convicted, of first degree murder w/use of a deadly weapon, Robbery w/use of a deadly weapon and Burglary. The above case is challenging a change in the law, which Clem believed to APPLY to his case retroactively. VILLAVERDE have never raised this claims, neither the District Court or Supreme Court had previously ruled in this issues; thus the findings of the DISTRICT COURT and the STATE'S reliance on Clem's Case are unfounded, and irrelevant to VILLAVERDE'S case. On page 12 to 14 of appellant's petition are noted

several reasons, which described impediments external to appellant preventing his compliance with applicable procedural rule.

1-) THE DOCUMENT IN DISPUTE, "THE AMENDED INFORMATION, attached as exhibit #1 of co-defendant Robert Castro", plea agreement, is a document and memo randum prepared by the prosecuting attorney in connection with the case, which per NRS 174. 235 and pursuant to the provisions stipulated at section 2-a, b "APPELLANT IS NOT EXTITLED TO DISCOVERY OR INSPECTION." VILLAVERDE'S case was severe and was the first one to face trial, after his sentence, he was immediately transferred, to serve time at a maximum security prison in ELY STATE PRIS ON and his direct appeal was handled by trial counsel MR. RANDALL PIKE, co-defendants Roberto Castro and Rene Gato, were awaiting trial, VILLAVERDE was completed unaware of any substantial changes were made in the case while Direct Appeal was pending in the Supreme Court of Nevada, he did not know or could not know about the events that took place on January 31, 2005 at his co-defendant Castro's arrangement hearing, the fact is that the State "strategically" filed in open court, all the new information and findings, the same day, that other co-defendant RENE GATO received his sentencing. Why it's significant? Because his trial counsel (Mr. Chris Oram), would've used the new findings and inconsistent theories, as a defense in Gato's trial, it's clear that both defendants, were prejudiced by the government's actions after both trials. It is UNREASONABLE, to think that, if VILLAVERDE had any possession of the afore mentioned documents, he would've waited nearly 15 years to bring this claims to this court. As previously mentioned, he has recently stumbled upon this information by pure coincidence, the Clark County, clerk of the Court, wrongfully provided his co-defendant's Castro plea agreement documents, instead of the arrangement hearing "transcripts" which was the papers originally requested by VILLAVERDE. (SEE exhibits # 9 attach to appellant's brief).

2-) Trial counsel was ineffective by failing to investigate, the state's course of actions and decision made when the prosecution dropped the murder charge, of co-defendant Castro whom the government adjudicated during VILLAVERDE'S trial to have committed the killing or murder, trial counsel for appellant proved to be more than negligent, incompetent and ineffective. The new finding of facts and/or information provided by the state, would have been easily raised in a motion for a new trial, and/or on appellant's direct appeal. There is nothing in the Juris precedence to suggest that the sixth amendment right to effective counsel is weaker or less important for appellate counsel that for trial counsel. The dividing line between cases in which state-court procedural default should, or should not, be forgiven was the line between constitutionally ineffective and merely negligent counsel: 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. The court in Coleman did not did not distinguish between ineffective assistance by trial and appellate counsel. As Coleman recognized, an attorney's error during an appeal on direct review may provide cause to excuse a procedural default, for if the attorney appointed by the state to pursue the direct appeal is ineffective, the prisoner has been denied fair process and the opportunity to comply with the state's procedures and obtain an adjudication on the merits of his claims: the right to counsel on appeal is essential to ensure Justice and fairness. Strickland requires a showing of prejudice only where "counsel fails to press a particular argument on appeal or fails to press a particular argument on appeal or fails to argue an issue as effectively as he or she might." In VILLAVERDE'S case was essential for trial counsel not to lose sight of VILLAVERDE'S co-defendants cases, specifically Roberto Castro whom the state prosecutor adduced culpability as principal perpetrator in committing the killing and/or causing the death of the victim. Trial

counsel which also conducted VILLAVERDE'S direct appeal knew that the only theory that the state extensively, argued to tie appellant to the crime was vicarious criminal liability, nothing else, hence attorney's failure to investigate and scrutinize the outcome of co-defendant's Castro case satisfied the standards of prejudice set forth in Strickland. VILLAVERDE is unlearned in the law, and inadvertently may not comply with the state's procedural rules, or may misapprehend the substantive details of Federal Constitutional law he sole reliance and trust, was in his court appointed attorney's performance, it's a great possibility that he would've had stay oblivious to this findings for an extent number of years if is not for the help received from a prisoner law clerk, at his prison legal library. Which is a shame that took nearly 15 years, to come across evidences and information's that could render his currents convictions overturned.

3-)THE STATE BREACHED its ethical duties by failing to notify changes in the theory of the case and exculpatory findings favorable to appellant's issues of guilt and punishment, THE ABA CODE OF PROFESSIONAL RESPONSIBILITY indicate that any continuing duty to disclose exculpatory evidence discovered post-trial is an "ethical responsibility" at trial duty is enforced by the requirements of due process, but after a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction". See Imbler V. Patchman, 424 U.S 409, 427 n.25, 96 SCT 984, 47 L. Ed 2d 128 (1976). In Imbler's case, the Deputy District Richard Patchman, who had been the prosecutor at Imbler's trial, shortly after, wrote to the Governor of California describing evidence turned up after trial by himself, and an investigator for the state correctional authority in substance the evidence consisted of newly discovered corroborating witnesses for Imbler's Alibi as well as new revelations about prime witness Costello's background which indicated that he was less trust worthy than he had represented originally to Patchman and in his

testimony. Further, he explained that he wrote from a belief that "a prosecuting attorney has a duty to be fair and see that all true facts whether helpful to the case or not should be presented."

Although a similar situation to the present case, its unfortune that VILLAVERDE did not ran into a honest prosecutor as MR. PACHTMAN, the actions of VILLAVERDE'S prosecutor are distinctive from the above case, his malicious act indicated, that the whole matter was swept under a RUG, until unravel 14yrs later by mere coincidence, through the CLERK OF THE COURT WHO SENT THE WRONGFUL DOCUMENTATION TO VILLAVERDE. This court should consider that due to the enumerated facts stated here in that VILLAVERDE had shown sufficient cause and prejudice to have his factual and/or actual innocent claims review and decide in their merits.

III- The district court and the state, in its order denying APPELLANT'S PETITION CLAIMED that the petition is successive because "if the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. Citing Mc Cleskey V. Zant , 499 U.S 467, 497-498(1991)

Appellant contend that the district court and the state findings and reliance on Mc Cleskey are irrelevant, without basics, and this court shall not be persuaded by this argument, first. The situation in MC Cleskey, is different than VILLAVERDE'S on December 23, 1987, THE DISTRICT COURT FOR THE STATE OF GEORGIA, GRANTED MC CLESKEY relief based upon a violation of massiah. Rejecting the state's argument that Mc Cleskey's assertion of the massiah claim for the first time in the second federal petition constituted an abuse of the writ,the court ruled that Mc Cleskey did not deliberately abandon the claim after raising it in his state petition. The eleventh circuit reversed holding that the District Court abused its discretion by failing to dismiss Mc Cleskey's massiah claim as an abuse of the writ. Because Mc Cleskey included a massiah claim in his first state petition, dropped it in his federal petition and then reasserted it in his second federal petition, he "made a knowing choice not to pursue

the claim after having raised it previously" that constituted a prima facie showing of "deliberate abandonment"

This is not the case or the same situation presented VILLAVERDE'S he is for the first time, raising a claim of actual innocent, supported by information newly discovered, and produced by the state after his trial, which he never knew existed, he could not have neglected or abandoned a claim that was never raised neither attempt to reassert it, in his second petition, because as previously mentioned the evidences and/or new information came from the district attorney's office who failed its ethic duty to notify the new developments, thus becoming unknown and unavailable to VILLAVERDE until 13 years later. Evidently the district court and the state, are trying to confuse and mislead this court with arguments of cases irrelevant to the different issues involve in this matter for example THE DISTRICT COURT AND THE STATE, in page 7 of the order denying the petition, claimed, that "bare" and "naked" allegations are, not, sufficient, nor are those belied and repelled by the record. (17-18) pg. 7

This concept, do not apply to VILLAVEDE'S case, the district court and the state are incorrect; first, a claim is not "belied by the record" just because a factual dispute is created by the pleadings or proven to be false by the record as it existed at the time the claim was made. For example, a petitioner's claim that he was not informed of the maximum penalty that he could face before pleaded guilty is belied if the transcript of the entry of plea shows that the district court Judge clearly informed petitioner of the penalty. The instant situation is different, VILLAVERDE'S claim that he is "actual innocent" Due to a documentation filed by the state after his trial, which included new relevant information, and theory that rendered his current convictions invalid, the record do not reflect that VILLAVERDE had previous knowledge of the changes made in writing by the state, therefore his claims could not possible, be, belied by the record. The district court's findings are contrary to the law, the habeas roles set forth by statute do not contemplate the district court resolving factual disputes in this fashion. See (MANN V STTATE, 118 NEV. 351; 46 P.3d 1228 2002)

IV- APPELLANT CONTEND THAT HE IS ACTUALLY INNOCENT OF FIRST DEGREE MURDER WITH THE USE OF DEADLY WEAPON, AND A FUNDAMENTAL MISCARRIAGE OF JUSTICE OCURRED IN THE PROCEEDINGS, WHEN THE STATE CONCEDED THAT APPELLANT DID NOT COMMTTED FIRST DEGREE MURDER BEYOND A REASONABLE DOUBT. AND ERRED BY INSTRUCTING THE JURY IN AN INVALID THEORY OF PREMEDITATION WILLFUL AND DELIBERATE, IN VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS TO RECEIVE A FAIR TRIAL.

At the close of the state case, during closing arguments the state gave the following instructions, Regarding Count 2 Murder with the use of a deadly weapon. The state explained as follow:

"What about count 2, going back to the Amended Information, murder with use of a deadly weapon? Initially in court 2 it lays out what murder is, willfully, with malice aforethought..... Which is another way of saying that it was deliberate out, and those are covered in the instructions..... Willfully, with malice aforethought kill....to kill another human being, it then lays out two ways in which this can be first degree murder, if the Killing was either, one, Willful, premeditated and deliberate. First, Willful, premeditated, and deliberate is pretty self-explanatory, if there's proof that someone killed another person by their own actions, such as shooting them or strangling them or Hitting them over the head and there's proof that their actions were willful, premeditated and deliberate, and again, the instructions talk about what that means, then they're clearly guilty of first degree murder.

"I would submit in this particular case that PROOF DOES NOT EXIST BEYOND A REASONABLE DOUBT THAT SALLY VILLAVERDE COMMITTED THIS TYPE MURDER. We do not have beyond a reasonable doubt that Sally Villaverde was the person that actually strangled Enrique Caminero by using a ligature or was the person that actually hit him over the head with a hard object, such as a gun, Does this mean that you should declare Sally Villaverde to be not guilty of first degree murder because we didn't actually prove that

he was the person that strangled or bludgeoned Mr. Caminero?

SEE T.T APRIL 7, 2004 pg. 10-11
EXHIBIT # 5

"The due process clause protects accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

In a first degree murder prosecution, The State bear the burden of establishing beyond a reasonable doubt that the killing was the result of premeditation and deliberation, it's clearly establish from the statute that all three elements, Willfulness, deliberation, and premeditation, must be proven beyond a reasonable doubt for an accused can be convicted of first degree murder.

The type of evidence sufficient to sustain a finding of premeditation or deliberation falls into three basic categories:

(1) Facts about how and what defendant did prior to the actual killing which show that defendant was engaged in activity directed toward, and explicable as intended to result in, the killing characterized as "Planning activity".

THE STATE, from the very beginning knew and acknowledged that petitioner was never involved in any "planning activity," or conspiracy to have the victim kill, the declaration of warrants signed under oath by THE LEAD DETECTIVE IN charge of the murder investigation, Mr. ROBERT WILSON declared that petitioner and his girlfriend were just approached by co-defendants Roberto Castro and Rene Gato to rent a room, for a drug transaction to occur. Further at trial DETECTIVE (ROBERT WILSON) testified under oath at to the same theory. There was not testimony offered at trial that involved petitioner into any conspiracy to rob or kill Mr. Caminero.

(2) Facts about defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a motive to kill the

victim which inference, together with the facts of type.

Testimonies offered at trial by the victim's best friend, witness for the prosecution (Lionel Garcia) testified under oath that there was not relationship between the victims AND. Villaverde.

The following is some excerpt from the trial, testimony by "Lionel Garcia." Garcia-Direct T.T pg.30 (EXHIBIT #7)

BY MR. FATTIG:

Q Did Enrique Caminero have a relationship with the defendant Sally Villaverde?

A No. He met him, too, back in 98.

Q Do you know what kind of relationship they had, or do you not know?

A No. I don't think had a relationship.

Q That you knew of?

A That I wouldn't know, no.

Q Do you know a person named Teresa Gamboa?

A No. Not by the name. I don't know her.

MR. FATTIG: Court's indulgence

(Pause in the proceeding)

In which way, can VILLAVERDE have a motive to murder the victim, when there was no relationship? It should be noted that this was a person that not only knew the victim, but was his <u>best friend</u>, so if Villaverde would've had any type of friendship or relationship with the victim, surely he would HAVE KNOWN AND TESTIFIED ABOUT IT.

(3) The nature of the killing from which the jury could infer that the

manner of killing was so particular and exacting that defendant must have intentionally killed according to a preconceived design to take his victim's life in a particular way for a reason reasonably inferable from facts.

Evidently the state failed to prove any of the categories fit Villaverde's case, when the prosecutor conceded and stated on record. "We do not have proof beyond a reasonable doubt that Sally Villaverde was the person that actually strangled Enrique Caminero by using a ligature or was the person that actually hit him over the head with a hard object, such as a gun."

A boldly admission indicative that the state's evidences were not strong against Villaverde to sustain a verdict of first degree murder. But we are not talking about evidences only. The prosecution also conceded, that petitioner's co-defendant Roberto Castro was the one responsible for the death of Caminero. The prosecutor state the following:

And the next question in turn actually follows, can the defendant be held responsible for the use of that ligature by "Roberto Castro". Clearly under the law the defendant is equally accountable, equally responsible for the use of that ligature by one of his coconspirators. (T.T closing Arguments pg. 20)

A STATEMENT THAT RAISE CONSTITUTIONAL CONCERN, because Roberto Castro pleaded Guilty of Voluntary Manslaughter and served 4 YRS to 10 YRS at high desert state prison. Showing once again that the state's THEORY OF FIRST DEGREE MURDER WAS UNRELIABLE beyond a reasonable doubt.

The relevant inquiry in reviewing the sufficiency of the evidence supporting a jury's verdict is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential of the crime beyond a reasonable doubt.

Testimonies offered at trial through: The state's witness (Teresa Gamboa); described that Villaverde tried to save the victim's life, by applying CPR or mouth to mouth resuscitation,the following is an excerpt of the redacted

preliminary transcript testimony used at trial.

Q Okay. Thank you. When Sally said he gave him mouth-to-mouth resuscitation, did you know if he knew how to give mouth-to-mouth resuscitation?

A Yes. His mother is a doctor in Cuba, and they, he grew up in clinic. So, he knew how to take blood and give blood and, you know, do shots and CPR. He knew how to do all that.

See exhibit#6 PH (pg. 150-151)

Even more relevant is the testimony offered by the state's witness (Doctor Worrell) expert and forensic Doctor, in charge of the autopsy performed on the victim, the following is a statement offered at trial by the Doctor UNDER "OATH".

WORRELL-CROSS 136

Isn't it a fact you found some body mucous in and around the nose?

A I did not notice that. I believe our investigator saw some fluid coming out of the nose at scene, but I did not note that in my report.

Q Okay, if someone were trying to revive someone, such as doing CPR, wouldn't there be mucous coming from the nose? Isn't that consistent with CPR?

A It's consistent with a dead body. I can't say it's just consistent with CPR.

MR. WENTWORTH: I'm basically referring to testimony, counsel, on page 35 of the preliminary hearing, lines 1 through 6.

BY MR. WENTWORTH:

Q And, doctor, I'm doing this not from the standpoint of trying to impeach your testimony. I just want to make it clear and maybe clarify.

The question was, "if someone were trying to revive a body, would mucous come from their nose," and I believe your answer was, "I'm trying to think, in all of my CPR's, if I ever had fluid. Yes, it very well can. I mean, we always have fluid in the back of our mouth. That's connected with the nasal pharynx, so yes."

Would you agree with that question and answer?

A Yes.

(See exhibit here in) t.t #9

The testimony, clearly corroborate the statement offered by the state's principal witness (Teresa Gamboa), enhancing appellant's lack of intent to conspires with co-defendants, and lack of intent to have the victim murdered.

Instructing the jury on premeditation and deliberation after the prosecution admitted that they did not had any proof beyond reasonable doubt that Villaverde committed first Degree Murder, violates the federal Constitution if there is a "Reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence."

In the instant case, the state completely disregarded the theory of premeditation and deliberation and willfulness and devoted themselves to absolutely focus in the different theories of criminal liability.

Maybe Assuming that their different theories could predict a verdict of first degree murder and not calculating that appellant perhaps was found guilty in an invalid ground. The jury reached a general verdict of first degree murder with the use of a DEADLY weapon and the question is upon which ground or theory they reached such a verdict?

Maybe the jury could not agree upon the theories of criminal liability thus the state offered a DEAL OF VOLUNTARY MANSLAUGHTER to the alleged MURDERER (ROBERTO CASTRO) or is likely that the jury did not followed the

Instruction correctly leaving open the possibility that VILLAVERDE was convicted on a legally impermissible theory. IN BABB V LOZOW SKY THE U.S DISTRICT COURT OF NEVADA declared that "A general verdict must be set side if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground. Additionally pursuant to NEV. Rev. stat 200.030 (1) (a), a conviction of first degree murder requires the Jury to conclude that the defendant committed a WILLFUL, deliberate and premeditated killing. A theory which the state conceded, could not be prove beyond a reasonable doubt against petitioner. Accordingly in light of the newly discovered theory, asserted by the state's charging document of the amended information, stating that Robert Castro committed (voluntary manslaughter), without malice and deliberation shall be strong evidence, showing that SALLY VILLAVERDE could not have committed first degree murder, deeming his current conviction INVALID, by the facts stated here in , which show clear and convincing evidences that is factual INNOCENT OF FIRST DEGREE MURDER WITH THE USE OF A DEADLY WEAPON.

V -a) VILLAVERDE CONTENDS THAT THERE IS NO basis in record to support his enhanced SENTENCES FOR THE USE OF A DEADLY WEAPON IN THE COMMISSION OF THE CRIMES. And he is actually innocent of the use of a deadly weapon by one of his co-defendant in this case (Robert Castro) and the instruction given by the state violated his 14th amendment right of due process.

In the instant case, the state instructed the Jury to the following:

"So can ligature be a deadly weapon? Instruction NUMBER 60 defines for you a deadly weapon. And I would submit to you that the second part is relevant in this particular case. "Deadly weapon means," and in the second section, "any weapon, device, instrument, material, or substance which under the circumstances in which it is used, attempted to be used, or threatened to be used is readily capable pf causing substantial bodily harm of death".

Now, clearly a ligature, whether it was the cord from the space heater that you remember in the picture sitting on the dresser with the blood on it on the back, with the cord laying on the ground unplugged, or whether it was a belt or whether it was a piece of cloth, all of those things qualify under this statute, and all of them are either a material, a device, an instrument. Are they readily capable of causing death? Well, this isn't Rocket science. This is a murder case. This isn't an attempted murder case. It caused the death. ENRIQUE CAMINERO died from ligature strangulation. So clearly under the law the ligature was a deadly weapon. (SEE T. Transcripts closing Arg. Pg. 19-20). EXHIBIT #5

A very erroneous way, to mislead the jury with an incomplete information; according to the Supreme Court of Nevada, that overruled the "Functional" test and applied the "inherently dangerous weapon" test for determining whether an instrumentality is a deadly weapon for purposes of NRS 193. 165.6 {908 P. 2d 689} the "inherently {111NEV 1495} dangerous weapon "test means" That the instrumentality itself, if used in the ordinary manner completed by its design and construction. Will or is likely to, cause a life threatening injury or death".

Obviously, the state forgot to instruct in that important "test" so to the Jury's mind, a dangerous weapon could be anything, from a Rubber band to a shoe lace, anything that could bind or tie. The trial court also failed to cure the damaging instructions, by denying trial counsel the use of an advisory verdict regarding the use of a deadly weapon a further indication of petitioner's constitutional rights to due process being violated beyond reasonable doubt.

V-b) THE PROSECUTOR'S COMMENTS MANIPULATED OR MISSTATED THE EVIDENCE.

And the end of petitioner's trial, the prosecutor falsely indicated that the use of a ligature, by Robert Castro caused the death of the victim, a totally prejudicial remarks, that contradicted the forensic testimony given by the state expert witness "DR Worrell", which clearly testified under oath, that the victim death was caused, due to asphyxia by strangulation, there was not one part of her testimony, indicating the use of a ligature. Yet the prosecutor did not restrain from using the onerous term, repeatedly,throughout closing arguments. For example: The following are some excerpts from the trial transcripts at closing arguments.

-) "and you" remember DR. REXENE WORRELL, who testified just two days ago that she reached a conclusion after the Autopsy that MR. ENRIQUE CAMINERO died due to strangulation that MR. CAMINERO had marks on his neck that was consistent with ligature strangulation (false statement,) DOCTOR WORRELL, never mentioned anything about ligature strangulation, She specifically testified that the neck are presented MARKS, ABRATIONS, CONSISTENT WITH 0.6 INCH ligature mark, more or less half of inch mark . (See T.T DIRECT EXAMINATION BY "DR WORRELL" At pg. 124, 125)

At trial the forensic examiner testified and state the following

Q And those observations, coupled with what you had seen on the outside of the Body in the area of the neck, did they lead to a conclusion that you made about the cause of death in this case?

A Yes. This was the cause of death

Q You would say strangulation or how did you term it?

A I termed it strangulation.

Q And the injuries to the face and to the head end the gunshot wound you did not determine to be the primary cause of death?

A NO.

Al though, the prosecution implied count less timesduring direct examination about the use of a ligature, Doctor Worrell never determined, whether the use of a ligature was the cause of death, she testified that the neck area presented MARKS, ABRATIONS, consistent with 0.6 inch ligature mark, more or less half of inch mark.

It's well known, that A Strangulation can be done with the HANDS (MANUAL STRANGULATION), and hands can leave abrasions marks, consistent with a ligature mark. In the instant case, the state did not presented or possed, any cord, belt, scalf as an evidence that was used on the victim to strangle to death. Additionally as previously discussed the use of the deadly weapon was never established

(DOCTOR WORRELL) state the following comments during direct examination.

Q. AND THE FACT THAT HE HAD BEEN SHOT AND A BULLET HAD GONE THROUGH HIS RIGHT BUTTOCKS AREA, WHY IS THAT NOT AS SIGNIFICANT?

A. THAT WAS AN IRRITATION INJURY IS WHATI'D CALL IT, JUST-IT IRRITATED HIM, IT WOULD HAVE ANGERED HIM TERRIBLY, BUT IT DIDN'T DO ANYTHING. IN AND OF ITSELF, EVEN UNTREATED, THAT WOULD NOT HAVE BEEN A SIGNIFICANT INJURY, ALTHOUG, AGAIN, I'M SURE HE WOULD THINK SO, BUT IT'S NOT SIGNIFICANT.

Q Would it bleed and awful lot?

A Fat has vessels, but it would have stopped with a bandage.

Q Okay, so the bullet was traveling through a fatty area that doesn't cause a lot of blood Lost, is that right?

A Correct.

Q And doesn't endanger Any Vital organs in that area, correct?

A NO. EXIBIT 9 (TT pg. 125, 126)

The testimony of the forensic examiner clearly described that the use of the deadly weapon by co-defendant was not the cause of death in fact, she stated that was nothing but a "bandage type of wound". The cause of death, according to the expert forensic "DOCTOR WORRELL" was "asphyxia due to strangulation."

VI.- APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS WERE VIOLATED AS A RESULT OF PROSECUTORIAL MISCONDUCT WHICH INFECTED THE TRIAL WITH UNFAIRNESS AS TO MAKE THE RESULTING CONVICTION A DENIAL OF DUE PROCESS.

In the instant case the prosecution misconduct, rose to the level of violating appellant's due process, when the prosecutor orally, instructed the Jury in the use of a deadly weapon, and in the Robbery instructions. Stating the following:

a.-) "Enrique Caminero died from ligature strangulation, so clearly under the law the ligature was a deadly weapon.

And the next question in turn actually follows, can the defendant be held responsible for the use of the ligature by Robert Castro? Clearly under the law the defendant is equally accountable, equally responsible for the use of that ligature by one of his coconspirators. (T.T Closing ARG pg. 20).

b.-) "Now, tape is attempted to be used by the defendant because ENRIQUE CAMINERO is struggling so much. And at that point the evidence showed that Robertico Takes matters into his own hands and attempts to find something to strangle him the cable cord of the television, which is number 1.

c.-) "Robertico then has to look for something else perhaps that was the cord from the space heater, which is number 21, which was lying unplugged with blood on the back of it. Robertico the uses some sort of ligature to strangle the life out of Enrique Caminero. (T.T Closing ARG pg.27) Exhibit #5

It's obvious, and fair to say, that the prosecutor could not make up his mind, upon which the instrument was that "Allegedly" Robert Castro used. (A ligature, tv cord or cable cord, cord from the space heater, etc.), inflammatory statements, that was injected into the mind of the Jury, causing VILLAVERDE'S convictions, enhanced sentences for the use of a deadly weapon. And the most significant fact is that this Remarks, and prejudicial comments was made, by the same prosecutor, who conceded 8 months after VILLAVERDE was tried, convicted and sentenced. That "Robert Castro" committed the murder by MANUAL STRANGULATION, and further stipulated, that the use of a deadly weapon shall be dropped. (SEE disposition 1. Use of a deadly weapon, dropped JAN, 31, 2005).

It has been legally established, that a prosecutor may not blatantly inflame the Jury with evidences that he doesn't have. A prosecutor should be unprejudiced, impartial, and nonpartisan, and he should not inject his personal opinion or beliefs into the proceedings or attempt to inflame the Jury's fears or passions in the pursuit of a conviction.

Further A conviction obtained through use of false evidence, known to be such by representatives of the state, must fall under the due PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT. If it is in anyway relevant to the case, the district Attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.....that the district attorney's silence was not the result of guile or a desire to prejudice matters LITTLE, for its impact was the same, preventing, as it did, a trial that could in Any Real Sense be termed fair.

''It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of LIBERTY THROUGH a deliberate deception of COURT AND JURY by the presentation of testimony Known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of JUSTICE as is the obtaining of a like result by intimidation.

VII- APPELLANT ALLEGE THAT HIS ACTUAL INNOCENT OF THE CRIME OF BURGLARY, newly discovered evidence and information, showed that a fundamental miscarriage of Justice occurred resulting in his conviction, in violation of his 14ht amendment RIGTH TO DUE PROCESS. To receive a fair trial. In the instant case, appellant argue that he could not be convicted of the crime of burglary, and he is factual innocent of burglary based on the following facts:

1- The room was rented legally, by appellant's girl-friend whom he maintained a romantic relationship at the time, therefore he had an unconditional and absolute right to enter the room.

2- Was the victim that came into the motel room with the purpose of making a "DRUG TRANSACTION'.

3- Petitioner was no present at the time that the crime occurred.

4- The newly discovered evidence revealed that the state dropped the Burglary Charge, against co-defendant ROBERTO CASTRO, whom the state asserted, committed the murder, and pleaded guilty of voluntary manslaughter, the amended information, also show that neither defendant committed the crime of burglary. Therefore appellant contend that the facts stated herein plus the newly discovered evidences are strong showing that the evidence at trial was insufficient to authorize his conviction for burglary.

Burglary is a specific intent crime, and appellant was held accountable or liable, for his co-defendant Robert Castro's Actions, the prosecution adopted the natural and probable consequences doctrine, when made comments like the following:

"And under the law we commonly use the term the act of one is the act of all." (T.T pag.14 closing Arg), further declared, "And also, as the charging document says, if we prove that he ----that Enrique Caminero was killed

because a Robbery was taking place and as a result of that felony, the Robbery or the burglary, the act of going into the room with-excuse-me felonious intent, as a natural result of either one of either one of those two crimes the killing took place, that is a theory of criminal liability that covers MR. VILLAVERDE (T.T pg. 106 closing Arg). Exhibit # 5

During the closing Arguments, the prosecution instructed extensively in the theory of criminal liability, one of the four different theories that the state used to prove their case was the theory of vicarious coconspirator liability.

"Now, going back to instruction Number 3, page 2 it spills over into two pages here- - - similar to an aiding and abetting theory is Number 3, "by conspiring with others to commit the offense of robbery and/or murder whereby each conspirator is Vicariously liable for the foreseeable acts of the other made in furtherance of the conspiracy. "Similar concept to number 2, aiding and abetting.

This theory of criminal liability state that if you conspire or agree to commit a crime with others you are held equally accountable under the law for the, quote, "foreseeable acts of the other made in furtherance of the conspiracy"

Exhibit # 5 (tt closing Arguments pg. 16)

To hold a defendant criminally liable for a specific intent crime, Nevada requires proof that possessed the state of mind required by the statutory definition of the crime.

The power to define crimes and penalties lies exclusively within the' power and authority of the legislator no statutory underpinning for the pinker ton rule exists in Nevada in the absence of statutory authority

providing other wise, a defendant may not be held criminally liable for the specifies intent crime committed by a Co-Conspirator Simply because that crime was a natural and probable consequence of the object of the conspiracy, to prove a specific intent crime. The state must show that the defendant actually possessed the requisite statutory intent.

ALTHOUGH THE PROSECUTION PRESSED HARD AND EXTENSIVELY IN THE THEORY OF CRIIMINAL LIABILITY, THE STATE FAILED TO PROVIDE ANY SINGLE STRAND OF EVIDENCE, To prove or tie MR VILLAVERDE to the state's conspiracy theory involving his codefendants, in fact the prosecution DID nothing but to provide Ample evidences of exculpatory statements offered by their own witnesses, for example the Lead Detective in charge of the murder investigation testified under oath that appellant's girlfriend and appellant were only involved in renting a Room, and received cash for a drug transaction to occur.

The following is some excerpt from the Direct and Cross-examination OF LEAD DETECTIVE ROBERT WILSON at appellant's trial. (t.t pg. 19) EXHIBIT#B

Q Okay. Now did she tell you what was in it for her to rent a room other people?

A Yes.

Q And what did she initially tell you?

A She told us that she the defendant were going to receive a thousand dollar (1,000) for renting the room.

Q Okay. And did she explain why she would receive she and the defendant would receive a thousand dollars (1,000)?

A Not satisfactorily. She said that they were supposed to watch a female friend of Gatos and eventually she conceded that it was likely that a drug deal was going to take place.

FURTHER, IN AND DURING CROSS-EXAMINATION, THE DETECTIVE TESTIFIED

AND ADMITTED THAT HE SIGNED A DECLARATION OR AFFIDAVIT STATING THE SAME (SEE EXHIBIT HEREIN) THE FOLLOWING IS ANOTHER EXCERPT OF THE CROSS EXAMINATION OF DETECTIVE WILSON AT TRIAL T.T PG 90-91.

Let me ask you this question them. Taking her statements----- You then took her statements and you used that as the basis to obtain search warrants in this case, didn't you?

A Yes, part of wat she said and other things

Q Now, in explaining how you obtain a search warrant, isn't it true you go through and do an affidavit to a judge? And an affidavit is a document that is signed, that you signed under oath.

And you signed a couple of those, isn't that correct?

A Do you recall, in those affidavits, which are sworn testimony similar to the testimony that's sworn to in here, that you identified MR. VILLAVERDE and MS. Gamboa as being two individuals that were just going to receive money for renting a room for a drug deal to occur? Do you remember putting that in the affidavits?

A Yes. (See EXHIBIT #8 Attach)

No once, no twice, but multiple times, the testimonies offered by the state's own witnesses contradicted the state's theory of VICARIOUS CO-CONSPIRATOR LIABILITY. Throughout the entire proceedings at trial, there were not one testimony that tie MR VILLAVERDE to the theory of Robbery/Murder offered by the prosecution.

The Supreme Court of Nevada refuses to adopt the NATURAL AND PROBABLE CONSEQUENCES DOCTINE. In general, the decision is limited to vicarious coconspirator liability based on that doctrine for specific intent crimes only. In further, explained that to hold a defendant criminally liable for a specific intent crime, Nevada requires PROOF that he possessed the state of mind required by the statutory definition of the crime

Others have criticized the role as well "Under the better view, one is not an accomplice to a crime merely because that crime was committed in furtherance of which he is a member, or because that crime was a NATURAL AND PROBABLE CONSEQUENCE {121 Nev 919} another offense as to which he is on accomplice the drafter of the model penal code have Similarly rejected the pinkerton view, commenting that the "law would lose all sense of just proportion if by virtue of his crime of conspiracy a defendant was" held accountable for thousands of additional offenses of which he was completely unaware and which he did not influence at all.

Accordingly, the prosecution's comments not only prejudiced appellant , but the state also instructed, in the erroneous instruction of vicarious coconspirator, that it has been harshly criticized in Nevada, and was clarified in 2002 in controlling cases like (Sharma v state) where the Supreme Court, announced that Sharma overruled Mitchell not to announce a new rule, but to expressly disavow Mitchell's "CLARIFICATION" of the law. The supreme court abandons the doctrine it is not only inconsistent with more fundamental principles of our System of Criminal law, but it also inconsistent with those Nevada Statutes that require proof of a specific intent to commit the crime alleged.

Villaverde was tried and convicted two years, after the Supreme Court made this Announcement of "CLARIFICATION", yet the state proceed to instruct the Jury in this DOCTRINE, which clearly violates NRS 195.020 where a defendant may not be held criminally liable for the specific intent crime committed by a coconspirator simply because that crime was a natural and probable consequence of the object of the conspiracy. To prove a specific intent crime, the State must show that the defendant actually possessed the requisite statutory intent A principle that was also applied in 2005 a year after petitioner's conviction. In "Bolden v State of Nevada 121 Nev. 908, 124 P.3d 191, 2005, where the Supreme Court again, held that the district Court understandably but erroneously instructed the Jury that Bolden could be found guilty of the specific intent crimes of burglary and first and second

degree Kidnapping as long as the commission of those offenses was a natural and probable consequence of the conspiracy, and even if Bolden never intended the Commission of those Crimes, and concluded that the error is applicable only with respect to Bolden's conviction of the specific intent crimes of Burglary and kidnapping.

The instruction on co-conspirator liability improperly allowed the Jury to find Bolden criminally liable for the specific intent crimes of burglary and kidnapping under a theory of vicarious liability that erased the statutory men's rea element required for those specific intent offenses.

As in Bolden's case, appellant was also affected by this improper DOCTRINE and was convicted for the specific intent crime of burglary. A crime that substantially affected his constitutional rights, to receive a fair trial, especially, because months later after VILLAVERDE was tried, convicted and sentenced. The state conceded to drop the charge against co-defendant "Robert Castro", admitted and confessed murderer. Therefore by legal standard, VILLAVERDE is actual innocent of the crime of burglary, which is one way where he can show that in light of previous case law that he cannot, as a legal matter, have committed the alleged crime. A constitutional violation and a fundamental miscarriage of Justice is sufficient to overcome the prisoner's procedural default in filing an untimely habeas corpus petition and allowed consideration of constitutional claims with regard to that conviction. VILLAVERDE'S claim of innocence is based on NEVADA CASE LAW clarifying that the specific intent crime of burglary, based on vicarious liability, erased the statutory men's rea element required. Therefore his conviction Shall be reverse and dismissed.

VIII- APPELLANT CONTEND THAT HE IS ACTUALLY INNOCENT OF ROBBERY WITH USE OF DEADLY WEAPON, AND A FUNDAMENTAL MISCARRIAGE OF JUSTICE OCURRED WHEN THE STATE MISLED THE JURY BY INSTRUCTING THAT

"The defendant in this case should be held accountable for the Robbery of Enrique Caminero, even if he didn't take the property from him."

A miscarriage of Justice occurred during that proceedings and a Violation of appellant's due process clause of the Fourteenth Amendment Rendering his Current Conviction Invalid.

2-) subsequently, the state instructed the Jury in Count 3, Robbery with use of a deadly weapon, asserting the following:

"And Instruction Number 47 Particularly defines it, and simply lays out that a robbery is "Taking property from another person by force or by threat of force." And just as in Count 2, murder with use of a deadly weapon, when it comes to Count 3, robbery with use of a deadly weapon, the same theories apply. The defendant in this case should be held accountable for the robbery of Enrique Caminero, even if HE didn't take the property from him." (see Exhibit # 5)

appellant alleges that the evidence produced at trial was insufficient to sustain the verdicts against him as to the Robbery Count as well as Failure to establish that a deadly weapon was used in the commission of the homicide. The statute is clear in the DEFINITION OF ROBBERY which is The Unlawful taking of Personal Property from the person of another, or in the person's presence, against his or her will by means of force or Violence or fear of injury; immediate or future, to his or her person or property, or the Person or property of a member of his or her family, or of anyone in his as her Company at the time of the robbery. A taking is by means of force or fear if force fear is used to:

(a) Obtain or possession of the Property.

(b) Prevent or overcome resistance to the taking, or

(c) Facilitate escape.

As it's described on the NRS 200.380 For a crime of robbery to occur a personal property must be taken. There is no one part in the statute that state that a defendant should be found guilty even "he did not take the property." To instruct the Jury in a "false INFORMATION" extremely prejudiced appellant to the point that the Jury were capable to convict Villaverde in an invalid theory. That it's completely contrary at to the NRS 200.380 States.

In the Present case the victim's Wallet, Credit Cards and his drugs (28 grams of cocaine; an ounce) street value 500—600 $ were found in his Pants. see exhibit #5 There was no independent evidence of a robbery, only the Specter that was raised by the state that the appellant's co-defendants conspired to Rob/Kill MR CAMINERO. VILLAVERDE further allege that he could not committed any Robbery, because he was not present at the scene when the crime happened.

Where record is barren of any evidence that would have supports an inference that defendant either committed the alleged Robbery or participated in a Scheme to do so habeas corpus challenge to robbery charge should have been granted. Archie V Sherriff. Clark Country, 95 NEV 182, 591 P2d 245. '979 NEV LEXIS 557 (1979).

As the statute require the Phrase "in his presence" the section prohibiting the unlawful taking of personal property from the person of another or in his presence, was added to increase the area in which a taking by force or fear Constituted the crime of robbery, but the element of possession must still be satisfied. Phillips V State, 99nev, 693, 669 P2d 706. 1983.

Another prejudicial and hard to grasp instruction, that it may have created a confusion to the jury, first, the NRS in Robbery is clear and specific, and explain that is "The taken of personal property" what it constituted the crime, yet in another hand the prosecutor instructed, that defendant should be accountable even he did not take the personal property. So which one it is? Because there was not any indication or evidence at trial that neither

Robert Castro nor Rene Gato, took anything or robbed anything in fact, the state's theory of the Robbery, was proved to be false, when they dropped the Robbery Charge against co-defendant Robert Castro. At his plea arrangement hearing held in (January, 31, 2005)

A patently prejudicial instruction error triggers a trial court's sue sponte duty. Absent objection, an appellate court reviews instruction errors for plain error. Determining whether a particular instance of prosecutorial misconduct is constitutional error, depends on the nature of the misconduct. For example, misconduct that involves impermissible comment on the exercise of a specific constitutional right has been addressed as constitutional error. Prosecutorial misconduct may also be of a constitutional dimension if, in light of the proceedings as a whole, the misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process.

As previously mentioned, the state concession that nothing was taken, should deemed the crime of Robbery invalid. Therefore appellant's Conviction of Robbery with the use of deadly weapon should be dismissed

Additionally to orally instruct the Jury during closing argument, infringed the requirement provided by NEV. REV, Stat 175.161 (1), which state that in any trial, requires the district court to instruct the Jury at the close of argument with written instructions. The same preclude the district court from giving oral instructions to the Jury unless the parties mutually agree to the oral instruction. If there is no record of the parties' affirmative mutual consent to an oral instruction, this court presumes objection to an oral Jury instruction even absent an actual objection.

In VILLAVERDE'S case, there is nothing on record that indicate of a mutual consent to an oral instruction, and his trial counsel was ineffective by failing to object to the prosecutions erroneous remarks through the reading of the Jury instructions. A clear violation of appellant XIV AMENDMENT RIGHT of due process to receive a fair trial, THEREFORE HIS CONVICTION SHALL BE REVERSE OR dismiss by this HONORABLE COURT.

IV-) WHETHER THE DISTRICT COURT ERRED BY DENYING APPELLANT'S PETITION WITHOUT CONDUCTING AN EVIDENTIARY HEARING AND WITHOUT FINDINGS OF FACTS AND CONCLUSION OF LAW.

NRS 34.735 clearly dictates the form and content of a post-conviction petition of a writ of habeas corpus. To avoid dismissal, a habeas petitioner who claims that the petitioner's imprisonment is illegal must "state facts which show that the restrain or detention is illegal." If the petitioner challenges the constitutionally of a conviction or sentence, NRS 34.370(4) also expressly requires the petitioner to attach affidavits, records, or other evidence supporting the claims.

In the case, VILLAVERDE complied with the terms established on the above NRS 34.735, appellant included factual allegations, supported by record that will entitle him relief. This court in VAILLAN COURT V. WARDEN, held that "where 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". Additionally, where a state court makes evidentiary findings absent an evidentiary hearing "such findings clearly result in an unreasonable determination of the facts" (internal citation omitted) Taylor V. Maddox 366 F.3d at 1001 (9th Cir 2003) A petitioner is entitle to due process during the habeas proceedings Moran V. Mc Daniel, 80 F 3d 1261 1271 (9th Cir 1996). This was proved when the state failed to file a timely response or serve a copy of the response to the appellant. VILLAVERDE notified THE DISTRICT COURT by filing a timely motion "to extend the hearing 15 days Beyond proof of receive the answer", the court scheduled the motion to be heard, 15 days after the appellant's petition was denied, and of course the motion was denied as moot, the respondent's untimely filing and failure to serve appellant with a copy of the response was never addressed. Entering an order without complying with minimum standard of notice and an opportunity to be heard is beyond a court's jurisdiction see Jefferson V. UPTON 130 SCT, 2217, 2219 (2010) (per Curium) (in a Pre-AEDPA case, where the state court's findings were drafted exclusively

by state's attorneys this court noted that it has "criticized the practice" of a court adopting the findings of fact drafted by the state) BIFORD V. STATE, 156 P 3d 691, 692 (NV 2007) "when requesting a party to draft an order, court must ensure that "other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions". See also Gebers V. STATE, 50 P 3d 1092 (NV 2000) holding that petitioner has a right to be present at evidentiary hearing involving his petition MANN V. STATE AND NRS 34,770. A petitioner "brought before the judge on the return of the writ deny or controvert any of the material facts or matters set forth in the return or answer deny the sufficiency thereof, or allege, ANY {118 NV 504} fact to show either that his imprisonment or detention is unlawful or that he is entitled to his discharge. "Thus it's clear that the provisions of NRS CHAPTER 34 require the presence of the petitioner at any evidentiary hearing conducted on the merits of the claims asserted in a post-conviction petition for a writ of habeas corpus. Such an evidentiary hearing conducted without first providing the petitioner an opportunity to be present violates the provisions set forth in NRS 34, Like Geber, VILLAVERDE WAS ALSO deprived from the opportunity to rebut and refute the state's contentions, arguments, etc. His due process, established in the XIV AMENDMENT was extremely violated. (1)- WHEN THE STATE failed to serve a copy of the response as is require pursuant N.R.A.P (2)- HEN THE DISTRICT COURT DENIED HIS PETITION without findings of facts and conclusion of law (see court minutes attach as Exhibit #11 date November 1, 2018). (3)- And by the court conducting the hearing without appellant's presence.

CONCLUSION

Based on the reasons aforementioned, appellant pray that this Honorable Court fin that he established a show of cause and prejudiced to have his claims of "actual and/or factual innocent" review, and that a fundamental MISCARRIAGE OF JUSTICE occurred in his case which violated THE XIV AND VI AMENDMENT rights to due process to receive a fair trial and

Appellant's jury is entitle to hear this findings, as previously state, THE CORE OF THE STATE'S theory at petitioner's trial is inconsistent whit the facts of the amended information attached to Roberto Castro's plea agreement and the dispositions (2) and (3) where the state decided to dismiss the use of the deadly weapon and the Robbery and Burglary, the persecutor may not "become the architect of a proceeding that does not comport whit the standards of justice" the prosecutor, therefore, violates the due process clause if he knowingly presents false testimony- whether it goes to the merit of the case or solely to a witness's credibility. Napes v. Illinois, 360 U.S 264, 3L.Ed. 2d 21217. 79 5ct. 1173 (1958), MOONEY v HOLOHAN, 294 U.S 103, 79L ED. 791, 55 S. CT 340 (1035) MOREOVER, THE PROSECUTOR HAS A CONSTITUTIONAL DUTY TO CORRECT EVIDENCE HE KNOWS IS FALSE, even if he did not intentionally submit it. Giles v Maryland, 386 U.S 66, 17L. Ed. 2d 737, 87 S.CT. 793(1967), from these bedrock principles, it is well established that when no new significant evidence come to light a prosecutor Cannot, in order to convict two defendants at separate trials, offer inconsistent theories and facts regarding the same crime.

From the theory of FIRST DEGREE MURDER WITH THE USE OF A DEADLY WEAPON ARGUED AT VILLAVERDE'S TRIAL, to the new theory of voluntary manslaughter, is a significant turning point, just for the fact that if this case were to turn out to be a proper case of voluntary manslaughter a case involving heat of passion and sufficient provocation, as defined in the statute, there is no reason to suspect that a jury would not recognize the diminished liability and refuse to convict VILLAVERDE FOR MURDER. Thus his claim of actual innocent of the crime of murder, shall be acknowledge and decided in the merits, this honorable Court had previously recognized that if a petitioner, assert colorable claims with

sufficient facts supporting, His innocence, the gateway shall open and the least gran evidentiary hearing. Additionally this Honorable Court, also should take in consideration that the new evidences in dispute, came from the same prosecutor, that tried VILLAVERDE, THAT HIS CO-DEFENDANT ROBERTO CASTRO, admitted to have committed the crime in open court, confessed in open court where VOLUNTARY CONFESSIONS are received in evidence, no matter where made, because it is presumed that persons accused of crime will not confess against their own interest, unless the confessions are true. VILLAVERDE'S jury did not had this opportunity and as a matter of due process, the jury is entitled to hear that Castro committed VOLUNTARY MANSLAUGHTER INSTEAD OF FIRST DEGREE MURDER is material either to guilt or to punishment. this Court should Also acknowledge that appellant did not received effective assistant of counsel and upon this exception he could overcome any procedural default. To obtain relief in his Habeas Corpus and reverse and/or dismiss his current convictions that had kept him illegally incarcerated for more than 16 years WHILE THE MAIN AND SOLE RESPONSIBLE OF CAUSING THE DEATH OF THE VICTM "Mr. ENRIQUE CAMINERO", WAS HIS CO-DEFENDANT "ROBERTO CASTRO" WHOM HAS been released since, only serving a year of imprisonment at THE STATE PRISION, because THE DISTRICT COURT ALSO AWARDED NEARLY FOUR YEARS of credit for time served. This court is the SUPREME AND MAXIMUM REPRESENTATION OF THE STATE LAW AND VILLAVERDE'S BELIEF THAT THIS COURT WILL RULE ACCORDINGLY AND ADEQUATELY IN THE NAME OF JUSTICE.

RESPECTFULLY SUBMITTED

Sally D. Villaverde #0081701

CERTFICATE OF SERVICE BY MAILING

I, SALLY D. VILLAVERDE, hereby certify, pursuant to NRCP 5(b), that on this 02 day of APRIL, 2019, I mailed a true and correct copy of the foregoing, "APPELLANT'S OPENING BRIEF" by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid, addressed as follows:

DISTRICT ATTORNEY
200 LEWIS AVE
LAS VEGAS, NV 89155

CC:FILE

DATED: this 02 day of APRIL, 2019.

Sally D. Villaverde #0081701
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