IN THE SUPREME COURT OF THE STATE OF NEVADA

SAMUEL HOWARD,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 81278
81279

RESPONDENT'S APPENDIX

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on August 25, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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DISTRICT COURT

CLARK COUNTY, NEVADA

SAMUEL HOWARD, Petitioner, v. E.K. McDANIEL, Warden, and CATHERINE CORTEZ MASTO, Attorney General for the State of Nevada, Respondents.	Case No. C53867 Dept. No. V **PETITION FOR WRIT OF HABEAS CORPUS** [POST-CONVICTION] Date of Hearing: 12-13-07 Time of Hearing: 8:30 (Death Penalty Case)

Petitioner, Samuel Howard, hereby files this Petition for Writ of Habeas Corpus pursuant to NRS 34.720, et seq. Mr. Howard alleges that he is being held in custody in violation of the Eighth and Fourteenth Amendments of the Constitution of the United States and Article 1, Sections 6 and 8, and Article 4, Section 21 of the Nevada Constitution.

PROCEDURAL ALLEGATIONS

Mr. Howard is currently in the custody of the State of Nevada at the Ely State Prison in Ely, Nevada, pursuant to a state court judgment of conviction and sentence of death. The conviction and sentence were entered on May 6, 1983, in the Eighth Judicial District Court, Clark County, Nevada,

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by the Honorable John F. Mendoza, Case No. C53867. 2 ROA 349.[1],[2] Respondent, E.K. McDaniel, is the Warden of Ely State Prison and Catherine Cortez Masto is the Attorney General of the State of Nevada. The Respondents are sued in their official capacities.

On June May 25, 1981, a Clark County Grand Jury indicted Mr. Howard on two counts of robbery with the use of a deadly weapon, and one count of murder in the first degree with use of a deadly weapon. 1 ROA 1-6. Mr. Howard was arrested in California and extradited to Las Vegas, Nevada in November of 1982. He entered his plea of not guilty on November 30, 1982. 1 ROA 17.

On April 22, 1983, the jury found Mr. Howard guilty of all charges: counts one and two, robbery with the use of a deadly weapon, and count three, first degree murder with the use of a deadly weapon. 2 ROA 293. Following the penalty hearing on May 2-4, 1983, the jury returned a sentence of death on the first-degree murder charge. 2 ROA 294.

The Nevada Supreme Court affirmed Mr. Howard's conviction and sentence on December 15, 1986. Howard v. State (Howard I), 102 Nev. 572, 729 P.2d 1341 (1986), Ex. 145.[3] On March 24, 1987, rehearing was denied. The United States Supreme Court denied Mr. Howard's Petition for Writ of Certiorari on October 5, 1987.

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[1] The record on appeal (ROA) cited to herein references the appendix filed in 1992, Nevada Supreme Court Docket No. 23386, unless otherwise noted.

[2] On September 20, 1983, a judgment of conviction was entered, sentencing Mr. Howard to fifteen years with a consecutive fifteen years on each of the two robberies with use of a deadly weapon.

[3] On direct appeal, counsel raised the following issues:
1. Whether the appellant was afforded the effective assistance of counsel?
2. Whether the trial court erred when it refused to sever Counts I [sic] from Counts II and III?
3. Whether the trial court erred when it refused to grant an evidentiary hearing regarding the voluntariness of statements made by the appellant?
4. Whether the trial court erred when it failed to give an instruction to the jury that the testimony of an accomplice ought to be viewed with distrust?
5. Whether the trial court erred when it failed to give an instruction directing the jury to consider Dawana Thomas an accomplice as a matter of law?
6. Whether the trial court erred when it failed to prohibit the district attorney from using three aggravating circumstances to which objections were raised?
7. Whether the trial court erred when it failed to instruct the jury regarding sympathy and mercy?

Ex. 145.

On October 28, 1987, Mr. Howard filed a Petition for Post-Conviction Relief in the Eighth Judicial District Court for the State of Nevada. The district court denied the petition and on November 7, 1990, the Nevada Supreme Court dismissed the appeal. Howard v. State (Howard II), 106 Nev. 713, 800 P.2d 175 (1990), Ex. 146.[4] While that proceeding was pending, Mr. Howard filed a federal petition for habeas relief in the United States District Court for the District of Nevada (CV-N-88-0264-ECR). On June 23, 1988, the federal case was dismissed without prejudice.

On May 1, 1991, Mr. Howard filed another federal habeas corpus petition in the United States District Court, District of Nevada (CV-N-91-196-ECR). Mr. Howard's petition was a "mixed" petition, and on October 16, 1991, the United States District Court entered an order granting Mr. Howard's request to stay the case and go back to state court for exhaustion purposes.

Mr. Howard returned to state court and filed an amended petition for post-conviction relief in the Eighth Judicial District Court on December 16, 1991. The court denied the petition and on March 19, 1993, the Nevada Supreme Court dismissed his appeal. Ex. 5.[5] The United States

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[4] On appeal from the dismissal of post-conviction relief, counsel raised the following issues:

I. Howard was denied reasonably effective assistance of counsel at trial.
   A. Improper closing argument denied Howard a fundamentally fair trial as a result of ineffective assistance of counsel.
   B. The failure to present substantial mitigating factors was the result of ineffective assistance of counsel.

II. Howard was denied reasonable effective assistance of counsel on appeal.

III Howard was [sic] not waived the right to receive effective assistance of counsel.

IV The cumulative effect of the conflict of interest and ineffective assistance of counsel deprived Howard of numerous Constitutional rights and thus a fair trial.

Ex. 146.

[5] The Nevada Supreme Court ordered the appeal of the denial of Mr. Howard's second post conviction petition be decided without briefing or argument. The issues raised by counsel in Mr. Howard's second post conviction petition were:

Ground One: Petitioner was denied a fundamentally fair trial by the numerous instances of prosecutorial misconduct which occurred during trial, including, but not limited to: (1) tampering with a juror which resulted in a motion for mistrial by defendant which was denied; (2) expression of personal belief and personal endorsement of the death penalty; (3) reference to the improbability of rehabilitation, to the possibility of escape and future unknown killings, comparison of the defendant's life to that of the victim, comparison of defendant to a notorious murderer, and reference to the notion that the community would benefit if defendant received the death penalty.

Ground Two: Petitioner was denied effective assistance of counsel in violation of the sixth and fourteenth amendments of the U.S. Constitution and Article I, section 8 of the Nevada Constitution

Supreme Court denied certiorari on October 4, 1993.

On December 8, 1993, Mr. Howard returned to the United States District Court and filed a pro se Petition for Writ of Habeas Corpus (CV-S-93-1209-LDG(LRL)). On September 2, 1996, the court dismissed the petition and required Mr. Howard to file a second amended petition that stated his claims in a non-conclusory manner.

On January 27, 1997, Mr. Howard filed a Second Amended Petition for Writ of Habeas Corpus in case no. CV-S-93-1209-LDG(LRL). On September 23, 2002, the court entered an order staying the Second Amended Petition to allow Mr. Howard to return to state court to exhaust his pending federal habeas claims.

On December 20, 2002, Mr. Howard filed his third state petition for post-conviction relief. On October 23, 2003, the state court dismissed the petition on procedural grounds. On December 1, 2004, the Nevada Supreme Court entered an order affirming the lower court's dismissal of Mr. Howard's petition. Ex. 147. On December 23, 2005, the United States District Court lifted its stay and directed the Clerk to file Mr. Howard's Third Amended Petition for Writ of Habeas Corpus. Ex. 148. This federal habeas corpus petition is currently pending in the United States District Court for the District of Nevada. (Howard v. McDaniel, Case No. 2:93-cv-01209-LRH-(LRL)).

Mr. Howard files this petition within one year of the Nevada Supreme Court's decisions in Rippo v. State, 122 Nev. __, 146 P.3d 279, 284 (2006), and Bejarano v. State, 122 Nev. __, 146 P.3d 265, 274 (2006), in which the Supreme Court held that the decision in McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004), reh'g denied 107 P.3d 1287 (2005), was retroactive.[6] See NRS

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where his trial counsel failed to explain to him what it meant to proffer evidence of mitigating circumstances at the penalty phase.

Ground Three: Petitioner was denied his right to a speedy trial in violation of the sixth amendment.

Ground Four: The cumulation of all the defects occurring at trial and on direct appeal, including those previously raised all served to deprive Petitioner of a fair trial in violation on the fifth and fourteenth amendment of the U.S. Constitution and Article I, section 8 of the Nevada Constitution.

[6] In McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004) reh'g denied 107 P.3d 1287 (2005), the Nevada Supreme Court "deem[ed] it impermissible under the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated." 102 P.3d at 624. The Court made it clear that this rule applies whenever a felony-murder theory may have been the basis for the first-degree murder

34.726. The claim raised in this petition, although partially raised in the direct appeal of the conviction and sentence and in the third state habeas petition, is properly raised in this petition because of the intervening authority of McConnell, Rippo, and Bejarano. See NRS 34.810. The claim raised in this petition is properly raised because Mr. Howard is actually innocent of the aggravating factors and failure to review the claim would result in a miscarriage of justice. State v. Bennett, 119 Nev. 589, 81 P.3d 1,7 (2003); Leslie v. Warden, 118 Nev. 773, 780, 59 P.3d 440 (2002); NRS 34.800.

Statement with Respect to Previous Proceedings

A. The failure to raise any of the claims asserted in this petition, which were susceptible to decision on direct appeal, was the result of ineffective assistance of counsel on appeal.

B. The failure to raise any of the claims asserted in this petition, which were susceptible of being raised in the state post-conviction proceeding, and appeal, was the result of ineffective assistance of counsel, in a proceeding in which Mr. Howard had a right to effective assistance of counsel under state and federal constitutional law; was the result of representation by counsel that violated state and federal constitutional due process standards; and/or was induced by the state trial court's refusal to permit appointed counsel adequate time or resources to identify and present all of the available constitutional claims in violation of the right to an adequate opportunity to be heard guaranteed by the due process clause of the Fourteenth Amendment. Mr. Howard did not consent to the failure to raise any available constitutional claim and did not knowingly and intelligently waive any such claim. Mr. Howard did not conceal from, or fail to disclose to appointed counsel,

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conviction:

> The decision has no effect in a case where the State relies solely on a theory of deliberate, premeditated murder to gain a conviction of first-degree murder; it can then use appropriate felonies associated with the murder as aggravators. But in the cases where the State bases a first-degree murder conviction in whole or part on felony murder, to seek a death sentence the State will have to prove an aggravator other than one based on the felony murder's predicate felony.

Id. In the absence of a special verdict, or clear evidence in a plea colloquy, that the conviction of first-degree murder was based solely on a theory other than felony-murder, the McConnell rule prohibits the use of felony-murder aggravating factors. Id. at 1062, 102 P.3d at 620, 624.

at any stage of the proceedings, any fact relevant to any available constitutional claim.

C. Mr. Howard and previous counsel were prevented from discovering and alleging all of the claims raised in this petition by the state's action in failing to disclose all material evidence in possession of its agents.

D. The Nevada Supreme Court has deemed counsel's failure to raise claims in prior proceedings or in a timely manner as sufficient cause to allow new claims to be considered and has disregarded such failures and addressed constitutional claims in the cases of similarly-situated litigants. Barring consideration of the merits of Mr. Howard's claims would violate the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

1) The Nevada Supreme Court has exercised complete discretion to address constitutional claims, when an adequate record is presented to resolve them, at any stage of the proceedings, despite the default rules contained in NRS 34.726, NRS 34.800, and NRS 34.810. A purely discretionary procedural bar is not adequate to preclude review of the merits of constitutional claims. E.g., Valerio v. Crawford, 306 F.3d 742, 774 (9th Cir. 2002) (en banc); Morales v. Calderon, 85 F.3d 1387, 1391 (9th Cir. 1996). Although the Nevada Supreme Court asserted in Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001), that application of the statutory default rules, some of which were adopted in the 1980's, was mandatory, 34 P.3d at 536, the examples cited below establish that the Nevada Supreme Court has always exercised, and continues to exercise, complete discretion in applying them. See also, Ybarra v. Warden, No. 43981, Order Affirming in Part, Reversing in Part, and Remanding (November 28, 2005), Ex. 133, and Ybarra v. Warden, No. 43981, Order Denying Rehearing (February 2, 2006), Ex. 134 (both reiterating that application of the statutory default rules is mandatory despite alleged inconsistencies in application).

2) The Nevada Supreme Court has complete discretion to address constitutional claims, when an adequate record is presented to resolve them, at any stage of the proceedings, despite the default rules contained in NRS 34.726; 34.800; 34.810. The Nevada Supreme Court has disregarded default rules and addressed constitutional claims, at any stage of capital proceedings, in the exercise of its complete discretion to do so.

3) The Nevada Supreme Court has now provided a laboratory example of this disparate, and therefore unconstitutional, treatment in the Rippo case. There, the Supreme Court, on appeal from the denial of post-conviction habeas corpus relief, sua sponte directed the parties to be prepared to argue an issue arising from a penalty phase jury instruction, regarding whether the jury had to be unanimous in finding that the mitigating evidence outweighed the aggravating factors to preclude death-eligibility. Rippo v. State, No. 44094; Bejarano v. State, No. 44297, Order Directing Oral Argument (March 16, 2006), Ex. 135 at 2. The issue was addressed on the merits by the Court in its decision. Rippo v. State, 122 Nev. ___, 146 P.3d 279, 285 (2006). This instructional issue had not been raised in any previous proceeding, cf. NRS 34.810(1)(b),(2), or in the habeas proceedings in the trial court, or in the Nevada Supreme Court itself. The only issue raised with respect to this jury instruction was whether it adequately informed the jury that non-statutory aggravating evidence that was not relevant to the statutory aggravating factors could be considered in the weighing process for finding death-eligibility. Exs. 136 at 30-33; 137; 138 at 31-34; 139 at 30-32; 140 at 20-23, 141. The Supreme Court first raised the issue sua sponte in its order directing oral argument in 2006, long after the one year rule, NRS 34.726(1), and the five year rule, NRS 34.800(2), had elapsed from the finality of the conviction and sentence in 1998. Rippo v. State, 113 Nev. 1239, 946 P.3d 1017 (1997), cert. denied 524 U.S. 841 (October 5, 1998).

4) Despite the Nevada Supreme Court's repeated claim that it applies its default rules consistently, State v. District Court (Riker), 121 Nev. __, 112 P.3d 1070, 1074-1082 (2005); Pellegrini v. State, 117 Nev. 860, 880-886, 34 P.3d 519 (2001), there can be no rational dispute that in Rippo the court sua sponte raised and addressed on the merits a claim that was barred under the statutory default rules. If those same rules are applied to bar consideration of the merits of any of Mr. Howard's claims, the constitutional violation based on arbitrarily disparate treatment of similarly-situated litigants will be complete. See, e.g., Bush v. Gore, 531 U.S. 98, 106-109 (2000) (per curiam); Village of Willowbrook v. Olech, 528 U.S. 564-565 (2000) (per curiam); Myers v. Ylst, 897 F.2d 917, 921 (9th Cir. 1990) (equal protection requires consistent application of state law to similarly-situated litigants).

5) In Rippo, the court's decision made no mention of the supposedly mandatory default rules. See also, Bejarano v. State, 106 Nev. 840, 843, 801 P.2d 1388 (1990) (on appeal from denial of collateral relief, "[w]e consider sua sponte whether failure to present such [mitigating] evidence constitutes ineffective assistance"); Bejarano v. Warden, 112 Nev. 1466, 1471 n. 2, 929 P.2d 922 (1996) (addressing claim on merits despite default rules); Bennett v. State, 111 Nev. 1099, 1103, 901 P.2d 676 (1995) (addressing claims asserted to be barred by default rules; "[w]ithout expressly addressing the remaining procedural bases for the dismissal of Bennett's petition, we therefore choose to reach the merits of Bennett's contentions" (emphasis supplied); Ford v. Warden, 111 Nev. 872, 886-887, 901 P.2d 123 (1995) (addressing claim of error in court's mandatory sentence review on direct appeal raised for first time on appeal in second collateral attack, without discussing or applying default rules); Hill v. Warden, 114 Nev. 169, 178-179, 953 P.2d 1077 (1998) (addressing merits claims raised for first time on appeal from denial of third post-conviction petition because claims "of constitutional dimension which, if true, might invalidate Hill's death sentence and the record is sufficiently developed to provide an adequate basis for review."); see also, Lane v. State, 110 Nev. 1156, 1168, 881 P.2d 1358 (1994) (vacating aggravating factor finding based on instructional error on mandatory review without noting issue not raised at trial or on appeal); Lord v. State, 107 Nev. 28, 38, 806 P.2d 548 (1991) ("Normally a proper objection is a prerequisite to our considering the issue on appeal. However, since this issue is of constitutional proportions, we elect to address it now.") (citation omitted); Powell v. State, 108 Nev. 700, 705-06, 838 P.2d 921 (1992) (addressing issue of delay in probable cause determination without indicating that issue not raised at trial or on appeal); Farmer v. Director, Nevada Dept. Of Prisons, No. 18052, Order Dismissing Appeal (March 31, 1988) (addressing two substantive claims on merits (guilty plea involuntary, insufficiency of aggravating circumstances) despite failure to raise on direct appeal), Ex. 104; Farmer v. State, No. 22562, Order Dismissing Appeal (February 20, 1992) (denying claim of improper admission of victim impact evidence on merits despite default), Ex. 105; Feazell v. State, No. 37789, Order Affirming in Part and Vacating in Part, at 5-6 (November 14, 2002) (granting penalty phase relief sua sponte (on appeal of first state habeas corpus petition) on basis of ineffective assistance of post-conviction counsel without requiring petitioner to plead "cause" under NRS 34.726(1) or

34.810)), Ex. 107; Hardison v. State No. 24195, Order of Remand (May 24, 1994) (addressing claims and granting relief despite timeliness and successive petition procedural bars raised by state), Ex. 109; Hill v. State No. 18253, Order Dismissing Appeal (June 29, 1987) (dismissing untimely appeal from denial of second post-conviction relief petition but sua sponte directing trial court to entertain merits of new petition), Ex. 110; Milligan v. State, No. 21504, Order Dismissing Appeal (June 17, 1991) (rejecting two substantive claims on merits (error to admit uncorroborated testimony of accomplice, death penalty cruel and unusual) despite failure to raise on direct appeal), Ex. 113; Neuschafer v. Warden No. 18371, Order Dismissing Appeal (August 19, 1987) (addressing merits of claims without discussion of default rules, in case decided without briefing, and in which court expressed "serious doubts" about authority of counsel to pursue appeal, but decided to "elect" to entertain appeal due to "gravity of appellant's sentence"), Ex. 116; Nevius v. Sumner (Nevius I) Nos. 17059, 17060, Order Dismissing Appeal and Denying Petition (February 19, 1986) (reviewing first and second collateral petitions in consolidated opinion, without addressing default rules as to second petition), Ex. 117; Nevius v. Warden (Nevius II), Nos. 29027, 29028, Order Dismissing Appeal and Denying Petition for Writ of Habeas Corpus (October 9, 1996) (entertaining claim in petition filed directly with Nevada Supreme Court despite failure to raise claim in district court; noting that district court had "discretion to dismiss appellant's petition . . . ."), Ex. 118; Nevius v. Warden (Nevius III), Nos. 29027, 29028, Order Denying Rehearing (July 17, 1998) (same), Ex.119; Rogers v. Warden, No. 22858, Order Dismissing Appeal (May 28, 1993) (addressing two claims on merits (objection to M'Naughten test for insanity, error to place the burden on defendant to prove insanity) despite successive petition bar and direct appeal bar; claims rejected under law of the case), Ex. 124; Stevens v. State, No. 24138, Order of Remand (July 8, 1994) (finding cause on basis of failure to appoint counsel in proceeding in which appointment of counsel not mandatory, cf. Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247 (1997)), Ex. 128; Williams v. State, No. 20732, Order Dismissing Appeal (July 18, 1990) (addressing claim in third collateral proceeding on merits without discussion of default rules), Ex. 130; Ybarra v. Director, No. 19705, Order Dismissing Appeal (June 29, 1989) (addressing previously-raised claim without reference to default rules), Ex. 132.

6) The Nevada Supreme Court has disregarded the procedural bar arising from

failure to raise claims in earlier proceedings. See Valerio v. Crawford, 306 F.3d 742, 778 (9th Cir. 2002); See also, Rippo v. State, 146 P.3d at 285; Bejarano v. Warden, 112 Nev. 1466, 1471 n. 2, 929 P.2d 922 (1996) (addressing claim on merits despite default rules); Bennett v. State, 111 Nev. 1099, 1103, 901 P.2d 676 (1995) (addressing claims asserted to be barred by default rules; "[w]ithout expressly addressing the remaining procedural bases for the dismissal of Bennett's petition, we therefore choose to reach the merits of Bennett's contentions" (emphasis supplied)); Ford v. Warden, 111 Nev. 872, 886-887, 901 P.2d 123 (1995) (addressing claim of error in court's mandatory sentence review on direct appeal raised for first time on appeal in second collateral attack, without discussing or applying default rules); Hill v. Warden, 114 Nev. 169, 178-179, 953 P.2d 1077 (1998) (addressing merits of claims raised for first time on appeal from denial of third post-conviction petition because claims "of constitutional dimension which, if true, might invalidate Hill's death sentence and the record is sufficiently developed to provide an adequate basis for review."); Farmer v. State No. 22562, Order Dismissing Appeal (February 20, 1992) (denying claim of improper admission of victim impact evidence on merits despite default), Ex. 105; Feazell v. State, No. 37789, Order Affirming in Part and Vacating in Part, at 5-6 (November 14, 2002) (granting penalty phase relief sua sponte (on appeal of first state habeas corpus petition) on basis of ineffective assistance of post-conviction counsel without requiring petitioner to plead or prove "cause" in a successive petition), Ex. 107; Hardison v. State No. 24195, Order of Remand (May 24, 1994) (addressing claims and granting relief despite timeliness and successive petition procedural bars raised by state), Ex. 109; Neuschafer v. Warden No. 18371, Order Dismissing Appeal (August 19, 1987) (addressing merits of claims without discussion of default rules, in case decided without briefing, and in which court expressed "serious doubts" about authority of counsel to pursue appeal, but decided to "elect" to entertain appeal due to "gravity of appellant's sentence"), Ex. 116; Ybarra v. Director No. 19705, Order Dismissing Appeal (June 29, 1989) (addressing previously-raised claim without reference to default rules), Ex. 132.

7) The Nevada Supreme Court has consistently failed to apply the time bar provisions of NRS 34.726, or the rebuttable presumption of NRS 34.800 (2) to capital habeas petitioners. Rippo v. State, 122 Nev. ___, 146 P.3d at 285 (issue raised by Nevada Supreme Court

sua sponte in 2006, when conviction and sentence final in 1998); Bejarano v. Warden, 112 Nev. 1466, 1471 n. 2, 929 P.2d 922 (1996) (addressing claim on merits despite default rules; successive petition filed approximately five years after direct appeal remittitur issued on January 10, 1989); Ford v. Warden, 111 Nev. 872, 886-887, 901 P.2d 123 (1995) (addressing claim of error in court's mandatory sentence review on direct appeal raised for first time on appeal in second collateral attack, without discussing or applying default rules; successive petition filed November 12, 1991, approximately five years after direct appeal remittitur issued on April 29, 1986); Hill v. State, 114 Nev. 169, 953 P.2d 1077 (1998) (addressing claims on merits filed directly with the Nevada Supreme Court; successive petition claims filed September 19, 1996, approximately ten years after direct appeal remittitur issued on September 5, 1986); Farmer v. State, No. 29120, Order Dismissing Appeal (November 20, 1997) (successive petition filed August 28, 1995, approximately ten years after direct appeal remittitur issued on September 17,1 85), Ex. 106; Jones v. McDaniel, No. 39091, Order of Affirmance (December 19, 2002) (addressing all three-judge panel claims on merits; successive petition filed May 1, 2000, approximately nine years after direct appeal remittitur issued on October 25, 1991), Ex. 112; Milligan v. Warden, No. 37845, Order of Affirmance (July 24, 2002) (successive petition filed December 1992, approximately seven years after direct appeal remittitur issued on October 15, 1986), Ex. 114; Nevius v. Warden (Nevius II), No. 29027, Order Dismissing Appeal (October 9, 1996) (successive petition filed August 23, 1996, approximately eleven years after direct appeal remittitur issued on December 31, 1985), Ex. 118; Nevius v. Warden (Nevius III), No. 29027, Order Denying Rehearing (July 17, 1998) (successive petition filed February 7, 1997, approximately twelve years after direct appeal remittitur issued on December 31, 1985), Ex. 119; O'Neill v. State, No. 39143, Order of Reversal and Remand, at 2 (December 18, 2002) (petition filed "more than six years after entry of judgment of conviction" and issuance of remittitur on direct appeal on March 13, 1996), Ex. 121; Riley v. State, No. 33750, Order Dismissing Appeal (November 19, 1999) (successive petition filed August 26, 1998, approximately seven years after direct appeal remittitur issued on July 18, 1991), Ex. 123; Sechrest v. State, No. 29170, Order Dismissing Appeal (November 20, 1997) (successive petition filed July 27, 1996, approximately eleven years after direct appeal remittitur issued on September 18, 1985), Ex. 126; Williams v.

Warden, No. 29084, Order Dismissing Appeal (August 29, 1997) (addressing claim that trial counsel failed to rebut aggravating evidence; claim rejected under law of the case, successive petition filed December, 1992, approximately five years after direct appeal remittitur issued on July 17, 1987), Ex. 131.

8) The Nevada Supreme Court has also applied inconsistent rules when deciding whether a petitioner can demonstrate "cause" to excuse a procedural default. One particularly striking inconsistency is the court's treatment of cases in which trial and/or appellate counsel acted as habeas counsel in the first state post-conviction petition. Compare Moran v. State, No. 28188, Order Dismissing Appeal (March 21, 1996) (finding that trial and appellate counsel's representation in first habeas proceeding did not establish "cause" to review merits of claims in subsequent habeas proceeding), Ex. 115, with Nevius v. Warden (Nevius II), Nos. 29027, 29028, Order Dismissing Appeal and Denying Petition (October 9, 1996) (Petitioner "arguabl[y] established "cause" under same circumstances), Ex. 118; Wade v. State, No. 37467, Order of Affirmance (October 11, 2001) (holding sua sponte that petitioner had established "cause" to allow filing of successive petition in same circumstances), Ex. 129; Hankins v. State, No. 20780, Order of Remand (April 24, 1990) (remanding sua sponte for appointment of new counsel on first habeas petition due to representation by same office at sentencing and in post-conviction proceeding), Ex. 108.

9) The Nevada Supreme Court has reached inconsistent results on the issue of whether a procedural rule that does not exist at the time of a purported default may preclude the review of the merits of meritorious constitutional claims. Compare Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) (applying NRS 34.726 to preclude review of merits of successive habeas petition when one-year default rule announced for the first time in that case); Jones v. McDaniel, No. 39091, Order of Affirmance (December 19, 2002) (same), Ex. 112, with State v. Haberstroh, 119 Nev. 173, 180-181, 69 P.3d 676, 681-82 (2003) (refusing to retroactively apply rule that parties may not stipulate not to apply procedural default rules); Smith v. State, No. 20959, Order of Remand (September 14, 1990) (refusing to apply default rule that was not in existence at the time of the purported default), Ex. 127; Rider v. State, No. 20925, Order of Remand (April 30, 1990) (same), Ex. 122.

10) The Nevada Supreme Court has taken opposite positions on whether application of procedural default rules is waivable by the State. State v. Haberstroh, 119 Nev. 173, 180-181, 69 P.3d 676, 681-682 (2003), holding that parties could not stipulate to overcome state's procedural defenses, but construing a stipulation as establishing cause to overcome default rules without identifying any theory of cause that such a stipulation would establish or how it existed before the stipulation was entered; contra Doleman v. State, No. 33424, Order Dismissing Appeal (March 17, 2000) (finding stipulation with state to allow adjudication of merits of claim ineffective because of petitioner's failure to seek rehearing on claim and failing to find "cause" on the basis of the stipulation), Ex. 103. See also, Jones v. State, No. 24497, Order Dismissing Appeal (August 28, 1996) (holding challenge to jurisdiction of court waived by guilty plea), Ex. 111. The definition of cause is completely amorphous, because it is whatever the Nevada Supreme Court says it is on any particular occasion. See also, Leslie v. State, 118 Nev. 773, 59 P.3d 440, 445 (2002) (sua sponte expanding definition of miscarriage of justice exception to default rules to include "innocence" of aggravating factor); contra Colwell v. State, 118 Nev. 807, 59 P.3d 463 (2002)(case decided same day as Leslie with the same aggravating factor and similar factual circumstances (a robbery case) but failing to take notice of petitioner's "innocence" of aggravating factor) (verdict form showing conviction of random and motiveless aggravating factor) Ex. 102; Rogers v. Warden, No. 36137, Order of Affirmance, at 5-6 (May 13, 2003) (raising miscarriage of justice exception sua sponte but failing to analyze petitioner's challenge to aggravating circumstance under actual innocence standard), Ex. 125. See also Feazell v. State, No. 37789, Order Affirming in Part and Vacating in Part (November 14, 2002) (sua sponte reaching both theory of cause not litigated in District Court or Supreme Court, and substantive issue, post-Pellegrini), Ex. 107.

11) The State has admitted that the Nevada Supreme Court has disregarded procedural default rules on grounds that cannot be reconciled with a theory of consistent application of procedural default rules. Bennett v. State, No. 38934, Respondent's Answering Brief at 8 (November 26, 2002) ("upon appeal the Nevada Supreme Court graciously waived the procedural bars and reached the merits" (emphasis supplied)), Ex. 101; Nevius v. McDaniel, D. Nev., No. CV-N-96-785-HDM-(RAM), Response to Nevius' Supplemental Memorandum at 3 (October 18, 1999)

(Nevada Supreme Court noted issue raised only on petition for rehearing in successive proceeding, "but it did not procedurally default the claim. Instead, 'in the interests of judicial economy' and, more than likely, out of its utter frustration with the litigious Mr. Nevius and to get the matter out of the Nevada Supreme Court once and for all, the court addressed the claim on its merits"), Ex. 120.

E. Default bars that can be "graciously waived," or disregarded out of "frustration," are not "rules" that bind the actions of courts at all, but are the result of mere exercises of unfettered discretion; and such impediments cannot constitutionally bar review of meritorious claims. Lonchar v. Thomas, 517 U.S. 314, 323 (1996) ("'There is no such thing in the Law, as Writs of Grace and Favour issuing from the Judges.' Opinion on the Writ of Habeas Corpus, Wilm. 77, 87, 97 Eng. Rep. 29, 36 (1758) (Wilmot, J.)."). The Nevada Supreme Court's practices make review of the merits of constitutional claims a matter of "grace and favor," and they cannot constitutionally be applied to bar consideration of Mr. Howard's claims.

F. The Nevada Supreme Court could not apply any supposed default rules to bar consideration of Mr. Howard's claims when it has failed to apply those rules to similarly-situated petitioners, and thus has failed to provide notice of what default rules will be enforced, without violating the equal protection and due process clauses of the Fourteenth Amendment. Bush v. Gore, 531 U.S. 98, 104-109 (2000) (per curiam); Village of Willowbrook v. Olech, 528 U.S. 562, 564-565 (2000) (per curiam); Ford v. Georgia, 498 U.S. 411, 425 (1991).

Mr. Howard is filing this petition more than one year following the filing of the decision on direct appeal and issuance of the remittitur.

A. Mr. Howard alleges that any delay in filing this petition is not his "fault" within the meaning of NRS 34.726(2). Mr. Howard has been continuously represented by counsel since the beginning of the proceedings in this case, and counsel have been responsible for conducting the litigation. Mr. Howard has not committed any "fault," within any rational meaning of that term as used in NRS 34.726(1), in connection with the failure to raise any issue in the litigation. Any failure to raise these claims has been the fault of counsel, which is not attributable to Mr. Howard under Pellegrini v. State, 117 Nev. 860, 36 P.3d 519, 526 n. 10 (2001); see also Strickland v. Washington, 466 U.S. 668 (1984).

B. Mr. Howard alleges that NRS 34.726 cannot properly or constitutionally be applied to bar consideration of the merits of his claims.

1) NRS 34.726 has not been applied consistently to bar consideration of the claims of similarly-situated litigants. Applying NRS 34.726 to bar consideration of Mr. Howard's claims would violate the due process and equal protection provisions of the Fourteenth Amendment.

2) NRS 34.726 cannot properly or constitutionally be applied to this petition, because the legislature did not intend it to apply to successive petitions. In holding that the section does apply to successive petitions, the Nevada Supreme Court's decision in Pellegrini v. State, 117 Nev. 860, 36 P.3d 519 (2001), arbitrarily ignored its own statutory construction precedents in order to apply a new procedural bar in capital cases.

I) NRS 34.726 was enacted in 1993 as part of legislation to consolidate the former statutory post-conviction procedure under Chapter 177 and the habeas procedure under Chapter 34. The legislature was assured that the legislation would have the limited effect of requiring the trial court to hear all the collateral proceedings, and of consolidating the procedures.

ii) The proposed amendments combining the two statutory collateral procedures were generated by a committee created by the Nevada Supreme Court to study the post-conviction process. Nevada Legislature, 66th Sess., Assembly Committee on Judiciary, Minutes at 3 (February 6, 1991).[7] The chair of the committee, who was staff counsel to the Chief Justice, explained to the Assembly that the bill was intended to eliminate the chapter 177 proceedings. Those proceedings would be "unnecessary" if a related constitutional amendment was approved to allow the district court, in which the trial was conducted, to exercise habeas jurisdiction, rather than restricting habeas jurisdiction to the district in which the Mr. Howard was incarcerated. Id. District Judge Fondi emphasized the problems of increased workload in the district of

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[7] The legislative history of the provision is in the 1991 legislative materials, although the statutory amendments took effect on January 1, 1993, because of the necessity of amending the constitution to allow the statutory change. Nev. Const. art. 6, sec. 6(1); art. 16, sec. 1(1).

confinement due to the rising prison population, and stressed the propriety of habeas cases being heard in the original trial district. Id. at 4. Judge Fondi represented that the proposed procedure "would lead to a simplification of the process, judicial economy and the betterment of not only the courts but also the individuals seeking relief and their attorneys." Id. David F. Sarnowski, the Chief Deputy Attorney General for the Criminal Justice Division, argued in favor of the amendment that "[t]he best forum for the consideration of any claim is in the original trial court. . . ." Id. at 5. In response to the question "who would be ahead and who would be behind?" under the proposed amendments, the staff counsel to the Chief Justice explicitly represented to the assembly committee, "the system would be ahead and no one would be behind. No access to the courts would be cut off, but rather the process was being simplified by eliminating a redundant procedure." Id. (emphasis supplied). Following these representations, the Assembly committee recommended passage of the bill. Id. at 6-7. The representations made to the Senate were equally unequivocal. Staff counsel to the Chief Justice again characterized the proposed amendments as simply making "a two-tier system for post-conviction relief into a one-tier system." Nevada Legislature, 66th Sess., Senate Committee on Judiciary, Minutes at 3 (March 20, 1991). He explicitly "affirmed" to the Senate committee that "a defendant would lose no procedural safeguards currently afforded him under Chapter 177"and that the bill only "removes process for the sake of process." Id. Most important, Chief Deputy Attorney General Sarnowski, again testified on behalf of his office in support of the bill, which he represented "as doing nothing more than transferring jurisdiction where it should be: in the court where the case was originally heard." Id. (Emphasis supplied). Following these representations, the Senate committee recommended the bill for passage. Id. at 4.

iii) In Pellegrini, the Court recognized that its interpretation of NRS 34.726 would add a new procedural hurdle to successive petitions that had not existed under prior law, 34 P.3d at 528, but it did not apply its normal rule that a statute should be interpreted consistently with the legislative intent even if the plain language appeared to contradict that interpretation. In Moody v. Manny's Auto Repair, 110 Nev. 320, 325, 871 P.2d 935 (1994), the Nevada Supreme Court construed a statute as codifying a court-created limitation on a rule of civil liability, rather than as a codification of the rule itself, although it was not "explicitly stated" in the

statute, relying specifically upon the legislative history. See also, Nevada Power Company v. Haggerty, 115 Nev. 353, 367 989 P.2d 870 (1999) (referring to legislative history in construing statutory term); Banegas v. S.I.I.S., 117 Nev. 222, 19 P.3d 245, 249 (2001) (reviewing entire statute and legislative history to construe apparently unambiguous phrase); Advanced Sports Information, Inc. v. Novotnak, 114 Nev. 336, 339-341, 956 P.2d 806 (1998) (reviewing legislative history to determine that term "product" ambiguous, relying on principle that legislative intent prevails over "literal sense" of terms, and concluding that "product" includes intangible services).

iv) In Guinn v. Legislature, 119 Nev. 460, 76 P.3d 22 (2003) (on denial of rehearing), decided after Pellegrini, the same court was faced with two constitutional provisions (the requirements of funding education and of a legislative super-majority to impose taxes) that were "clear on [their] face" yet still subject to "conflicting interpretations." 76 P.3d at 29. In construing the provisions, the Court resorted to "extrinsic evidence" to determine legislative intent based upon the fact that the voters were not informed of the conflicting interpretations before the passage of the constitutional provision. Id. at 29-30. Consequently, the court in Guinn resorted to a review of legislative history - focusing specifically upon the assurances made by proponents of the constitutional provision, id. at 25-27, in order to discern the intent of the legislation. Id. at 30. In particular, the court focused upon consequences of the legislation that its proponents failed to warn about to conclude that the super-majority requirement for tax legislation had to yield to the education funding requirement. Id. 29-30. Had the court applied the same neutral principles of statutory construction that it applied in Guinn to the Pellegrini case, it could not rationally have concluded that NRS 34.726 applied to successive petitions.

v) The Court's failure to apply neutral principles in Pellegrini, and the resulting unanticipated creation and retroactive application of a new default rule, makes the application of NRS 34.726 to Mr. Howard's case impermissible under the due process and equal protection guarantees of the state and federal constitutions. Bush v. Gore, 531 U.S. at 104-109; Village of Willowbrook v. Olech, 528 U.S. at 562-565; Myers v. Ylst, 897 F.2d 417, 421 (9th Cir. 1990); Hicks v. Oklahoma, 447 U.S. 343, 346 (1980); see Hoffman v. Arave, 236 F.3d 523, 531 (9th Cir. 2001) ("if a state procedural rule frustrates the exercise of a federal right, that rule is

'inadequate' to preclude federal courts from reviewing the merits of the federal claim . . . [and] federal courts may reach the merits of the underlying claim"); Williams v. Lockhart, 873 F.2d 1129, 1131-32 (8th Cir.), cert. denied, 493 U.S. 942 (1989) ("new [state] rule designed to thwart the assertion of federal rights" is not adequate, and its violation will not be allowed to defeat federal jurisdiction).

Mr. Howard is "actually innocent" of the death penalty and this issue is therefore appropriately considered in this proceeding. Leslie v. State, 118 Nev. 773, 779-80, 59 P.3d 440, 445 (2002). As set forth below, both aggravating circumstances filed against Mr. Howard are illegal and were inappropriately applied at trial. Because there is a reasonable probability that absent these aggravating circumstances Mr. Howard would not have been sentenced to death, a fundamental miscarriage of justice has occurred. Id. The sentence of death must be vacated because it is not clear that absent the erroneous aggravating circumstances the jury would have imposed a sentence of death. Id. at 447. See also State v. Haberstroh, 119 Nev. 173, 69 P.3d 676 (2003).

Mr. Howard was represented by appointed counsel at all previous proceedings, as follows:

a. Marcus Cooper and George Franzen
Clark County Public Defender Office
Pretrial and trial proceedings

b. Lizzie Hatcher
Direct appeal

c. John J. Graves, Jr.
Petition for Writ of Certiorari and initial Petition for Post-Conviction Relief

d. David Schieck
Petition for Post-Conviction Relief and appeal of dismissal of petition

e. Patrick Flanagan, III
Federal Public Defender Office (Reno)
First federal petition for writ of habeas corpus

f. Cal Potter, III
Amended petition for post-conviction relief, appeal from dismissal of petition, petition for writ of certiorari, and second federal habeas petition

g. Patricia Erickson
Third federal petition and third state petition for post-conviction relief (state exhaustion petition) and appeal from dismissal of third state petition

h. Kelly Miller and Mike Charlton
Federal Public Defender's Office

Request for Discovery, Evidentiary Hearing and Appointment of Experts

Mr. Howard requests full discovery rights, an evidentiary hearing, and the appointment of necessary experts to further develop the claims set forth below, including but not limited to the appointment of mental health experts. See NRS 34.780 (2) ("After the writ has been granted and a date set for the hearing, a party may invoke any method of discovery available under the Nevada Rules of Civil Procedure if, and to the extent that, the judge or justice for good cause shown grants leave to do so."); Bracy v. Gramley, 520 U.S. 899 (1997) (order dismissing habeas petition reversed because petitioner should have been granted discovery for purpose of supporting the claims in his petition); Harris v. Nelson, 394 U.S. 286 (1969) (finding that habeas petitioners are entitled to discovery "as law and justice require" and when necessary to fully develop facts that would demonstrate entitlement to relief); Smith v. McCormick, 914 F.2d 1153, 1170 (9th Cir.1990) (a petitioner is entitled to an evidentiary hearing if he raises a colorable claim of ineffective assistance); Hendricks v. Vasquez, 974 F.2d 1099, 1103, 1109-10 (9th Cir.1992); Morris v. California, 966 F.2d 448, 454 (9th Cir.1991) (remand for evidentiary hearing required where allegations in affidavit raised inference of deficient performance); Harich v. Wainwright, 813 F.2d 1082, 1090 (11th Cir.1987) (where a petitioner raises a colorable claim of ineffective assistance, and there has not been a hearing on the claim, the court must remand to the district court for an evidentiary hearing); Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986) (without an evidentiary hearing, the court cannot conclude whether attorneys properly investigated a case or whether their decisions about evidence were made for tactical reasons). See also Byford v. State, 123 Nev. __, 156 P.3d 691 (2007) ("a post-conviction habeas petitioner is entitled to an evidentiary hearing on any claims that if true would warrant relief as long as the claims are supported by specific factual allegations which the record does not belie or repel."); Doyle v. State, 116 Nev. 148, 995 P.2d 465 (2000) (noting habeas petition in death penalty case was dismissed only after an evidentiary hearing); Singleton v. State, 115 Nev. 148, 979 P.2d 222 (1999) (case remanded for evidentiary hearing based upon defendant's statement, without supporting documents, in habeas petition); Crump v. Warden, 113 Nev. 293, 934 P.2d

(1997) (evidentiary hearing ordered for second habeas corpus petition); Hatley v. State, 100 Nev. 214, 678 P.2d 1160 (1984) (evidentiary hearing required to resolve conflicting evidence).

Mr. Howard alleges the following grounds for relief from his sentence of death and judgment of conviction. References in this petition to the accompanying exhibits incorporate the contents of the exhibit as if fully set forth in this petition. N.R.C.P. 10(c).

CLAIM ONE:

Mr. Howard's death sentence is invalid under the state and federal constitutional prohibitions on cruel and unusual punishments and the accompanying guarantees of due process, equal protection, and a reliable sentence because the jury found Mr. Howard eligible for the death penalty based on a felony murder aggravating factor – murder in the course of robbery – that was based on the same felony murder theory used to establish guilt of first degree murder. U.S. Const. amends. VIII & XIV; Nevada Const. art. I, sec. 3, 6 and 8; art. IV, Sec. 21. This aggravating factor has been invalidated by the Nevada Supreme Court as unconstitutional and its application against Mr. Howard to return a death sentence violated his state and federal constitutional rights. His death sentence must be vacated as a result.

Mr. Howard fully incorporates Claims Four, Five and Twenty by reference herein.

SUPPORTING FACTS

On May 21, 1981, the Clark County Grand Jury returned an Indictment charging Mr. Howard with, inter alia:[8]

> Count II - Robbery and Use of a Deadly Weapon in Commission of a Crime
>
> [the defendant] did, on or about March 27, 1980, then and there wilfully, unlawfully and feloniously take personal property belonging to GEORGE STEVEN MONAHAN, to-wit: wallet and contents, from the person of GEORGE STEVEN MONAHAN, or in his presence, by means of force or violence or fear of injury to, and without the consent and against the will of the said GEORGE STEVEN MONAHAN, said Defendant's using a deadly weapon, to-wit: a firearm, during the commission of said crime.
>
> Count III - Murder and Use of a Deadly Weapon in Commission of a Crime
>
> [the defendant] did, on or about March 27, 1980, then and there, without authority of law and with malice aforethought, wilfully and feloniously kill GEORGE STEVEN MONAHAN, a human being, by shooting at and into the body of GEORGE STEVEN MONAHAN with use of a deadly weapon, to-wit: a firearm.

Ex. 142.

At the guilt phase of Mr. Howard's trial, the trial court instructed the jury that:

> Murder of the First Degree is murder which is (a) perpetrated by any kind of willful, deliberate and premeditated killing, or (b) committed in the perpetration or

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[8] Count I of the indictment charged the robbery of a separate victim at a separate location that occurred the day prior to the robbery and murder of Mr. Monahan.

attempted perpetration of robbery.

2 ROA 229 (emphasis added). The trial court further instructed the jury that:

> There are certain kinds of murder which carry with them conclusive evidence of malice aforethought. One of these classes of murder is murder committed in the perpetration or attempted perpetration of robbery. Therefore, a killing which is committed in the perpetration or attempted perpetration of robbery is deemed to be murder of the first degree, whether the killing was intentional, unintentional or accidental. The specific intent to perpetrate or attempt to perpetrate robbery must be proven beyond a reasonable doubt.

2 ROA 229.

At guilt phase closing argument, the prosecutor emphasized the felony murder rule to the jury as follows:[9]

> We further know, with regard to the killing, we know that Doctor Monahan was killed, that he was murdered; we know that he was robbed, because he had things and they were later missing. The question in this case, and they're easily resolvable according to the instructions: was there premeditation on behalf of the defendant when he did the killing? Did he think about doing the killing before he did it? And was there malice in his mind? And I'm not going to go through all these things because that's settled real easily in a couple of instructions, and let me go over them with you now.
>
> With regards to the premeditation and in a murder case the state must show premeditation, listen to instruction number 11, if you would, it's very short on murder of the first degree. I've never mentioned that before but that's what the state is obviously asking for in this situation:
>
> > Murder of the first degree is murder which is, number one, perpetrated by any kind of willful, deliberate and premeditation killing; or B, committed in the perpetration or attempted perpetration of robbery.
>
> So if Doctor Monahan was killed while the robbery was going on, you don't even need to worry about premeditation. The law does not require it. The fact of the killing is enough within the scope of a robbery to bring it up to the level of first degree murder and the law demands that that occur.
>
> Instruction 13 has to do with malice, and I'll try to paraphrase this. In fact, I'll just – it talks about that you have to have conclusive evidence of malice and it say, therefore, a killing which is committed in a robbery is deemed to be murder of the first degree, whether that killing was . . . intentional, unintentional or accidental, and that is if it's also committed while the robbery is going on.
>
> So what you have here with instructions 11 and 13, is that it says if the requirement of malice and the requirement of premeditation is gone, you do not need

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[9] The State's emphasis on the felony murder theory is not surprising, given that the State presented little evidence of premeditation and malice aside from that which flowed from the felony murder theory.

– you do not have to worry about that. So long as you decide that a robbery took place, and I contend that the evidence is so abundantly clear as to the fact of a robbery of Doctor Monahan, that the question isn't even up for grabs.

And once you get to that point, when there's a robbery in the commission of a killing, you not only . . . don't have to worry about malice or premeditation, but the law tells you that that particular murder was murder in the first degree, and that is the verdict to bring back.

14 ROA 2392-2393.

The prosecutor reiterated the felony murder theory in rebuttal:

The court, in instructions 11 and 13, has made it clear that where a killing occurs during the commission of a robbery, because that is an inherently dangerous felony and because those who made our law wanted to deter that type of conduct, where a killing occurs during a robbery it is deemed to be murder in the first degree. So if you find that George Monahan was killed during the commission of a robbery. if you find that the motive of Mr. Howard in posing as Keith, a security guard for Caesars Palace, and in luring this man out for a test drive in a vehicle when, according to his girlfriend, he had no money, they were broke, was to rob him and if Mr. Monahan was murdered during a robbery, then instructions 11 and 13 establish the offense is murder in the first degree and it is with the use of a deadly weapon.

14 ROA 2419.

The prosecutor further made it clear to the jury that the robbery that formed the basis of the felony murder theory of first degree murder of Dr. Monahan was the same robbery that formed the basis of the charge of robbery of Dr. Monahan. Thus, the prosecutor's argument emphasized that Mr. Howard intended to meet Dr. Monahan to rob him and that, in fact, Mr. Howard robbed Dr. Monahan of his wallet, watch, and C.B. radio:

Now, how about the story about the pimp? Now, that was an interesting one. He comes back to Dawana, after telling – after making a phone call in the Castaways and he said to her that he's made arrangements to meet with a pimp, and the purpose of his meeting with the pimp is to rob that pimp. . . .

. . . And what does he tell her that night? I couldn't rob the pimp, he had his prostitutes with him.

. . . [T]he pimp – the pimp in this case that the defendant was referring to was none other than George Steven Monahan and the prostitutes were none other than Mary Lou Monahan, Mary Catherine Monahan and Barbara Zeman[.] And just think of it for a minute. You've started that – the story – if you were the defendant and you get there and all these people are around and you say, well, I can make arrangements to meet for a test drive later on the next day, so I don't need to do the robbery now. . . .

14 ROA 2366-2367.

And we know, when he tells [Dawana Thomas] that he arranged to meet the pimp for a robbery the next morning, that that is corroborated by Mary Lou, by Barbara Zeman, who tells us that indeed an appointment had ben set up with Doctor Monahan the next morning for the purpose of a test drive. . .

14 ROA 2367.

He also made the statement when he got up the next morning, Sam Howard did, that this was the date that was going to make or break him. . . . This is the date that's going to make or break me, and I'm going to go rob the pimp, still the pimp. Well, now who did he have an appointment with that day? A pimp? He had an appointment with George Monahan. And as we talk a little later on, the evidence shows circumstantially that he met with George Monahan. And we certainly know that George Monahan was robbed and he was also killed. . . .

14 ROA 2368.

. . . What happened when he came back to the room [after Dawana dropped him off at Mr. Monahan's office]? He had a C.B. radio in his hand. . . . It had wires hanging out of the back of it, and the wires didn't have plugs on them. And if you remember the testimony of the police officers, there were wires coming out of the headliner area [of Mr. Monahan's van] where the C.B. radio had been. . . .

* * *

He [Mr. Howard] also had a gold watch on. . . .

* * *

What is reasonable I think is that there is corroboration between Mary Lou Monahan, who knows that a Seiko watch was on the wrist of Doctor Monahan when he left the office that morning, and between the testimony of one of the police officers or a couple of them, who said there was no watch on Doctor Monahan when looked at in the van, and between Dawana Thomas who says that she saw a Seiko watch on the wrist of the defendant an hour after she'd seen him earlier and to the best of her ability he didn't have a watch, had pawned it a few days before. . . .

* * *

And later Dawana tells us she sees a wallet. In one report it's brown or black. Here on the stand it's brown. We know that George Monahan's wallet was brown. We know that from Mary Lou Monahan it had plastic inserts in it and in those plastic inserts were credit cards and pictures of the family. And Dawana tells us that Sam pulled out this black or brown wallet, call it green if you want to, and he flipped out this plastic thing and she's driving and she sees there are credit cards in there and she sees that there are pictures. And it's pretty easy, even from a distance from her in the driver's seat to the passenger's seat to determine if the subject of a picture is white or black. And she says it was – it was a Caucasian person, Caucasian people, light brown – light brown haired woman, I think she said, and children, all of whom where white. . . .

14 ROA 2372-2374.

Now, I'd like to move on to the part of the case that has to do with the murder

and the robbery of Doctor Monahan. . . .

14 ROA 2379.

> I think the evidence shows that Doctor Monahan was made to lie down on his stomach in a spread-eagle position; that the defendant, just like he did with Keith Kinsey, went beside him, had the gun near his head, was taking out his wallet, was taking off his watch, and because – think about this one for a minute – because he had the – the secrecy, the protection of the van, because people from the outside couldn't see him very easily, because they couldn't hear him very easily because of the interior of the van as opposed to an open automobile, the best way to get rid of your witness is to kill him . . .

14 ROA 2391.

> . . . And Sam Howard's got that gun and he's holding it on George Monahan. . . . Now, George is told . . . he's told to lay down on the floor of his van. . . . And then the Mr. Hyde in Sam Howard is taking the belongings and robbing George Monahan at that time. And then the potion works to such – to such a degree that it explodes – no, not the – the potion doesn't explode, now the gun explodes and explodes into the head of Doctor Monahan. . . .

14 ROA 2382.

On April 22, 1983, the jury returned a general verdict of guilt on the murder charge and a guilty verdict on the robbery charge. 2 ROA 293.

The State's Notice of Intent to Seek the Death Penalty, filed against Mr. Howard on January 7, 1983, alleged, *inter alia*, that:

> The murder was committed while the person was engaged in the commission of or an attempt to commit any robbery. [See NRS 200.033(4)]. The evidence in support of this allegation will consist of testimony and physical evidence arising out of "the aggravated nature of the offense itself" and will be introduced during the guilt phase of these proceedings.

1 ROA 86.

The penalty hearing began on May 2, 1983. The trial court instructed the jury on the alleged aggravating circumstance of felony-murder as follows:

> You are instructed that the following factors are circumstances by which Murder of the First Degree may be aggravated: . . . (2) The murder was committed while the defendant was engaged in the commission of any robbery.

2 ROA 284.[10]

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[10] In a hearing outside the jury's presence, the prosecution informed the trialcourt that they intended to argue the felony murder aggravator to the jury; they declined additional proof. "We'll just argue that it's been shown as clearly as it can be." 15 ROA 2481.

In penalty phase argument, the prosecutor emphasized that the felony murder aggravator was based on the same robbery of George Monahan that formed the basis of the first degree murder conviction:

> Circumstance number two alleged is set forth in instruction nine as follows:
>
> The murder was committed while the defendant was engaged in the commission of any robbery.
>
> Well, our legislature, the people we put in office, has made certain judgments in terms of what circumstances aggravate a first degree murder.
>
> Robbery, as you have been instructed, is a crime of violence. It involves threat. It involves force. Many times it involves the use of a gun. It's an apparently dangerous felony. You know, it's bad enough to decide you're going to kill anyone, but to involve also the notion you're going to rob and kill them, and maybe murder is very probably the likely outgrowth of any robbery. The law in this state says if you rob and murder, that aggravates murder in the first degree. I've already made a finding in connection with this case. But Mr. Howard not only murdered George Monahan, he robbed him. So certainly that aggravating circumstance has been proven beyond a reasonable doubt.
>
> There's little doubt that Mr. Howard took the Seiko wristwatch from George Monahan. There's little doubt that the C.B. radio he carried into the Motel 6 with wires hanging out of it had been taken from George Monahan's van. Dawana Thomas saw credit cards and photographs of children, family-type pictures, soon after he came back after a 45-minute absence to the motel. Both those aggravating circumstances have been proven beyond a reasonable doubt. This is a robbery/murder. This is a robbery/murder committed by a defendant who has already committed and been convicted of a prior crime of robbery.

15 ROA 2601-2602 (emphasis added). The prosecutor further expressed to the jury his personal opinion that Mr. Howard had "forfeited his privilege to continue to live" because he had committed both robbery and murder:

> . . . I believe in the rule of law, and I believe that those who commit crimes, particularly crimes of robbery and murder, deserve to be punished. And I believe their punishment should fit their crime. And it is the position of the State of Nevada that the man who killed George Monahan, Samuel Howard, has forfeited his privilege to continue to live.

15 ROA 2596 (emphasis added).

The prosecutor reiterated the state's robbery or economic gain theory of the case yet again in support of the state's deterrence rationale for imposing a sentence of death upon Mr. Howard:

> . . . You can deter the premeditators though, the people like Sam Howard, the people who do murder for economic gain. And Sam Howard did murder for economic gain, although he wasn't really successful. I can remember $2 that Doctor

> Monahan had and $2 that Dorothy Weisband had. But if you can – if you can alter their business decision, that is that of the business decision of the criminal, if you can make him weigh the cost of the crime versus the potential gain of the crime, and if you are able to impose a higher cost, you are going to deter other people from killing.

15 ROA 2619 (emphasis added).

On May 4, 1983, the jury imposed a sentence of death and made a finding that the felony murder aggravator of murder in the course of a robbery was present. 2 ROA 294.

Eligibility for a sentence of death, under state and federal constitutional law, may not be premised on the statutory aggravating circumstance of felony murder under NRS 200.033(4), where the defendant's conviction could rest on a theory of felony murder. McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004), reh. denied, McConnell v. State, 121 Nev. __, 107 P.3d 1287 (2005). See also Bejarano v. State, 122 Nev. __, 146 P.3d 265 (2006) (holding McConnell retroactive); Rippo v. State, 122 Nev. __, 146 P.3d 279 (2006) (same). Where the conviction is based on felony murder, a death sentence premised on the felony murder aggravating factor insufficiently narrows the class of offenders eligible for a sentence of death and violates the state and federal constitutions. This claim was not available to Mr. Howard previously, and is therefore properly raised in this proceeding. Bejarano, supra.

Further, Mr. Howard is "actually innocent" of the death penalty and this issue is therefore appropriately considered in this proceeding. Leslie, 118 Nev. at 779-80, 59 P.3d at 445. Because there is a reasonable probability that absent this aggravating factor, and the illegal aggravating factor set forth below, Mr. Howard would not have been sentenced to death, a fundamental miscarriage of justice has occurred. Id. The sentence of death must be vacated because it is not clear that absent the erroneous aggravating factors the jury would have imposed a sentence of death. Id. at 447. See also Haberstroh, 119 Nev. 173, 69 P.3d 676.

Mr. Howard was deprived of his state and federal constitutional right to the effective assistance of counsel, both at trial and on appeal, when counsel failed to challenge the invalidity of this aggravating factor.

The state cannot demonstrate beyond a reasonable doubt that the invalid aggravating factor did not affect the verdict and Mr. Howard's sentence of death must be vacated.

This issue is of obvious merit. There is no rational strategy, reasonably designed to effectuate Mr. Howard's best interest, that would justify failing to raise this meritorious claim.

CLAIM TWO:

Mr. Howard alleges that his conviction and death sentence are invalid under the state and federal constitutional guarantees of due process, effective assistance of counsel, equal protection, and a reliable sentence due to trial counsel's conflict with Mr. Howard, and their failure to investigate the guilt and penalty phases of the offense, and present mitigating evidence at Mr. Howard's capital sentencing proceeding, as well as the failure to investigate and present evidence rebutting the State's evidence in aggravation. U.S. Const. amends. V, VI, VIII, XIV; Nevada Const. art. I, Sec. 3, 6 and 8; art. IV, Sec. 21.

Mr. Howard fully incorporates Claims Three, Eight, Nine, Twenty-One, Twenty-Two, and Twenty-Three by reference herein.

1. Conflict of Interest

Trial counsel violated Mr. Howard's clearly established state and federal constitutional rights because of the close and personal relationship between the Clark County Public Defender's Office (CCPD) and the victim, Dr. Monahan. At least two CCPD attorneys, Messrs. Jackson and Gibson, were Dr. Monahan's close friends. At the time, Terrence Jackson, team leader of the Clark County Public Defender's Office, informed the trial judge about his personal relationship with the murder victim - George Monahan. 1 ROA 15. Monahan had been Mr. Jackson's dentist for fifteen years. Additionally, Mr. Jackson's parents both knew the victim well. The trial judge ordered Mr. Jackson to have nothing to do with Mr. Howard's case.

Mr. Howard's own counsel represented to the trial court that a fellow CCPD attorney had indicated that he believed Mr. Howard should be executed for the crime. Although Mr. Jackson and Mr. Gibson did not directly represent Mr. Howard, Mr. Howard knew of the CCPD's opinion of him, which in turn adversely affected his relationship with Mr. Cooper, Mr. Peters, and Mr. Franzen (his trial counsel).

At one point prior to trial, Mr. Cooper informed the trial judge he wished to be removed as trial counsel because several of his CCPD colleagues were Dr. Monahan's close friends and associates:

Mr. Cooper: Mr. Jackson is not the only attorney in our office who is familiar with

> the victim in this case. **Mr. Gibson, an attorney with our office, has expressed his hope that our client be executed**. He's indicated that he is a friend, or was a friend, of Doctor Monahan and, in fact, played on numerous sports teams with him.
>
> Mr. Cooper: **Mr. Howard does not trust the lawyers in the public defender's office, partially because of that relationship with Doctor Monahan**. He has refused, has continually refused, to discuss this case with us.
> . . .
>
> Mr. Cooper: We are almost completely unprepared for reasons stated in the motions filed. . . . In short, your Honor, there is no meaningful attorney/client relationship here. **We are totally unprepared to proceed to trial**.

1 ROA 128-129 (emphasis added).

At the same hearing, Mr. Cooper indirectly informed the trial judge that he and Mr. Peters did not believe in Mr. Howard's case, and that they filed various "boiler-plate" motions to create the illusion that Mr. Howard received effective representation.

> Mr. Cooper: Well, your Honor, I have to admit that a majority of these motions are just boiler-plate type motions that we filed in an effort to give some semblance of effective representation here.

1 ROA 130.

Based upon the CCPD's openly expressed views and unconstitutional policies, the relationship between Mr. Howard and trial counsel immediately broke down in such a way that it was impossible for trial counsel to provide Mr. Howard his clearly established state and federal constitutional right to effective and conflict-free representation. U.S. v. Moore, 159 F.3d 1154, 1157 (9th Cir. 1988). The inability to effectively and meaningfully communicate with Mr. Howard destroyed trial counsels' ability to adequately represent Mr. Howard's life and liberty interests at trial. In short, the CCPD's unconstitutional practices, and trial counsels' obvious disdain for their client, violated Mr. Howard's clearly established state and federal constitutional rights because they created a situation where Mr. Howard and trial counsel could not, under any circumstances, effectively communicate with one another in order to craft a plan to investigate, develop, and present evidence to rebut the prosecution's guilt and penalty phase evidence. The inability to undermine the prosecution's guilt and penalty phase evidence substantially prejudiced Mr. Howard and rendered his trial fundamentally unfair. Daniels v. Woodford, 428 F.3d 1181, 1197 (9th Cir. 2005).

Mr. Howard expressed multiple times on the record, his concerns about the CCPD

representing him and his desire for conflict-free counsel. During his initial appearance, Mr. Howard filed his own motion in which he sought to remove the CCPD from his case. 1 ROA 42. After he argued the motion, Mr. Howard expressed the following concerns:

> Mr. Howard: Well, like I said, he [Mr. Peters] hadn't come to see me.

1 ROA 43.

> Mr. Howard: The Victim, Mr. – Mr. Monahan, was directly a friend with the public defenders here in Clark County. And initially **you appointed another public defender officer to represent me and he wanted out because he figured – he figures – he didn't want to represent me. He thought that he couldn't because he was a personal friend.**

1 ROA 43-44. (Emphasis added.)

> Mr. Howard: Okay. I made numerous telephone calls to his office. He never returned them. He promised to come by and see me and he never came back to see me.

1 ROA 45.

> Mr. Howard: The brief appearances he [Mr. Peters] came by to see me he stated that I knew the person that actually committed this crime. He felt that I did it, you know, therefore I figured that if he – if he's saying this to me how I could be – I couldn't – how I could be represented adequately.

1 ROA 45.

> Mr. Howard: . . . I couldn't possibly trust Mr. Peters or anyone related with the public defender's office here in Clark County.

1 ROA 45.

As trial counsel prepared for the penalty hearing, they once again informed the trial judge about the total breakdown in communication between the CCPD and Mr. Howard. In fact, the relationship between Mr. Howard and trial counsel deteriorated to such a point that Mr. Howard refused to sign a medical release, lost all trust in his attorneys, and actively sought to have trial counsel removed. The trial judge erroneously denied Mr. Howard's requests and the requests of his counsel to be released from their representation of him. The trial judge's rulings violated Mr. Howard's clearly established state and federal constitutional rights because the rulings played a significant role in the eventual breakdown in communications between Mr. Howard and trial counsel; the trial judge was obligated, under clearly established state and federal constitutional law, to remove Mr. Peters and Mr. Cooper because it was obvious from the record that Mr. Howard had

completely lost trust in their ability to adequately defend him against capital murder charges. U.S. v. Adelzo-Gonzalez, 268 F.3d 772, 769 (9th Cir. 2001) (holding that "where a defendant has, with legitimate reason, completely lost trust in this attorney, and the trial court refuses to remove the attorney, the defendant is constructively denied counsel.")

Under these circumstances trial counsel were in conflict with Mr. Howard and were ineffective. See Cuyler v. Sullivan, 446 U.S. 335, 349 (1980) ("a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief."); U.S. v. Bruce, 89 F.3d 886 (D.C. Cir. 1996); Middleton v. Warden, 120 Nev. 664, 666, 98 P.3d 694, 696 (2004) ("'This court places the highest priority on diligence in the discharge of professional responsibility in capital cases. . . . The highest standards of competence and diligence are expected of capital defense counsel in all stages of the criminal proceedings. When these standards are not met and the interests of justice demand, this court must exercise its inherent authority to sua sponte remove counsel from representing a capital defendant.") (quoting SCR 250).

2. Ineffective Assistance of Counsel

Trial counsel failed to adequately investigate, develop, and present mitigating evidence at Mr. Howard's guilt trial and penalty hearing. Trial counsel failed to investigate and present evidence from collateral reporting sources regarding Mr. Howard's background and family history. Trial counsel failed to investigate evidence of Mr. Howard's prior criminal record. Trial counsel failed to create a comprehensive social history for Mr. Howard from collateral reporting sources to provide to an expert in support of a psychiatric, neuropsychological, pharmacological, and psychological diagnoses. Trial counsel failed to investigate and present available medical, mental health, social services, and criminal history records for the purposes of an expert diagnosis. Trial counsel failed to investigate information from Mr. Howard's prior offenses to rebut the aggravating evidence presented by the State. If trial counsel had conducted a complete and adequate mitigation investigation, a reasonable probability exists that Mr. Howard would have received a sentence less than death.

Trial counsel failed to investigate and present evidence that would have mitigated the

aggravating evidence presented by the State. Trial counsel failed to investigate and present evidence from medical, mental health, criminal history, social services and other records pertaining to Mr. Howard's family members. Trial counsel failed to obtain childhood and military service photographs of Mr. Howard to publish to the jury that would have humanized Mr. Howard.

Trial counsel failed to investigate and present mitigating evidence regarding Mr. Howard's childhood and family background. Trial counsel failed to obtain medical, mental health, and social services records relating to Mr. Howard and his family members to provide to an mental health expert. Trial counsel failed to obtain criminal history information about Mr. Howard and his family members. Trial counsel failed to submit a special verdict form specifying mitigating circumstances for the jury's consideration to weigh against statutory aggravating circumstances.

Trial counsel failed to adequately select and prepare mental health experts to testify at Mr. Howard's trial. Trial counsel failed to ensure that a full neuropsychological battery of testing was performed on Mr. Howard. Trial counsel failed to retain a mitigation specialist who could have assisted with the investigation, development, and presentation of mitigating evidence to the jury. Trial counsel failed to provide information from collateral reporting sources to an expert, and in failing to make those collateral reporting sources available to an expert for interviews, in order to provide a foundation for the expert's diagnoses. Trial counsel failed to present all of the records they obtained regarding Mr. Howard to an expert for the purpose of a diagnosis. Trial counsel failed to investigate and present other mitigating evidence from Mr. Howard's background to an expert for the purpose of a diagnosis.

Mr. Howard alleges that trial counsel did not have a strategic justification for failing to conduct an adequate investigation and presentation of mitigating evidence. Mr. Howard further alleges that trial counsel did not have a strategic justification for failing to conduct adequate investigation of the State's evidence in aggravation in order to obtain and elicit mitigating evidence from the State's witnesses.

Mr. Howard alleges that there is a reasonable probability of a more favorable outcome if trial counsel had adequately investigated and presented available mitigating evidence on his behalf. Mr. Howard alleges that effective trial counsel would have presented mitigating evidence regarding his

mental illness, brain damage, and developmental limitations. Mr. Howard alleges that effective trial counsel would have presented expert testimony synthesizing his mental health issues with the risk factors present in his childhood and adolescence which contributed to adverse outcomes in the community. Mr. Howard alleges that effective trial counsel would have presented expert testimony to explain why his mental illness and developmental limitations inhibited his impulse control and moral judgement. In short, had trial counsel conducted a constitutionally adequate and complete mitigation investigation, a reasonable probability exists that Mr. Howard would not have been convicted of first-degree murder, and in any event would have received a sentence less than death.

The Sixth Amendment right to effective assistance of counsel extends to the sentencing phase of a capital case. Silva v. Woodford, 279 F.3d 825, 836 (9th Cir. 2002). Under the prevailing standards at the time of Mr. Howard's trial, counsel had an obligation to conduct a thorough investigation of the defendant's background. Williams v. Taylor, 529 U.S. 362, 395-98 (2000); Strickland v. Washington, 466 U.S. 668, 688 (1984). When it comes to the penalty phase of a capital trial, "it is imperative that all relevant mitigating information be unearthed for consideration." Caro v. Calderon, 165 F.3d 1223, 1227 (9th Cir. 1999). "'It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.'" Rompilla v. Beard, 545 U.S. 374, 387 (2005) (quoting ABA Standard 4-4.1). See also ABA Guideline 11.4.1. The Nevada SupremeCourt has also clearly held that defense counsel in a capital case is obligated to diligently investigate mitigation evidence. See Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 281 (1996).

Mr. Howard's first-degree murder conviction and death sentence must be vacated as a result of the ineffective assistance of his trial counsel.

3. Policy of Polygraphing

The Clark County Public Defender's Office (CCPD) represented Mr. Howard at his arraignment and his trial. Specifically, Michael Peters, Marcus Cooper and George Franzen, three

CCPD Deputy Defenders, represented Mr. Howard.[11]

Unbeknownst to Mr. Howard, but well known to trial counsel, there were systemic failures within the Clark County Public Defender's Office that prevented Mr. Howard's trial counsel and all CCPD attorneys from thoroughly investigating his capital murder case and mounting a constitutionally adequate defense.

The CCPD lacked adequate resources to properly defend Mr. Howard against capital murder charges. Indeed, resources were so scarce, that the CCPD instituted a policy of allocating-resources based on whether the client passed a polygraph examination; if one failed the examination, the CCPD invested very little time, money, and energy into the client's case; conversely, if one passed, the CCPD's investment substantially increased. See Miranda v. Clark County, Nevada, 319 F.3d 465, 469 (9th Cir. 2003) (noting how the CCPD "subjected each client to a polygraph test and then allocated the resources of the office according to the result of that test."; if the client refused or failed the polygraph examination, "as determined by the subjective assessment of the polygraph examiner, a minimal investigation would be conducted and a limited defense would be provided."). The CCPD used this policy when it represented Mr. Howard; former CCPD investigators have confirmed that the policy existed, and that the CCPD used it extensively during the period Mr. Cooper and Mr. Peters represented Mr. Howard. See Ex. 156; see also Exs. 157, 158.

The May 1992 issue of Unreasonable Doubt, a newsletter for Nevada criminal defense attorneys, contained an article written by the CCPD's polygraph examiner, Bill Mason, that explained the CCPD's polygraph policy: a "correctly-used polygraph technique . . . has a two-fold approach: 1) To aid in getting focus and direction in the investigation of the case. 2) To aid in negotiating a case." Ex. 158. Mr. Mason explained that, if a client fails the polygraph question, "Did you do it?" but "still insists on going to trial," the failed polygraph justifies not investigating witnesses or evidence to corroborate the client's assertion of innocence. Id. (emphasis added). The CCPD developed a policy wherein if a client failed the polygraph, the client's CCPD attorneys tried to persuade him to plead guilty. Id. Mr. Mason advised that the polygrapher should explain to the

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[11] Mr. Peters was removed from the case and chastised by the trial court for failing to provide Mr. Howard with effective assistance of counsel. 1 ROA 151.

client that if he "could not convince a 'machine' made of wires and screws, how could [he] ever hope to convince a jury of twelve people[.]" Id. On the other hand, Mr. Mason advised that, if the client passes the polygraph, his CCPD attorney can safely direct investigative resources toward establishing his innocence "with a great deal of confidence . . . that the witnesses will be valuable." Id. Mr. Mason's article concluded that "[t]he two and one-half to three hours minimum which the polygrapher spends on each case not only saves the attorney and investigators time and energy better spent elsewhere, but it can also save the taxpayers a great deal of money." Id.

Mr. Lucero, a CCPD investigator, confirmed Mr. Mason's observations. In Mr. Lucero's experience, the CCPD used the polygraph to identify the "truly" innocent, so it could better allocate its limited resources. Ex. 156. During the initial interview, the CCPD asked the client to take a polygraph "as a means of holding down office expenses." Id. Mr. Lucero explained:

> If a person failed a polygraph, that meant the person was guilty and there was no point in expending a lot of money defending him. It was the same if a person refused to take a polygraph, that person appeared to be guilty, too. So a defendant who failed a polygraph or who refused to take one was much less likely to get a good defense than one who passed the polygraph.

Id.

The CCPD conducted very little investigation to prepare for Mr. Howard's capital murder trial. The little investigation conducted by the CCPD, was performed shortly before Mr. Howard's trial. The CCPD's polygraph policy, which resulted in a rudimentary and woefully incomplete investigation, violated Mr. Howard's clearly established state and federal constitutional rights and substantially prejudiced him. Mr. Howard is entitled to relief.

CLAIM THREE:

Given the additional mitigating evidence developed since Mr. Howard's sentencing phase, and this Court's responsibility to consider such evidence in light of Claims One and Two, Mr. Howard's death sentence violates his state and federal constitutional rights. U.S. Const. amend. V, VI, VIII, XIV; Nevada Const. art. I, Sec. 3, 6 and 8; art. IV, Sec. 21.

Mr. Howard fully incorporates Claims Two, Nine, Twenty-One, Twenty-Two and Twenty-Three by reference herein.

SUPPORTING FACTS

Trial counsel notified the trial court of their need for a continuance arguing that they had just been provided copies of Mr. Howard's mental health records. 1 ROA 131-32, 139. Despite obtaining these records, defense counsel made no effort to use them. Mr. Howard himself referenced his mental health history during his penalty hearing testimony, but was unable to provide any details. 13 ROA 2269, 2281. The actual details of his mental health history, however, provide compelling mitigation, and it contains evidence that this Court is compelled now to evaluate given the allegations in Claims One and Two. Haberstroh, 119 Nev. at 183-84, 69 P.3d at 683-84.

Mr. Howard was arrested for robbery in California and, after he attempted suicide in the San Bernardino County jail, was sent first to the Patton State Hospital and later to the Atascadero State Hospital, both in California. Those records are attached as Exs 150-51. Medical personnel in the San Bernardino county jail noted that Mr. Howard was screaming his Marine Corp number and was otherwise incoherent. Mr. Howard suffered from memory blackouts and paranoid ideation; his judgment was considered grossly impaired. Ex. 152, Evaluation by Dr. Raj Lall, MD. Dr. Ethel Chapman later noted an explosive personality, potential organic brain damage and extensive drug and alcohol abuse. Ex. 153. Organicity issues have been noted throughout all of Mr. Howard's mental health stays. Current counsel are informed and therefore allege that subsequent testing after conviction also revealed that Mr. Howard has serious brain impairment issues. See Claim Four.

After his extradition to Nevada on the present charge, trial counsel also represented to the court during a pretrial motion for a continuance that they learned that Mr. Howard had been hospitalized in mental institutions on at least three different occasions: the Veterans Administration

Hospital; the Patton State Hospital; and Atascadero Hospital. 1 ROA 131. Also, while at the Vacaville State Prison in California, Mr. Howard was confined to the psychotic unit of the facility for a portion of time. 1 ROA 131. Further, counsel represented that they learned Mr. Howard had been diagnosed with schizophrenia and hyperthyroidism. 1 ROA 131. Mr. Howard also apparently had a history of drug abuse, including phencyclidine, PCP, heroin, cocaine, mescaline, amphetamines, and barbiturates. 1 ROA 131. Mr. Howard was also known to have complained of severe headaches and claimed past head injuries. 1 ROA 131.

During the penalty hearing, trial counsel represented to the court that they had learned that Mr. Howard had been determined to be incompetent after his arrest in April 1980. 15 ROA 2445.

Based on this extensive evidence of Mr. Howard's likely mental incompetence to proceed to trial or to assist in his defense, the trial court's sua sponte determination that Mr. Howard was competent, based upon his pretrial appearance before the court and absent any medical opinion whatsoever, 1 ROA 140, was an abuse of discretion. Likewise, the trial court's canvass of Mr. Howard during the penalty hearing about his purported waiver of presentation of mitigation evidence was incomplete and insufficient to survive a state or federal constitutional challenge as to whether Mr. Howard knowingly, intelligently and voluntarily waived his right to present mitigation evidence.

The entire canvass conducted by the trial court consisted of the following discussion with Mr. Howard:

> Court: Do you have anything to state to the court at this time?
>
> Howard: Well, basically what [trial counsel] said is true. We had differences starting back in November. And I'd rather not for them to enter any mitigating factors on my behalf.
>
> Court: All right. You are aware of the fact that those mitigating factors may possibly be of assistance to you in this matter?
>
> Howard: Yes. I'm aware, Your Honor.
>
> Court: And being fully aware of that, you still's don't desire that they present those, is that correct?
>
> Howard: Exactly.
>
> Court: Thank you. You may be seated.

15 ROA 2447. The canvass by the court in no way informed Mr. Howard of the ramifications of

waiving the presentation of any and all mitigation, nor did the court inquire as to Mr. Howard's rationale for refusing the presentation of such evidence. Indeed, Mr. Howard's waiver is invalid given that it was made in response to his trial counsels' motion to withdraw from representation during the penalty hearing. 15 ROA 2444-45. The waiver also fails under additional scrutiny given the evidence available to trial counsel and the court at the time of the canvass of Mr. Howard's severe mental illness history.

Further, trial counsel had no relationship with Mr. Howard, and failed to explain to Mr. Howard what it meant to proffer evidence of mitigating circumstances at the penalty phase. As a result, Mr. Howard did not understand what "mitigation" was or what purpose it served and thus he was not aware that the introduction of complete and extensive evidence regarding his military record, mental health history, and his traumatic experience (the brutal murder of Mr. Howard's sister and mother by his father) would have positively benefitted him during the penalty phase of the his trial.

There is no indication in the record that Mr. Howard ever gave a knowing, intelligent and voluntary waiver of his right to present mitigation evidence at the penalty hearing.

The Nevada Supreme Court has not addressed whether a defendant must give a knowing, voluntary and intelligent waiver before he may forego presentation of mitigation in a capital case. In other circumstances where a defendant waives his constitutional rights, however, the court requires that a district court determine that the defendant is competent and that his waiver is knowing and voluntary. See Hymon v. State, 111 P.3d 1092, 1101 (Nev. 2005) (waiver of counsel); Mendoza v. State, 130 P.3d 176, 181 (Nev. 2006) (waiver of Miranda rights). For a waiver of counsel, the trial courts should conduct a canvass to educate "'the defendant fully of the risks of self-representation and of the nature of the charged crime so that the defendant's decision is made with a "clear comprehension of the attendant risks."'" Id. at 1101 (quoting Johnson v. State, 117 Nev. 153, 164, 17 P.3d 1008, 1016 (2001) (citing Tanksley v. State, 113 Nev. 997, 1001, 946 P.2d 148, 150 (1997) (in turn quoting Graves v. State, 112 Nev. 118, 124, 912 P.2d 234, 238 (1996))); see also Faretta v. California, 422 U.S. 806, 835 (1975); Godinez v. Moran, 509 U.S. 389, 400-01 (1993). The same thorough analysis should be required for a defendant to waive presentation of mitigation evidence, particularly where his life is at stake.

Mr. Howard respectfully submits that he did not invoke a knowing, intelligent and voluntary waiver of his right to present mitigation evidence at the penalty hearing, given his irreconcilable relationship with trial counsel at the time the waiver was made, and given his extensive history of mental health complications, including a prior finding that he was incompetent to proceed in a criminal case. He further submits that extensive mitigation evidence was available to assist in his defense and in the penalty phase of the trial, and that his counsels' failure to investigate and develop that mitigation was ineffective assistance of counsel. Strickland, 466 U.S. 688. Mr. Howard is entitled to a new penalty hearing. This claim is of obvious merit. There is no reasonable strategy reasonably designated to effectuate Mr. Howard's best interest for failing to raise, develop, and litigate this meritorious claim on appeal.

CLAIM FOUR:

The evidence is legally insufficient to sustain Mr. Howard's first-degree murder conviction and sentence of death which were obtained in violation of his state and federal constitutional rights. U.S. Const. amend. V, VI, VIII, XIV; Nevada Const. art. I, Sec. 3, 6 and 8; art. IV, Sec. 21.

Mr. Howard fully incorporates Claims One, Two, Three, Nine, and Twenty-One by reference herein.

SUPPORTING FACTS

All of the aggravating factors found by Mr. Howard's jury are now known to be invalid. Further, the readily available and compelling mitigating evidence that was not presented by conflicted and ineffective counsel show that the evidence sustaining his death sentence completely fails and the sentence cannot now pass muster under Jackson v Virginia, 443 U.S. 307 (1979). Mr. Howard's sentence of death must now be set aside.

1. Neuro-Psychological testing.

Counsel is informed and therefore alleges that in August of 2000, Dave Schmidt, Ph.D., visited Mr. Howard and performed neuropsychological testing. Mr. Howard received a score of one (1) correct on this test out of a possible score of ten (10). According to Dr. Schmidt, the inability to satisfactorily complete this test could be indicative of severe damage in the executive function of the brain, located in the frontal lobe. The frontal lobe is the area of the brain that controls rage impulses.

The Sixth Amendment right to effective assistance of counsel extends to the sentencing phase of a capital case. Silva v. Woodford, 279 F.3d 825, 836 (9th Cir. 2002). Under the prevailing standards at the time of Mr. Howard's trial, counsel had an obligation to conduct a thorough investigation of the defendant's background. Williams v. Taylor, 529 U.S. 362, 395-98 (2000); Strickland v. Washington, 466 U.S. 668, 688 (1984). When it comes to the penalty phase of a capital trial, "it is imperative that all relevant mitigating information be unearthed for consideration." Caro v. Calderon, 165 F.3d 1223, 1227 (9th Cir. 1999). "'It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.'" Rompilla v. Beard, 545 U.S. 374,

387 (2005) (quoting ABA Standard 4-4.1). See also ABA Guideline 11.4.1. The Nevada Supreme Court has also clearly held that defense counsel in a capital case is obligated to diligently investigate mitigation evidence. See Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 281 (1996).

Mr. Howard respectfully submits that his trial counsel were conflicted and ineffective for failing to conduct a full psychological and neuropsychological evaluation of Mr. Howard, based upon the available evidence at the time of his trial which suggested that suffered from severe mental health problems. Strickland, 466 U.S. 488. Mr. Howard respectfully requests that if this Court declines to grant relief on the claims presently before it, that undersigned counsel be granted leave to conduct the specialized tests that would demonstrate the merit of this claim that Mr. Howard is brain damaged, and to supplement this claim at a later date.

2. Post-Traumatic Stress Disorder

During his trial, Mr. Howard testified on several occasions that before and after the time of the instant offense, he often suffered flashbacks to his service in Vietnam. 13 ROA 2269. Mr. Howard's family members also noted that after he returned form his service in Vietnam, he seemed "harder." His family felt that the Marines had "brainwashed" him into being a killer. Although not formally diagnosed with any mental problems at the time, Mr. Howard did not appear to be the same. He "wasn't normal."

Mr. Howard's cousin, Winston Williams, declared that when Mr. Howard came back from Vietnam he was "changed." Winston felt that Mr. Howard had different personalities and Winston noted that sometimes Mr. Howard's voice would change suddenly. Mr. Howard suddenly became angry, hostile and violent. See Amended Petition, p.55, 8/20/2003.

Years later, Mr. Howard met Dawana Thomas. Ms. Thomas related that Mr. Howard was obsessed with Vietnam. She reported that every time a plane would fly overhead, he would get out of the car and salute it. Ms. Thomas expressed that Mr. Howard suffered from nightmares, often mumbled in his sleep and woke up with cold sweats. He told her that he was dreaming of shooting at "gooks," but they kept popping back up so he would cut off their ears. Ms. Thomas thought Mr. Howard was "shell-shocked," but could only help by holding him while he would cry and tell her about these nightmares. See Amended Petition, p.55, 8/20/2003.

Evidence of a diagnosis of post-traumatic stress disorder would have been highly relevant to present as a mitigating circumstance at Mr. Howard's penalty hearing to show that he was under the influence of extreme mental or emotional disturbance. State v. Bilke, 781 P.2d 28 (Ariz. 1989) (noting that in Arizona, a post-trial diagnosis of post-traumatic stress disorder was considered "newly discovered evidence" in a post-conviction petition); Goad v. State, 938 S.W.2d 363, 369-73 (Tenn. 1996) (trial counsel were ineffective for failing to present additional evidence to support PTSD mitigation evidence; Ex parte Gonzales, 204 S.W.3d 391 (2006) (trial counsel were ineffective for failing to present mitigation evidence on defendant's PTSD).

Further, trial counsel were ineffective for failing to obtain an evaluation of Mr. Howard for a possible diagnosis of post-traumatic stress disorder, and for failing to present other testimony to support the mitigating factor that Mr. Howard changed for the worse after his Vietnam service. Strickland, 466 U.S. 668. One author has noted that this problem is common among defendants tried and convicted of serious offenses in the early 1980s, such as Mr. Howard:

> A major problem exists with those Vietnam veterans convicted of crimes before the benchmark year of 1980, when PTSD was officially recognized by the American Psychiatric Association. Presumably, these veterans did not have the opportunity to raise PTSD as a defense to their charges. Similarly, some Vietnam veterans were represented after 1980 by attorneys who were unfamiliar with PTSD and consequently did not raise it as an affirmative defense during trial.

Captain Daniel E. Speir, USAR, Army Lawyer, 1989 Army Law 17, 20-21.

The Sixth Amendment right to effective assistance of counsel extends to the sentencing phase of a capital case. Silva v. Woodford, 279 F.3d 825, 836 (9th Cir. 2002). Under the prevailing standards at the time of Mr. Howard's trial, counsel had an obligation to conduct a thorough investigation of the defendant's background. Williams v. Taylor, 529 U.S. 362, 395-98 (2000); Strickland v. Washington, 466 U.S. 668, 688 (1984). When it comes to the penalty phase of a capital trial, "it is imperative that all relevant mitigating information be unearthed for consideration." Caro v. Calderon, 165 F.3d 1223, 1227 (9th Cir. 1999). "'It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to

the merits of the case and the penalty in the event of conviction.'" Rompilla v. Beard, 545 U.S. 374, 387 (2005) (quoting ABA Standard 4-4.1). See also ABA Guideline 11.4.1. The Nevada Supreme Court has also clearly held that defense counsel in a capital case is obligated to diligently investigate mitigation evidence. See Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 281 (1996).

This claim is of obvious merit. There is no rational legal strategy reasonably designed to effectuate Mr. Howard's best interest for failing to raise, develop, and litigate this meritorious claim. Mr. Howard is entitled to a new trial and sentencing proceeding.

CLAIM FIVE:

Mr. Howard's death sentence is invalid under the state and federal constitutional prohibitions on cruel and unusual punishments and the constitutional guarantees of due process, equal protection, and a reliable sentence because the jury found Mr. Howard eligible for the death penalty based on a charge of aggravated robbery that had never resulted in a final conviction in violation of his state and federal constitutional rights. U.S. Const. amend. V, VI, VIII, XIV; Nevada Const. art. I, Sec. 3, 6 and 8; art. IV, Sec. 21.

Mr. Howard fully incorporates Claims One, Four, Five and Twenty by reference herein.

SUPPORTING FACTS:

Prior to Mr. Howard's trial, the Clark County District Attorney's office filed two additional allegations as aggravators in the notice of intent to seek the death penalty:

> (1) The murder was committed by a person who was previously convicted of a felony involving the use of or threat of violence to the person of another. (citation omitted). The evidence will consist of certified judgments of conviction and/ or certified court minutes and/ or state prison records showing that defendant Samuel Howard was convicted in San Bernardino County, California, in 1980 or 1981 of the felony offense of robbery with the use of a firearm and unlawful taking of a motor vehicle. . . .

1 ROA 85. The second aggravator alleged was the murder in the course of a felony (robbery) that is the subject of Claim One. 1 ROA 86. The third aggravator, later abandoned, alleged murder for the purpose of avoiding or preventing a lawful arrest. 1 ROA 86-87; 15 ROA 2480.

The District Attorney's office also provided notice, in the same filing, of their intent to offer additional evidence that the Mr. Howard was "convicted in absentia of first degree robbery." The prosecution admitted in its pleading that it could not offer or produce a certified copy of a judgment of conviction in the matter because Mr. Howard "jumped bail" after two days of testimony. They also argued that they would present evidence of the 1979 murder of Louis Zempano, a used car salesman in Queens, NY. Neither offense was listed as an aggravating factor.[12]

During the guilt phase, Mr. Howard testified and was cross-examined about a conviction in

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[12] The district attorney's office later filed a supplemental notice contending that they would offer evidence of three additional robbery offenses where Edward Schwartz, John Tucillo and Mark Rothman were the victims. None of these offenses were alleged to have resulted in a conviction. 1 ROA 159-60.

California for car theft and robbery and the in absentia conviction in New York for the robbery of Dorothy Weisbrand. 13 ROA 2271; 13 ROA 2271-2272. No other details were elicited.

At the penalty phase, defense counsel sought to strike the aggravator allegation that Mr. Howard had been convicted of a prior violent felony. 15 ROA 2478-82. Counsel argued that the State had chosen not to introduce evidence of the three alleged New York robberies noted in the supplemental notice in footnote 8. The prosecution argued that the California robbery had been brought in for impeachment. 15 ROA 2479. It was noted that the State had to prove the conviction beyond a reasonable doubt and that they had to establish that the prior conviction actually involved the use of force or violence; Mr. Howard's mere admission to the nature of the fact of the conviction would not satisfy the State's burden. 15 ROA 2480. "... [T]he mere fact of a weapon being present in the name of a charge under which the defendant is convicted, I don't think tells the jury enough about the nature of those acts to allow them to come to the conclusion that beyond a reasonable doubt the state has shown that there is a threat or use of violence." 15 ROA 2484.

Trial resumed the following day. The prosecution informed the court that it intended to call the investigating officer from California and to move for introduction of the judgment of conviction from the state of California. 15 ROA 2521. The defense objected to the evidence arguing that Mr. Howard was not convicted for the California offense until after the commission of the Nevada offense and thus, the California offense was not a prior conviction. 15 ROA 2522. They also argued that the officer could not testify about his conversation with the offense victim who did not intend to come to Nevada to testify. 15 ROA 2524. Ultimately the trial court agreed and the evidence was excluded. 15 ROA 2533.[13] The State rested.

The trial court subsequently instructed the jury. Instruction number 9 noted that a first degree murder could be aggravated if the murder was committed by a defendant who had been previously convicted of a felony involving the use or threat of violence to the person of another and if the murder had been committed while the defendant was engaged in the commission of any robbery. 15

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[13] The trial court incorrectly stated that Mr. Howard had admitted being convicted in San Bernardino, California; that was not correct. He admitted only that he had been convicted in California.

ROA 2599. Robbery was also defined.

In its argument to the jury, the prosecution referred to Instruction number 9 and the prior conviction.

> . . . When we consider Sam Howard, we're not talking about someone who committed his first offense in relation to George Monahan. . . in the morning of March 27, 1980. We are talking about someone who is now shown to have committed a violent felony against a nurse for which he has been convicted, and there was absolutely no provocation for that.

Id. The prosecution then summarized the details of the Weisband robbery.

> Ladies and gentleman, court minutes are in evidence as State's Exhibit 69. You heard the testimony of Detective John McNicholas, that the defendant was convicted of these crimes. There is no doubt they occurred May 24, 1978. Mr. Howard had previously been convicted of a crime involving the use of violence before he even came to Las Vegas in 1980 and that is the circumstance that aggravates murder in the first degree, and that's been proven beyond a reasonable doubt.

15 ROA 2599-2601.

It is clear that the prosecution relied on the New York robbery of Ms. Weisband. This reliance, however, was legally inappropriate for two reasons. First, it had not been alleged as the aggravating factor in the notice of intent to seek death. SCR 250(4)(c). ("The notice must allege all aggravating circumstances which the state intends to prove and allege with specificity the facts on which the state will rely to prove each aggravating circumstance."); NRS 175.552. The rules also require the state to specify their evidence they intend to introduce at the punishment phase. SCR 250(4)(f). See also Kirksey v. State, 107 Nev. 499, 814 P.2d 1008 (1991).

Second and more importantly, Mr. Howard was never convicted in the State of New York; because of his bail jumping, only a jury verdict was received. A copy of the entire file of the New York robbery of Ms. Weisband is attached as Ex. 149. It shows only that a jury verdict was returned. No judgment of conviction was entered and no sentence pronounced. The prosecution admitted as much in their notice of intent to seek death when they informed the Court they had no judgment of conviction.

In the absence of a pronouncement of sentence, this aggravating factor must be discarded. As recently as January of 2007, the U.S. Supreme Court addressed the issue of what constitutes a final judgment in Burton v. Stewart, 127 S. Ct. 793, 798-799 (2007), when it said, "[f]inal judgment

in a criminal case means sentence. The sentence is the judgment." (citing Berman v. United States, 302 U.S. 211, 212 (1937)).

The issue of finality of judgment has also come before the Nevada Supreme Court and it has ruled that, "a district judge's pronouncement and of judgment and sentence from the bench is not a final judgment and does not, without more, oust the district of jurisdiction over the defendant. Only after a judgment of conviction is 'signed by the judge and entered by the clerk,' as provided by NRS 176.105, does it become final." Miller v. Hayes, 95 Nev. 927, 929, 604 P.2d 117, 118 (1979) (emphasis added). See also Fairman v. State, 83 Nev. 287, 289, 429 P.2d 63, 64 (1967) ("A verdict of the jury is not a judgment of the court, nor is it the final determination." (citing Allgood v. State, 78 Nev. 326, 328, 372 P.2d 466, 467-68 (1962)); Allgood,78 Nev. at 329, 372 P.2d at 468 (noting that while the federal courts might consider a jury verdict to be a final judgment, the Nevada statutes forbid such a determination for purposes of appealing from a final judgment); Petrocelli v. Angelone, 248 F.3d 877, 891(9th Cir. 2001) (noting that under Nevada law "a jury verdict is not a final determination amounting to a conviction." (citing Fairman, 83 Nev. 287, 429 P.2d 63) (emphasis in original)).

Because this aggravating factor was illegally applied against Mr. Howard, he is "actually innocent" of the death penalty and this issue is therefore appropriately considered in this proceeding. Leslie, 118 Nev. at 779-80, 59 P.3d at 445. As there is a reasonable probability that absent this aggravating circumstance, and the illegal aggravating circumstance set forth above, Mr. Howard would not have been sentenced to death, a fundamental miscarriage of justice has occurred. Id. The sentence of death must be vacated because it is not clear that absent the erroneous aggravating circumstances the jury would have imposed a sentence of death. Id. at 447. See also Haberstroh, 119 Nev. 173, 69 P.3d 676.

Further, Mr. Howard was deprived of his state and federal constitutional right to the effective assistance of counsel, both at trial and on appeal, when counsel failed to challenge the invalidity of this aggravating factor. Mr. Howard's sentence of death must be vacated as a result. This claim is of obvious merit. There is no reasonable strategy reasonably designated to effectuate Mr. Howard's best interest for failing to raise, develop, and litigate this meritorious claim on appeal or in post-

conviction.

CLAIM SIX:

Mr. Howard was denied a fundamentally fair trial in violation of the Fifth, Eighth and Fourteenth amendments of the United States Constitution when the trial court refused to sever Count I from Counts II and III. U.S. Const. amends. V, VIII, XIV; Nevada Const. art. I, Sec. 3, 6 and 8; art. IV, Sec. 21.

SUPPORTING FACTS

On May 21, 1981, Mr. Howard was charged by way of Indictment with three crimes which allegedly occurred in Las Vegas, Clark County, Nevada. Ex. 142. In Count I, Mr. Howard was charged with robbery with use of a deadly weapon. This offense was stated to have occurred on or about March 26, 1980, when it was alleged that Mr. Howard took personal property - a Motorola two way channel radio belonging to Sears, Roebuck & Company, and a wallet and its contents. The indictment alleged that the radio and wallet (with its contents) were taken from Keith Kinsey. In Count II, Mr. Howard was charged with robbery with use of a deadly weapon. This offense allegedly occurred on or about March 27, 1980 when it was alleged that Mr. Howard took personal property (a wallet and contents) from George Monahan. In Count III, Mr. Howard was charged with murder with use of a deadly weapon. This offense also allegedly occurred on or about March 27, 1980 and the person killed was George Monahan.

On January 6, 1983, a "Motion To Sever Offenses" was filed on behalf of Mr. Howard. 1 ROA 74. This motion was based upon the fact that the victim in Count I was not the same alleged victim in Counts II and III, and the victims were unrelated to each other. It was also based upon the fact that the acts alleged in Count I (taking of a 2 way radio and wallet) were not part of the same act or transaction as the acts alleged in Counts II and III (taking of a wallet and murder of that person). The trial court denied this motion, Mr. Howard proceeded to trial on all counts, and was convicted of all three charges. The failure to sever the trial of Count I from the trial of Counts II and III unfairly combined unrelated felony charges and bolstered the credibility of each charge in the eyes of the jury, all to Mr. Howard's prejudice.

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

constitutional error substantially and injuriously affected the fairness of Mr. Howard's trial and rendered the convictions and sentence fundamentally unfair. NRS 173.115; Weber v. State, 121 Nev. __, 119 P.3d 107 (2005) (severance should be granted where defendant will otherwise suffer unfair prejudice); Tabish v. State, 119 Nev. 293, 303, 72 P.3d 584, 590 (2003) (citing U.S. v. Lane, 474 U.S. 438 (1986)).

CLAIM SEVEN:

Mr. Howard was denied a fundamentally fair trial and sentencing hearing in violation of his state and federal constitutional rights by the trial court's failure to conduct an evidentiary hearing to determine the admissibility of statements made by Mr. Howard at the time that he was in custody. U.S. Const. amends. V, VIII, XIV; Nevada Const. art. I, Sec. 3, 6 and 8; art. IV, Sec. 21.

Mr. Howard fully incorporates Claim Twenty-One by reference herein.

SUPPORTING FACTS

The indictment, underlying the present conviction, alleged criminal acts which occurred on or about March 26 and 27, 1980 in Las Vegas, Clark County, Nevada.[14]

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

While in the custody of the Downey Police Department, a California detective named Morrow contacted Mr. Howard in an effort to question Mr. Howard regarding the crime for which he had been arrested (a robbery in California). Detective Morrow advised Mr. Howard of his Miranda rights, and Mr. Howard immediately stated, "Yes, I know my rights officer, but you may as well talk to the wall because I'm not talking to you." See Amended Petition, p.9, 8/20/2003. Detective Morrow noted that Mr. Howard was visibly upset, incoherent and lost his composure. Notwithstanding Mr. Howard's assertion of his right to remain silent, Detective Morrow improperly continued questioning him.

On April 2, 1980, Las Vegas Metropolitan Police Department Homicide Detective Leavitt, traveled to California, to speak with Mr. Howard about the Las Vegas charges. At the time of the interview, Mr. Howard continued to be in the custody of the California authorities. See Amended Petition, p.10, 8/20/2003.

Prior to Mr. Howard's trial, a "Motion For Evidentiary Hearing" was filed on April 1, 1983, which requested an evidentiary hearing to determine the admissibility of statements allegedly made by Mr. Howard to police officers of the Downey Police Department and the Las Vegas Metropolitan

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

Police Department. 1 ROA 198-201. On April 20, 1983 a "Motion To Suppress and Supplemental Points and Authorities In Support Of Motion To Suppress" was filed on behalf of Mr. Howard. 2 ROA 207-10. This Motion requested the trial court suppress and/or strike: 1) all statements taken from Mr. Howard by Officers Morrow and Leavitt; 2) the two way radio and all testimony given by witnesses identifying the radio as being in the possession of Mr. Howard; 3) car keys and all evidence taken from HOWARD at the time of his arrest by officers of the Downey Police Department; and 4) all evidence regarding identification of Mr. Howard as one George Williams which was obtained by officers of the Downey Police Department.

A hearing on the Motion For Evidentiary Hearing was scheduled for April 8, 1983. However on April 7, 1983, counsel stipulated that the motion would be continued until the date of trial, April 11, 1983. 2 ROA 203. When the trial date arrived, the matter was not pursued. No further mention of an evidentiary hearing was made until the State of Nevada presented the rebuttal testimony of Detective Leavitt.

Detective Leavitt testified at Howard's trial that prior to beginning his interview with Mr. Howard, that Leavitt informed Mr. Howard of his Miranda warnings, that Mr. Howard waived those rights, agreed to speak with Leavitt, and made incriminating statements regarding the Las Vegas charges. 13 ROA 2287-90.

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

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

TT. 4/22/83 pp. 1267-69. The trial court denied a hearing and refused to suppress the statements given by Mr. Howard to the police officers.

The introduction of this unconstitutionally obtained statement and other evidence substantially prejudiced Mr. Howard, rendered the trial proceeding fundamentally unfair, eroded the

reliability of the verdicts and had a substantial and injurious effect on the guilt and penalty phase verdicts. See Miranda v. Arizona, 384 U.S. 436, 445 (1966); Jones v. U.S., 357 U.S. 493, 497 (1958); U.S. v. Wallace, 848 F.2d 1464, 1475 (9th Cir. 1988).

This claim is of obvious merit. There is no reasonable strategy reasonably designated to effectuate Mr. Howard's best interest for failing to raise, develop, and litigate this meritorious claim on appeal or in post-conviction.

CLAIM EIGHT:

Mr. Howard was denied his state and federal constitutional rights to due process of law, was denied his right to an individualized sentence, and was denied his right to a speedy trial when his trial, which was scheduled to begin on January 10, 1983, was continued by the trial court over Mr. Howard's specific objections to the continuance. U.S. Const. amends. V, VI, VIII, XIV; Nevada Const. art. I, Sec. 3, 6 and 8; art. IV, Sec. 21.

Mr. Howard fully incorporates Claim Two by reference herein.

SUPPORTING FACTS

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

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

On November 30, 1982, the trial court was informed that Mr. Howard was indigent and was therefore qualified to be represented by the Clark County Public Defender's Office.

At this time, Terrence Jackson, team leader of the Clark County Public Defender's Office, informed the trial judge about his personal relationship with the murder victim - George Monahan. 1 ROA 15. Monahan had been Mr. Jackson's dentist for fifteen years. Additionally, Mr. Jackson's parents both knew the victim well. The trial judge ordered Mr. Jackson to have nothing to do with Mr. Howard's case. Immediately thereafter, Michael Peters, an attorney with the Clark County Public Defender's Office indicated that as he was newly assigned to the case that he would request a one week continuance of the arraignment in order to be able to confer with Mr. Howard. Mr. Howard objected to this request and stated "I would rather have a fast and a speedy trial, plus the fact the case is nearly three years old, and I'm presently doing time in California. I would like to get on with it. I'm quite sure the People are ready." 1 ROA 15-16. Based upon this statement, the trial court arraigned Mr. Howard on the three charges and set a trial date of January 10, 1983.

On December 30, 1982, Michael Peters, lead counsel for Mr. Howard, provided counsel for

the State of Nevada with a Motion To Continue Trial. Mr. Peters indicated to the trial court that there would be no way that he would be prepared to go forward with the trial scheduled to begin on January 10, 1983. 1 ROA 50.

On January 4, 1983, counsel for the parties appeared before the trial court. At this time, counsel for Mr. Howard informed the trial court that they were "simply not in a position to be ready for trial by Monday." 1 ROA 56. Counsel for Mr. Howard stated that "the investigation that's necessary in order to adequately represent, effectively represent Mr. Howard's trial has not been done; in fact, I seriously doubt it has even gotten off the ground." When the trial court inquired about Mr. Howard's position, Mr. Howard objected to the vacation of the trial date. Mr. Howard stated "unequivocally I want to go to trial." 1 ROA 56-57.

On January 7, 1983, at 4:55 p.m., three days before trial was scheduled to begin, the State of Nevada filed the "Notice Of Intent To Seek The Death Penalty." 1 ROA 85-87.

On January 10, 1983, counsel for Mr. Howard requested the trial court vacate the trial date, and continue the trial over Mr. Howard's objection. Even though the trial judge recognized that Mr. Howard had continually insisted on being tried on January 10, 1983, the judge continued the trial to April 11, 1983. 1 ROA 127-41.

On January 18, 1983, the State of Nevada filed a "Motion To Compel Production Of Fingerprint Exemplar." 1 ROA 176-78. This motion was based upon the State's desire for a comparison can be performed between the requested fingerprint exemplar and the latent fingerprints developed, and lifted from the van of the murder victim George Monahan.

On January 27, 1983, over objection of Howard's counsel, the trial judge ordered that Mr. Howard submit to the taking of finger and palm print exemplars. 1 ROA 183-85.

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

A. the waiver of any legal challenge to the sufficiency of notice received by the defendant as to the State's intent to seek death penalty. Strickland, 466 U.S. 668. The Notice of Intent to Seek Death Penalty was filed on January 7, 1983 at 4:55 p.m. and counsel for the defendant personally received the Notice on January 10, 1983, the morning trial was to begin. Such notice is

both statutorily and constitutionally inadequate and had the trial gone forward on that date and Mr. Howard received the death penalty, Mr. Howard would have been entitled to a new penalty hearing, see NRS 175.552(3), SCR 250(4), Emmons v. State, 107 Nev. 53, 807 P.2d 718 (1991), Rogers v. State, 101 Nev. 457, 466-67, 705 P.2d 664, 670-71 (1985), Lankford v. Idaho, 500 U.S. 110 (1991); and,

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

The unconstitutional actions of the trial court in delaying the trial substantially prejudiced Mr. Howard, rendered the trial proceeding fundamentally unfair, eroded the reliability of the verdicts and had a substantial and injurious effect on the guilt and penalty verdicts. Further, trial counsel were ineffective for failing to vigorously protect Mr. Howard's right to a speedy trial. Strickland, 466 U.S. 668.

CLAIM NINE:

Mr. Howard was denied a fundamentally fair trial in violation of his state and federal constitutional rights and was denied his right to the effective assistance of counsel by the trial court's interference with the attorney-client relationship wherein the trial court found that defense counsel had been ineffective but thereafter refused to allow counsel to withdraw and refused to appoint new counsel. U.S. Const. amends. V, VI, VIII, XIV; Nevada Const. art. I, Sec. 3, 6 and 8; art. IV, Sec. 21.

Mr. Howard fully incorporates Claims Two, Three, Four and Twenty-One by reference herein.

SUPPORTING FACTS

On November 30, 1982, the trial court was informed that Mr. Howard financially qualified to be represented by the Clark County Public Defender's Office. 1 ROA 15. At this hearing, Terrence Jackson, a member of and team leader of the Clark County Public Defender's Office, also informed the trial judge regarding Jackson's personal relationship with the murder victim - George Monahan. The murder victim had been Mr. Jackson's dentist for fifteen years. Additionally, Mr. Jackson's parents both knew the murder victim well. The trial judge ordered Mr. Jackson to have nothing to do with Howard's case.

On December 30, 1982, Mr. Howard filed a "Motion For Substitution and Removal Of Attorney Of Record." 1 ROA 42-46. This Motion was based upon the following facts:

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

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

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

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

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

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

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

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

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

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

B. Mr. Gibson, another attorney at the Clark County Public Defender's office, had expressed his hope that Mr. Howard be executed. 1 ROA 128. Mr. Gibson was a friend of George Monahan, and played on numerous sports teams with the murder victim.

C. Mr. Howard did not trust the lawyers in the Clark County Public Defender's office because of the above relationships between the murder victim and members of the office and based upon this lack of trust refused to discuss his case with his counsel. 1 ROA 130.

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

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

A. The court's order that Mr. Jackson not be involved in any way in Howard's case was expanded to preclude Morgan Harris (the Clark County Public Defender), Mr. Jackson and any other deputy of the Public Defender's Office from becoming involved in the case without the express approval of Marcus Cooper and/or George Franzen. The court specified that it did not want "anymore of this garbage of coming back before the court that one deputy doesn't like this defendant or whatever." 1 ROA 150. While the trial judge recognized that he did not know how that remark

came about, a defendant is entitled to feel that he has his counsel's one-hundred percent loyalty and his counsel's efforts in doing so. He's also entitled to feel that his counsel are not going to be influenced by any such involvement from any other members of the Public Defender's office. The trial judge specifically stated "if it occurs again that individual deputy will appear before this court to show cause as to why he should not be held in contempt."

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

C. Mr. Howard's motion to the court was based upon the fact that his attorney Mr. Mike Peters had not represented him at all and had done so without any diligence and that Peters had represented him incompetently. The trial court specifically found that these allegations were true. 1 ROA 157.

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

E. The court did not know what would cause Mr. Howard's attorneys to allow this case to get bungled up and allow him to almost go to trial (it being ten days before trial) before he even has done anything with the case.

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

G. The trial court did not understand why motions were being filed so late except to secure a continuance that was caused by trial counsels' inaction.

H. That Mr. Howard was not competently and adequately represented.

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

1 ROA 151.

On April 8, 1983, two days before Mr. Howard's trial began, Mr. Howard submitted a letter

to the trial judge expressing his concern over the ineffectiveness of his counsel's representation. 1 ROA 205.

On April 11 and 12, 1983, the first and second days of trial, the trial court was again informed of the fact that there had been no communication between Mr. Howard and his attorneys and that this had been the case since the inception of the Public Defender's representation in November of 1982. 6 ROA 1019; 7 ROA 1210-11.

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

Mr. Howard lost all trust in his attorneys and actively sought to have trial counsel removed. The trial court denied his requests. The trial court's rulings violated Mr. Howard's clearly established state and federal constitutional rights because his rulings played a significant role in the eventual breakdown in communications between Mr. Howard and trial counsel; the trial court was obligated, under clearly established state and federal constitutional law, to remove the CCPD and its deputies from representing Mr. Howard, because it was obvious from the record that Mr. Howard completely lost trust in their ability to adequately defend him against capital murder charges. U.S. v. Adelzo-Gonzalez, 268 F.3d 772, 769 (9th Cir. 2001) (holding that "where a defendant has, with legitimate reason, completely lost trust in this attorney, and the trial court refuses to remove the attorney, the defendant is constructively denied counsel.")

Under these circumstances trial counsel were in conflict with Mr. Howard and were ineffective. The trial court abused its discretion by failing to appoint Mr. Howard conflict-free counsel, after making a finding that the public defender had not provided Mr. Howard with adequate representation in pretrial proceedings. See Cuyler v. Sullivan, 446 U.S. 335, 349 (1980) ("a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief."); U.S. v. Bruce, 89 F.3d 886 (D.C. Cir. 1996); Middleton v. Warden, 120 Nev. 664, 666, 98 P.3d 694, 696 (2004) ("'This court places the highest priority on diligence in the discharge of professional responsibility in capital cases. . . . The highest standards of competence and diligence are expected of capital defense counsel in all stages

of the criminal proceedings. When these standards are not met and the interests of justice demand, this court must exercise its inherent authority to sua sponte remove counsel from representing a capital defendant.") (quoting SCR 250).

CLAIM TEN:

Mr. Howard was denied his state and federal constitutional rights to a fair trial when the trial court failed to give Mr. Howard's requested instructions to the jury, at the conclusion of the guilt phase, that witness Dawana Thomas was an accomplice as a matter of law and further that the testimony of an accomplice ought to be viewed with distrust. U.S. Const. amends. V, VI, VIII, XIV; Nevada Const. art. I, Sec. 3, 6 and 8; art. IV, Sec. 21. Additionally, trial counsel were ineffective for failing to investigate and fully impeach Ms. Thomas' testimony.

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

Mr. Howard fully incorporates Claims Two, Three, Four, and Twenty-One by reference herein.

SUPPORTING FACTS

Trial counsel proffered two instructions on accomplice liability and the reliability of the testimony of an accomplice, namely that of Dawana Thomas. Proffered Instructions A and B. The trial court rejected Proffered Instruction A, concluding that the jury had been properly instructed on the law of accomplice at Instructions 18 and 19, and that the proffered instruction did not accurately state the law as it existed in Nevada. 14 ROA 2425-26. The court also rejected Proffered Instruction B, that Dawana Thomas was an accomplice as a matter of law, concluding that the instruction was contrary to Nevada law, in that it improperly charged the jury on a factual matter. 14 ROA 2427-29. The trial court abused its discretion when it refused to instruct the jury on Mr. Howard's theory of the case.

"The defense has the right to have the jury instructed on its theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be." Crawford v. State, 121 Nev. ___, 121 P.3d 582, 586 (2005) (internal citations and quotations omitted); see also Rosas v. State, 122 Nev. ___, 147 P.3d 1101 (2006). The district court may only refuse a proffered defense instruction to the jury if it "misstates the law or is adequately covered by other instructions." Boykins v. State, 116 Nev. 171, 182, 995 P.2d 474, 482 (2000) (internal citations and quotations

omitted). The district court has a duty to correct an inaccurate or incomplete theory-of-defense instruction. Estes v. State, 122 Nev. __, 146 P.3d 1114, 1124 (2006) (citing Carter v. State, 121 Nev. 759, __, 121 P.3d 592, 597-98 (2005)). "[E]ven though [a] principle of law could be inferred from the general instructions, . . . the district court may not refuse a proposed instruction on the ground that the legal principle it provides may be inferred from other instructions." Crawford, 121 Nev. at __, 121 P.3d at 588 (holding that where a defense theory in a homicide case includes voluntary manslaughter, the district court should provide complete instructions outlining the State's burden of proof).

Mr. Howard also alleges that his trial counsel were ineffective for failing to investigate Dawana Thomas prior to her damaging testimony against Mr. Howard at his trial. Strickland, 466 U.S. 668. Current counsel are informed and therefore allege that Ms. Thomas admitted that she suffered a nervous breakdown sometime in 1980, and that she had to be hospitalized in Arizona. Had trial counsel conducted adequate investigation of Ms. Thomas before she testified, there is a reasonable probability that counsel could have impeached her testimony with evidence of her questionable mental state, and her possible bias against Mr. Howard. Further, trial counsel could have introduced evidence of Ms. Thomas' mental state to discredit her testimony before the jury. Failure to investigate and present this important evidence resulted in significant prejudice to Mr. Howard, where Ms. Thomas' testimony was particularly damaging to his theory of defense.

CLAIM ELEVEN:

Mr. Howard was denied his state and federal constitutional rights because the instructions given to the jury allowed it to convict him on a degree of proof less than that required by due process. U.S. Const. amends. V, VIII, XIV; Nevada Const. art. I, Sec. 3, 6 and 8; art. IV, Sec. 21.

Mr. Howard fully incorporates Claims Twelve, Thirteen, and Fourteen by reference herein.

SUPPORTING FACTS

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

A. The jury was instructed, pursuant to instruction no. 21 of the guilt phase instructions, that:

> The defendant is presumed to be innocent until the contrary is proved. This presumptions places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the defendant is the person who committed the offense.
>
> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual and substantial, not mere possibility or speculation.
>
> If you have a reasonable doubt as to the guilt of the defendant, he is entitled to a verdict of not guilty.

2 ROA 237.

The instruction inflates the quantum of doubt which must be found before a "reasonable doubt" exists, and thus the instruction dilutes the state's burden of proving a criminal offense beyond a reasonable doubt. The instruction improperly minimized the State's burden of proof by including the terms, "It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life" and "Doubt to be reasonable must be actual and substantial, not mere possibility or speculation." (Emphasis added). This instruction inflates the constitutional

standard of doubt necessary for acquittal, and the giving of this instruction created a reasonable likelihood that the jury would convict and sentence based on a lesser standard of proof than the constitution requires. See Victor v. Nebraska, 511 U.S. 1, 24 (1994) (Ginsburg, J., concurring in part); Cage v. Louisiana, 498 U.S. 39, 41 (1990); Estelle v. McGuire, 502 U.S. 62, 72 (1991). Mr. Howard recognizes that the Nevada Supreme Court has found this instruction to be permissible. See e.g. Elvik v. State, 114 Nev. 883, 965 P.2d 281 (1998); Bolin v. State, 114 Nev. 503, 960 P.2d 784 (1998).

The instruction includes the "actual and substantial doubt" language condemned by the United States Supreme Court in Cage vs. Louisiana, 498 U.S. 39, 111 S.Ct. 328 (1990)(per curiam).

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

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

The instruction also states "doubt to be reasonable must be actual and substantial, not mere possibility or speculation." This language is functionally identical to the language condemned in Cage. Moreover, this instruction leads to the danger that "substantial doubt" would be interpreted by a juror "in parallel with the preceding reference to" a doubt which would "govern or control" a person's actions. The danger that the jurors would adopt this parallel interpretation is exacerbated by the parallel references to "possible" doubt. The last sentence of the instruction contrasts "actual and substantial doubt" with "mere possibility." The second sentence of the instruction contrasts "mere possible doubt" with doubt which "would govern or control a person in the more weighty affairs of life." Thus, in the context of this instruction, it was inevitable that the jurors would interpret "substantial doubt" as requiring the "govern or control" standard which is an unconstitutional standard for determining "reasonable doubt."

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

The instruction does nothing to dispel the false inference that the jurors could have an "abiding conviction" as to guilt of the offense charged if the reasonable doubts they harbored were not sufficient to "govern or control" their actions.

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

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

2 ROA 231. By its own language, this instruction erroneously allows a jury to return a verdict of guilty even when it entertains a reasonable doubt as to guilt.

C. The jury was also improperly instructed on the definition of premeditation, the mental state element of the crime, and malice.

These instructions diluted the proper standard of proof, introduced confusion and ambiguity into the jury's assessments, and abridged the fundamental principle that the accused may be convicted only when the jury finds, beyond a reasonable doubt, every fact necessary to constitute the crime with which he is charged. "[I]n view of all the circumstances the instruction may have misled the jury, and it should not have been given." Zelavin v. Tonopah Belmont Dev. Co., 39 Nev. 1, 7, 149 P. 188, 189 (1915). See Penry v. Johnson, 532 U.S. 782, 799 (2001) (a jury charge which is internally contradictory places jurors in an impossible situation); Francis v. Franklin, 471 U.S. 307,

322 (1985) ("Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity.")

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

CLAIM TWELVE:

Mr. Howard's convictions are unlawfully and unconstitutionally imposed, in violation of his state and federal constitutional rights, because the jury was not properly instructed on, and did not properly find, the mental state element of the crime of first degree murder. U.S. Const. amends. V, VI, VIII, XIV; Nevada Const. art. I, Sec. 3, 6 and 8; art. IV, Sec. 21.

Mr. Howard fully incorporates Claims Four, Eleven, Thirteen, and Fourteen by reference herein.

SUPPORTING FACTS

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

Mr. Howard's jurors were not clearly instructed that this mens rea was necessary to return a guilty verdict. Instead they were instructed in a confusing manner as to general intent. The jurors were instructed by guilt phase instruction number 20 that:

> To constitute the crime charged, there must exist a union or joint operation of an act forbidden by law and an intent to do the act.
>
> The intent with which an act is done is shown by the facts and circumstances surrounding the case.
>
> Do not confuse intent with motive. Motive is what prompts a person to act. Intent refers only to the state of mind with which the act is done.
>
> Motive is not an element of the crime charged and the State is not required to prove a motive on the part of the defendant in order to convict. However, you may consider evidence of motive or lack of motive as a circumstance in the case.

2 ROA 236.

Although the jury was given other instructions defining "malice" and "premeditation," it was never instructed on the specific mental state required except for the vague, general assertion that the crime required "an intent to do the act." 2 ROA 226, 228. Consequently, the jury likely found Mr.

Howard guilty solely because of his general criminal intent - the "intent to do the act" - without finding the specific mental state of the crime to be true. The State was required to prove all elements of the crime beyond a reasonable doubt, and the trial court's failure to instruct the jury on this critical issue deprived Howard of his state and federal constitutional rights to due process, a fair trial and a reliable sentence. Osborne v. Ohio, 495 U.S. 103, 122-23 (1990); Francis v. Franklin, 471 U.S. 307, 313 (1985); In re Winship, 397 U.S. 358, 363 (1970); Jackson v. Virginia, 443 U.S. 307, 320, n. 14 (1979); Screws v. United States, 325 U.S. 91, 107 (plurality opinion); Hern v. State, 97 Nev. 529, 532, 635 P.2d 278, 280 (1981).

The unconstitutional definition of "premeditation" exacerbated the error defined in the present claim. Likewise, the unconstitutional definition of "malice" exacerbated the error defined in the present claim.

The improper, confusing, and vague instructions regarding the mental state element invalidate the jury's verdict. This error substantially prejudiced Mr. Howard, rendered the trial proceeding fundamentally unfair, eroded the reliability of the verdicts and had a substantial and injurious effect on the guilt and penalty phase verdicts. "[I]n view of all the circumstances the instruction may have misled the jury, and it should not have been given." Zelavin v. Tonopah Belmont Dev. Co., 39 Nev. 1, 7, 149 P. 188, 189 (1915). See Penry v. Johnson, 532 U.S. 782, 799 (2001) (a jury charge which is internally contradictory places jurors in an impossible situation); Francis v. Franklin, 471 U.S. 307, 322 (1985) ("Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity.").

CLAIM THIRTEEN:

Mr. Howard's convictions are unlawfully and unconstitutionally imposed in violation of his state and federal constitutional rights because the definition of premeditation given to the jury in the guilt phase of Mr. Howard's trial was erroneous, confusing and eliminated any meaningful distinction between first and second degree murder. U.S. Const. amends. V, VI, VIII, XIV; Nevada Const. art. I, Sec. 3, 6 and 8; art. IV, Sec. 21.

Mr. Howard fully incorporates Claims Four, Eleven, Twelve, and Thirteen by reference herein.

SUPPORTING FACTS

In addition to the other instructional problems with the mental state requirement, the instructions indicated that "murder of the first degree is perpetrated by any kind of willful, deliberate and premeditated killing or committed in the perpetration or attempted perpetration of robbery." The jury was instructed that "murder of the second degree is murder with malice aforethought, but without the admixture of premeditation." The distinction between degrees of murder therefore hinge on the difference between malice - a deliberate intention to kill - and premeditation. NRS 200.030.

Jury instruction number 12 defined premeditation as:

> [A] design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing. Premeditation need not be for a day, an hour or even a minute. For if the Jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

2 ROA 228. The instruction is unconstitutional because it muddled the distinction between first and second degree murder and thereby violated the constitutional requirement that the state's death penalty scheme be narrowly applied, Zant v. Stephens, 462 U.S. 862, 877 (1983); Byford v. State, 116 Nev. 215, 233-37, 994 P.2d 712-15 (2000).

The misdefining of premeditation in this way, and the failure to explain the different mental states involved in the degrees of murder, deprived Mr. Howard of his right to have the jury decide all the necessary elements of the charged crime and rendered the second degree murder instruction

meaningless. Smith v. Mitchell, 437 F.3d 884, 889 (9th Cir. 2006) ("whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.") (citing Jackson v. Virginia, 443 U.S. 307, 319, (1979)); see also In re Winship, 397 U.S. 358, 364 (1970); Fiore v. White, 531 U.S. 225, 228-29 (2001); U.S. Const. amend. XIV.; Nolan v. State, 122 Nev. ___, 132 P.3d 564, 573 (2006) (citations omitted). This error substantially prejudiced Mr. Howard, rendered the trial proceeding fundamentally unfair, eroded the reliability of the verdicts and had a substantial and injurious effect on the guilt and penalty phase verdicts.

The instruction was unconstitutional because it muddled the distinction between first and second degree murder and thereby violated the constitutional requirement that a greater degree of punishment resulting from the conviction of a greater offense, or a greater degree of an offense, must be supported by a rational distinction which distinguishes the greater culpability from the lesser, People v. Calvaresi, 534 P.2d 316, 318 (Colo. 1975); and the requirement that criminal laws must be written so that there are significant differences between offenses and so that the exact same conduct is not subject to different penalties. State v. Bryan, 709 P.2d 257, 263 (Utah 1985); City of Chicago v. Morales, 527 U.S. 41, 56-61 (1999).

CLAIM FOURTEEN:

Mr. Howard's convictions are unlawful and unconstitutionally imposed in violation of his state and federal constitutional rights because he was convicted pursuant to instructions which failed to coherently define the mental state required for murder, defined malice in a vague, incomprehensible and improper manner, and unconstitutionally shifted the burden to the Mr. Howard to negate malice. U.S. Const. amends. V, VIII, XIV; Nevada Const. art. I, Sec. 3, 6 and 8; art. IV, Sec. 21.

Mr. Howard fully incorporates Claims Four, Eleven, Twelve, and Thirteen by reference herein.

SUPPORTING FACTS

Mr. Howard's jury was instructed that murder "is the unlawful killing of a human being, with malice aforethought, either express or implied." 2 ROA 224.

The jury was also instructed that:

> Malice aforethought, as used in the definition of murder, means the intentional doing of a wrongful act without legal cause or what the law considers adequate provocation. The condition of mind described as malice aforethought may arise, not alone from anger, hatred, revenge, or from particular ill will, spite, or grudge toward the person killed, but may result from any unjustifiable or unlawful motive or purpose to injure another, which proceeds from a heart fatally bent on mischief or with reckless disregard of consequences and social duty. Malice aforethought does not imply deliberation or the lapse of any considerable time between the malicious intention but denotes rather an unlawful purpose and design in contradistinction to accident and mischance.

2 ROA 225.

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

> Express Malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.
>
> Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

2 ROA 226.

Under these instructions, no rational juror could decipher the meaning of malice. It appears to be an all-encompassing mental state, extending to all cases of homicide dependent only on consciousness. The instruction is vague and makes no meaningful distinction between mental states. "[I]n view of all the circumstances the instruction may have misled the jury, and it should not have been given." Zelavin v. Tonopah Belmont Dev. Co., 39 Nev. 1, 7, 149 P. 188, 189 (1915). See Penry v. Johnson, 532 U.S. 782, 799 (2001) (a jury charge which is internally contradictory places jurors in an impossible situation); Francis v. Franklin, 471 U.S. 307, 322 (1985) ("Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity.").

The instruction also creates an unconstitutional presumption that malice exists whenever a homicide has occurred thus improperly shifting the burden of proof on the mental state element of murder to Mr. Howard. Patterson v. New York, 432 U.S. 197, 215 (1977).

The effect of this erroneous, vague and unconstitutional instruction was exacerbated by the problems with the definition of premeditation, the general intent instruction, and the mental state instructions' infirmities. This error substantially prejudiced Mr. Howard, rendered the trial proceeding fundamentally unfair, eroded the reliability of the verdicts and had a substantial and injurious effect on the guilt and penalty phase verdicts. This instruction provided for an impermissible and unconstitutional presumption and therefore deprived Mr. Howard of his right to a fair trial, to equal protection, and to due process of law. Moreover, this instruction interfered with the presumption of innocence and relieved the State of its burden to prove guilt of each of the elements of the offense beyond a reasonable doubt. Elimination of the sentence prescribing when malice "shall be implied" was necessary to avoid constitutional problems. This language is reasonably interpreted as imposing an impermissible mandatory presumption. See Yates v. Aiken, 484 U.S. 211 (1988); Hill v. Maloney, 927 F.2d 646, 651 (1st Cir. 1990); Davis v. Kemp, 752 F.2d 1515, 1519-20 (11th Cir. 1985). See also Coleman v. Jones, 909 F.2d 447, 449 (11th Cir. 1990). Although the Nevada Supreme Court has found this instruction to be an accurate reflection of NRS 200.020, Guy v. State, 108 Nev. 770, 839 P.2d 578 (1992), Cordova v. State, 116 Nev. 664, 666, 6

P.3d 481 (2000), it did not pass on any constitutional issues or upon the instruction's validity under NRS 47.230(3).

CLAIM FIFTEEN:

Mr. Howard was denied his state and federal constitutional rights where the trial court instructed the jury at the conclusion of the penalty hearing that a verdict, at that phase of the proceeding, may never be influenced by sympathy, prejudice or public opinion. U.S. Const. amends. V, VIII, XIV; Nevada Const. art. I, Sec. 3, 6 and 8; art. IV, Sec. 21.

Mr. Howard fully incorporates Claims Two, Three, Sixteen, Seventeen, Eighteen, and Twenty-One by reference herein.

SUPPORTING FACTS

At the penalty hearing, the trial court instructed the jury that "a verdict may never be influenced by sympathy . . ." 2 ROA 290.

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

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

This instruction was improper and unconstitutional because it acted to limit or prohibit the jury's consideration of mercy in determining whether to sentence Mr. Howard to death. Penry v. Lynaugh, 492 U.S. 302, 326 (1989) (violation of the 8th and 14th amendments to tell jurors that they could not act on their emotions but had instead to act on the law as the judge had given them); California v. Brown, 479 U.S. 538, 545 (1987) ("The sentence imposed at the penalty phase should reflect a reasoned moral response to the defendant's background, character, and crime rather than mere sympathy or emotion.") (O'Connor, J., concurring); Presnell v. Zant, 959 F.2d 1524, 1529 (11th Cir. 1992) (prosecutor's comment that jurors should not show mercy rendered the trial fundamentally unfair); Drake v. Kemp, 762 F.2d 1449, 1460 (11th Cir. 1985) ("The suggestion that mercy is inappropriate was not only a misrepresentation of the law, but it withdrew from the jury one of the most central sentencing considerations, the one most likely to tilt the decision in favor of life"); Saffle v. Parks, 494 U.S. 484, 490 (1990). Mr. Howard recognizes that the Nevada Supreme Court has approved of the "anti-sympathy" instruction. See e.g. Leonard v. State, 114 Nev. 1196, 969 P.2d 288 (1998). Nonetheless, for the purpose of giving the court the opportunity to reconsider

its earlier decisions and for the purpose of preserving this issue for federal review, this issue is presented here.

CLAIM SIXTEEN:

Mr. Howard was denied his state and federal constitutional rights to due process of law, and was denied his right to an individualized sentence by the trial court's failure to instruct the jury with regard to the statutory mitigating circumstance that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. U.S. Const. amends. V, VIII, XIV; Nevada Const. art. I, Sec. 3, 6 and 8; art. IV, Sec. 21. This unconstitutional action by the trial court substantially prejudiced Mr. Howard, rendered the penalty proceeding fundamentally unfair, eroded the reliability of the verdicts and had a substantial and injurious effect on the penalty phase verdicts.

Mr. Howard fully incorporates Claims Two, Three, Fifteen, Sixteen, Seventeen, Eighteen, and Twenty-One by reference herein.

SUPPORTING FACTS

The trial court erred when it failed to instruct the jury during the penalty phase of the trial that it could consider as a mitigating circumstance whether Mr. Howard was under the influence of extreme mental or emotional disturbance at the time of the killing. Trial counsel argued that the instruction should have been given under NRS 200.033(2) (1983).

During the defense presentation of evidence at the penalty hearing, Mr. Howard testified extensively about his turbulent family background, including that he had witnessed his father kill his mother and sister, 15 ROA 2540, and he gave lengthy testimony about his difficulties with mental illness, such as a diagnosis of schizophrenia and an attempted suicide shortly before his arrest in connection with the instant offense. 15 ROA 2541-49. Under NRS 175.554, the trial court was obligated to instruct the jury on the mitigating circumstance of extreme mental or emotional disturbance, as it was alleged by the defense and testified to by Mr. Howard. The trial court refused, however, to instruct the jury on extreme emotional or mental disturbance, stating:

> These offenses or statements that are defined here, that if murder was committed while the defendant was under the influence of extreme or emotional disturbance, there is no evidence in this record, except the defendant's own statement, that he has had mental problems in the past, not even the defendant's statements, to indicate that he ever had – was mentally ill or emotionally disturbed at the time of the killing of the victim in this case. The reason very obviously [is that] he

denies it.

> Further, there is no psychiatric testimony in this record which ties the defendant to that event and states that at the time of that event he was emotionally and mentally ill or disturbed; for it is obvious that he could have been mentally ill at any other time and still not be a mitigating circumstance in this case. That's what we have here. It says the defendant has a history of mental illness or that the defendant has in the past been in mental or psychiatric wards or that he served honorably in the United States Service or that he observed the murder of his mother and sister. I don't think the law has gone yet to the point of saying merely that because I fought for my flag I am entitled to have my first degree murder considered second or manslaughter, or the fact that I was mentally ill at the age of 16, that at the age of 30, I am entitled to have my murder of the first degree considered manslaughter.
>
> The issue I think in any other mitigating circumstance must focus, particularly in these areas when we are talking about a mental state of this defendant, must focus upon the time of the killing. There was never a defense of insanity raised in this case. This is merely, it looks to me like, an attempt to raise an insanity defense at this late date under some kind of limited liability theory or approach. I find none stated in the statute except two, and that is clear that there has to be some evidence in the record. And there isn't any evidence in the record that at the time of the killing of the victim the defendant was mentally ill or emotionally disturbed.
>
> For those reasons, counsel, the court did not give it, but did give instruction twelve. I have no idea what the legislature meant by "any other mitigating circumstance," and I know of no court, no do I know of any legislature – legislator, that has defined what that means. It's there and it's for that reason I think you are entitled at least to argue that the testimony he gave may fall under this category. But for me to rule, as a matter of fact, that it is a mitigating circumstance is beyond, I believe, my call. It is a matter for the jury to make that consideration and that decision. And for those reasons, counsel, I refused to give the instruction. And maybe some supreme court down the line may define that for us, but as of the moment, that's the law.

15 ROA 2580-81.

"The defense has the right to have the jury instructed on its theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be." Crawford v. State, 121 Nev. __, 121 P.3d 582, 586 (2005) (internal citations and quotations omitted); see also Rosas v. State, 122 Nev. __, 147 P.3d 1101 (2006). The district court may only refuse a proffered defense instruction to the jury if it "misstates the law or is adequately covered by other instructions." Boykins v. State, 116 Nev. 171, 182, 995 P.2d 474, 482 (2000) (internal citations and quotations omitted). The district court has a duty to correct an inaccurate or incomplete theory-of-defense

instruction. Estes v. State, 122 Nev. __, 146 P.3d 1114, 1124 (2006) (citing Carter v. State, 121 Nev. 759, __, 121 P.3d 592, 597-98 (2005)). "[E]ven though [a] principle of law could be inferred from the general instructions, . . . the district court may not refuse a proposed instruction on the ground that the legal principle it provides may be inferred from other instructions." Crawford, 121 Nev. at __, 121 P.3d at 588 (holding that where a defense theory in a homicide case includes voluntary manslaughter, the district court should provide complete instructions outlining the State's burden of proof).

Likewise, in a capital case "'the sentencer [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" Eddings v. Oklahoma, 455 U.S. 104, 110 (1982), (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion)); see also Skipper v. South Carolina, 476 U.S. 1, 4 (1986). Likewise, the principle that "'the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence'" is equally 'well established.'" Mills v. Maryland, 486 U.S. 367, 374-375 (1988) (quoting Eddings, 455 U.S. at 114. n7).

The trial court erred when it concluded that Mr. Howard was not entitled to a jury instruction on the issue of extreme mental or emotional disturbance, despite the significant evidence given by Mr. Howard to support the giving of such an instruction. Mr. Howard was prejudiced because the trial court only concluded that Mr. Howard's testimony could be argued to the jury under the "any other mitigating circumstance" category. 15 ROA 2581. Mr. Howard was therefore deprived of his right to fully argue to the jury that he suffered from extreme mental and emotional disturbance at the time of the crime.

Further, trial counsel were ineffective for failing to introduce additional evidence to support the mitigating factor of extreme emotional or mental disturbance, and Mr. Howard was deprived his right to effective assistance of counsel. Strickland, 466 U.S. 668.

CLAIM SEVENTEEN:

Mr. Howard was denied his state and federal constitutional rights to due process of law, and was denied his right to an individualized sentence by the trial court's limitation of the mitigating circumstances, to be considered by the jury at the conclusion of penalty hearing, to the statutory factor of "any other mitigating circumstance." U.S. Const. amends. V, VIII, XIV; Nevada Const. art. I, Sec. 3, 6 and 8; art. IV, Sec. 21. This unconstitutional action by the trial court substantially prejudiced Mr. Howard, rendered the penalty proceeding fundamentally unfair, eroded the reliability of the verdicts and had a substantial and injurious effect on the penalty phase verdicts.

Mr. Howard fully incorporates Claims Two, Three, Fifteen, Sixteen, Eighteen, and Twenty-One by reference herein.

SUPPORTING FACTS

As noted above, the trial court refused to instruct the jury on the specific mitigating circumstance of extreme emotional or mental disturbance. The trial court also refused to instruct the jury on anything other than the mitigating circumstance of "any other mitigating circumstance:"

> These offenses or statements that are defined here, that if murder was committed while the defendant was under the influence of extreme or emotional disturbance, there is no evidence in this record, except the defendant's own statement, that he has had mental problems in the past, not even the defendant's statements, to indicate that he ever had – was mentally ill or emotionally disturbed at the time of the killing of the victim in this case. The reason very obviously [is that] he denies it.
>
> Further, there is no psychiatric testimony in this record which ties the defendant to that event and states that at the time of that event he was emotionally and mentally ill or disturbed; for it is obvious that he could have been mentally ill at any other time and still not be a mitigating circumstance in this case. That's what we have here. It says the defendant has a history of mental illness or that the defendant has in the past been in mental or psychiatric wards or that he served honorably in the United States Service or that he observed the murder of his mother and sister. I don't think the law has gone yet to the point of saying merely that because I fought for my flag I am entitled to have my first degree murder considered second or manslaughter, or the fact that I was mentally ill at the age of 16, that at the age of 30, I am entitled to have my murder of the first degree considered manslaughter.
>
> The issue I think in any other mitigating circumstance must focus, particularly in these areas when we are talking about a mental state of this defendant, must focus upon the time of the killing. There was

> never a defense of insanity raised in this case. This is merely, it looks to me like, an attempt to raise an insanity defense at this late date under some kind of limited liability theory or approach. I find none stated in the statute except two, and that is clear that there has to be some evidence in the record. And there isn't any evidence in the record that at the time of the killing of the victim the defendant was mentally ill or emotionally disturbed.
>
> For those reasons, counsel, the court did not give it, but did give instruction twelve. I have no idea what the legislature meant by "any other mitigating circumstance," and I know of no court, no do I know of any legislature – legislator, that has defined what that means. It's there and it's for that reason I think you are entitled at least to argue that the testimony he gave may fall under this category. But for me to rule, as a matter of fact, that it is a mitigating circumstance is beyond, I believe, my call. It is a matter for the jury to make that consideration and that decision. And for those reasons, counsel, I refused to give the instruction. And maybe some supreme court down the line may define that for us, but as of the moment, that's the law.

15 ROA 2580-81.

"The defense has the right to have the jury instructed on its theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be." Crawford v. State, 121 Nev. ___, 121 P.3d 582, 586 (2005) (internal citations and quotations omitted); see also Rosas v. State, 122 Nev. __, 147 P.3d 1101 (2006). The district court may only refuse a proffered defense instruction to the jury if it "misstates the law or is adequately covered by other instructions." Boykins v. State, 116 Nev. 171, 182, 995 P.2d 474, 482 (2000) (internal citations and quotations omitted). The district court has a duty to correct an inaccurate or incomplete theory-of-defense instruction. Estes v. State, 122 Nev. __, 146 P.3d 1114, 1124 (2006) (citing Carter v. State, 121 Nev. 759, __, 121 P.3d 592, 597-98 (2005)). "[E]ven though [a] principle of law could be inferred from the general instructions, ... the district court may not refuse a proposed instruction on the ground that the legal principle it provides may be inferred from other instructions." Crawford, 121 Nev. at __, 121 P.3d at 588 (holding that where a defense theory in a homicide case includes voluntary manslaughter, the district court should provide complete instructions outlining the State's burden of proof).

In a capital case "'the sentencer [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" Eddings v. Oklahoma, 455

U.S. 104, 110 (1982), (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion)); see also Skipper v. South Carolina, 476 U.S. 1, 4 (1986). Likewise, the principle that "'the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence'" is equally 'well established.'" Mills v. Maryland, 486 U.S. 367, 374-375 (1988) (quoting Eddings, 455 U.S. at 114. n7).

The trial court erred when it concluded that Mr. Howard was entitled only to a jury instruction on the "any other mitigating circumstance," and when it refused to give an instruction on any other mitigating circumstance, despite the significant evidence given by Mr. Howard to support the giving of such instructions. Trial counsel requested instructions on: 1) Mr. Howard's history of mental illness; 2) Mr. Howard's admission to multiple psychiatric or mental wards; 3) Mr. Howard honorably served his country in the military; and 4) that Mr. Howard was present and observed the murder of his mother and sister by his father. 15 ROA 2576. Mr. Howard was prejudiced because the trial court only concluded that such evidence should be limited to the mental state of the defendant only at the time of the killing, and that other mitigating evidence was irrelevant. 15 ROA 2580-81. Mr. Howard was therefore deprived of his right to fully argue to the jury the existence of other mitigating circumstances, such as witnessing the murder of his mother and sister, and his experiences in Vietnam, including head injuries and the subsequent mental and emotional consequences of his service.

Further, trial counsel were ineffective for failing to introduce additional evidence to support the mitigating factor of extreme emotional or mental disturbance. Counsel were also ineffective for failing to present the trial court with case law to support their argument that Mr. Howard was entitled to such instructions, and the trial court noted that counsel had not at any time requested additional time to present the court with legal support to introduce additional mitigating circumstances to the jury, although such case law existed. 15 ROA 2575. See Eddings v. Oklahoma, 455 U.S. 104, 110 (1982), Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion). The penalty phase was a critical stage of the proceedings, to which Mr. Howard was entitled the effective assistance of counsel. Powell v. Alabama, 287 U.S. 45 (1932); Gideon v. Wainwright, 372 U.S. 335 (1963); Coleman v. Alabama, 399 U.S. 1, 9 (1970); Strickland, 466 U.S. 668.

CLAIM EIGHTEEN:

Mr. Howard was denied his state and federal constitutional rights to due process of law, and his right to an individualized sentence by the trial court's instructions and the verdict forms, which were submitted to the jury at the conclusion of the penalty hearing, which required a unanimous finding with regards to the existence of any mitigating circumstance. U.S. Const. amends. V, VIII, XIV; Nevada Const. art. I, Sec. 3, 6 and 8; art. IV, Sec. 21. These unconstitutional actions by the trial court substantially prejudiced Mr. Howard, rendered the penalty proceeding fundamentally unfair, eroded the reliability of the verdicts and had a substantial and injurious effect on the penalty phase verdicts.

Mr. Howard fully incorporates Claims Two, Three, Fifteen, Sixteen, Seventeen and Twenty-One by reference herein.

SUPPORTING FACTS

As noted above, the trial court refused to instruct the jury on anything other than the mitigating circumstance of "any other mitigating circumstance:"

> These offenses or statements that are defined here, that if murder was committed while the defendant was under the influence of extreme or emotional disturbance, there is no evidence in this record, except the defendant's own statement, that he has had mental problems in the past, not even the defendant's statements, to indicate that he ever had – was mentally ill or emotionally disturbed at the time of the killing of the victim in this case. The reason very obviously [is that] he denies it.
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> Further, there is no psychiatric testimony in this record which ties the defendant to that event and states that at the time of that event he was emotionally and mentally ill or disturbed; for it is obvious that he could have been mentally ill at any other time and still not be a mitigating circumstance in this case. That's what we have here. It says the defendant has a history of mental illness or that the defendant has in the past been in mental or psychiatric wards or that he served honorably in the United States Service or that he observed the murder of his mother and sister. I don't think the law has gone yet to the point of saying merely that because I fought for my flag I am entitled to have my first degree murder considered second or manslaughter, or the fact that I was mentally ill at the age of 16, that at the age of 30, I am entitled to have my murder of the first degree considered manslaughter.
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> The issue I think in any other mitigating circumstance must focus, particularly in these areas when we are talking about a mental state of this defendant, must focus upon the time of the killing. There was

> never a defense of insanity raised in this case. This is merely, it looks to me like, an attempt to raise an insanity defense at this late date under some kind of limited liability theory or approach. I find none stated in the statute except two, and that is clear that there has to be some evidence in the record. And there isn't any evidence in the record that at the time of the killing of the victim the defendant was mentally ill or emotionally disturbed.
>
> For those reasons, counsel, the court did not give it, but did give instruction twelve. I have no idea what the legislature meant by "any other mitigating circumstance," and I know of no court, no do I know of any legislature – legislator, that has defined what that means. It's there and it's for that reason I think you are entitled at least to argue that the testimony he gave may fall under this category. But for me to rule, as a matter of fact, that it is a mitigating circumstance is beyond, I believe, my call. It is a matter for the jury to make that consideration and that decision. And for those reasons, counsel, I refused to give the instruction. And maybe some supreme court down the line may define that for us, but as of the moment, that's the law.

15 ROA 2580-81.

Likewise, the jury was given multiple instructions which muddled the lack of unanimity requirement on mitigating circumstances. Specifically, the jury was instructed that it was required to return "one appropriate verdict pertaining to the punishment," and "one appropriate special verdict . . . with respect to aggravating and mitigating circumstances." 2 ROA 16. Further, the jury was instructed that all of its "verdicts must be unanimous." 2 ROA 17.

The jury instructions and verdict forms improperly suggested to the jury that it was required to unanimously find any mitigating circumstances, and they violated the well-established requirement that in a capital case "'the sentencer [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" Eddings v. Oklahoma, 455 U.S. 104, 110 (1982), (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion)); see also Skipper v. South Carolina, 476 U.S. 1, 4 (1986). Likewise, the principle that "'the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence'" is equally 'well established.'" Mills v. Maryland, 486 U.S. 367, 374-375 (1988) (quoting Eddings, 455 U.S. at 114. n7); McKoy v. North Carolina, 494 U.S. 433 (1990).

The critical question is whether a reasonable jury would have understood that there was no requirement that the jurors each agree on the mitigators, based upon the instructions given by the trial

judge and from the verdict form employed in this case. Mills, 486 U.S. at 375 (citing Francis v. Franklin, 471 U.S. 307, 315-316, 85 L. Ed. 2d 344, 105 S. Ct. 1965 (1985) ("The question . . . is not what the State Supreme Court declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning"), citing Sandstrom v. Montana, 442 U.S. 510, 516-517, 61 L. Ed. 2d 39, 99 S. Ct. 2450 (1979). Accord, California v. Brown, 479 U.S. 538, 93 L. Ed. 2d 934, 107 S. Ct. 837 (1987).

Mr. Howard was prejudiced by the trial court's abuse of discretion in giving unconstitutional jury instructions and verdict forms to the jury which deprived Mr. Howard of his state and federal constitutional rights to an individualized sentencing determination by each member of the jury. His sentence of death must be vacated as a result of the denial of his fundamental rights to due process and a reliable sentence.

CLAIM NINETEEN:

Mr. Howard was denied his state and federal constitutional rights by the numerous instances of prosecutorial misconduct which occurred during trial. U.S. Const. amends. V, VIII, XIV; Nevada Const. art. I, Sec. 3, 6 and 8; art. IV, Sec. 21.

SUPPORTING FACTS

The prosecution tampered with a juror which resulted in a motion for mistrial by counsel for Mr. Howard which was denied by the trial court. See Amended Petition, p.33, 8/20/2003.

During the rebuttal penalty closing argument the prosecutor expressed his personal belief that the death penalty was the only proper punishment to be imposed in the case. See Amended Petition, p.33, 8/20/2003. Such argument as improper. Berger v. U.S., 295 U.S. 78, 85 (1935); U.S. v. McKoy, 771 F.2d 1207, 1210-1211 (9th Cir. 1985); U.S. v. Smith, 962 F.2d 923, 934 (9th Cir. 1992); Earl v. State, 111 Nev. 1304, 904 P.2d 1029 (1995); ABA Standards for Criminal Justice 3-5.8 ("ABA Standards"). It was also misconduct for the prosecutor to identify the State with the victim. Flanagan v. State, 104 Nev. 105, 107, 109, 754 P.2d 836, 837-38 (1988); Hawthorne v. U.S., 476 A.2d 164, 171-72 (D.C. 1984).

The prosecutor committed misconduct during the rebuttal penalty closing argument when he improperly expressed his personal endorsement of the death penalty. See Amended Petition, p.33, 8/20/2003. Berger v. U.S., 295 U.S. 78, 85 (1935); U.S. v. McKoy, 771 F.2d 1207, 1210-1211 (9th Cir. 1985); U.S. v. Smith, 962 F.2d 923, 934 (9th Cir. 1992); Earl v. State, 111 Nev. 1304, 904 P.2d 1029 (1995); ABA Standards for Criminal Justice 3-5.8 ("ABA Standards"). It was also misconduct for the prosecutor to identify the State with the victim. Flanagan v. State, 104 Nev. 105, 107, 109, 754 P.2d 836, 837-38 (1988); Hawthorne v. U.S., 476 A.2d 164, 171-72 (D.C. 1984).

During the rebuttal penalty closing argument, the prosecutor improperly argued the improbability of rehabilitation, the possibility of escape and future unknown killings that would be committed by Mr. Howard if he was given a sentence less than death. See Amended Petition, p.34, 8/20/2003. Darden v. Wainwright, 477 U.S. 168, 180 (1986); Viereck v. U.S., 318 U.S. 236, 247 (1943); Cunningham v. Zant, 928 F.2d 1006, 1019-20 (11th Cir. 1991); Hance v. Zant, 696 F.2d 940, 951 (11th Cir. 1983), overruled on other grounds by Brooks v. Kemp, 762 F.2d 1383, 1399 (11th

Cir. 1985); Floyd v. State, 118 Nev. 156, 173, 42 P.3d 249, 261 (2002). But see Haberstroh v. State, 105 Nev. 739, 741, 782 P.2d 1343, 1344 (1989).

During the rebuttal penalty closing argument, the prosecutor improperly compared the Mr. Howard's life to that of the victim. See Amended Petition, p.34, 8/20/2003. Lesko v Lehman, 925 F.2d 1527, 1545 (3d Cir. 1991); Duvall v. Reynolds, 139 F.3d 768, 795 (10th Cir. 1998); Rhodes v. State, 547 So.2d 1201 (Fla. 1989). But see Williams v. State, 113 Nev. 1008, 1019, 945 P.2d 438, 444-45 (1997).

During the rebuttal penalty closing argument, the prosecutor improperly compared Mr. Howard to a notorious murderer. See Amended Petition, p.34, 8/20/2003. DeFreitas v. State, 701 So.2d 593, 601 (Fla. App. 1997); Barnes v. Commonwealth, 91 S.W.3d 564, 569-570 (Ky. 2002); Valdez v. People, 966 P.2d 587, 595 (Colo. 1998) (noting admonishment of prosecutor for referencing O.J. Simpson during opening remarks of voir dire); State v. Thompson, 578 N.W.2d 734, 743 (Minn. 1998) ("No purpose is served by comparing [the defendant] to another charged with a notorious crime other than to attempt to impassion the jury, and [such a statement] clearly was prosecutorial misconduct."). See also Browning v. State (Browning I), 104 Nev. 269, 272, 757 P.2d 351, 353 (1988) (reference to horror movie "served no purpose other than to divert the jury's attention from its sworn task.").

During the rebuttal penalty closing argument, the prosecutor improperly argued that the community would benefit if Mr. Howard received the death penalty. See Amended Petition, p.34, 8/20/2003. Darden v. Wainwright, 477 U.S. 168, 179 (1986); U.S. v. Leon-Reyes, 177 F.3d 816, 822-23 (9th Cir. 1999); Collier v. State, 101 Nev. 473, 479, 705 P.2d 1126, 1130 (1985); U.S. v. Moreno, 991 F.2d 943, 947 (1st Cir. 1993); Guy v. State, 108 Nev. 770, 780, 839 P.2d 578, 586 (1992). But see Williams v. State, 113 Nev. 1008, 1019, 945 P.2d 438, 445 (1997).

The unconstitutional actions of the prosecutor substantially prejudiced Mr. Howard, rendered the penalty proceedings fundamentally unfair, eroded the reliability of the verdicts and had a substantial and injurious effect on the penalty phase verdicts. The prosecutorial misconduct infected the trial with unfairness and as a result the sentence of death is a denial of due process. Greer v. Miller, 483 U.S. 756, 765 (1987); Donnelly, 416 U.S. at 643. See also U.S. v. Bagley, 473 U.S. 667,

676 (1985); U.S. v. Agurs, 427 U.S. 97, 108 (1976); Floyd v. Meachum, 907 F.2d 347, 353-55 (2d Cir. 1990) (cumulative effect of repeated and escalating misconduct in closing argument rendered trial fundamentally unfair and violated due process).

CLAIM TWENTY:

Mr. Howard was deprived of his state and federal constitutional rights to due process of law, equal protections of the laws, and a reliable sentence by the use of the felony of robbery to support his conviction of murder on a felony-murder theory and to support an aggravating factor in the penalty phase. U.S. Const. amends. V, VIII, XIV; Nevada Const. art. I, Sec. 3, 6 and 8; art. IV, Sec. 21.

Mr. Howard fully incorporates Claims One, Four and Five by reference herein.

SUPPORTING FACTS

Mr. Howard was charged by way of indictment with two counts of robbery and one count of murder, all with the use of a deadly weapon. Ex. 142. Count I of the indictment alleged a robbery on or about March 26, 1980 and further alleged that the victim of the robbery was Keith Kinsey. Count II of the indictment alleged a robbery on or about March 27, 1980 and further alleged that the victim of the robbery was George Monahan. Count III of the indictment alleged the murder of George Monahan on or about March 27, 1980.

At Mr. Howard's trial the jury was instructed that "murder of the first degree is murder which is . . . **(b) committed in the perpetration or attempted perpetration of robbery**. 2 ROA 229.

At Mr. Howard's trial the jury was instructed that:

> There are certain kinds of murder which carry with them conclusive evidence of malice aforethought. One of these classes of murder is murder committed in the perpetration or attempted perpetration of robbery. Therefore, a killing which is committed in the perpetration or attempted perpetration of robbery is deemed to be murder in the first degree, whether the killing was intentional, unintentional or accidental. The specific intent to perpetrate or attempt to perpetrate robbery must be proven beyond a reasonable doubt.

2 ROA 229.

The State of Nevada filed it's Notice of Intent to Seek the Death Penalty. 1 ROA 85-87. One of the aggravating circumstances alleged in the Notice is "the murder was committed while the person was engaged in the commission of or an attempt to commit any robbery."

Nevada is a "weighing" state, in which the existence of an aggravating factor is a necessary predicate to death eligibility, and in which aggravating factors are also weighed in the ultimate

calculus to determine the appropriate sentence to be imposed. NRS 200.030(4)(a).

The use of the same fact as a necessary element of first degree murder and as an additional "weight" in favor of the imposition of the death penalty results in an arbitrary, capricious and irrational sentence, because two separate increments of culpability are based on the same facts which do not rationally support both imposition of liability for the murder offense and aggravation of the same offense. McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004), reh. denied, McConnell v. State, 121 Nev. __, 107 P.3d 1287 (2005). See also Bejarano v. State, 122 Nev. __, 146 P.3d 265 (2006) (holding McConnell retroactive); Rippo v. State, 122 Nev. __, 146 P.3d 279 (2006) (same).

When Mr. Howard was charged with the offense of first degree murder based upon the theory of felony murder, the application of the aggravating circumstance of robbery was unconstitutional as the circumstance does not narrow the class of death eligible murderers as required by the both the Eighth Amendment of the United States Constitution and the case law of the United States Supreme Court. Woodson v. North Carolina, 428 U.S. 280, 296 (1976). A state's capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty. Hollaway v. State, 116 Nev. 732, 6 P.3d 987, 996 (2000); Arave v. Creech, 507 U.S. 463, 474 (1993); Zant v. Stephens, 462 U.S. 862, 877 (1983); McConnell, 121 Nev. at __, 107 P.3d at 1289. The Nevada statutes which permit the duplicative use of the robbery for the finding of first degree murder and for the imposition of the death penalty fail to narrow the class of person eligible for the death penalty because automatically instructing the sentencing body on the underlying felony in a felony murder case does nothing to aid the jury in its task of distinguishing between first degree homicides and defendants for the purpose of imposing the death penalty. Relevant distinctions dim, since all participants in a felony-murder, regardless of varying degrees of culpability, enter the sentencing stage with at least one aggravating factor against them. The felony murderer, in contrast to the premeditated murderer, enters the sentencing stage with one aggravating circumstance automatically charged against him. This disparity in sentencing treatment bears no relationship to legitimate distinguishing features upon which the death penalty might constitutionally rest.

The unconstitutional statutes which permitted this action by the trial court substantially prejudiced Mr. Howard, rendered the penalty proceeding fundamentally unfair, eroded the reliability

of the verdicts and had a substantial and injurious effect on the penalty phase verdicts.

CLAIM TWENTY-ONE:

Mr. Howard was denied his state and federal constitutional rights to effective assistance of counsel by trial counsels' failure to prepare adequately for his trial, to discover and present available evidence, and to argue on Mr. Howard's behalf on the basis of the evidence that was presented. U.S. Const. amends. V, VIII, XIV; Nevada Const. art. I, Sec. 3, 6 and 8; art. IV, Sec. 21.

Mr. Howard fully incorporates Claims Four, Seven, Nine, Ten, Fifteen, Sixteen, Seventeen, Eighteen, and Twenty-Three by reference herein.

SUPPORTING FACTS

Trial counsel failed to initiate adequate contact with Mr. Howard in order to form an attorney-client relationship. Mr. Howard's first contact with Clark County Public Defender's office was a visit from Clark County Public Defender's investigator on December 1, 1982 (trial was scheduled to begin on January 10, 1983); thereafter, Mr. Howard only received visits from his trial counsel on the following dates: 12/29/82 or 12/30/82 - first attorney visit with Cooper & Peters; 1/2/83 - second attorney visit with Peters and Cooper; 1/7/83 - third attorney visit with Cooper and Franzen; 1/9/83 visit by Cooper; 1/10/83 visit by Cooper and Franzen; 1/27/83 visit by Franzen and Cooper; 3/24/83 visit by Franzen and Cooper; 4/20/83 visit by Cooper and Franzen; 5/1/83 visit by Cooper and Franzen; 6/16/83 visit by Cooper and Franzen. See Amended Petition, p.41, 8/20/2003.

Trial counsels' conflict of interest made the cooperation and assistance of Mr. Howard in the efforts of counsel impossible.

Mr. Howard was arrested on April 1, 1980, in California and charged with robbery with the use of a deadly weapon and theft/unlawful taking of a motor vehicle. See Amended Petition, p.42, 8/20/2003. Mr. Howard was represented in the California litigation by Charles Nacsin, Esq. The California litigation ended with the conviction and sentencing of Mr. Howard on May 27, 1982. Trial counsel failed to contact Charles Nacsin, Esq. and thus failed to learn the following:

A. After his arrest, Mr. Howard was initially detained in the San Bernardino County Jail.

B. Based upon his mental condition, on July 17, 1980 Mr. Howard was transferred to Patton State Hospital where he remained for one hundred eight (108) days. Ex. 150.

C. On December 12, 1980, Mr. Howard was transferred to Atascadero State Hospital for one hundred forty-nine (149) days. Mr. Howard remained at Atascadero State Hospital until April 7, 1981 when he was judged competent to stand trial.

D. During 1980 and 1981, a number of letters, medical reports, and certificates regarding Howard's mental state were submitted to the Superior Court and whose existence was known by attorney Charles Nacsin, Esq.

See Amended Petition, p.42, 8/20/2003.

By failing to contact Mr. Nacsin, Nevada trial counsel failed to obtain:

A. Available independent evidence that defendant was not competent to stand trial in Nevada based upon his actions and the Court's findings during the trial in California;

B. Available documents regarding Howard's being declared incompetent to stand trial in California;

C. Available documents that identified family members who could have been contacted for testimony at the penalty hearing.

Moreover, by failing to contact Mr. Nacsin, Nevada trial counsel were unable to refute the prosecution's untruthful contention that Dawana Thomas testified at trial in California without Mr. Howard challenging her testimony as privileged communications made during the marriage of Mr. Howard and Dawana Thomas. See Amended Petition, p.43, 8/20/2003.

Additionally, Nevada trial counsel were unable to refute the prosecution's unsupported contention that the fact that Dawana Thomas testified at the California trial, and her testimony was not challenged as a privileged marital communication, was evidence that Mr. Howard had never been married to her. Had trial counsel contacted Charles Nacsin, Esq., he would have informed Nevada counsel that it was at Mr. Howard's insistence that Ms. Thomas was present at the California trial, and that the DA in California had not planned on calling her. See Amended Petition, p.43, 8/20/2003. As Ms. Thomas was only present because Mr. Howard demanded that Mr. Nacsin call her as a witness for the defense, there was no invocation of the marital privilege by Mr. Howard. Mr. Howard's failure to invoke the marital privilege in his California trial was not evidence that he was not married to Ms. Thomas.

Trial counsel failed to obtain documents from Patton State Hospital and Atscadero State Hospital which were available pursuant to subpoena power (either through Nevada or the Interstate Compact), Exs. 150-51, and thus:

A. Failed to obtain available documents regarding Mr. Howard's being declared incompetent to stand trial in California which was very close in time to Mr. Howard's trial in Nevada and which would have provided independent evidence of his incompetence to stand trial in Nevada;

B. Failed to obtain available documents that identified family members who could have been contacted for testimony at the penalty hearing; and

C. Failed to obtain available records to corroborate Mr. Howard's testimony at the penalty hearing.

Trial counsel failed to obtain transcripts of robbery trial in California which were completed and available on November 1, 1982, which was several months before Mr. Howard's the initial trial date and five months before he actually began trial in Nevada. See Amended Petition, p.44, 8/20/2003. Trial counsels' failure to obtain these available independent records denied Mr. Howard his rights under the Fifth and Fourteenth Amendments to be competent to assist counsel in his own defense. These records would have supported a finding of incompetency of Mr. Howard at the time of trial in Nevada. Additionally, trial counsels' failure to obtain transcripts prevented Mr. Howard from being able to refute Dawana Thomas' inaccurate testimony at the Nevada trial that she testified in California that she was never the wife of Sam Howard, and that she testified about things that Mr. Howard had told her about the car theft and robbery with the gun.

Trial counsel failed to review medical records maintained by the Clark County Detention Center which indicate that on December 7, 1982, Mr. Howard felt that he was being harassed by the jail staff because the medical staff determined him eligible for general population from a psychiatric treatment aspect. See Amended Petition, p.45, 8/20/2003. This record is independent evidence that Mr. Howard's competency should have been challenged and could have been challenged by review of available records.

Trial counsel failed to obtain available documents, request a competency hearing prior to trial, and submit the available documents to support trial court finding Mr. Howard incompetent to

stand trial.

Trial counsel failed to follow the prescribed rules of court and failed to obtain a suppression hearing regarding Mr. Howard's in-custody statements to police officers.

Trial counsel failed to present and support a viable defense that Mr. Howard was legally insane at the time of the killing.

Trial counsel failed to object to the giving of unconstitutional jury instructions regarding the state of mind required for conviction, reasonable doubt, premeditation, and malice at the guilt phase of Mr. Howard's trial.

Trial counsel failed to review available visiting records maintained by the Clark County Detention Center (or the County Jail which was in existence at the time of Mr. Howard's pretrial incarceration), failed to discover records which indicated visits by friends: Tamara Durr (3/13/83); Joseph Gordon (4/10/83); Betty Richard (4/11/83, 4/12/83, 4/18/83, 4/24/83, 5/6/83, 5/12/83, 6/15/83 and 6/16/83) and Bobbie Wheeler (4/11/83 and 5/6/83) and records which also indicated that Richard and Wheeler came to visit on at least one of the same dates and times, and thus failed to discovery and investigate persons who may have testified at the penalty hearing and provided mitigation evidence for the consideration by the jury. See Amended Petition, p.46, 8/20/2003.

Trial counsel failed to obtain documents maintained by the California State Prison Archives Division, and failed to obtain available documents which identified names and addresses of family member (aunt Pinkie Williams) and girlfriend (Carol Walker) who could have been contacted for testimony at the penalty hearing. See Amended Petition, p.46, 8/20/2003.

Trial counsel failed to review other records maintained by the Clark County Detention Center and thus failed to discover a January 10, 1983, Memorandum from Correctional Training Facility in Soledad, CA with a request by their inmate Benjamin D. Evans Sr #C-46867 to correspond with Mr. Howard which was granted on January 14, 1983. See Amended Petition, p.46, 8/20/2003. Trial counsels' failure to review these records prevented them from discovering and investigating another possible person to testify at the penalty hearing.

Trial counsel failed to obtain medical records from San Bernardino County Medical records regarding Mr. Howard's attempted suicide on April 3, 1980, and subsequent diagnosis of

suicidal/depression and failed to obtain available records to introduce at penalty hearing regarding mental illness of Mr. Howard as a mitigating circumstance. Exs. 150-53.

Trial counsel failed to obtain Mr. Howard's military records, which were available pursuant to subpoena power (either through Nevada or the Interstate Compact) and thus failed to obtain independent evidence which would have corroborated Mr. Howard's testimony at the penalty hearing regarding the awards received and participation in counterinsurgency operations in vicinity of Danang, Vietnam. Ex. 154.

Trial counsel failed to explain to Mr. Howard what it meant to proffer evidence of mitigating circumstances at the penalty phase. As a result, Mr. Howard did not understand "mitigation" or what purpose it served and thus he was not aware that the introduction of complete and extensive evidence regarding his military record , mental health history, and traumatic adolescence experience (murder of his sister and mother by his father) would have positively benefitted him during the penalty phase of the his trial. See Amended Petition, p.47, 8/20/2003.

Trial counsel failed to object to the giving of the unconstitutional jury instruction during the penalty phase regarding "reasonable doubt."

Trial counsel failed to object to the numerous instances of prosecutorial misconduct during the closing argument at the penalty stage.

Trial counsel failed to refute the prosecution's argument regarding future dangerousness by failing to call jail personnel and fellow inmates as well as to document and present psychiatric testimony that Mr. Howard was not a threat to the jail population if granted life imprisonment by the jury. See Amended Petition, p.48, 8/20/2003.

Trial counsel failed to object to the trial court's limitation of the mitigating circumstances, to be considered by the jury at the conclusion of the penalty hearing, to the statutory factor of "any other mitigating circumstance."

Trial counsel failed to object to the trial court's instruction and verdict form which were submitted to the jury, at the conclusion of the penalty hearing, which required a unanimous finding with regards to the existence of any mitigating circumstance.

Trial counsel failed to conduct any investigation into Mr. Howard's background and failed

to develop the following available information which should have been presented to Mr. Howard's jury at the time of the penalty phase:

A. Sam Howard, Jr. was born to Sam Howard and Marie Jackson on August 18, 1948. Mr. Howard's mother and father were married on March 8, 1947 in Clanton, Alabama. Mr. Howard's father was twenty-nine (29) years of age and his mother was nineteen (19) years old when they married. While Mr. Howard's father was originally from Montgomery, Alabama, his mother as from Selma, Alabama, they met, married and lived in Clanton, Alabama.

B. In the 1950's, the area of Alabama where Mr. Howard grew up was still very much segregated. In fact, Alabama was the most racially segregated state in the United States. Life was very hard for blacks in Alabama. Blacks were not allowed to use the same water fountains as the whites. Blacks were not allowed to eat at the same restaurants. Blacks were also not allowed to use the same restrooms. There were signs all over town that said "Colored Only." The black families were all poor. The blacks worked mainly at farm hand jobs or other handyman-type jobs. The only solace black families had was to attend church and beg God to make their lives better.

C. The atmosphere in Alabama caused blacks to feel oppressed. They often drank and took their frustrations out on each other. The black children were afraid and confused about their lives. Things were not fair and times were very hard.

D. If a black person were to drive through a small town, the sheriff or local police would stop their vehicle for no reason. Most blacks lived in fear of the local authorities.

E. In the 1950's, the KKK was in full force in Clanton, Alabama. The KKK members rode through the streets at night fully robed and blew their horns in order to instill, and maintain, fear. Alabaman blacks were denigrated on a daily basis. There were many unsolved black murders. The black churches were bombed, and many black men were castrated by the KKK.

F. The town of Clanton had a very small black community. In fact, "going across town" meant that you were going to travel six (6) blocks away. It was common knowledge that Sam Howard Sr. had a violent temper, especially when he was drinking. Sam Sr.'s first marriage was to a woman named, Julia Hosecloth. No one really knew Sam Sr. or Julia during their marriage. There were, however, stories that Julia had been killed by Sam Sr. who, it was rumored, "cut out her guts"

and "stabbed her to death." In actuality, Julie Hosecloth died of Locked Bowel Syndrome.

G. Some time after Julie's death, Sam Sr. met Marie Jackson in Clanton, Alabama. Marie's family attempted to dissuade her from marrying Sam Sr. based on his prior marriage and the rumors about how his first wife, Julia, had died. Everyone knew, however, that Sam Sr. was a mean drunk and was dangerous to be around when he was drinking. Sam Sr. was often beaten by the police due his constant drunken behavior. At that time, Chilton County, Alabama, was dry. Therefore, the only alcohol Sam Sr. could have obtained was bootleg whiskey, which was only available one county over. Despite her family's warnings, Marie married Sam Sr.

H. Marie Howard gave birth to Sam Howard Jr. on August 18, 1948, in Clanton, Alabama. On November 22, 1950, Marie gave birth to Diane Howard. Thereafter, on June 30, 1951, Marie gave birth to her third child, Elizabeth Howard. The Howard family was poor.

I. During their marriage, Sam Sr. worked for Hayes Chevrolet Company in Clanton, and Marie worked as a housekeeper/cook for the Headley family. There were rumors that Marie was cheating on Sam Sr., however, no one knew for sure whether this was true. It was true that their relationship was very volatile. Otis Reese, Marie's brother, related that Sam Sr. would beat Marie, she would kick him out, then later she would take him back. Marie's family tried to get her to leave Sam Sr. because of the abuse she sustained at his hand. Otis Reese eventually stopped visiting his sister due to the abusive way that Sam Sr. treated her. Sam Sr. was also very violent with his children. Mr. Reese stated that at one point during his daughter's life, Sam Sr. cut Diane's legs so badly that it almost crippled her.

J. On the evening of Saturday, October 6, 1951, Sam Sr. and Marie were involved in a family argument. The newspaper articles located from that date state that Sam Sr. used a .22 automatic rifle to shoot and kill Marie and Elizabeth Howard. Marie was twenty-three (23) years old and Elizabeth was three (3) months and six (6) days old. Sam Jr. was just over three (3) years old when he witnessed this incident. After seeing his drunk father kill his mother and little sister, Elizabeth, Mr. Howard hid. This was after his father threatened Mr. Howard that he would get him next time. Mr. Howard's other sister, Diane, however, was not so lucky and was shot in the upper thigh area. Sam Sr. was tried for the murder of his wife and daughter, as well as the assault

on Diane. He was sentenced to two (2) terms of life imprisonment at the Alabama State Penitentiary. The Circuit Court records indicate that Sam Sr. was suspected of a second murder after being released from prison. Investigation in Alabama did not reveal whether he was ever convicted of this second crime. However, James Childrey, who is Mr. Howard's cousin, advised that he is aware that Sam Sr. was released from prison and that he later killed a man and was sent to prison a second time. Mr. Childrey reported that he visited Sam Sr. in prison at Camp Kilby in Alabama. Sam Sr. eventually died in prison on July 20, 1986.

K. After witnessing his mother's murder, Mr. Howard and his little sister, Diane, were forced to live with relatives who were very old and poor and could not take care of two (2) small children on long-term basis. Mr. Howard's cousin, Jimmie Baker, recalled that Mr. Howard never seemed the same. After the murders, Mr. Howard often cried for his "Mamma!" His family tried to tell him that she was no longer alive, and Mr. Howard just cried. The day after the murders, Mr. Howard cried "I want to go home." At three (3) years old, Mr. Howard's mother was his life. Jimmie Baker recalled that after the murder of his mother Mr. Howard always seemed to be seeking the kind of love one receives from their mother. Mr. Howard seemed to go through the motions of being a regular child, but always seemed as if something were missing.

L. Mr. Howard and Diane later went to live with the Dudley Family in Alabama. The Dudley family had no children and were the unofficial version of a foster-type home for black children in the 1950s in Alabama.

M. The 1958 Alabama "Colored Family Census Card" listed Mr. Howard and Diane as living at 406 13th Street, which was the Dudley's residence. Mr. Howard and his sister, Diane, attended elementary school at the Holy Ghost Mission School in Marbury, Alabama, which was run by nuns at that time. The nuns drove into town (Clanton) everyday to pick the children up for school in their station wagon. The nuns returned the children home at the end of the day. Eventually the state school authorities discovered that Mr. Howard was being kept home by the Dudleys to help work at the house and in the fields. Because he was not attending school, Mr. Howard was taken to Mt. Meigs reform school when he was approximately twelve (12) years old.

N. Mr. Howard's Aunt, Pinkie Williams, who lived in Jamaica, New York, drove

to Alabama and brought Mr. Howard to live with her when he was approximately sixteen (16) years old. At that time, Mr. Howard was still living at Mt. Meigs, a juvenile facility, in Alabama. Mt. Meigs was considered a "glorified orphanage" where a lot of kids with no place else to go ended up.

O. Mr. Howard's cousin, Winston Williams, who is the youngest child of Pinkie Williams, recalled that Mr. Howard's early childhood had a "great effect" on Mr. Howard.

P. In August of 1967, when Mr. Howard was 19 years old, he enlisted in the United States Marine Corp. After bootcamp, he was sent to Vietnam from early 1968 until he was discharged in July of 1969. After Vietnam, Mr. Howard's family noted a change in him, stating that he seemed "harder." His family felt that the Marines had "brainwashed" Mr. Howard into being a killer. Although not formally diagnosed with any mental problems at that time, Mr. Howard was not the same. He "wasn't normal."

Q. Mr. Howard's cousin, Winston Williams, declared that when Mr. Howard came back from Vietnam he was "changed." Winston felt that Mr. Howard had different personalities and Winston noted that sometimes Mr. Howard's voice would change suddenly. Mr. Howard often became angry, hostile and violent. Winston believed Mr. Howard could have some mental problems.

R. Mr. Howard met Cynthia Harris while living in Jamaica, New York. They only knew each other briefly. However, as a result of this relationship, David Harris, was born on November 14, 1977. Mr. Howard was not aware of this child for many years.

S. Years later, Mr. Howard met Dawana Thomas. This was a very volatile relationship. Ms. Thomas related that Mr. Howard was obsessed with Vietnam. She reported that every time a plane would fly overhead, Mr. Howard got out of the car to salute it. Ms. Thomas reported that Mr. Howard suffered from nightmares, often mumbled in his sleep and woke up with cold sweats. Mr. Howard told her that he was dreaming of shooting at "gooks," but they kept popping back up so he would cut off their ears. Ms. Thomas thought Mr. Howard was "shell-shocked," but could only help by holding him while he cried and told her about these nightmares. She recounted that Mr. Howard often rocked himself back and forth, paced and acted like a caged animal. He had wild mood swings - violent one minute, then crying and asking for forgiveness the

next. Their relationship substantially ended in 1980, with Mr. Howard's arrest in connection with the instant case. See Amended Petition, pp.55-56, 8/20/2003.

The Sixth Amendment right to effective assistance of counsel extends to the sentencing phase of a capital case. Silva v. Woodford, 279 F.3d 825, 836 (9th Cir. 2002). Under the prevailing standards at the time of Mr. Howard's trial, counsel had an obligation to conduct a thorough investigation of Mr. Howard's background. Williams v. Taylor, 529 U.S. 362, 395-98 (2000); Strickland v. Washington, 466 U.S. 668, 688 (1984); Gardner v. Florida, 430 U.S. 349 (1977). When it comes to the penalty phase of a capital trial, "it is imperative that all relevant mitigating information be unearthed for consideration." Caro v. Calderon, 165 F.3d 1223, 1227 (9th Cir. 1999). "'It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.'" Rompilla v. Beard, 545 U.S. 374, 387 (2005) (quoting ABA Standard 4-4.1). See also ABA Guideline 11.4.1. The Nevada Supreme Court has also clearly held that defense counsel in a capital case is obligated to diligently investigate mitigation evidence. See Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 281 (1996).

Trial counsels' failure to adequately investigate Mr. Howard's background violated his state and federal constitutional rights to due process, the effective assistance of counsel, and a reliable sentence.

CLAIM TWENTY-TWO:

Mr. Howard was deprived of his state and federal constitutional rights to due process of law, equal protection of the laws, effective assistance of counsel, and a reliable sentence by appointed counsel's failure to provide effective assistance of counsel on appeal. U.S. Const. amends. V, VI, VIII, XIV; Nevada Const. art. I, Sec. 3, 6 and 8; art. IV, Sec. 21.

SUPPORTING FACTS

Appointed counsel failed to raise meritorious issues on the direct appeal to the Nevada Supreme Court. Mr. Howard fully incorporates Claims One through Thirty-Two by reference herein.

Counsel did not have any reasonable or tactical justification for failing to raise these issues. Counsel failed to conduct adequate legal and factual investigation and did not recognize the existence of these issues. When a state guarantees criminal defendants the right to appellate review, the right to effective assistance of counsel extends beyond the state court trial to the first appeal as of right in accordance with the Due Process and Equal Protection Clauses of the United States Constitution. Evitts v. Lucey, 469 U.S. 387, 392-93 (1985) (citing Griffin v. Illinois, 351 U.S. 12, 18-20 (1956); Douglas v. California, 372 U.S. 353, 356-57 (1963)); see also Mapes v. Coyle, 171 F.3d 408, 427-28 (6th Cir. 1999) (remanding for an evidentiary hearing on the ineffective assistance of appellate counsel claim); Strickland v. Washington, 466 U.S. 668; ABA Crim. Just. Stand. 21-3.2 (appellate counsel should "consider all issues that might affect the validity of the judgment of conviction and sentence, including any that might require initial presentation in a post-conviction proceeding").

Mr. Howard was prejudiced by counsel's failure to raise these claims, as it is reasonably probable that a result more favorable to him would have been obtained after an effective appeal.

CLAIM TWENTY-THREE:

Mr. Howard was deprived of his right to counsel, to due process of law, to equal protection of the law and to a reliable sentence in violation of his state and federal constitutional rights by the failure of appointed counsel in the state post-conviction proceedings to adequately investigate and develop all above noted issues. U.S. Const. amends. V, VIII, XIV; Nevada Const. art. I, Sec. 3, 6 and 8; art. IV, Sec. 21.

Mr. Howard fully incorporates Claims One through Thirty-Two by reference herein.

SUPPORTING FACTS

Mr. Howard has a federal constitutional right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution during habeas litigation. See Justice Steven's concurrence and dissent to Ohio Adult Parole Authority v. Woodward, 523 U.S. 272 (1998); see also Morrissey v. Brewer, 408 U.S. 471 (1971), Gagnon v. Scarpelli, 411 U.S. 778 (1983), Pennsylvania v. Finley, 481 U.S. 551 (1987), and, Yates v. Aiken, 484 U.S. 211 (1988). Due process cannot be achieved in the prior *habeas* litigation without review, investigation and development of all above noted issues. Counsel did not perform a legally and factually sufficient investigation and thus failed to discover all meritorious issues arising from Mr. Howard's conviction and sentence.

Mr. Howard was not informed by counsel of all meritorious claims which could be raised in the post-conviction proceeding, and he did not knowingly and intelligently waive, or authorize counsel to waive any claim that could be made at this proceeding.

Mr. Howard was prejudiced by post-conviction counsel's failure to provide due process of law during the habeas litigation which is required by the federal constitution under the fifth and fourteenth amendments. The state district court relied upon inaccurate information in rendering it's decision denying relief at the post-conviction stage of Mr. Howard's litigation and it is reasonably probable that the district court would have granted relief if it had been presented with all of his claims and supporting evidence.

CLAIM TWENTY-FOUR

Mr. Howard was deprived of his state and federal constitutional rights to due process of law, to equal protection of the laws, to a reliable sentence and to be free of cruel and unusual punishment by the sentence of death imposed by the Nevada judicial process. U.S. Const. amends. V, VIII, XIV; Nevada Const. art. I, Sec. 3, 6 and 8; art. IV, Sec. 21.

Mr. Howard fully incorporates Claims Twenty-Five, Twenty-Seven, Twenty-Eight, Twenty-Nine, Thirty, and Thirty-One by reference herein.

SUPPORTING FACTS

The administration of the Nevada death penalty has resulted in irrational, arbitrary and capricious imposition and non-imposition of sentences of death.

As a result of plea bargaining practices, and imposition of sentences by juries and three-judge panels, sentences of less than death have been imposed for offenses which are more aggravated than the one which Mr. Howard was convicted, and in situations where the amount of mitigating evidence was less than the mitigation both of the present offenses and the Mr. Howard's background.

The arbitrariness of the state procedural system is prejudicial per se and requires vacation of the sentence.

CLAIM TWENTY-FIVE

Mr. Howard's conviction and death sentence are invalid under state and federal constitutional guarantees of due process of law, equal protection of the laws, and a reliable sentence due to the failure of the Nevada Supreme Court to conduct fair and adequate appellate review. U.S. Const. amends. V, VI, VIII, & XIV; Nevada Const. art. I, Sec. 3, 6; art. IV, Sec. 21.

Mr. Howard fully incorporates Claims Twenty-Four, Twenty-Seven, Twenty-Nine and Thirty by reference herein.

SUPPORTING FACTS

The Nevada Supreme Court's review of cases in which the death penalty has been imposed is constitutionally inadequate. The opinions rendered by the court, as in this case, have been consistently arbitrary, unprincipled and result-oriented.

Under Nevada law, the Nevada Supreme Court had a duty to review Mr. Howard's death sentence to determine: (a) whether the evidence supports the finding of an aggravating circumstance or circumstances; (b) whether the sentence of death was imposed under the influence of passion, prejudice or other arbitrary factor; (c) whether the sentence of death is excessive considering both the crime and the defendant. NRS 177.055(2). That review includes the necessity of reviewing whether the aggravating factors are constitutionally valid and are applicable to the facts of the case under review. Such appellate review was also required as a matter of constitutional law to ensure the fairness and reliability of Mr. Howard's death sentence.

The Nevada Supreme Court's opinion affirming Mr. Howard's conviction and sentence of death provides almost no indication that the mandatory review of whether the sentence was imposed under the influence of passion, prejudice, or other arbitrary factor was ever conducted in this case, other than a single boilerplate reference to that issue in the opinion. Mr. Howard was informed and believes, and therefore alleges, that the statutory reference is contained in a formatted "macro" (a word-processing feature that prompts the repetition of word groups) in the Nevada Supreme Court's computer system, which the court staff have been instructed to insert at the end of every death penalty affirmance. The Nevada Supreme Court in this case and in many other cases, has accordingly purported to fulfill its duty to provide so-called mandatory "review" of death sentences

by instructing its staff members to push a button on a computer.

The Supreme Court has never articulated any basis for conducting the review required by NRS 177.055(2). Specifically, the Nevada Supreme Court has never, in this case or any other, made clear what standards apply to such review, and it has not published any rule or decision giving notice of what cases it uses for comparison in its review, of what evidence it will consider, or of how counsel should litigate the issue.

Had the Nevada Supreme Court conducted the type of appellate review required by statutory law and by the Constitution, it could not have upheld Mr. Howard's conviction and death sentence. The reasons why Mr. Howard's conviction and sentence cannot withstand scrutiny are alleged throughout this petition, and Mr. Howard incorporates each and every factual allegation as if fully set forth herein.

The lack of adequate appellate review in this case is symptomatic of an irrational appellate review process in Nevada as a whole. The Nevada Supreme Court is among the busiest appellate courts in the nation; its seven justices decide approximately 1,800 cases per year, and in 2005, the court had over 2000 filings. Consequently, the members of the Nevada Supreme Court have virtually no knowledge about the facts and law surrounding most of the cases they are reviewing. Two former members of the Nevada Supreme Court have publicly declared that they normally do not read the briefs but rely on the bench memorandum prepared by staff to represent the arguments of counsel and the facts in the record. State Bar of Nevada, "Advocacy before the Supreme Court" (Reno, February 1, 1996). One justice referred to the former requirement of filing six copies of the briefs as "perpetuat[ing] the myth that we read each brief. That simply isn't true." (Tape 1, Session 1.) A second justice characterized the bench memorandum as a "necessary evil," and later added "it would be far better if we read your briefs before oral argument and digested them . . . the time simply isn't there to do that." The justices have also publicly acknowledged that they do not personally read appellate records, explaining that "reading the entire record [is] what the law clerks do." (Tape 2, Session 6.)

The Nevada Supreme Court's failure to provide fair and adequate appellate review was prejudicial in the circumstances of Mr. Howard's case. The consideration of mitigation evidence

on direct review, the determination of whether aggravating circumstances were proven beyond a reasonable doubt, excessiveness review and a review for passion and prejudice can be performed only by the state appellate court. The failure to provide such review here violated Mr. Howard's state and federal constitutional rights to due process and to a reliable sentencing determination. Therefore, the constitutional error had a substantial and injurious effect on the verdict and Mr. Howard's conviction and death sentence must be reversed. Mr. Howard is entitled to relief in the form of a new trial and new sentencing proceeding.

The above stated claim is of obvious merit. Competent appellate and post-conviction counsel would have raised and litigated this meritorious issue on direct appeal and in state post-conviction. There is no reasonable appellate strategy, reasonably designed to effectuate Mr. Howard's best interest, that would justify appellate counsel's failure in this regard. Mr. Howard is entitled to relief in the form of a new trial and sentencing hearing.

CLAIM TWENTY-SIX

Mr. Howard's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, and a reliable sentence because execution by lethal injection violates the constitutional prohibition against cruel and unusual punishments. U.S. Const. amends. V, VI, VIII, & XIV; International Covenant on Civil and Political Rights, art. 7; Nevada Const. art. I, Sec. 3, 6; art. IV, Sec. 21.

Mr. Howard fully incorporates Claims Twenty-Four, Twenty-Eight, Twenty-Nine, Thirty, and Thirty-One by reference herein.

SUPPORTING FACTS

1. **Lethal Injection Constitutes Cruel and Unusual Punishment**

Nevada law requires that execution be inflicted by an injection of a lethal drug. NRS 176.355(1).

The Nevada Department of Corrections did not release a redacted copy of its "Confidential Execution Manual," last revised February 2004, until April 2006. Ex. 159. The execution manual specifies that execution by lethal injection will be carried out using 5 grams of sodium thiopental, a barbiturate typically used by anesthesiologists to induce temporary anesthesia; 20 milligrams of Pavulon, a paralytic agent; and 160 milliequivalents of potassium chloride, a salt solution that induces cardiac arrest. Id.. Sodium Pentothal is a brand name for the generic drug sodium thiopental. Pavulon is a brand name for the generic drug pancuronium bromide.

Competent physicians cannot administer lethal injection because the ethical standards of the American Medical Association prohibit physicians from participating in an execution other than to certify that a death has occurred. American Medical Association, House of Delegates, Resolution 5 (1992); American Medical Association, Judicial Counsel, Current Opinion 2.06 (1980). Thus, lethal injection is not administered by competent medical personnel.

Lethal injection conducted by untrained personnel using the three drugs specified by Nevada's protocol creates an unnecessary risk of undue pain and suffering because Nevada's procedures for inducing and maintaining anesthesia fall below the medical standard of care for the use of anesthesia prior to conducting painful procedures. See Ex. 163 at ¶14-15, 18. The

humaneness of execution by lethal injection is dependent upon the proper administration of the anesthetic agent, sodium thiopental. In the surgical arena, general anesthesia can be administered only by physicians trained in anesthesiology or nurses who have completed the necessary training to be Certified Registered Nurse Anesthetists (CRNAs). Id. at ¶ 23. Nevada's execution manual does not specify what, if any, training in anesthesiology the person(s) administering the lethal injection may have. If the untrained executioner fails to successfully deliver a quantity of sodium thiopental sufficient to achieve adequate anesthetic depth, the inmate will feel the excruciating pain of the subsequent injections of pancuronium bromide and potassium chloride. Id. at ¶ 17; Leonidas G. Koniaris et al., Inadequate anaesthesia in lethal injection for execution, The Lancet, Vol. 365, April 16, 2005, at 1412-14, See Ex. 162. According to Dr. Mark Heath, a board-certified anaesthesiologist who has reviewed NDOC's redacted Execution Manual,

> [i]f an inmate does not receive the full dose of sodium thiopental because of errors or problems in administering the drug, the inmate might not be rendered unconscious and unable to feel pain, or alternatively might, because of the short-acting nature of sodium thiopental, regain consciousness during the execution.

See 163. Moreover, according to Dr. Heath:

> [i]f sodium thiopental is not properly administered in a dose sufficient to cause the loss of consciousness for the duration of the execution procedure, then it is my opinion held to a reasonable degree of medical certainty that the use of pancuronium places the condemned inmate at risk for consciously experiencing paralysis, suffocation and the excruciating pain of the intravenous injection of high dose potassium chloride.

Id.

Nevada's lethal injection procedure is vulnerable to many potential errors in administration that would result in a failure to administer a quantity of sodium thiopental sufficient to induce the necessary anesthetic depth. The risk of error is compounded by Nevada's use of inadequately trained personnel. Id. at ¶ 21-22. The potential errors include: errors in preparing the sodium thiopental solution (because sodium thiopental has a relatively short shelf-life in liquid form, it is distributed as a powder and must be mixed into a liquid solution prior to the execution, id. at ¶ 19, errors in labeling the syringes, errors in selecting the syringes during the execution, errors in correctly injecting the drugs into the IV, leaks in the IV line, incorrect insertion of the catheter, migration of

the catheter, perforation, rupture, or leakage of the vein, excessive pressure on the syringe plunger, errors in securing the catheter, and failure to properly flush the IV line between drugs. Id. at ¶ 22.

Nevada's lethal injection protocol further falls below the standard of care for administering anesthesia because it prevents any type of effective monitoring of the inmate's condition or whether he is anesthetized or unconscious. Id. at ¶ 26. In Nevada, during the injection of the three drugs, the executioner is in a room separate from the inmate and has no visual surveillance of the inmate:

> Accepted medical practice dictates that trained personnel monitor the IV lines and the flow of anesthesia into the veins through visual and tactile observation and examination. The lack of any qualified personnel present in the chamber during the execution thwarts the execution personnel from taking the standard and necessary measures to reasonably ensure that the sodium thiopental is properly flowing in to the inmate and that he is properly anesthetized prior to the administration of the pancuronium and potassium.

Id. at ¶ 26. The American Society of Anesthesiologists requires that "[q]ualified anesthesia personnel . . . be present in the room throughout the conduct of all general anesthetics" due to the "rapid changes in patient status during anesthesia." Id. at Attachment D [American Society of Anesthesiologists, Standards for Basic Anesthetic Monitoring].

Nevada's lethal injection protocol fails to account for the foreseeable circumstance that the executioner(s) will be unable to obtain intravenous access by a needle piercing the skin and entering a superficial vein suitable for the reliable delivery of drugs. See Ex. 163 at ¶ 33. Inability to access a suitable vein is often associated with past intravenous drug use by the inmate. However, medical conditions such as diabetes or obesity, individual characteristics such as heavily pigmented skin or muscularity, and the nervousness caused by impending death can impede peripheral IV access. See Deborah W. Denno, When Legislatures Delegate Death: the Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What it Says About Us, 63 Ohio St. L.J. 63, 109-10 (2002). Typically, when the executioner is unable to find a suitable vein, the executioner resorts to a "cut down," a surgical procedure used to gain access to a functioning vein. When performed by a non-physician, the risks are great. When deep incisions are made there is a risk of rupturing large blood vessels causing a hemorrhage, and if the procedure is performed on the neck, there is a risk of cardiac dysrhythmia (irregular electrical activity in the heart) and pneumothorax (which induces the sensation of suffocation). In addition, a cut-down causes severe physical pain and obvious emotional

stress. This procedure should take place only in a hospital or other appropriate medical setting and should be performed only by a qualified physician with specialized training in that area. See Ex.160 (Amicus Brief of Drs. Dill, Gogan, Kalkut, Mitchell, Mobley, and Winternitz on Writ of Certiorari to the United States Supreme Court, Nelson v. Campbell, No. 03-6821, dated Feb. 4, 2004). Nevada's execution manual recognizes that a "sterile cut-down tray" may be required equipment "if necessary," see Ex. 159 at 7, but does not specify who determines when a cut down is necessary, how that determination is made, or the training or qualifications of the personnel who would perform such a cut-down.

If the inmate is not adequately anesthetized by the successful administration of sodium thiopental, he will suffer the pain of the remaining two injections. The choice of "potassium chloride to cause cardiac arrest needlessly increases the risk that a prisoner will experience excruciating pain prior to execution" because the "[i]ntravenous injection of concentrated potassium chloride solution causes excruciating pain." See Ex. 163 at ¶ 12. The inmate would be consciously aware and feel the pain of the potassium-induced fatal heart attack. Id.

Pancuronium bromide, the second drug in the lethal injection process, is a paralytic agent that paralyzes all voluntary muscles. This includes paralysis of the diaphragm and other respiratory muscles, which causes the inmate to cease breathing. Pancuronium "does not affect sensation, consciousness, cognition, or the ability to feel pain or suffocation." Id. at ¶ 37 (emphasis added). If the inmate is not adequately anesthetized prior to the pancuronium injection, the pancuronium will cause the inmate to consciously experience a "torturous suffocation" lasting "at least several minutes." Id. at ¶ 39-40.

Pancuronium is "unnecessary" and "serves no legitimate purpose" in the execution process because both sodium thiopental and potassium chloride, if properly administered in the doses specified in the execution manual, are adequate to cause death. Id. at ¶ 37, 44. Pancuronium "compounds the risk that an inmate may suffer excruciating pain during his execution" because it masks any physical manifestations of pain that an inadequately anesthetized inmate would feel during pancuronium-induced suffocation and potassium-induced cardiac arrest. Id. at ¶ 37, 42. "[U]sing barbiturates [such as sodium thiopental] and paralytics [such as pancuronium] to execute human beings poses a serious risk of cruel, protracted death" because "[e]ven a slight error in dosage

or administration can leave a prisoner conscious but paralyzed while dying, a sentient witness of his or her own slow, lingering asphyxiation." Chaney v. Heckler, 718 F.2d 1174, 1191 (D.C. Cir. 1984), reversed on other grounds, 470 U.S. 84 (1985) (citing Royal Commission on Capital on Capital Punishment, 1949-1953 Report (1953)). By paralyzing the inmate and preventing physical manifestations of pain, pancuronium places a "chemical veil" on the lethal injection process that precludes observers from knowing whether the prisoner is experiencing great pain. See Ex. 163 at ¶ 44; Adam Liptak, "Critics Say Execution Drug May Hide Suffering," N.Y. Times (October 7, 2003).

Nevada's lethal injection protocol falls below the standard of care for euthanizing animals. The American Veterinary Medical Association (AVMA) allows euthanasia by potassium chloride, but mandates that animals be under a surgical plane of anesthesia prior to the administration of potassium. See Ex. 163, Attachment B [American Veterinary Medical Association, 2000 Report of the American Veterinary Medical Association Panel on Euthanasia] at 680-81. "It is of utmost importance that personnel performing this technique are trained and knowledgeable in anesthetic techniques, and are competent in assessing anesthetic depth appropriate for administration of potassium chloride intravenously." Id. at 681. "A combination of phenobarbital [a barbiturate similar to, but longer acting than, sodium thiopental] with a neuromuscular blocking agent is not an acceptable euthanasia agent." Id. at 680. Nevada is one of at least 30 states that prohibit the use of neuromuscular blocking agents in euthanizing animals, either expressly or by mandating the use of a specific euthanasia agent such as phenobarbital. See Ala. Code § 34-29-131; Alaska Stat. § 08.02.050; Ariz. Rev. Stat. Ann. § 11-1021; Cal. Bus. & Prof. Code § 4827; Colo. Rev. Stat. § 18-9-201; Conn. Gen. Stat. § 22-344a; Del. Code Ann. tit. 3, § 8001; Fla. Stat. § 828.058; Ga. Code Ann. § 4-11-5.1; 510 Ill. Comp. Stat. 70/2.09; Kan. Stat. Ann. § 47-1718(a); La. Rev. Stat. Ann. § 3:2465; Me. Rev. Stat. Ann. tit. 17, § 1044; Md. Code Ann., Crim. Law, § 10-611; Mass. Gen. Laws ch. 140, § 151A; Mich. Comp. laws § 333.7333; Mo. Rev. Stat. § 578.005(7); Neb. Rev. Stat. § 54-2503; Nev. Rev. Stat. Ann. § 638.005; N.J. Stat. Ann. § 4:22-19.3; N.Y. Agric. & Mkts. Law § 374; Ohio Rev. Code Ann. § 4729.532; Okla. Stat. tit. 4, § 501; Ore. Rev. Stat. § 686.040(6); R.I. Gen. Laws § 4-1-34; S.C. Code Ann. § 47-3-420; Tenn. Code Ann. § 44-17-303; Tex. Health & Safety Code Ann. § 821.052(a); W. Va. Code § 30-10A-8; Wyo. Stat. Ann. § 33-30-216. Nevada's lethal

injection statute would violate state law if applied to a dog. The consistent trend in professional norms and statutory regulation of animal euthanasia, places the method currently practiced by Nevada is outside the bounds of evolving standards of decency.

There have been numerous documented cases of botched lethal injection executions that have produced prolonged and unnecessary pain, including:

Charles Brooks, Jr. (December 7, 1982, Texas): The executioner had a difficult time finding a suitable vein. The injection took seven minutes to kill. Witnesses stated that Brooks "had not died easily." See Deborah W. Denno, Getting to Death: Are Executions Unconstitutional?, 82 Iowa L. Rev. 319, 428-29 (1997) ("Denno-1"); Deborah W. Denno, When Legislatures Delegate Death: the Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What it Says About Us, 63 Ohio St. L.J. 63, 139 (2002) ("Denno-2").

James Autry (March 14, 1984, Texas): Autry took ten minutes to die, complaining of pain throughout. Officials suggested that faulty equipment or inexperienced personnel were to blame. See Denno-1 at 429; Denno-2 at 139.

Thomas Barefoot (October 30, 1984, Texas): A witness stated that after emitting a "terrible gasp," Barefoot's heart was still beating after the prison medical examiner had declared him dead. See Denno-1 at 430; Denno-2 at 139.

Stephen Morin (March 13, 1985, Texas): It took almost 45 minutes for technicians to find a suitable vein, while they punctured him repeatedly, and another eleven minutes for him to die. See Denno-1 at 430; Denno-2 at 139; Michael L. Radelet, Post-Furman Botched Executions, Death Penalty Information Center, available at http://www.deathpenaltyinfo.org ("Radelet").

Randy Woolls (August 20, 1986, Texas): Woolls had to assist execution technicians in finding an adequate vein for insertion. He died seventeen minutes after technicians inserted the needle. See Denno-1 at 431; Denno-2 at 139; Radelet; "Killer Lends A Hand to Find A Vein for Execution," L.A. Times, Aug. 20, 1986, at 2.

Elliot Johnson (June 24, 1987, Texas): Johnson's execution was plagued by repetitive

needle punctures and took executioners thirty-five minutes to find a vein. See Denno-1 at 431; Denno-2 at 139; Radelet; "Addict Is Executed in Texas For Slaying of 2 in Robbery," N.Y. Times, June 25, 1987, at A24.

Raymond Landry (December 13, 1988, Texas): Executioners "repeatedly probed" his veins with syringes for forty minutes. Then, two minutes after the injection process began, the syringe came out of Landry's vein, "spewing deadly chemicals toward startled witnesses." A plastic curtain was pulled so that witnesses could not see the execution team reinsert the catheter into Landry's vein. "After 14 minutes, and after witnesses heard the sound of doors opening and closing, murmurs and at least one groan, the curtain was opened and Landry appeared motionless and unconscious." Landry was pronounced dead twenty-four minutes after the drugs were initially injected. See Denno-1 at 431-32; Denno-2 at 139; Radelet.

Stephen McCoy (May 24, 1989, Texas): In a violent reaction to the drugs, McCoy "choked and heaved" during his execution. A reporter witnessing the scene fainted. See Denno-1 at 432; Denno-2 at 139; Radelet.

George Mercer (January 6, 1990, Missouri): A medical doctor was required to perform a surgical "cutdown" procedure on Mercer's groin. See Denno-1 at 432; Denno-2 at 139.

George Gilmore (August 31, 1990, Missouri): Force was used to stick the needle into Gilmore's arm. See Denno-1 at 433; Denno-2 at 139.

Charles Coleman (September 10, 1990, Oklahoma): Technicians had difficulty finding a vein, delaying the execution for ten minutes. See Denno- 1 at 433; Denno-2 at 139.

Charles Walker (September 12, 1990, Illinois): There was a kink in the IV line, and the needle was inserted improperly so that the chemicals flowed toward his fingertips instead of his heart. As a result, Walker's execution took eleven minutes rather than the three or four contemplated by the state's protocols, and the sedative chemical may have worn off too quickly, causing excruciating pain. When these problems arose, prison officials closed the blinds so that witnesses could not observe the process. See Denno-1 at 433- 34; Denno-2 at 139; Radelet; Niles Group Questions Execution Procedure, United Press International, Nov. 8,1992 (Lexis/Nexis file).

Maurice Byrd (August 23, 1991, Missouri): The machine used to inject the lethal dosage malfunctioned. See Denno-1 at 434; Denno-2 at 140.

Rickey Rector (January 24, 1992, Arkansas): It took almost an hour for a team of eight to find a suitable vein. Witnesses were separated from the injection team by a curtain, but could hear repeated, loud moans from Rector. See Denno-1 at 434-35; Denno-2 at 140; Radelet; Joe Farmer, "Rector's Time Came, Painfully Late," Arkansas Democrat Gazette, Jan. 26, 1992, at 1B; Marshall Frady, "Death in Arkansas," The New Yorker, Feb. 22, 1993, at 105.

Robyn Parks (March 10, 1992, Oklahoma): Parks violently gagged, jerked, spasmed and bucked in his chair after the drugs were administered. A news reporter witness said his death looked "painful and inhumane." See Denno-1 at 435; Denno-2 at 140; Radelet.

Billy White (April 23, 1992, Texas): White's death required forty-seven minutes because executioners had difficulty finding a vein that was not severely damaged from years of heroin abuse. See Denno-1 at 435-36; Denno-2 at 140; Radelet.

Justin May (May 7, 1992, Texas): May groaned, gasped and reared against his restraints during his nine-minute death. See Denno-1 at 436; Denno-2 at 140; Radelet; Robert Wernsman, "Convicted Killer May Dies," Item (Huntsville, Tex.), May 7, 1992, at 1; Michael Graczyk, "Convicted Killer Gets Lethal Injection," Herald (Denison, Tex.), May 8, 1992.

John Gacy (May 10, 1994, Illinois): The lethal injection chemicals solidified, blocking the IV tube. The blinds were closed for ten minutes, preventing witnesses from watching, while the execution team replaced the tubing. See Denno-1 at 435; Denno-2 at 140; Radelet; Scott Fornek & Alex Rodriguez, "Gacy Lawyers Blast Method: Lethal Injections Under Fire After Equipment Malfunction," Chicago Sun-times, May 11, 1994, at 5; Rich Chapman, "Witnesses Describe Killer's 'Macabre' Final Few Minutes," Chicago Sun-times, May 11,1994, at 5; Rob Karwath & Susan Kuczka, "Gacy Execution Delay Blamed on Clogged IV Tube," Chicago Trib., May 11, 1994, at 1 (Metro Lake Section).

Emmitt Foster (May 3, 1995, Missouri): Seven minutes after the lethal chemicals began to flow into Foster's arm, the execution was halted when the chemicals stopped circulating. With Foster gasping and convulsing, blinds were drawn so witnesses could not view the scene. Death was pronounced thirty minutes after the execution began, and three minutes later the blinds were reopened so the witnesses could view the corpse. According to the coroner, the problem was caused by the tightness of the leather straps that bound Foster to the execution gurney. Foster did not die until several minutes after a prison worker finally loosened the straps. See Denno-1 at 437; Denno-2 at 140; Radelet; "Witnesses to a Botched Execution," St. Louis Post- Dispatch, May 8, 1995, at 6B; Tim O'Neil, "Too-Tight Strap Hampered Execution," St. Louis Post-dispatch, May 5, 1995, at B1; Jim Slater, "Execution Procedure Questioned," Kansas City Star, May 4, 1995, at C8.

Ronald Allridge (June 8, 1995, Texas): Allridge's execution was conducted with only one needle, rather than the two required by the protocol, because a suitable vein could not be found in his left arm. See Denno-1 at 437; Denno- 2 at 140.

Richard Townes (January 23, 1996, Virginia): It took twenty-two minutes for medical personnel to find a vein. After repeated unsuccessful attempts to insert the needle through the arms, the needle was finally inserted through the top of Townes' right foot. See Denno-1 at 437; Denno-2 at 140; Radelet.

Tommie Smith (July 18, 1996, Indiana): It took one hour and nine minutes for Smith to be pronounced dead after the execution team began sticking needles into his body. For sixteen minutes, the team failed to find adequate veins, and then a physician was called. Smith was given a local anesthetic and the physician twice attempted to insert the tube in Smith's neck. When that failed, an angio-catheter was inserted in Smith's foot. Only then were witnesses permitted to view the process. The lethal drugs were finally injected into Smith 49 minutes after the first attempts, and it took another 20 minutes before death was pronounced. See Denno-1 at 438; Denno-2 at 140; Radelet.

Luis Mata (August 22, 1996, Arizona): Mata remained strapped to a gurney with the needle in his arm for one hour and ten minutes while his attorneys argued his case. When injected,

his head jerked, his face contorted, and his chest and stomach sharply heaved. See Denno-1 at 438; Denno-2 at 140.

Scott Carpenter (May 8, 1997, Oklahoma): Carpenter gasped, made guttural sounds, and shook for three minutes following the injection. He was pronounced dead eight minutes later. See Denno-2 at 140; Radelet; Michael Overall & Michael Smith, "22-Year-Old Killer Gets Early Execution," Tulsa World, May 8, 1997, at A1.

Michael Elkins (June 13, 1997, South Carolina): Liver and spleen problems had caused Elkins's body to swell, requiring executioners to search almost an hour – and seek assistance from Elkins – to find a suitable vein. See Denno-2 at 140; Radelet; "Killer Helps Officials Find A Vein At His Execution," Chattanooga Free Press, June 13, 1997, at A7.

Joseph Cannon (April 23, 1998, Texas): It took two attempts to complete the execution. Cannon's vein collapsed and the needle popped out after the first injection. He then made a second final statement and was injected a second time behind a closed curtain. See Denno-2 at 141; Radelet; "1st Try Fails to Execute Texas Death Row Inmate," Orlando Sent., Apr. 23, 1998, at A16; Michael Graczyk, "Texas Executes Man Who Killed San Antonio Attorney at Age 17," Austin American-statesman, Apr. 23, 1998, at B5.

Genaro Camacho (August 26, 1998, Texas): Camacho's execution was delayed approximately two hours when executioners could not find a suitable vein in his arms. See Denno-2 at 141; Radelet.

Roderick Abeyta (October 5, 1998, Nevada): The execution team took twenty-five minutes to find a vein suitable for the lethal injection. See Denno-2 at 141; Radelet; Sean Whaley, "Nevada Executes Killer," Las Vegas Review-Journal, Oct. 5, 1998, at 1A.

Christina Riggs (May 3, 2000, Arkansas): The execution was delayed for 18 minutes when prison staff could not find a vein. Radelet.

Bennie Demps (June 8, 2000, Florida): It took the execution team thirty-three minutes to find suitable veins for the execution. "They butchered me back there," said Demps in his final statement. "I was in a lot of pain. They cut me in the groin; they cut me in the leg. I was bleeding profusely. This is not an execution, it is murder." The executioners had no

unusual problems finding one vein, but because the Florida protocol requires a second alternate intravenous drip, they continued to work to insert another needle, finally abandoning the effort after their prolonged failures. See Denno-2 at 141; Radelet; Rick Bragg, "Florida Inmate Claims Abuse in Execution," N.Y. Times, June 9, 2000, at A14; Phil Long & Steve Brousquet, "Execution of Slayer Goes Wrong; Delay, Bitter Tirade Precede His Death," Miami Herald, June 8, 2000.

Bert Hunter (June 28, 2000, Missouri): In a violent reaction to the drugs, Hunter's body convulsed against his restraints during what one witness called "a violent and agonizing death." See Denno-2 at 141; Radelet; David. Scott, "Convicted Killer Who Once Asked to Die is Executed," Associated Press, June 28, 2000.

Claude Jones (December 7, 2000, Texas): His execution was delayed 30 minutes while the execution team struggled to insert an IV. One member of the execution team commented, "They had to stick him about five times. They finally put it in his leg." Radelet.

Joseph High (November 7, 2001, Georgia): For twenty minutes, technicians tried unsuccessfully to locate a vein in High's arms. Eventually, they inserted a needle in his chest, after a doctor cut an incision there, while they inserted the other needle in one of his hands. High was pronounced dead one hour and nine minutes after the procedure began. See Denno-2 at 141; Radelet.

Sebastian Bridges (April 21, 2001, Nevada): Mr. Bridges spent between twenty and twenty-five minutes on the execution bed, with the intravenous line inserted, continuously agitated, asserting his innocence, the injustice of executing him, and the injustice of requiring him to sign a habeas corpus petition, and to suffer prolonged delay, in order to have the unconstitutionality of his conviction recognized by the court system. He remained agitated after the execution process began, as the sedative drugs appeared not to take effect, and he died while apparently still conscious and shouting about the injustice of his execution.

Joeseph L. Clark (May 2, 2006, Ohio): It initially took executioners 22 minutes to find a suitable vein in Mr. Clark's left arm for insertion of the catheter. As the injection began, the vein collapsed. After an additional 30 minutes, the execution team succeeded in placing a

catheter in Mr. Clark's right arm. However, the team again tried to inject the drugs into the left arm, where the vein had already collapsed. These difficulties prompted Mr. Clark to sit up, tell the executioners that "It don't work," and to ask "Can you just give me something by mouth to end this?" Mr. Clark was finally pronounced dead 90 minutes after the execution began. Radelet; Andrew Walsh-Huggins, "IV Fiasco Led Killer to Ask for Plan B," AP (May 12, 2006).

Nevada's execution protocol is similar to the lethal injection protocol employed in California prior to the recent litigation in Morales v. Hickman, 415 F. Supp. 2d 1037 (N.D. Cal. February 14, 2006), aff'd, 438 F.3d 926 (9th Cir. 2006), cert denied, 546 U.S. 1163, 126 S.Ct. 1314 (2006). See Ex. 163 at ¶ 7. The use of sodium thiopental, pancuronium bromide, and potassium chloride without the protections imposed in Morales to ensure adequate administration of anesthesia poses an unreasonable risk of inflicting unnecessary suffering.

The legality of lethal injection on a national level is in doubt after the Supreme Court granted a writ of certiorari in Baze v. Rees and Bowling v. Rees, Docket 07-5439. Baze et.al. considers the following questions:

I. Does the Eighth Amendment to the United States Constitution prohibit means for carrying out a method of execution that create an unnecessary risk of pain and suffering as opposed to only a substantial risk of the wanton infliction of pain?

II. Do the means for carrying out an execution cause an unnecessary risk of pain and suffering in violation of the Eighth Amendment upon a showing that readily available alternatives that pose less risk of pain and suffering could be used?

III. Does the continued use of sodium thiopental, pancuronium bromide, and potassium chloride, individually or together, violate the cruel and unusual punishment clause of the Eighth Amendment because lethal injections can be carried out by using other chemicals that pose less risk of pain and suffering?

IV. When it is known that the effects of the chemicals could be reversed if the proper actions are taken, does substantive due process require a state to be prepared to maintain life in case a stay of execution is granted after the lethal injection chemicals

are injected?

Since the Supreme Court granted certiorari in Baze, several courts have stayed executions by lethal injection pending the Court's ruling. See Siebert v. Allen, 2007 U.S. Lexis App.24802 (11th Cir., 10/24/07); Norris v. Jones, 2007 U.S. Lexix 11678 (10/16/07) (denying application to vacate stay). Indeed, the Nevada Supreme Court issued a temporary stay of all executions by lethal injection on October 15, 2007. See ACLU v. Skolnik, Docket No. 50354.

This Court must prevent the infliction of unnecessary suffering in Mr. Howard's execution by vacating the sentence or by requiring the execution to be conducted under conditions that eliminate the unnecessary risk of infliction of pain.

2. Ineffective Assistance and Preservation

The refusal of the NDOC to release information on the process of execution prevented Mr. Howard from raising this issue in previous proceedings. See, e.g., Banks v. Dretke, 540 U.S. 668,695-698 (2004). Moreover, the scientific evidence showing that the chemicals used in the execution process are likely to cause unnecessary pain was not published until last year. See Ex. 162 [Leonidas G. Koniaris et al., Inadequate anaesthesia in lethal injection for execution, The Lancet, Vol. 365, April 16, 2005, at 1412-14].[15]

In the alternative, trial counsel was ineffective under the Sixth Amendment to the United States Constitution for failing to object to and/or properly litigate and argue the claims, issues and errors raised herein. Relief is therefore appropriate under the Fifth, Sixth, Eighth and Fourteenth Amendments.

In addition, direct appeal counsel were ineffective under the Sixth Amendment to the United States Constitution for failing to object to and/or properly litigate and argue these claims, issues and errors. Relief is therefore appropriate under the Fifth, Sixth, Eighth and Fourteenth Amendments.

3. Conclusion

Mr. Howard's averments demonstrate at least the risk that Nevada's methods and protocols

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[15] That this issue is a serious and potentially meritorious one is shown by the fact that the United States Supreme Court recently addressed a case in which it temporarily entered a stay of execution to determine how challenges to lethal injection can be made. Hill v. McDonough, 126 U.S. 2096 (2007).

in conducting lethal injections violates the Eighth and Fourteenth Amendments. Similarly, the NDOC's policy of withholding its current manual and materials regarding the implementation of the death penalty violate Mr. Howard's state and federal constitutional rights as defined by the First, Sixth, Eighth and Fourteenth Amendments. For the reasons described above, Mr. Howard is entitled to relief.

CLAIM TWENTY-SEVEN

Mr. Howard's conviction and sentence violate the state and federal constitutional guarantees of due process of law, equal protection of the laws, a reliable sentence, and international law because Mr. Howard's capital trial, sentencing, and review on direct appeal were conducted before state judicial officers whose tenure in office was not during good behavior but whose tenure was dependent on popular election. U.S. Const. art. V, VI, amends. VIII & XIV; Nevada Const. art. I, Sec. 3, 6; art. IV, Sec. 21.

Mr. Howard fully incorporates Claims Twenty-Four, Twenty-Five, Twenty-Nine, and Thirty, by reference herein.

SUPPORTING FACTS

The tenure of judges of the Nevada state district courts and of the Justices of the Nevada Supreme Court is dependent upon popular contested elections. See Nev. Const. art. 6, Sec. 3, 5.

Mr. Howard's capital trial and sentencing and review on direct appeal were conducted before elected judges.

The justices of the Nevada Supreme Court perform mandatory review of capital sentences, which includes the exercise of unfettered discretion to determine whether a death sentence is excessive or disproportionate, without any legislative prescription as to the standards to be applied in that evaluation. See NRS 177.055(2).

At the time of the adoption of the United States Constitution, the common law definition of due process of law included the requirement that judges who presided over trials in capital cases, which at that time potentially included all felony cases, had tenure during good behavior. All of the judges who performed the appellate function of deciding legal issues reserved for review at trial had tenure during good behavior. This mechanism was intended to, and did, preserve judicial independence by insulating judicial officers from the influence of the sovereign that would otherwise have improperly affected their impartiality.

Nevada law does not include any mechanism for insulating state judges and justices from majoritarian pressures which would affect the impartiality of an average person as a judge in a capital case. Making unpopular rulings favorable to a capital defendant or to a capitally-sentenced appellant

poses the threat to a judge or justice of expending significant personal resources, of both time and money, to defend against an election challenger who can exploit popular sentiment against the jurist's pro-capital defendant rulings, and poses the threat of ultimate removal from office. These threats "offer a possible temptation to the average [person] as a judge . . . not to hold the balance nice, clear and true between the state and the [capitally] accused." Tumey v. Ohio, 273 U.S. 510, 532 (1927). One justice of the Nevada Supreme Court has acknowledged publicly that the time and expense of an election challenge involving a charge that a sitting justice was "soft on crime" due to a ruling that favored the defense "was not lost on" the elected Nevada judiciary.

Judges and justices who are subject to popular election cannot be impartial in any capital case within due process and international law standards because of the threat of removal as a result of unpopular decisions in favor of a capital defendant.

Conducting a capital trial or direct appeal before a tribunal that does not meet constitutional standards of impartiality is prejudicial per se, and requires that Mr. Howard's death sentence be vacated. Mr. Howard is entitled to relief in the form of a new trial and new sentencing proceeding.

The above stated claim is of obvious merit. Competent appellate counsel would have raised and litigated this meritorious issue on direct appeal and in state post-conviction. There is no reasonable appellate strategy, reasonably designed to effectuate Mr. Howard's best interest, that would justify appellate counsel's failure in this regard. Mr. Howard is entitled to relief in the form of a new trial and sentencing hearing.

CLAIM TWENTY-EIGHT

Mr. Howard's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, and punishment which is not cruel or unusual due to the restrictive conditions on Nevada's death row. U.S. Const. amends. V, VI, VIII & XIV; Nevada Const. art. I, Sec. 3, 6; art. IV, Sec. 21.

Mr. Howard fully incorporates Claims Twenty-Four, Twenty-Six, Twenty-Nine and Thirty-One by reference herein.

SUPPORTING FACTS

Mr. Howard has been incarcerated in single-occupancy confinement on the Nevada Department of Corrections' death row since 1981. During those 25 years, he has been allowed only two hours of recreation and social contact for every 36 hour period. In addition, Mr. Howard has suffered numerous health maladies as a result of his incarceration. For instance, Mr. Howard filed suit against the NDOC for failing to regulate and treat his diabetes. He also was stabbed in the eye by other inmates in 1988, which resulted in a complete loss of vision in that eye. Ex. 155 (incident report from 9/14/88).

The principal social purposes of retribution and deterrence sought through the death penalty have lost their compelling purpose by the passage of time. The acceptable state interest of retribution has been satisfied by the severe punishment already inflicted by forcing Mr. Howard to live in spartan circumstances, cut off from normal social interaction. The United States Supreme Court has recognized the "painful character" of holding a prisoner in solitary confinement for only four weeks while awaiting execution. In re Medley, 134 U.S. 160, 171-72 (1890). This is due, not only to the isolating nature of solitary confinement, but also to the "horrible feeling" the prisoner must feel due to the knowledge he is to be executed and the "uncertainty" as to when. Id. Mr. Howard has suffered those four weeks' agony 325 times over.

The deterrent value of any punishment is directly related to the promptness with which it is inflicted. The deterrent value of carrying out an execution 16 years after conviction is minimal, at best. See Jeffrey Fagan, Columbia Law School, "Deterrence and the Death Penalty: A Critical Review of New Evidence;" Death Penalty Information Center, "National Murder Rates, 1995-

2004." Carrying out an execution at such a removed date may have no deterrent value over and above the deterrent value of simply incarcerating the defendant for the years between conviction and execution.

The delay from Mr. Howard's conviction to present is attributable to the ineffective assistance of Mr. Howard's trial, appellate, and post-conviction counsel. Trial, appellate, and post-conviction counsel failed to investigate and present many legitimate claims to this Court. Mr. Howard cannot be held responsible for delays caused by his prior counsels' ineffectiveness. Inflicting the punishment of death upon Mr. Howard, after the State has inflicted the torturous punishment of holding him in near-solitary confinement for 25 years, would push his total punishment beyond what evolving standards of decency can tolerate. Accordingly, Mr. Howard's death sentence must be vacated.

CLAIM TWENTY-NINE

Mr. Howard's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, and a reliable sentence, as well as under international law, because of the risk that the irreparable punishment of execution will be applied to innocent persons. U.S. Const. amends. VI, VIII & XIV; International Covenant on Civil and Political Rights, art. VII; Nevada Const. art. I, Sec. 3, 6; art. IV, Sec. 21.

Mr. Howard fully incorporates Claims Twenty-Four, Twenty-Five, Twenty-Six, Twenty-Seven, Twenty-Eight, Thirty, and Thirty-One by reference herein.

SUPPORTING FACTS

Both the United States and Nevada Constitutions bar the execution of innocent persons. Under the due process clause of the Fourteenth Amendment, the execution of the innocent is "contrary to contemporary standards of decency," Ford v. Wainwright, 477 U.S. 399 (1986), "shocking to the conscience," Rochin v. California, 342 U.S. 165 (1952), and offensive to "a principle so rooted in the traditions and conscience of our people as to be ranked as fundamental." Medina v. California, 505 U.S. 537 (1992). Under the Eighth Amendment, the execution of the innocent is cruel and unusual since it is arbitrary, Furman v. Georgia, 408 U.S. 238 (1972), and excessive. Coker v. Georgia, 433 U.S. 917 (1977).

The Nevada Constitution is violated by the irreparable mistaken application of the death penalty. Nev. Const. art. 1., Sec. 6 (prohibiting cruel and unusual punishment); art. 1, Sec. 7, (prohibiting deprivation of life, liberty or property without due process of law.) Nevertheless, serious legal errors often occur in Nevada, which has the highest death penalty rate in the country.

Because of the inability of the State of Nevada to prevent execution of innocent persons, the Nevada capital sentencing scheme is invalid and it cannot be applied to uphold the sentence imposed in this case.

Mr. Howard is entitled to relief in the form of a new trial and new sentencing proceeding. The above stated claim is of obvious merit. Competent appellate counsel would have raised and litigated this meritorious issue on direct appeal and in state post-conviction. There is no reasonable appellate strategy, reasonably designed to effectuate Mr. Howard's best interest, that would justify

appellate counsel's failure in this regard. Mr. Howard is entitled to relief in the form of a new trial and sentencing hearing.

CLAIM THIRTY

Mr. Howard's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, and a reliable sentence because the Nevada capital punishment system operates in an arbitrary and capricious manner. U.S. Const. art. VI, amends. VI, VIII, & XIV; Nevada Const. art. I, Sec. 3, 6; art. IV, Sec. 21.

Mr. Howard incorporates each and every allegation contained in this petition as if fully set forth herein.

SUPPORTING FACTS

The Nevada capital sentencing process permits the imposition of the death penalty for any first-degree murder that is accompanied by an aggravating circumstance. NRS 200.030(4)(a). The statutory aggravating circumstances are so numerous and so vague that they arguably exist in every first degree murder case. See NRS 200.033. Nevada permits the imposition of the death penalty for all first degree murders that are "at random and without apparent motive." NRS 200.033(9). Nevada statutes also appear to permit the death penalty for murders involving virtually every conceivable kind of motive: robbery, sexual assault, arson, burglary, kidnaping, torture, escape, to receive money, and to prevent lawful arrest and escape. See NRS 200.033. The scope of the Nevada death penalty statute makes the death penalty an option for all first degree murders that involve a motive, and death is also an option if the first degree murder involves no motive at all. See id.

The death penalty is permitted in Nevada for all first-degree murders, and first-degree murders, in turn, are not restricted in Nevada within traditional bounds of premeditated and deliberate murder. As the result of the Nevada courts' use of unconstitutional definitions of reasonable doubt, express malice, and premeditation and deliberation, first degree murder convictions occur in the absence of proof beyond a reasonable doubt, in the absence of any rational showing of premeditation and deliberation, and as a result of the presumption of malice aforethought. Consequently, a death sentence is permissible under Nevada law in every case where the prosecution can present evidence, not even beyond a reasonable doubt, that an accused committed an intentional killing. It is well-settled that, in order to pass constitutional muster, a capital sentencing scheme must narrow the class of persons eligible for the death penalty and must

reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

As a result of plea bargaining practices and imposition of sentences by juries and three-judge panels, sentences less than death have been imposed for offenses that are more aggravated than the one for which Mr. Howard stands convicted and in situations where the amount of mitigating evidence was less than the mitigation evidence that exists here. The untrammeled power of the sentencer under Nevada law to decline to impose the death penalty, even when no mitigating evidence exists at all, or when the aggravating factors far outweigh the mitigating evidence, means that the imposition of the death penalty is necessarily arbitrary and capricious.

Nevada law fails to provide sentencing bodies with any rational method for separating those few cases that warrant the imposition of the ultimate punishment from the many that do not. The narrowing function required by the Eighth Amendment is accordingly non-existent under Nevada's sentencing scheme, and the process is contaminated even further by Nevada Supreme Court decisions permitting the prosecution to present unreliable and prejudicial evidence during sentencing, regarding uncharged criminal activities of the accused. Consideration of such evidence necessarily diverts the sentencer's attention from the statutory aggravating circumstances, whose appropriate application is already virtually impossible to discern.

Because the Nevada capital punishment system provides no rational method for distinguishing between who lives and who dies, such determinations are made on the basis of illegitimate considerations. In Nevada, capital punishment is imposed disproportionately on racial minorities: Nevada's death row population is approximately 50% minority even though Nevada's general minority population is less approximately 17%. The disparity is even greater for African-American defendants. In addition, all the people on Nevada's death row are indigent and have had to defend with the meager resources afforded to indigent defendants and their counsel. As this case illustrates, the lack of resources provided to capital defendants virtually ensures that compelling mitigating evidence will not be presented to, or considered by, the sentencing body. Nevada sentencers are accordingly unable to, and do not, provide the individualized, reliable sentencing determination that the constitution requires.

Under contemporary standards of decency, death is an inappropriate punishment for a substantial portion of convicted first-degree murderers. Woodson v. North Carolina, 428 U.S. 280, 296 (1976). A state's capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty. Hollaway, 116 Nev. 732, 6 P.3d at 996; Arave, 507 U.S. at 474; Zant, 462 U.S. at 877; McConnell, 121 Nev. at __, 107 P.3d at 1289. Despite the Supreme Court's requirement for restrictive use of the death sentence, Nevada law permits broad imposition of the death penalty for virtually any and all first-degree murderers.

Further, the defects in the Nevada system are aggravated by the inadequacy of the appellate review process.

The Nevada capital punishment system suffers from the problems of under-funding of defense counsel, the lack of a fair and adequate appellate review process, and the pervasive effects of race. The problems with Nevada's process, moreover, are exacerbated by open-ended definitions of both first degree murder and the accompanying aggravating circumstances, which permit the imposition of a death sentence for virtually every intentional killing. This arbitrary, capricious, and irrational scheme violates state and federal constitutional law and is prejudicial per se and violates Mr. Howard's rights under international law, which prohibits the arbitrary deprivation of life.

Mr. Howard is entitled to relief in the form of a new trial and new sentencing proceeding.

The above stated claim is of obvious merit. Competent appellate counsel would have raised and litigated this meritorious issue on direct appeal and in state post-conviction. There is no reasonable appellate strategy, reasonably designed to effectuate Mr. Howard's best interest, that would justify appellate counsel's failure in this regard. Mr. Howard is entitled to relief in the form of a new trial and sentencing hearing.

CLAIM THIRTY-ONE

Mr. Howard's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, and a reliable sentence, as well as his rights under international law, because the death penalty is cruel and unusual punishment. U.S. Const. art. VI, amends. V, VI, VIII & XIV; International Covenant on Civil and Political Rights; Nevada Const. art. I, Sec. 3, 6; art. IV, Sec. 21.

Mr. Howard fully incorporates Claims Twenty-Four, Twenty-Five, Twenty-Six, Twenty-Seven, Twenty-Eight, Twenty-Nine and Thirty by reference herein.

SUPPORTING FACTS

The Eighth Amendment guarantee against cruel and unusual punishment prohibits punishment which is inconsistent with the evolving standards of decency that mark the progress of a maturing society.

The worldwide trend is toward the abolition of capital punishment and most civilized nations no longer conduct executions. Portugal outlawed capital punishment in 1867; Sweden and Spain abolished the death penalty during the 1970's; and France abolished capital punishment in 1981. In 1990, the United Nations called on all member nations to take steps toward the abolition of capital punishment. Since this call by the United Nations, Canada, Mexico, Germany, Haiti and South Africa, pursuant to international law provisions that outlaw "cruel, unusual and degrading punishment," have abolished capital punishment. The death penalty has recently been abolished in Azerbaijan and Lithuania. Many "third world" nations have rejected capital punishment on moral grounds. As demonstrated by the world-wide trend toward abolition of the death penalty, state-sanctioned killing is inconsistent with the evolving standards of decency that mark the progress of a maturing society.

The death penalty is unnecessary to the achievement of any legitimate societal or penalogical interests in Mr. Howard's case.

The death penalty constitutes cruel and unusual punishment under any and all circumstances, and constitutes cruel and unusual punishment under the circumstances of this case. Mr. Howard's death sentence also violates international law, which prohibits the arbitrary deprivation of life, and

cruel, inhuman or degrading treatment or punishment.

Mr. Howard is entitled to relief in the form of a new trial and new sentencing proceeding.

The above stated claim is of obvious merit. Competent appellate counsel would have raised and litigated this meritorious issue on direct appeal and in state post-conviction. There is no reasonable appellate strategy, reasonably designed to effectuate Mr. Howard's best interest, that would justify appellate counsel's failure in this regard. Mr. Howard is entitled to relief in the form of a new trial and sentencing hearing.

CLAIM THIRTY-TWO

Mr. Howard's conviction and death sentence are invalid under the state and federal constitutional guarantees of due process, equal protection, effective assistance of counsel, a fair tribunal, an impartial jury, and a reliable sentence due to the cumulative errors in the admission of evidence and instructions, gross misconduct by state officials and witnesses, the systematic deprivation of Mr. Howard's right to the effective assistance of counsel, the atmosphere of intimidation at trial, and issues of juror bias. U.S. Const. amends. V, VI, VIII, & XIV; Nevada Const. art. I, Sec. 3, 6; art. IV, Sec. 21.

Mr. Howard incorporates each and every allegation contained in this petition as if fully set forth herein.

SUPPORTING FACTS

Each of the claims specified in this petition requires vacation of the conviction or sentence.

"The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." Butler v. State, 120 Nev. 879, 899, 102 P.3d 71, 85 (2004); United States v. Necoechea, 986 F.2d 1273, 1282 (9th Cir. 1993) (although individual errors may not separately warrant reversal, "their cumulative effect may nevertheless be so prejudicial as to require reversal"); see also U.S. Const. amend. V, VI, XIV, Nevada Const. art. I, Sections 1, 3, 8.

The cumulative effect of the errors demonstrated in this petition deprived Mr. Howard of proceedings that were fundamentally fair and resulted in a constitutionally unreliable sentence. Whether or not any individual error requires the vacation of the judgment or sentence, the totality of these multiple errors and omissions resulted in substantial prejudice to Mr. Howard.

The State cannot show, beyond a reasonable doubt, that the cumulative effect of these numerous constitutional errors was harmless beyond a reasonable doubt; in the alternative, the totality of these constitutional violations substantially and injuriously affected the fairness of the proceedings and prejudiced Mr. Howard.

Mr. Howard is entitled to relief in the form of a new trial and new sentencing proceeding.

The above stated claim is of obvious merit. Competent trial, appellate, and post-conviction

counsel would have raised and litigated these meritorious issues at trial, on direct appeal and in state post-conviction. There is no reasonable strategy, reasonably designed to effectuate Mr. Howard's best interests, that would justify counsels' failure in this regard. Mr. Howard is entitled to relief in the form of a new trial and sentencing hearing.

PRAYER FOR RELIEF

For the reasons stated above, this Court should issue a writ of habeas corpus and vacate Mr. Howard's sentence, and grant him a new trial and sentencing hearing.

DATED this 25th day of October 2007.

Respectfully submitted

BRIAN ABBINGTON
Assistant Federal Public Defender

KELLY MILLER
Assistant Federal Public Defender

Attorneys for Mr. Howard

VERIFICATION

Under penalty of perjury, the undersigned declares that he is counsel for the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge except as to those matters stated on information and belief and as to such matters he believes them to be true. Petitioner personally authorized undersigned counsel to commence this action.

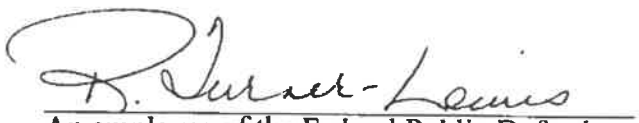
DATED this 25th day of October 2007.

BRIAN ABBINGTON

CERTIFICATE OF SERVICE

The undersigned hereby certifies that pursuant to N.R.C.P. 5(b), on this 25th day of October 2007, she deposited for mailing, in the United States mail, postage prepaid, a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS [POST-CONVICTION] addressed to opposing counsel as follows:

Catherine Cortez Masto
Nevada Attorney General
David K. Neidert
Deputy Attorney General
Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717



An employee of the Federal Public Defender

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81C053867
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Finding of Fact and Conclusions of Law
1039704

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

SAMUEL HOWARD,
#0624173

Defendant.

CASE NO: 81C053867

DEPT NO: XVII

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: 2/4/10
TIME OF HEARING: 8:30 A.M.

THIS CAUSE having come on for hearing before the Honorable MICHAEL VILLANI, District Judge, on the 4th day of February, 2010, the Petitioner not being present, and his presence having been waived by Counsel, MICHAEL CHARLTON, Assistant Federal Public Defender, the Respondent being represented by DAVID ROGER, District Attorney, by and through NANCY A. BECKER, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

PROCEDURAL HISTORY

On May 20, 1981 defendant Samuel Howard was indicted on one count of Robbery With Use of a Deadly Weapon involving a Sears security officer named Keith Kinsey on

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March 26, 1980; one count of Robbery With Use Of A Deadly Weapon involving Dr. George Monahan and one count of Murder With Use Of A Deadly Weapon involving Dr. Monahan, both committed on March 27, 1980. With respect to the murder count, the State alleged two theories: willful, premeditated and deliberate murder or murder in the commission of a robbery.

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

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

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

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

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

At a status check on January 4, 1983, defense counse indicated the defense could not

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

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

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

Defense counsel made an oral motion to withdraw indicating they had irreconcilable differences with Howard over the conduct of the penalty phase. Counsel indicated they had documents and witnesses in mitigation, but that Howard had instructed them not to present any mitigation evidence. Howard also instructed them not to argue mitigation and they would not follow that directive, but would argue mitigation. Counsel also indicated that Howard told them he wished to testify, but would not tell them the substance of his testimony. Finally counsel indicated they had attempted to get military and mental health records but were unsuccessful because the agencies possessing the records would not send copes without a release signed by Howard and Howard refused to sign the releases. The

district court canvassed Howard if this was correct and Howard confirmed it was true and that he did not want any mitigation presented. The district court found Howard understood the consequences of his decision and denied the motion to withdraw concluding defense counsel's disagreement with Howard's decision was not a valid basis to withdraw.

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

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

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

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

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

On October 28, 1987, Howard filed his first State petition for post-conviction relief. John Graves Jr. and Carmine Colucci originally represented Howard on the petition. They withdrew and David Schieck was appointed. The petition raised the following claims for

relief: 1) ineffective assistance of trial counsel – guilt phase - failure to present an insanity defense and Howard's history of mental illness and commitments; 2) ineffective assistance of trial counsel – penalty phase – failure to present mental health history and documents; failure to present expert psychiatric evidence that Howard was not a danger to jail population; failure to rebut future dangerousness evidence with jail records and personnel; failure to object to improper prosecutorial arguments involving statistics regarding deterrence, predictions of future victims, Howard's lack of rehabilitation, aligning the jury with "future victims," comparing victim's life with Howard's life, diluting jury's responsibility by suggesting it was shared with other entities, voicing personal opinions in support of the death penalty and its application to Howard, references to Charles Manson, voice of society arguments and referring to Howard as an animal; 3) ineffective assistance of appellate counsel – failure to raise prosecutorial misconduct issues.

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

On the issue of failure to object to prosecutorial misconduct, the district court found that defense counsel did object where appropriate and the arguments that were not objected to did not amount to misconduct and were a fair comment on the evidence. Even if some of the comments were improper, the district court concluded that they would not have succeeded on appeal as they were harmless beyond a reasonable doubt. Formal Findings Of

Fact And Conclusions Of Law were filed on July 5, 1989.[1]

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

With respect the mitigation evidence issues, the Nevada Supreme Court upheld the district court's findings that this was a result of Howard's own conduct and not ineffective assistance of counsel.[3]

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

Howard then filed a second State petition for post-conviction relief on December 16, 1991. Cal J. Potter, III and Fred Atcheson represented Howard in the second State petition. In that petition, Howard alleged denial of a fair trial based on prosecutorial misconduct, namely: 1) jury tampering based on the prosecutor's contact with the juror between the guilt

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

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

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

and penalty phases; 2) expressions of personal belief and a personal endorsement of the death penalty; 3) reference to the improbability of rehabilitation, escape, future killings; 3) comparing Howard's life with Dr. Monahan's and 4) a statement that the community would benefit from Howard's death. The petition also asserted an ineffective assistance of trial counsel claim for failing to explain to Howard the nature of mitigating circumstances and their importance. Finally the petition raised a speedy trial violation and cumulative error.

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

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

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

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

on September 23, 2002, the Second Amended Federal petition was stayed for Howard to again exhaust his federal claims in state court.

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

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

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

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

On August 20, 2003, Howard filed his opposition to the State's motion to dismiss his third State petition. As good cause for delay, Howard alleged Nevada's successive petition and waiver bar (NRS 34.810) is inconsistently applied and Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) is not controlling. Howard contended NRS 34.726 did not apply because

any delay was the fault of counsel not Howard and NRS 34.726 is unconstitutional and cannot be applied to successive petitions Pellegrini notwithstanding. Howard argued the Due process and Equal Protection clauses of the Federal Constitution bar application of NRS 34.726, NRS 34.800 and NRS 34.810 to Howard. In addition, Howard asserted NRS 34.800 did not apply because the State had not shown prejudice and the presumption of prejudice was overcome by the allegations in the petition.

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

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

Howard then returned to Federal district court where he filed his Third Amended Petition for Writ of Habeas Corpus on October 23, 2005. Subsequently, without seeking approval from the Federal Court, the Federal Public Defender's Office filed, on Howard's behalf, the current Fourth State Post-Conviction Petition on October 27, 2007. The State filed a motion to dismiss the Fourth State Petition on April 8, 2008. The parties agreed to stay this case for several months while Howard sought permission from the Federal District

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

Court to hold his federal petition for post-conviction habeas corpus in abeyance pending exhaustion of the claims already filed in the Fourth State Petition and of new claims he wished to file in State court as a result of the Ninth Circuit's decision in Polk v. Sandoval, 503 F.3d 903, 910 (9th Cir. 2007).

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

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

STATEMENT OF FACTS

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

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

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

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

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

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

Around 6:00 a.m. on March 27, 1980, Thomas and Howard left the motel and went to breakfast. After breakfast, Thomas dropped Howard off in the alley behind Dr. George Monahan's office. This was at approximately 7:00 a.m. Thomas went back to the motel room. Approximately an hour later, Howard returned to the motel. Howard had a CB radio with him that had loose wires and a gold watch she had never seen before. Howard told

Thompson that he was tired of Las Vegas and to pack up their things as they were leaving for California.

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

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

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

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

stating that he had an appointment with the doctor.

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

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

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

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

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

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

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

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

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

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

Ed Schwartz was working as a car salesman in New York on October 5, 1979. When he arrived at work at approximately 9:00 a.m. Howard entered the agency and was looking at an Oldsmobile car. Howard showed Schwartz a New York driver's license and checkbook and told Schwartz that he worked for a security firm in New York. Howard asked if they could take a demonstration ride and Schwartz drove the car for a few blocks while Howard was the passenger. Howard asked if he could drive the car and the men switched seats. After driving for a short time, Howard pulled over and pointed an automatic pistol at Schwartz. Schwartz was told to get down on the floor of the car and remove his shoes and pants. Schwartz complied and Howard took Schwartz' watch, ring and wallet. Schwartz got out of the car when ordered to do so and Howard drove off. The car was later found abandoned.[6]

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

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

man was sitting in the back.

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

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

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

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

Howard testified regarding his military, family and mental health histories. Howard discussed his military service and stated he had suffered a concussion and received a purple heart.[7] Howard also stated he was on veteran's disability in New York.[8] He said he was in

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

[8] Howard's military records do not support this and there is nothing in the record substantiating any admission to a veteran's hospital. The record reflects Howard was never

various mental health facilities in California including being housed in the same facility as Charlie Manson. He testified he had been diagnosed as a schizophrenic, but that some of the doctors thought he was malingering. When asked about his childhood, Howard became upset. He indicated he didn't want to talk about the death of his mother and sister. Howard indicated he was not mentally ill and knew what he was doing at all times.

FINDINGS OF FACT

1. The Court adopts the above Procedural History as its first Finding of Fact.

2. The Court adopts the above Statement of Facts as its second Finding of Fact.

3. This is Howard's fourth state petition for post-conviction relief.

4. The current Petition for Post-Conviction Relief was filed on October 27, 2007, approximately twenty-one years after Howard's conviction and nineteen years after remittitur was issued on direct appeal from the Judgment of Conviction.

5. The following claims raised in the original Fourth State Petition are time-barred under NRS 34.726 as they were filed more than one year from the remittitur on direct appeal: Claims 2(1) conflict of interest, 2(2) ineffective assistance of trial counsel – mitigation evidence, 2(3) polygraphing policy; Claim 3 – competency and validy of mitigation evidence waiver; Claim 4 – insufficiency of the evidence, failure to conduct neuro-psychological testing, failure to develop post-traumatic stress disorder evidence; Claim 5 – invalidity of New York Robbery conviction; Claim 6 – denial of motion to sever counts; Claim 7 – denial of evidentiary hearing to suppress statements; Claim 8 – speedy trial violation; Claim 9 – denial of motions to dismiss counsel and motions to withdraw; Claim 10 - failure to give accomplice instruction; Claims 11(A) – reasonable doubt instruction, 11(B) – lesser-included Second Degree Murder instruction, 11(C) – premeditation and malice instructions; Claim 12 – validity of Instruction # 20; Claim 13 – *Kazalyn* instruction; Claim 14 – improper malice instructions; Claim 15 – anti-sympathy instruction; Claim 16 – failure to instruct on mental.emotional disturbance mitigating

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actually admitted to a hospital in New York because it required identification and he could not identify himself due to existing warrants for his arrest.

circumstance; Claim 17 – improper limitation of mitigating circumstances; Claim 18 – forms and instructions implied mitigating circumstances must be unanimous finding; Claim 19 – prosecutorial misconduct; Claim 21 – ineffective assistance of trial counsel; Claims 22 – ineffective assistance of appellate counsel; Claim 23 – ineffective assistance of post-conviction counsel; Claim 24 – Nevada's death penalty scheme is arbitrary and capricious in application; Claim 25 – Nevada Supreme Court fails to adequately review death penalty cases; Claim 26 – lethal injection; Claim 27 – elected judiciary; Claim 28 – restrictive death row conditions; Claim 29 – international law; Claim 30 – Nevada's death penalty scheme unconstitutional; Claim 31 – evolving standards of decency; Claim 32 – cumulative errors.

6. The following claims in the original Fourth State Petition involve issues that either were, or could have been, raised at trial, on direct appeal or in a previous timely post-conviction petition. They are therefore procedurally barred under NRS 34.810 as either waived, successive or an abuse of the writ. Claims 2(1) conflict of interest, 2(2) ineffective assistance of trial counsel – mitigation evidence, 2(3) polygraphing policy; Claim 3 – competency and validy of mitigation evidence waiver; Claim 4 – insufficiency of the evidence, failure to conduct neuro-psychological testing, failure to develop post-traumatic stress disorder evidence; Claim 5 – invalidity of New York robbery conviction; Claim 6 – denial of motion to sever counts; Claim 7 – denial of evidentiary hearing to suppress statements; Claim 8 – speedy trial violation; Claim 9 – denial of motions to dismiss counsel and motions to withdraw; Claim 10 - failure to give accomplice instruction; Claims 11(A) – reasonable doubt instruction, 11(B) – lesser-included second degree murder instruction, 11(C) – premeditation and malice instructions; Claim 12 – validity of Instruction # 20; Claim 13 – *Kazalyn* instruction; Claim 14 – improper malice instructions; Claim 15 – anti-sympathy instruction; Claim 16 – failure to instruct on mental.emotional disturbance mitigating circumstance; Claim 17 – improper limitation of mitigating circumstances; Claim 18 – forms and instructions implied mitigating circumstances must be unanimous finding; Claim 19 – prosecutorial misconduct; Claim 21 – ineffective assistance of trial counsel; Claims 22 – ineffective assistance of appellate counsel; Claim 23 – ineffective assistance of

post-conviction counsel; Claim 24 – Nevada's death penalty scheme is arbitrary and capricious in application; Claim 25 – Nevada Supreme Court fails to adequately review death penalty cases; Claim 26 – lethal injection; Claim 27 – elected judiciary; Claim 28 – restrictive death row conditions; Claim 29 – international law; Claim 30 – Nevada's death penalty scheme unconstitutional; Claim 31 – evolving standards of decency; Claim 32 – cumulative errors.

7. In its Motion to Dismiss the original Fourth State Petition, the State alleged laches under NRS 34.800. The Fourth State Petition was filed over twenty years after the entry of the Judgment of Conviction. Therefore the rebuttable presumption of prejudice to the State under NRS 34.800 applies.

8. The legal and factual issues surrounding the claims raised in the original Fourth State Petition are intertwined and the State is likely to have difficulty with memories, location and availability of witnesses from the 1980's creating actual prejudice.

9. Howard failed to meet his burden to prove facts by a preponderance of the evidence to rebut the presumption of prejudice.

10. The following claims in the original Fourth State Petition are procedurally barred pursuant to NRS 34.800: Claims 2(1) conflict of interest, 2(2) ineffective assistance of trial counsel – mitigation evidence, 2(3) polygraphing policy; Claim 3 – competency and validy of mitigation evidence waiver; Claim 4 – insufficiency of the evidence, failure to conduct neuro-psychological testing, failure to develop post-traumatic stress disorder evidence; Claim 5 – invalidity of New York robbery conviction; Claim 6 – denial of motion to sever counts; Claim 7 – denial of evidentiary hearing to suppress statements; Claim 8 – speedy trial violation; Claim 9 – denial of motions to dismiss counsel and motions to withdraw; Claim 10 - failure to give accomplice instruction; Claims 11(A) – reasonable doubt instruction, 11(B) – lesser-included second degree murder instruction, 11(C) – premeditation and malice instructions; Claim 12 – validity of Instruction # 20; Claim 13 – *Kazalyn* instruction; Claim 14 – improper malice instructions; Claim 15 – anti-sympathy instruction; Claim 16 – failure to instruct on mental.emotional disturbance mitigating

circumstance; Claim 17 – improper limitation of mitigating circumstances; Claim 18 – forms and instructions implied mitigating circumstances must be unanimous finding; Claim 19 – prosecutorial misconduct; Claim 21 – ineffective assistance of trial counsel; Claims 22 – ineffective assistance of appellate counsel; Claim 23 – ineffective assistance of post-conviction counsel; Claim 24 – Nevada's death penalty scheme is arbitrary and capricious in application; Claim 25 – Nevada Supreme Court fails to adequately review death penalty cases; Claim 26 – lethal injection; Claim 27 – elected judiciary; Claim 28 – restrictive death row conditions; Claim 29 – international law; Claim 30 – Nevada's death penalty scheme unconstitutional; Claim 31 – evolving standards of decency; Claim 32 – cumulative errors.

11. Claims 1 and 20 of the original Fourth State Petition involve a claim under McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004). McConnell was decided in 2004 and the instant petition was filed in 2007, over two years after issuance of the decision. The claim was available in 2004 and nothing prevented Howard from raising the claim prior to 2007 and arguing McConnell should be retroactively applied. Howard acted unreasonably in waiting until the Nevada Supreme Court addressed the issue of retroactivity before raising this claim. Thus the decision in Bejarno v. State, 122 Nev. 1066, 146 P.3d 265 (2006) does not constitute good cause for the delay in raising the claim. Accordingly, Claims 1 and 20 are time-barred under NRS 34.726.

12. Howarded filed an Amended Petition for Writ of Habeas Corpus on February 24, 2009. For purposes of applying the procedural bars, the original petition filing date of October 27, 2007 still applies. Thus the claims in the Amended Petition were raised approximately twenty-one years after Howard's conviction and nineteen years after remittitur was issued on direct appeal from the Judgment of Conviction.

12. The following claims in the Amended Fourth State Petition are time-barred under NRS 34.726: Claim 1 – validity of New York prior felony aggravator; Claim 2(1) – actual conflict of interest, Claim 2(2) – ineffective assistance of counsel (mitigation issues), Claim 2(3) – polygraph/resources allegations, Claim 2(4) – failure of trial court grant motions for new counsel; Claim 3 – *Kazalyn* instruction fails to distinguish first and second

degree murder and violates *Byford*; Claim 4 – Nevada statutes permit the death penalty to be imposed for second degree murder; Claim 5 – instructions and verdict form implied mitigating circumstances must be unanimous finding; Claim 6 – prosecutorial misconduct; Claim 7 – ineffective assistance of appellate counsel; Claim 8 – Nevada Supreme Court fails to conduct fair and adequate review of death cases; Claim 9 – Nevada's capital system is arbitrary and capricious; Claim 10 – cumulative error.

13. Claim 1 of the Amended Petition also asserts a McConnell claim which is also time-barred under NRS 34.726 for the reasons set forth in Finding # 11.

14. The State's motion to dismiss the Amended Fourth State Petition asserted laches under NRS 34.800. As noted in Findings # 8 and # 9, the State has suffered actual as well as presumptive prejudice and Howard has not overcome that presumption.

15. The following claims of the Amended Fourth State Petition are barred under NRS 34.800: Claim 1 – validity of New York prior felony aggravator; Claim 2(1) – actual conflict of interest, Claim 2(2) – ineffective assistance of counsel (mitigation issues), Claim 2(3) – polygraph/resources allegations, Claim 2(4) – failure of trial court grant motions for new counsel; Claim 3 – *Kazalyn* instruction fails to distinguish first and second degree murder; Claim 4 – Nevada statutes permit the death penalty to be imposed for second degree murder; Claim 5 – instructions and verdict form implied mitigating circumstances must be unanimous finding; Claim 6 – prosecutorial misconduct; Claim 7 – ineffective assistance of appellate counsel; Claim 8 – Nevada Supreme Court fails to conduct fair and adequate review of death cases; Claim 9 – Nevada's capital system is arbitrary and capricious; Claim 10 – cumulative error.

16. The following claims in the Amended Fourth State Petition involve issues that either were, or could have been, raised at trial, on direct appeal or in a previous timely post-conviction petition. They are therefore procedurally barred under NRS 34.810 as with waived, successive or an abuse of the writ: Claim 2(1) – actual conflict of interest, Claim 2(2) – ineffective assistance of counsel (mitigation issues), Claim 2(3) – polygraph/resources allegations, Claim 2(4) – failure of trial court grant motions for new counsel; Claim 3 –

Kazalyn instruction fails to distinguish first and second degree murder; Claim 4 – Nevada statutes permit the death penalty to be imposed for second degree murder; Claim 5 – instructions and verdict form implied mitigating circumstances must be unanimous finding; Claim 6 – prosecutorial misconduct; Claim 7 – ineffective assistance of appellate counsel; Claim 8 – Nevada Supreme Court fails to conduct fair and adequate review of death cases; Claim 9 – Nevada's capital system is arbitrary and capricious; Claim 10 – cumulative error.

17. As good cause to execuse the procedural delays, in the original or amended petitions, Howard asserts: 1) ineffective assistance of trial, appellate and post-conviction counsel; 2) inconsistent application of procedural bars; 3) delay was not the result of any direct fault of Howard; 4) Howard was litigating in Federal court; 5) as to the *Kazalyn* claim, the Ninth Circuit decision Polk v. Sandoval, 503 F.3d 903 (2007).

18. Howard's claims of ineffective assistance of trial and appellate counsel are, in themselves, procedurally barred.

19. Under the Statutes of Nevada in 1987, Howard was not entitled to the appointment of post-conviction counsel on his first state petition for post-conviction relief.

20. Even if Howard had been entitled to counsel during his first state petiton, any claim of ineffective assistance of post-conviction counsel is, in itself, procedurally barred.

21. Actions of Howard's counsel are attributable to Howard.

22. Nothing in Polk v Sandoval indicates it is retroactive to cases that were final when the Nevada Supreme Court issued its opinion in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

23. Howard's conviction became final when remittitur issued on his direct appeal on February 12, 1988. Neither Byford nor Polk are applicable to Howard's conviction.

24. None of allegations raised to explain the delays in bringing these claims constitute good cause.

25. Howard also asserts a claim of "actual innocence" of the death penalty as justification for excusing the procedural bars.

26. Howard has not demonstrated clear and convincing evidence that the

Legislature intended the prior felony aggravator to apply only to cases in which a judgment of conviction was entered as opposed to a jury verdict.

27. Howard has not produced any evidence or factual allegations let alone, clear and convincining evidence that he is innocent of the New York robbery.

28. To the extent that anything in the pleadings is intended to assert a claim of "actual innocence" with respect to guilt, Howard has not produced any evidence or factual allegations, let alone clear and convincing evidence, that he is not the killer of Dr. Monahan.

29. The only allegations of "new evidence" involve mitigating circumstances.

30. Even if Howard's McConnell claim is not untimely, Howard has failed to establish prejudice. Without the "in the commission of a robbery" aggravator, the jury still heard evidence that Howard committed a violent robbery with a gun in New York only one year before he committed the instant crimes. The facts of that robbery indicated he terrorized a nurse who was trying to help him, forcing her to remove her clothes and locking her in closet before stealing her car. The mitigation evidence consisted of Howard's own statements concerning his service in Vietnam, the time spent in some California mental health facilities until doctors concluded he was malingering and his expression of sympathy to Dr. Monahan's family while maintaining his innocence. Given this evidence, this Court concludes, beyond a reasonable doubt, that the jury would still have determined the aggravating circumstances were not outweighed by the mitigating circumstances without the "in the commission of the robbery" aggravator.

31. In considering the effect of the aggravator on the ultimate sentence of death, the Court concludes, beyond a reasonable doubt, that the jury would have sentenced Howard to death absent that aggravator. In addition to the facts of the Sears robbery and Monahan murder, the jury heard evidence Howard committed two violent robberies in New York. All these crimes were committed within a two year period.

32. To the extent that any conclusion of law stated below can also be considered a finding of fact, it shall be so treated.

CONCLUSIONS OF LAW

1. Under NRS 34.810(1)(b) every challenge to a conviction that could have been raised at trial or on direct appeal cannot be raised in a post-conviction habeas proceeding. In addition, under NRS 34.810(2), all claims of ineffective assistance of trial and appellate counsel are required to be raised in a first petition for post-conviction relief and any claims of ineffective assistance of post-conviction are required to be filed in a second petition for post-conviction relief. Failure to do so constitutes either a successive petition or an abuse of the writ. Any claims in a post-conviction petition that fail to comply with the statute are procedurally barred.

2. NRS 34.810(2) incorporates the concept that where a subsequent petition raises new or different grounds for relief and those grounds could have been asserted in a prior petition, it is an abuse of the writ. In essence, it encompasses the same concerns as NRS 34.810(1)(b), the waiver provision, except that it applies to all petitions, not just those arising from trial. It also reflects the policy behind the Law of the Case Doctrine; rulings on previous issues cannot be avoided by a more detailed or precisely focused argument. Hogan v. State, 109 Nev. 952, 860 P.2d 710 (1993). In other words, if the information or argument was previously available, it is an abuse of the writ to wait to assert it in a second or subsequent petition. McClesky v. Zant, 499 U.S. 457, 497-498 (1991).

3. As noted in Findings # 6 and # 16, all of Howard's claims and sub-claims were either raised in previous proceedings and denied on their merits (or found to be procedurally barred) or could have been raised in previous proceedings and were not. Thus they are barred under NRS 34.810.

4. Under NRS 34.726, any challenge to Howard's conviction based upon a substantive claim of ineffective assistance of trial and/or appellate counsel was required to be filed within one year of the remittitur, which was February 12, 1988. However, pursuant to Pellegrini v. State, 117 Nev. 860, 34 P.3d 519, 537 (2001), that period would be extended to January 1, 1994. The instant petition was filed in 2007, thus, as noted in Findings # 5, # 11, # 12 and #13, all claims and subclaims are untimely and procedurally barred under NRS

34.726.

5. NRS 34.726 is strictly enforced. In Gonzales v. State, 118 Nev. 61, 590 P.3d 901 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two days late, pursuant to the "clear and unambiguous" mandatory provisions of NRS 34.726(1).

6. Besides the provisions of NRS 34.726, NRS 34.800 recognizes that a post-conviction petition should be dismissed when delay in presenting issues would prejudice the State in responding to the petition or in retrial. NRS 34.800(1)(a)(b).

7. NRS 34.800(2) creates a rebuttable presumption of prejudice to the State where a period of five years has elapsed between the filing a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction. To invoke the presumption, the statute requires that the State plead laches in its motion to dismiss the petition. NRS 34.800(2). Once the presumption is invoked, the petitioner has the burden of pleading specific facts to overcome the presumption.

8. The decision on direct appeal was rendered in 1987. The instant petition was filed in 2007. The State plead laches in its motion to dismiss, therefore the presumption of prejudice applies.

9. Because Howard failed to plead or prove factual allegations to overcome the presumption of prejudice all claims and sub-claims, except the McConnell claim, are procedurally barred under NRS 34.800.

10. To overcome the procedural bars under NRS 34.726, NRS 34.800 and NRS 34.810, Howard must show either show good cause and prejudice for the delay or manifest injustice.

11. Good cause means an impediment external to the defense that prevented petitioner from complying with the state procedural default rules. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); citing Pellegrini v. State, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001); Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994); Passanisi v. Director, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989); see also Crump v. Warden, 113 Nev. 293, 295, 934 P.2d 247, 252 (1997); Phelps v. Director, 104 Nev. 656, 764 P.2d

1303 (1988).

12. An external impediment exists if the factual or legal basis for a claim was not reasonably available to counsel, or where some interference by officials' made compliance impracticable. Hathaway, 71 P.3d at 506; quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645 (1986); see also Gonzales, 118 Nev. at 595, 53 P.3d at 904; citing Harris v. Warden, 114 Nev. 956, 959-60 n. 4, 964 P.2d 785 n. 4 (1998).

13. Fault of the petitioner encompasses not only a petitioner's own actions, but also actions of a petitioner's counsel or agents. For example, trial counsel's failure to forward a copy of the file to a petitioner is not good cause for excusing a delay in filing. See Phelps, 104 Nev. at 660; Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995). Other than implying that any "fault" in the delay was that of his attorneys, Howard presented no evidence of an external impediment.

14. A claim of ineffective assistance of counsel that is procedurally barred cannot constitute good cause for excusing the procedural bars, for itself or any other claim. State v. District Court (Riker), 121 Nev. 225, 112 P.3d 1070 (2005). See also Edwards v. Carpenter, 529 U.S. 446, 453 (2000) (procedurally barred ineffective assistance of counsel claim is not good cause). See generally Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506-07 (2003) (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing).

15. As Howard fails to show good cause for not bringing his ineffective assistance of counsel claims in a timely manner, they are procedurally barred and do not constitute good cause for overcoming the procedural bars. Moreover, as to the claims of ineffective assistance of counsel that were brought in prior petitions and decided on their merits, these claims would be successive and new arguments in support of the claims would be an abuse of the writ, so they are also procedurally barred under NRS 34.810 and cannot constitute good cause for delay. Any claims that were not previously raised in the first or second post-conviction petitions would be waived and barred under NRS 34.810(1)(b) and likewise cannot establish good cause for delay.

16. Because Howard was not entitled to post-conviction counsel at the time of his first post-conviction petition, he cannot maintain a claim of ineffective assistance of post-conviction counsel and thus this cannot constitute good cause for any delays. See Pellegrini, 117 Nev. at 888, 34 P.3d at 538, fn. 125.

17. The Nevada Supreme Court has gone to great lengths to refute claims that it arbitrarily and inconsistently applies the procedural default rules. See State v. Dist.Ct. (Riker), 121 Nev. 225, 112 P.3d 1070 (2005). Nevada does not inconsistently apply its procedural bars and this allegation does not demonstrate good cause for the delay in the filing of Howard's claims in the instant petition.

18. Howard claims Polk v. Sandoval constitutes good cause for the delay in raising his challenge to the *Kazalyn* instruction. As noted in Nika v. State, 198 P.3d 839 (2008), Polk v. Sandoval misconstrues the Nevada Supreme Court's decision in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). Further Nika notes that Byford would only apply to cases that were not final when Byford was issued. Howard's case was final in 1988 and Byford was issued in 2000. Thus Byford and Polk are not applicable to Howard and cannot constitute good cause for the delay in raising the *Kazalyn* issue in the instant petition.

19. Generally, a defendant who has procedurally defaulted on a claim may subsequently raise the claim in a habeas petition upon a showing of manifest injustice which is defined as "actual innocence". Bousley v. State, 523 U.S. 614, 1611, 118 S.Ct. 1604, 1611 (1998). Courts have consistently found "actual innocence" to be a miscarriage of justice sufficient to overcome any procedural post-conviction time bar or default without analyzing good cause and prejudice. See Sawyer v. Whitley, 505 U.S. 333, 338-39, 112 S.Ct. 2514, 2518-19 (1992). In other words, actual innocence acts as a "gateway" for innocent defendants to present constitutional challenges to a court years after the procedural defaults and bars have ran. See Sawyer at 315.

20. A claim of actual innocence requires both an allegation that the defendant's constitutional rights were violated and the presentation of newly discovered evidence. The Eighth Circuit Court of Appeals has "rejected free-standing claims of actual innocence as a

basis for habeas review stating, '[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.'" Meadows v. Delo, 99 F.3d 280, 283 (8th Cir. 1996) (citing Herrera v. Collins, 506 U.S. 390, 400, 113 S. Ct. 853, 860 (1993)).

21. Furthermore, the newly discovered evidence suggesting the defendant's innocence must be "so strong that a court cannot have confidence in the outcome of the trial." Id. at 316, at 861. Actual innocence focuses on actual not legal innocence, and therefore, a defendant who only challenges the validity of evidence presented at trial has not sufficiently claimed actual innocence to overcome the procedural bars and defaults. See Sawyer, 112 U.S. at 339, 505 S. Ct. at 2519. The United States Supreme Court has held that, "Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of the barred claim." Schlup v. Delo, 513 U.S. 298, 316, 115 S. Ct. 851, 861 (1995).

22. The applicable standard applied to the actual innocence analysis depends upon whether the defendant is challenging his conviction or his death ineligibility:

> To avoid application of the procedural bar to claims attacking the *validity of the conviction*, a petitioner claiming actual innocence *must show that it is more likely than not* that no reasonable juror would have convicted him absent a constitutional violation. Where the petitioner has argued that the procedural default should be ignored because he is *actually ineligible for the death penalty*, he must show by *clear and convincing evidence* that, but for a constitutional error no reasonable juror would have found him death eligible. (Emphasis added).

Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

23. Once a defendant has made such a showing, he may then use the claim of actual innocence as a "gateway" to present his constitutional challenges to the court and require the court to decide them on the merits. Schlup, 513 U.S. at 315, 115 S. Ct. at 861.

24. As a matter of federal constitutional law, the Sawyer Court also indicated that to qualify for "actual innocence" sufficient to overcome the procedural bars, a petitioner

must eliminate all aggravating circumstances.

> "Thus, a petitioner may make a colorable showing that he is actually innocent of the death penalty by presenting evidence that an alleged constitutional error implicates *all* of the aggravating factors found to be present by the sentencing body. That is, but for the alleged constitutional error, the sentencing body *could not* have found *any* aggravating factors and thus the petitioner was ineligible for the death penalty. In other words, the petitioner must show that absent the alleged constitutional error, the jury would have lacked the discretion to impose the death penalty; that is, that he is *ineligible* for the death penalty." *Johnson v. Singletary,* 938 F.2d, at 1183 (emphasis in original).

Sawyer, 505 U.S. at 347, 112 S.Ct. at 2523.

25. In addition, any new evidence regarding mitigating factors is not considered in an "actual innocence" death eligibility determination. The United States Supreme Court has indicated that the "actual innocence" standard is a very narrow and limited method of overcoming procedural bars and should be based on objective standards, not subjective issues relating to the weight to be given to mitigating evidence. Sawyer, 505 U.S. at 345-46, 112 S.Ct. at 2522.

26. Because the Nevada Supreme Court relied upon Sawyer in Pelligrini, the limitations on the "actual innocence" doctrine discussed in Sawyer also apply to Howard's petition and State law procedural bars.

27. The Nevada Supreme Court recognizes one other form of "actual innocence" involving aggravating circumstances. Leslie v. Warden, 118 Nev. 773, 59 P.3d 440 (2002). In Leslie, which involved a timely filed first state petition for post-conviction relief, the Nevada Supreme Court received evidence that the legislative history did not support the previous interpretation of the "random and no apparent motive" aggravator.[9] Based on this evidence, the Court examined the trial record and concluded that there was insufficient evidence in the record to support that aggravator, as correctly interpreted. The Supreme Court then struck the aggravator and conducted a reweighing analysis. Concluding that there was a reasonable probability the jury would not have given a death sentence without that

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[9] The claim was procedurally barred under NRS 34.810(1)(b) waiver provision. It was not barred under NRS 34.726 or NRS 34.800.

aggravator, the Supreme Court found Leslie met the actual innocence standard and that the procedural bar was excused. After considering the merits of the claims, a new sentencing hearing was ordered.

28. The Nevada Supreme Court in Leslie relied upon its earlier decision in Pelligrini, which recognized the "actual innocence" standard set forth in Sawyer. See Pellegrini, 117 Nev. at 887, 34 P.3d at 537. When read with Pellegrini and Sawyer, Leslie makes it clear that to be "actually innocent" of an aggravating circumstance under Leslie a defendant must demonstrate, by clear and convincing evidence, that: 1) the Legislative History demonstrates a previous interpretation of an aggravating circumstance was actually incorrect and in direct contradiction to legislative intent; and 2) under the correct interpretation, based upon the evidence presented at trial, no reasonable juror would have found the existence of that aggravating factor beyond a reasonable doubt. If the defendant can meet this standard, then the defendant is actually innocent of that aggravating circumstance and it is stricken.

However, after striking the aggravating circumstance, a court must still reweigh the remaining valid aggravators with the mitigating factors derived from the evidence at trial. If it is clear the remaining aggravating circumstance(s) are not outweighed by the mitigating circumstances, then the defendant is still death qualified and the claim of gateway "actual innocence" fails. If the court cannot make such a determination, then Defendant has demonstrated sufficient evidence that Defendant is actually innocent of the death penalty and a new penalty hearing is ordered. Leslie, 118 Nev. at 783, 59 P.3d at 447.

29. Howard alleges that he is actually innocent of the death penalty because the two aggravators in his case, the murder was committed during a robbery and he had been previously convicted of a violent felony are invalid

30. With respect to the felony robbery *McConnell* aggravator, Leslie is inapplicable. As noted in Findings # 31 and # 32, even if Howard's McConnell claim is timely, stiking that aggravator would not result in actual innocence. The Court concludes beyond a reasonable doubt that the jury would still have found the aggravating circumstance

was not outweighed by any mitigating circumstances. The violent nature of the New York robbery conviction, the fact that it occurred one year before the robberies and murders in the instant case and the self-serving and inconsistent nature of the mitigation evidence demonstrate this.

31. Given the calculated manner in which Howard planned his robberies; lured Dr. Monahan; shot Dr. Monahan execution style in the head; terrorized or threatened to kill his robbery victims in New York and Las Vegas as well as considering his activities in California prior to his arrest, this Court also concludes beyond a reasonable doubt, that absent the *McConnell* aggravator, the jury would still have sentenced Howard to death.

32. With respect to the New York prior violent felony robbery, Howard presented to evidence that it falls within the narrow holding of Leslie and the Supreme Court already held the New York jury verdict was sufficient to satisfy the prior crime of violence aggravator. Therefore Howard has not demonstrated he is actually innocent of that aggravator. As that aggravator remains, he is not actually innocent of the death penalty and he cannot, therefore, overcome the procedural bars on this ground.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Fourth State Petition for Post-Conviction Relief shall be, and it is, hereby denied.

DATED this 5 day of November, 2010.

DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY
NANCY A. BECKER
Deputy District Attorney
Nevada Bar #00145

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing, was made this 4th day of November, 2010, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

MICHAEL B. CHARLTON
Assistant Federal Public Defender
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101

Eileen Davis

Employee for the District Attorney's Office

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*** TX REPORT ***
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OFFICE OF THE DISTRICT ATTORNEY
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Fax No. (702) 382-5815

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TO: Michael Charlton FAX#: (702) 388-5819

FROM: Nancy A. Becker NAB

SUBJECT: Samuel Howard, 81C053867, Proposed Findings

DATE: October ~~19~~ 20, 2010 1 of 2

Mr. Charlton,
The following Findings will be submitted to the Judge on November 2, 2010.
Sincerely,

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*** TX REPORT ***
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TRANSMISSION OK

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RESULT	OK	

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