IN THE SUPREME COURT OF THE STATE OF NEVADA

WILBER ERNESTO MARTINEZ GUZMAN,
Petitioner,
v.

THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; THE HONORABLE CONNIE J. STEINHEIMER, DISTRICT JUDGE,
Respondents,
and

THE STATE OF NEVADA
Real Party in Interest.

_____/

No. 82342

REAL PARTY IN INTEREST'S APPENDIX VOLUME 1

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JUDITH ANN SCHONLAU

CCR #18

75 COURT STREET

RENO, NEVADA

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

BEFORE THE HONORABLE CONNIE J. STEINHEIMER, DISTRICT JUDGE

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THE STATE OF NEVADA, Plaintiff, vs. WILBER ERNESTO MARTINEZ GUZMAN, Defendant.	)	CASE NO. CR19-0447 DEPARTMENT NO. 4

TRANSCRIPT OF PROCEEDINGS

STATUS HEARING

MONDAY, JULY 29, 2019, 10:00 A.M.

Reno, Nevada

Reported By: JUDITH ANN SCHONLAU, CCR #18
NEVADA-CALIFORNIA CERTIFIED; REGISTERED PROFESSIONAL REPORTER
Computer-aided Transcription

A P P E A R A N C E S

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RENO, NEVADA

RENO, NEVADA; MONDAY, JULY 29, 2019; 10:00 A.M.

-oOo-

THE COURT: Good morning. let the record reflect the previously sworn interpreter is present interpreting for the Defendant.

Counsel, I am sorry for the delay. We seem to be having a little disconnect getting the interpreters here with all their equipment on time. I hope this is the last delay we have. So my apologies for us starting a little bit late.

I saw from what you all gave me the Discovery Order, your Stipulation and I entered the Discovery Order a couple of days ago or weeks ago maybe, and the dates that we talked about were codified in the Scheduling Order.

Now today we were talking about whether or not you notified your experts of the dates that we selected last time, and if they were able and available, and you are going to talk to us about that day. Mr. Hicks.

MR. HICKS: Good morning, Your Honor.

THE COURT: Good morning.

MR. HICKS: The State has notified all of our experts that we know of right now that we expect to have of that date and, obviously, the trial date and the motion hearings date, and we have no issues right now. They all seem to be available and say they will be available at that time.

We also provided all our law enforcement partners and the Washoe County Crime Lab the discovery order you recently signed. They are aware of the August 30th deadline.

THE COURT: All right. Thank you. Mr. Arrascada.

MR. ARRASCADA: Good morning, Your Honor.

THE COURT: Good morning.

MR. ARRASCADA: Preliminarily, I know this Court is aware the Supreme Court ordered a Reply to our Writ.

THE COURT: Yes.

MR. ARRASCADA: At our last hearing, Judge, I mentioned that we would be seeking a stay in writing. I just want to make clear for the record, Judge, at this point in time we are not seeking a stay. However, I do want, any of the comments that I make, I want to reemphasize we are not waiving our challenge by participating in today's hearing.

With no disrespect to the Court, if I say I can't comment upon that, it is out of fear and protection of having anything construed as being a waiver.

Regarding our experts, the experts we retained to date, we have confirmed their availability both for the current trial date and also for the hearings.

THE COURT: Okay. Is there anything -- Thank you for your update and what the Supreme Court has ordered. Is there anything you would like to share with me this morning? Counsel

for the State.

MR. HICKS: Your Honor, I guess the only thing we would like to share, just an update on discovery, it is still going very smoothly. We are now up to three thousand four hundred seventeen pages that have been provided to the defense. We also provided forty-eight CDs and a number of thumb drives as well for larger data. So it is going quite well. We don't anticipate having any issues with the August 30th deadline. And we expect to be receiving some more materials in the near future which we will turn over right away.

THE COURT: I think the last time you thought some of the forensic work from Douglas County was not ready yet. Is it ready now?

MR. HICKS: I will let Mr. Jackson speak to that.

MR. JACKSON: Mark Jackson on behalf of the State. Everything from Douglas County, we have a deadline internally of the 15th. All of the reports have been received and the next batch of material will be provided. We are providing everything to the Washoe County Sheriff's Office to a certain detective to make sure that nothing falls through the cracks. So we are well on track and anticipate it will be well in advance of the August 30th date.

THE COURT: Okay. Thank you. Mr. Arrascada.

MR. ARRASCADA: Your Honor, the representations by the State are correct. I just would like to add that prior to my appointment as Public Defender and having gone through the battles, trials and tribulations not only in criminal practice but the civil practice, I will state that this has been the most effective and efficient and open discovery process to date that I have ever participated in, and I commend the State for their openness.

THE COURT: Thank you.

MR. ARRASCADA: Your Honor, I do have two issues if it is time --

THE COURT: It is time.

MR. ARRASCADA: -- to bring up.

THE COURT: Yes.

MR. ARRASCADA: Your Honor, at our last hearing, you asked two questions, and they were somewhat spawned by the Nika decision that came out. And regarding that, Your Honor, first, your first question was regarding whether we have been in communication with the El Salvadorean Consulate. I represented to the Court we have been virtually since the time Mr. Guzman was arrested in Carson City.

Also, Your Honor, we remain in constant contact with the, I believe the title is the Consulate General, for the El Salvadorean government. He's based out of Las Vegas, and his

territory is the West Coast. However, we have been and continue to remain in communication and contact with him, and they have expressed a willingness to assist us in any way that we deem necessary.

THE COURT: And so I know at the last hearing there was some discussion about mitigation evidence that is being sought in El Salvador. Are they assisting with the securing of that information, at least access to it?

MR. ARRASCADA: That was my next topic. I will answer your question first, Your Honor. Your Honor, we have also retained a consulting mitigation expert, and that business, that consulting, that investigative business has extensive -- has done extensive work in El Salvador, and we are working with them based on their experience regarding making those requests and obtaining those different items we are about to address. Of those, due to some of the tumult there is in El Salvador at times are more easily and readily obtained personally as opposed to through requesting them through government channels. But we are working not only with the government but also with our mitigation experts, the consultant we have retained to assist us in that matter.

THE COURT: Okay.

MR. ARRASCADA: Next, Your Honor, I would like to continue to address mitigation and our investigation.

THE COURT: Okay.

MR. ARRASCADA: Your Honor, I anticipate that we will be filing a motion pursuant to NRS 174.098 which is a motion to declare that the Defendant is intellectually disabled. Your Honor, regarding that process, and that process was the codification of U.S. Supreme Court case of Atkins vs. Virginia 536 U.S. 304, 122 Supreme Court 2242 which is, as this Court knows, bars the execution of people with intellectual disabilities because it violates the Eighth Amendment of the United States Constitution regarding cruel and unusual punishment.

Your Honor, there are two prongs regarding Atkins in essence. Others will break it down depending on what legal scholar you read. But the two primary prongs are: One, IQ level; and then the second, functional adaptability. I will represent to the Court that we have had Mr. Martinez Guzman's IQ tested. It is a sixty-six which seventy is the usual number I guess is what we would call that. Your Honor, that IQ quotient does not take into effect what is called the Flynn effect which, based on the literature I have read, under the Flynn affect, Mr. Martinez Guzman's IQ will in all likelihood be lower than sixty-six based on the Flynn effect.

The second prong is what's called functional adaptability. We are conducting and in the process of, through

our consultants and both independently conducting an extensive investigation and research of Mr. Guzman's background and history. As you know, he's from El Salvador. We need to obtain birth records, medical record, school records, investigate what trauma he may have encountered throughout his life, environmental factors and exposure that may have affected him prior to his 18th birthday. If the Court is not aware, Mr. Guzman turned twenty in February. In that regard, Your Honor, that is supported actually by the Nevada Supreme Court in Rippo vs. State where they quoted: Evidence regarding social background and mental health is significant as there is a belief long held by this society that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems may be less culpable than defendants who have no difficulties in that area.

The challenge, though, that is facing us as defense counsel, Your Honor, is to present mitigation evidence that explains the Defendant, Mr. Guzman's commission of the crime and the mitigation aspect of it. Judge, we are not conceding anything at this point. This request is providing the jury with an empathy provoking way of understanding the Defendant and his conduct. Your Honor, to that regard, and I take this from Nika, the American Bar Association has published

guidelines for the appointment and performance of counsel in death penalty cases. They have been generally accepted as reflecting the standards of practice in death penalty cases. The State Bar stated they long recognize prevailing norms of practice are guides to determining what is reasonable. It is unquestioned that under the prevailing professional norms at this time we have an obligation to conduct a thorough investigation of Mr. Martinez Guzman's background. Under the guidelines and pursuant to Nika, Your Honor, the investigation for preparation of a sentencing phase which is mitigation should comprise efforts to discover all reasonable available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. That includes Mr. Martinez Guzman's background including his medical history, including mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays, educational history, special educational means including cognitive limitation and learning disabilities. Military history. Employment and training history. Family and social history including physical, sexual or emotional abuse. Adult and juvenile record. Correctional experience. Religious and cultural influence. These are all areas, Your Honor, that are going to take quite some time to investigate.

We are already in the process of scheduling a trip

to El Salvador to begin that in-depth investigation, all the factors and different areas I have explained to the Court.

Your Honor, we have retained a functional capacity or functional adaptability expert, and that expert will need all of this information in order to form a valid opinion to present to the Court when we do file our motion pursuant to NRS 174.098. I provide this all to the Court so the Court and counsel can appreciate the work that we are undertaking and undergoing. The timing of that work, we are pushing as hard and as fast as we can. One problem we encounter, I guess you could say one of the issues that we encounter is this: There are very few people that are experts, true experts in this field. We have been fortunate to retain an expert that is not only bilingual but also has experience with El Salvadorean people.

THE COURT: Are we talking about your expert for mitigation or are we talking about you expert for functional adaptability?

MR. ARRASCADA: Functional adaptability, Your Honor. It would be one and the same, Your Honor, because the functional adaptability issues may also roll into the mitigation issues, if we get to that point.

I wish I could sit here at this point in time and provide the Court a date that we'll have all of that

information gathered, processed and placed into a motion for a hearing to occur, but at this time, I cannot, Your Honor. We are having to get so many people that are involved in this, working with all these various and unique calendars that they all have, and as I was mentioning, the functional adaptability expert, there are very few of them that are true experts. He's agreed to work with us on this case. He's available, if this matter goes to trial. He's expressed also he's available regarding the hearing dates that we have been provided.

Court's indulgence.

THE COURT: Yes.

MR. ARRASCADA: Your Honor, I just wanted to provide to the Court the challenges we are facing. As I said, we are moving along as rapidly as we possibly can, but we can never let efficiency get in the way of our effectiveness. We are not going to allow that to happen. However, we are continuing to push forward in our goal and effort to meet that trial date. As I said, though, we will be filing a motion. I will provide the Court and counsel a status as soon as we have our timeline more in shape.

Your Honor, we have been working on this for months, but as we have all of the different calendars and availability in shape because, as I said, we'll be making at least one investigative trip to the country of El Salvador. There may

be more. But as far as what I was stating as far as calendaring, I will put the Court and counsel on notice, as soon as we know we'll be filing that motion and provide a date for that time. After that motion is filed, we also understand that the State has a right, pursuant to statute, to retain their own experts. But at this juncture, that is where the case stands.

As I said regarding, the two prongs of Atkins, it appears that Mr. Martinez Guzman more than meets prong one which is an empirical test. Regarding prong two, we are in the process of developing all of that information. And, Your Honor, our road map came from the Nika decision, and it is -- Court's indulgence.

THE COURT: Yes.

MR. ARRASCADA: And, Your Honor, it is my understanding the Nika Order which was from Mr. Mahan who is a Federal District Court judge, that the State did not appeal his Order to the 9th Circuit. However, Mr. Nika's counsel appealed an issue regarding the guilt phase of the trial. So as far as whether the opinion that Judge Mahan issued is going to be subject to review regarding the minimal requirements for effective counsel in the mitigation portion of a trial, that Order stands, because the State did not appeal that Order, Judge.

That is all I have at this point unless the Court has questions of me.

THE COURT: I don't have any questions as long as you have made representation to the Court that you will notify the Court and counsel as soon as you have reports to disclose and have a motion ready to go, because that will cause a delay for them to secure their experts and have an opportunity to interview your client and do their forensic work with your client once the motion is filed. I would still hope we could meet that November deadline. That is the first time we have a hearing set. I'd be glad to set something earlier if possible, but I am not sure we'll be even able to meet that November date.

MR. ARRASCADA: Your Honor, the earlier date I don't foresee even remotely possible. We are targeting that November date. However, Your Honor, there is a lot of moving pieces, parts and people and calendars we don't have control over, but we are putting forth every effort. May I have your indulgence for a moment?

THE COURT: Yes.

MR. ARRASCADA: That is all we have at this point, Your Honor, unless you have other questions.

THE COURT: I have no questions.

MR. ARRASCADA: Thank you.

THE COURT: Thank you. Does the State have anything?

MR. HICKS: Thank you, Your Honor. We recognize the hurdles the defense has to overcome in this situation. Nevertheless, we would ask they be aware of your discovery order and perhaps start providing us with some of these materials so we can in turn prepare ourselves to have our own independent evaluation done of the Defendant. Obviously, they have done their test. The attorneys for the Defendant for over six months now, I know that they have had capacity experts go and speak with him already. So we would appreciate reciprocal discovery as soon as possible so we are not put in that difficult position where we are trying to meet these deadlines.

Aside from that, Your Honor, we just ask the Court order that.

THE COURT: Well, I think, Mr. Arrascada, you are aware of your obligation under the Order, and so it is incumbent upon you to provide reciprocal discovery, so you should do so.

MR. ARRASCADA: Your Honor, in no way are we even getting close to violating that Order. We'll provide expert reports in accordance with the Court's Order.

THE COURT: Okay. Thank you. So I think it is a good idea for the next 30 days, it seems like the issue really

for all of you to be talking to each other about will be this issue in terms of at least the intellectual capacity of Mr. Guzman in terms of the IQ test. That at some point is obviously going to be presented. It doesn't really depend upon finding your functional adaptability expert. It is a much, I shouldn't say easier, but it is a simpler task, one that we accomplish in the court all the time. So I would like to see, in the next 30 days, a discussion about the results from the IQ test so the State can move forward with their request, if they're actually going to make a request, they will make a formal request to have their expert test Mr. Guzman's IQ, at least we have that part of what you call the two prong test. There could be other issues involved, but at least we'll have that beginning. So in the next 30 days I would like to see that happen, and that seems to be the most significant issue that you raised for me today.

We would plan to get together 30 days from now or so which would be Monday August 26th. Does that work for everyone?

MR. HICKS: Works for the State, Your Honor. Thank you.

MR. ARRASCADA: Judge, I turned off my phone.

THE COURT: I'm glad you turned it off. That's good you follow the rules, Mr. Arrascada.

MR. ARRASCADA: I make all the effort to, Your Honor.

Your Honor, we are available then.

THE COURT: Okay. Monday, August 26th at 10:00 a.m. between now and then you all can work on your projects that you are working on. If there is anything you need the Court's assistance with, let us know. If there is nothing further for this morning, we'll be in recess. Thank you. Court's in recess.

(Whereupon, the proceedings were concluded.)

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STATE OF NEVADA,)
) ss.
COUNTY OF WASHOE.)

I, Judith Ann Schonlau, Official Reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, DO HEREBY CERTIFY:

That as such reporter I was present in Department No. 4 of the above-entitled court on MONDAY, JULY 29, 2019 at the hour of 10:00 a.m. of said day and that I then and there took verbatim stenotype notes of the proceedings had in the matter of THE STATE OF NEVADA vs. WILBER ERNESTO MARTINEZ GUZMAN, Case Number CR19-0447.

That the foregoing transcript, consisting of pages numbered 1-18 inclusive, is a full, true and correct transcription of my said stenotypy notes, so taken as aforesaid, and is a full, true and correct statement of the proceedings had and testimony given upon the trial of the above-entitled action to the best of my knowledge, skill and ability.

DATED: At Reno, Nevada this 29th day of July, 2019.

/s/ Judith Ann Schonlau
JUDITH ANN SCHONLAU CSR #18

4185

JUDITH ANN SCHONLAU

CCR #18

75 COURT STREET

RENO, NEVADA

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

BEFORE THE HONORABLE CONNIE J. STEINHEIMER, DISTRICT JUDGE

-o0o-

THE STATE OF NEVADA, Plaintiff,	)	
vs.	)	CASE NO. CR19-0447
	)	DEPARTMENT NO. 4
WILBER ERNESTO MARTINEZ GUZMAN, Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

STATUS HEARING

MONDAY, AUGUST 26, 2019, 10:00 A.M.

Reno, Nevada

Reported By: JUDITH ANN SCHONLAU, CCR #18
NEVADA-CALIFORNIA CERTIFIED; REGISTERED PROFESSIONAL REPORTER
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RENO, NEVADA; MONDAY, AUGUST 26, 2019; 10:00 A.M.

-OOO-

THE COURT: Thank you. Please be seated. Let the record reflect this is the time set for a status hearing in CR19-0447. Present on behalf of the Court is the previously sworn court interpreter assisting Mr. Guzman.

Counsel, make your appearance for the record.

MR. HICKS: Good morning. Chris Hicks on behalf of the State.

MR. JACKSON: Good morning. Mark Jackson on behalf of the State.

MR. LUCIA: Good morning. Travis Lucia on behalf of the State.

MR. ARRASCADA: Good morning, Judge. John Arrascada on behalf of Mr. Guzman.

MS. HICKMAN: Kate Hickman on behalf of Mr. Hickman.

MR. GOODNIGHT: Joe Goodnight on behalf of Mr. Guzman.

MS. VERNESS: Gianna Verness on behalf of Mr. Guzman.

THE COURT: This is the time set for a status. I think at this hearing we initially have a couple of things. One is to make sure discovery has happened the way we expected it to. Are there any issues with regard to the discovery?

MR. ARRASCADA: Your Honor, we received a packet of

discovery last week from the State, roughly 1,500 pages give or take. I also am uncertain, I would defer to the State to update regarding the complete testing from SERI Labs which is the independent lab that Douglas County was utilizing. We have a few documents from them, but I don't believe we have all the documents, but I also appreciate we don't control the labs.

THE COURT: Right. Okay. Counsel.

MR. HICKS: Thank you, Your Honor. Yes, discovery is going as it has been. Current numbers, we are up to 3,696 pages of discovery that has been provided. The most recent dump, if you will, of discovery contained a good portion of the bench notes our experts relied upon in the DNA testing. We have also supplied fifty-seven disks or thumb drives with media evidence. And in speaking with our detective today who has been in charge of chronicling all their discovery, we'll have another dump she'll be providing to us this week. We will turn around and give it to the defense as it happens. I am comfortable saying we are probably at ninety-five percent of the entire discovery. SERI Labs, as Mr. Arrascada brought up, are included in this disclosure of discovery we are receiving from Douglas County this week.

THE COURT: So you think you will still be able to make the August 30th deadline?

MR. HICKS: Absolutely.

THE COURT: Okay. Great. What is the status with regard to experts and forensic interviews.

MR. ARRASCADA: Your Honor, I reviewed the transcript from our prior status hearing before today. For the Court's information, we met, we the defense team, met with the prosecution team on August the 15th. We have discussed with them. It appears we believe we'll have the final report from the IQ report, we hope to have it this weekend or next week. I discussed this previously with Mr. Hicks and shared with him any mail correspondence we had had with the expert.

Regarding, as the Court knows, we are not only preparing to defend the charges that Mr. Guzman is facing, but also it is our Constitutional duty to Mr. Guzman to prepare mitigation. And also we are looking at the intellectual capacity pursuant to NRS 174.098.

We'll be traveling to El Salvador on September the 4th through the 10th to begin gathering documents, information and evidence.

THE COURT: You are taking a team?

MR. ARRASCADA: It will be myself and two mitigation/ intellectual capacity experts who have substantial experience in El Salvador on occasions of this nature.

THE COURT: Okay. And what do you anticipate you

will find there? Are you going to have more experts out of this, or do you think you will still be able to keep with the experts you have identified so far?

MR. ARRASCADA: Your Honor, I don't know. I am not in a position to answer that question at this time.

THE COURT: Okay. All right. So what can the Court do to assist either side or both of you at this time?

MR. ARRASCADA: Your Honor, practically speaking, as I said before at the last status conference, in my legal career, this is the smoothest I have seen discovery.

THE COURT: I don't want you saying that. You better knock on some wood.

MR. ARRASCADA: I will knock on wood. It is as smooth as I have seen it to date. Thank you with the qualifier. We have nothing further to add, Your Honor. The only request we would have, as you know, we have that running order to have Mr. Guzman's left hand unshackled. The other which would be very beneficial and helpful is to have a running order to have the headsets.

THE COURT: I asked for those. Nobody paid attention.

MR. ARRASCADA: Well, we are bringing it up again.

THE COURT: Are you okay with the left hand today?

MR. ARRASCADA: We are today, Your Honor.

THE COURT: We'll make sure we have that.

MR. ARRASCADA: Thank you.

THE COURT: Thank you for reminding me it hadn't happened.

Counsel.

MR. HICKS: Thank you, Your Honor. I just want to bring up a couple of things. The second will be about the trip to El Salvador. The first thing I want to bring up, Your Honor, we were here for his Arraignment on March 19th. We agreed, mutually agreed upon a trial date and, candidly, Your Honor, as every day passes that we are not getting definitive answers what experts are going to be needed or receiving reports from experts, we're starting to get concerned. I looked at the number of days today since the day we set the trial and 160 days have lapsed. By the time we have our next status hearing, we'll only be six months out from trial.

THE COURT: Right.

MR. HICKS: We have made this a priority, Your Honor. We have done so in large part because it is important to move this case along, and our victims who are here every time, they have informed us they want to exert their Constitutional rights under the Victims Bill of Rights to make sure this is an efficient trial. They have been very reasonable, as reasonable as you could ever dream of for

victims, but it is important for the State as well. A lot of people had a hard time understanding why we set it out a year. We did that because that was an agreed upon date to move forward. We don't want to lose that date. You have been very respectful of that as well. You've had a succinct briefing schedule, had the status conferences, it is clearly a priority for you as well.

I don't want this to seem as though I am casting aspirations to the defense. That's not what I am doing, nor am a casting them at their current expert, Dr. Mahaffey. But we are looking, and the last time we were here July 24th you said get with the State, provide the results of that IQ test, provide the reports. We still don't have them. When I looked at the jail visitation logs, Dr. Mahaffey spent ten visits with the defendant in early March. She's had four more, one in late May, actually two in late May and two in early June. So we are six months from the bulk of her meetings, almost three months from our concluding meetings, and we still don't have the reports. I am sure there is an explanation, but the reality is the clock is ticking, and we need to keep this moving forward. And in the interest of fairness for the State, the intellectual disability challenge, we need to know what they are going to give to us. Because as soon as they file that motion, proceedings are stayed, and we have fifteen

days to turn around with our own expert and then we have to deal with this issue that they have brought up. And so I guess when you say what can the Court do, what the Court can do in my interest as the prosecutor for the State, Mr. Jackson, Mr. Lucia and our victims, is to make sure that we are staying on target. Because we were very reasonable in setting that trial date, and Your Honor was very reasonable accommodating that. So that is the first ask I would make.

Secondly, Your Honor, so as we have spent some more time looking at NRS 174.098 and the functional adaptability portion of the intellectual disability challenge, the IQ test is one thing. Mr. Arrascada went through this a little bit at the last hearing. The functional adaptability is the bulk of the evidence presentation to the Court to make the determination you are going to have to make. Part of that functional adaptability is what experts do is they assess the adaptive behavior using standardized rating scales based on the reports of informants who knew the individual, Mr. Guzman, Mr. Martinez Guzman well, and can report on current or recent function. So in essence, what the experts do, in addition to acquiring evidence which I am sure they will attempt to do in El Salvador. I hope they can find the schooling, possible records if there are any, but then there is interviews, interviews of family, interviews of friends, interviews of

neighbors, interviews of teachers, any number of people that can testify to what they know about the Defendant and how he could function. That is going to happen in El Salvador. That is going to be documented in some way for their expert to ultimately rely on to draw conclusions as to his functional adaptability. When you're looking at that statute, it is very clear under Subsection 4, once that is filed, there is no privilege for any information or evidence provided to the prosecution or obtained by the prosecution regarding the Defendant. So the request, I have already mentioned this to Mr. Arrascada last week, is if there are interviews being conducted in El Salvador of individuals who the experts are going to rely upon in reaching their functional adaptability conclusion, I would ask those be recorded so our expert can review the same. Any notes that are taken, any tests that are given, any documents that are used for that purpose we would ask that be documented and recorded so our expert can use the same. We don't want to turn around on the taxpayer dime and have to fly our experts to El Salvador to try to find these people. What we re trying to determine with regard to that statute is is the Defendant intellectually disabled. I kind of see it in all the hearings and motions we are going to have, it is the most objective analysis. Really, we are just trying to get the experts together to give Your Honor a view

of who he is and if he is functionally disabled. So I think it is fair to ask the defense to provide that to us, much like our DNA experts. We provided them hundreds of pages of notes, the bench notes they have taken in reaching their conclusions. It is the same analysis.

Now I recognize they are going to be doing mitigation research as well, but, really, that is within your discovery order that should be turned around to us promptly, too.

So second to my initial request is that we receive prompt discovery disclosure of what they find in El Salvador so we can begin to investigate and analyze it ourselves,and anything that is going to be used by their intellectual disability experts to reach their conclusions be recorded and shared with the State. Like I said, I did speak with Mr. Arrascada last week, and he needed a little time to think about it. I don't know what their stance is today.

That is all, Your Honor. Thank you.

THE COURT: Okay. Mr. Arrascada.

MR. ARRASCADA: Your Honor, I am going to go in reverse order. Well provide that once it is at issue and it is relevant, that information to the State. We know our obligation and our duties. We are not here to play games.

THE COURT: That seems a little waffly to me,

Mr. Arrascada. It is already at issue. You already told me you have an IQ test. You have already got the basis, mostly, for filing a motion. You have told me you have known that now for ninety days. I have seen no motion. And I understand you want to get more of the functional adaptability information.

MR. ARRASCADA: We have none of that. We have one prong as I said, Your Honor in our initial hearing. That is why we are going to El Salvador.

THE COURT: You should have it by September 10th.

MR. ARRASCADA: No, Your Honor, I will be in transit September 10th. I think we have to look at this in perspective, Judge.

THE COURT: No, I understand you will be in transit.

MR. ARRASCADA: Your Honor, the State --

THE COURT: You would physically have your evidence when you leave El Salvador.

MR. ARRASCADA: We should. Then it goes to our expert. Our expert will then be reviewing it, then we'll disclose it accordingly. Just like the State has done, Your Honor. Since January they have had all their evidence gathered, collected. Then it gets reviewed by their lab. Their lab prepares reports. Then their lab sends all the reports to the designated detective who then sends it to the District Attorney's office who then reviews it before they

give it to us. We'll follow the exact same process and procedure, Your Honor. That is the fairness.

THE COURT: Have you given the IQ stuff to the State?

MR. ARRASCADA: Your Honor, as I mentioned earlier, we anticipate we'll have the finalized report this week. I reached out to Mr. Hicks regarding that last week and spoke with him.

THE COURT: So if it is true that Dr. Mahaffey last saw the defendant in May, is that right? June?

MR. HICKS: June 4th.

THE COURT: So this is August 26th, so that took sixty days or so for you to get the finalized report.

MR. ARRASCADA: We don't have the final report.

THE COURT: But you're anticipating you will have it about sixty days from her last visit?

MR. ARRASCADA: That's accurate.

THE COURT: Okay. Are you anticipating it is going to take you sixty days to get your information to the State and file a motion after you return from El Salvador? The reason I am asking that is sixty days means we do not have our trial date. We are going to lose a lot of our motions that have been set. So sixty days, if that is your anticipation it will take that long, we have got a problem in terms of timing

of the trial.

MR. ARRASCADA: Your Honor I appreciate that. May I suggest I will know more when I come back.

THE COURT: Okay.

MR. ARRASCADA: And I will provide, either I can meet with counsel or we can hold a status hearing that week that I have returned, and I can provide the Court better information at that time.

THE COURT: Okay. Well, our next status hearing would normally be September 30th, so you will be back twenty days before that. I don't want to lose a lot of time there. We are going to have to have some motion work at some point. I would like to get that sooner than later, but, obviously, the 10th is too soon.

MR. ARRASCADA: Right. Perhaps, Your Honor, I think the 10th is a Tuesday, we would like to hold a hearing later that week we can come, or the week after that, then we would have a better idea where we stand. I would suggest the week after that, like the 17th 18th, 19th area.

THE COURT: Will that give you enough time to get a sense of where you are?

MR. ARRASCADA: We hope so, Judge. We are not dragging our feet here. I know Mr. Hicks said he wasn't stating that, but we are moving as rapidly as we can under the

circumstances. We respect the trial date we set. Candidly, Mr. Hicks and Mr. Jackson I believe will agree when we met for a trial date, I was pushing for October, and I stated on the record when we set the trial date the April date was ambitious. We are doing everything to meet that. We are keeping in mind the Marsy's Law rights, but the Marsy rights do not trump Mr. Guzman's due process rights. We are doing everything we can to meet every deadline imposed by this Court.

THE COURT: Okay. So you said you would have the IQ information to the State this week or next week, correct?

MR. ARRASCADA: That's accurate.

THE COURT: So let's set a deadline just so we have a deadline set that is reasonable. That would be Thursday, September 5th. So that is ten days from now, right? So I think that makes sense. If you do it sooner, great, but if not, there is no reason why you can't provide that information by that date. Then you will have left for El Salvador, but one of the attorneys on the team will be here. Then you will be gone, and we can set a hearing around the 18th maybe is a good date, Ms. Clerk, or do you want the 16th? We are going to have to do it on the 16th. We'll keep it a Monday morning. We'll do it on the 16th at 10:00 a.m. And we might as well call that our monthly status. But at that hearing, we can

make a decision. You can provide us with all the information, generally what you have got, how long you think it will be before we can move forward.

Now the other part of the request from the State was that if you get information, interviews, that you record them. That you don't -- What I understand is happening, your experts are physically going to be there, so they will have first-hand knowledge of the content of the interviews, so it may not be essential for them to record it, but it will be essential for the State not to have to go back with their own experts to have those interviews recorded. Do you have any objection to doing that?

MR. ARRASCADA: Personally, no. We'll to our best to do that. But we may have someone that says they won't provide an interview if it is recorded or something of that nature. We'll take copious notes. Well do everything we can, because we understand our duty, Judge.

THE COURT: Well, I am going to enter the order that any information your expert is going to rely upon, be it notes, tests, documents or statements, you have to have the statements recorded and the notes preserved for the State. Now if for some reason there is an anomaly, we can talk about it and discuss what happened and figure out how we can solve that problem. But, generally, you have to provide all of that. You

have to keep it, and you will have to provide it to the State. I know a lot of what you're looking for will be mitigation, generally. Of course, at a certain time, that must be disclosed also. But I am much more concerned with 174.098 evidence we have to look at and the experts will have to look at that and the delay in the trial that kind of motion might bring. That will be the order with regard to the preservation of the information and evidence that you secure and is relied upon by your expert, then we'll come back on the 16th and you can share with us how it all went, where you think you are and what the status of your expert is.

I would also want at that time an indication of when you all think you're going to be filing your motion. We have a lot of -- we have the Thanksgiving week set aside already for hearings. We have already been in the middle of September when you come back, so that is only sixty days from November, so we'll keep moving. Okay.

MR. ARRASCADA: Understood. Thank you, Judge.

THE COURT: Is there anything else for today?

MR. HICKS: No thank you, Your Honor.

MR. ARRASCADA: No, Your Honor.

THE COURT: All right.

MR. ARRASCADA: Have a great day.

THE COURT: You too. We'll see you back on the 16th.

Court's in recess.

(Whereupon, the proceedings were concluded.)

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STATE OF NEVADA,)
) ss.
COUNTY OF WASHOE.)

I, Judith Ann Schonlau, Official Reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, DO HEREBY CERTIFY:

That as such reporter I was present in Department No. 4 of the above-entitled court on Monday, August 26, 2019 at the hour of 10:00 a.m. of said day and that I then and there took verbatim stenotype notes of the proceedings had in the matter of THE STATE OF NEVADA vs. WILBER ERNESTO MARTINEZ GUZMAN, Case Number CR19-0447.

That the foregoing transcript, consisting of pages numbered 1-19 inclusive, is a full, true and correct transcription of my said stenotypy notes, so taken as aforesaid, and is a full, true and correct statement of the proceedings had and testimony given upon the trial of the above-entitled action to the best of my knowledge, skill and ability.

DATED: At Reno, Nevada this 26th day of August, 2019.

/s/ Judith Ann Schonlau
JUDITH ANN SCHONLAU CSR #18

4185

JUDITH ANN SCHONLAU

CCR #18

75 COURT STREET

RENO, NEVADA

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

BEFORE THE HONORABLE CONNIE J. STEINHEIMER, DISTRICT JUDGE

-o0o-

THE STATE OF NEVADA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CASE NO. CR19-0447
	)	DEPARTMENT NO. 4
WILBER MARTINEZ GUZMAN,	)	
	)	
Defendant.	)	
_____	)	

TRANSCRIPT OF PROCEEDINGS

STATUS HEARING

MONDAY, SEPTEMBER 16, 2019, 10:00 A.M.

Reno, Nevada

Reported By: JUDITH ANN SCHONLAU, CCR #18
NEVADA-CALIFORNIA CERTIFIED; REGISTERED PROFESSIONAL REPORTER
Computer-aided Transcription

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RENO, NEVADA; MONDAY, SEPTEMBER 16, 2019; 10:00 A.M.

-oOo-

THE COURT: Counsel, make your appearances for the record.

MR. JACKSON: Mark Jackson on behalf of the State.

MR. HICKS: Chris Hicks on behalf of the State.

MR. LUCIA: Good morning. Travis Lucia on behalf of the State.

MR. ARRASCADA: Good morning, Your HOnor, John Arrascada on behalf of Mr. Martinez Guzman.

MR. GOODNIGHT: Joe Goodnight on behalf of Mr. Guzman.

MS. VERNESSS: Gianna Verness on behalf of Mr. Guzman.

THE COURT: The record should also reflect Mr. Martinez Guzman is present and being assisted by the previously sworn court interpreter.

This is the time set for a status hearing. I think the first order of business was did you find out, Mr. Arrascada, if you are ready to move forward or going to file a motion? Have you made that decision?

MR. ARRASCADA: Your Honor, we will be filing a Motion to Continue. If I may provide some brief presentation

regarding the trip to El Salvador?

THE COURT: Certainly.

MR. ARRASCADA: Your Honor, the trip to El Salvador, we were able to spend five days in the country, itself, two day's for travel. For safety and security reasons, we could only conduct investigation from sunup to sundown. We had to be off the streets by darkness.

I was there with two bilingual investigators who are experts in mitigation and also regarding intellectual disability. During our time there, we interviewed ten family members. To put it in perspective, Your Honor, at one point, I was in a field assisting with irrigation while an interview could be conducted with one of my client's uncles. We also interviewed two separate teachers, a principal, a janitor/caregiver or caretaker/guard for the school.

We also went to three separate hospitals where we were able to confirm records existed. We went with releases and provided them, however, the medical records gathering is going to be and also scholastic record gathering is going to be a little bit laborious. I can assure the Court prior to departing, having worked with the local counsel for El Salvador, we are in contact with and working through him, also with the El Salvadorean Minister of Foreign Affairs which is based in El Salvador including directly with the Director

General for Human Rights who is the person that would be able to obtain the necessary medical records and also school records for us, at least assist us in doing so.

We also, Your Honor, obtained some forensic investigation regarding pesticides, fertilizers, etcetera that our client was exposed to while working in the fields. It is a very rural agricultural economy. His family are farmers.

Your Honor, the interviews confirmed that there is a good faith determination, we made a good faith determination to continue forward with the intellectual disability investigation and begin working towards clinical interviews by our Spanish speaking experts in the intellectual disability field. Also, I will be meeting next week with one of our Spanish speaking intellectual disability experts in San Francisco to obtain from him his schedule.

Your Honor, we have also retained Dr. Steven Greenspan. Doctor Greenspan, and I consulted with him regarding timing. To give the Court some background regarding Dr. Greenspan, he's been involved in over thirty-five capital cases over the past fifteen years. In all of those cases, he was retained to address whether the defendant had suffered or had intellectual disability which used to be termed mental retardation as we see in our statute, Your Honor.

Dr. Greenspan shared with me in roughly eight of those cases

his involvement did not progress past consultation because he did not feel or believe the evidence supported an intellectual disability claim. Of the remaining cases, his role did not progress to testimony as a plea agreement was reached. In cases where he did testify, he testified both as what is called a teaching expert for the Court regarding intellectual disability and also in some cases played a clinical role where he evaluated the Petitioner. In this case, we do not envision him performing a clinical role, because he's not a Spanish speaker.

As a teaching expert, he educates the Court about intellectual disability and the appropriate methods for determining the diagnoses.

He has been, Your Honor, primarily retained by defense counsel, however, he's also been hired by courts to perform independent evaluations. Doctor Greenspan is the most cited authority in the two intellectual disability classification manuals which our Supreme Court has adopted and relied upon in the Ibarra case which is the only Supreme Court case we have regarding intellectual disability, and there is also an unpublished opinion. I can provide those cites to the Court.

Court's indulgence.

THE COURT: Yes.

MR. ARRASCADA: Ibarra is 127 Nev. 47, and the unpublished opinion, State v. Covington 433 P.3rd 1252. I asked Dr. Greenspan to provide to me his thoughts regarding timelines. Your Honor, if I may go back again, he's the most cited authority in the two I.D. classification manuals the 2010 classification of AAIDD and the I.D. section in the 2013 DSM-5. He's also has the most chapters in the AAIDD published Death Penalty and Intellectual Disability book, and he's written numerous papers on classification issues regarding intellectual disability in both legal and human service context. At one time, he was a member of the AAIDD Classification Committee and was an official advisor to the community that wrote the I.D. section for the DSM-5. He's the most cited person on the 2010 AAIDD manual and also the DSM-5. In essence, he is the expert of experts in this field, Your Honor.

Dr. Greenspan has shared with us that in a case regarding intellectual disability where the defendant spent part of their developmental period prior to age 18 in another country -- Mr. Guzman came to our country at roughly the age of 17. He's now 20. He turned 20 in February -- requires multiple international trips, interviewing percipient witnesses, and that roughly at the earliest onset you're looking at eleven months to have a complete, full and accurate

intellectual disability investigation completed.

Your Honor, one thing that is a triggering factor, and because we assured the State and assured the Court we would always be candid with the tribunal regarding issues that we were able to be candid with, we shared these preliminary results as soon as we learned of them from Dr. Mahaffey to let the State and the Court know this could be an issue. We have been working on these issues from the very beginning and inception of this case when we were appointed. But from an expert's standpoint, their triggering event is not a lawyer saying, "I was told that IQ," which is one of the three separate criteria regarding the NRS 174.098. Their triggering event is when they receive a clinical report. The final report written by Dr. Mahaffey I believe was written on September the 6th, and we did provide that to Mr. Hicks shortly thereafter. Doctor Greenspan opined, at least provided to me that regarding the Atkins proceedings, it was best for them to be scheduled between July and September of 2020, and he provided me the reasons for that. Qualified experts, including himself, are likely booked out until January 2020 or later. As I said, I have a meeting with one of our qualified experts in I.D. next week. I am going to be pushing to have this move along as fast and as quickly as possible regarding his schedule. Judge, I also --

THE COURT: You don't know that expert's schedule?

MR. ARRASCADA: At this point in time, I do not. That is why I am going to be meeting with him.

THE COURT: You can't do it over the phone, find out today what his schedule is?

MR. ARRASCADA: Your Honor, he's traveling in Rome right now. I am going to be meeting him as he gets off the plane in San Francisco. The other reasons are the tracking of records from various agencies in the United States and El Salvador can take a long time. Your Honor, I have shared with you what we have already done in front loading before we were even told, so we're getting that process moving as quickly as possible.

Also, Your Honor, comprehensive biopsychosocial developmental history is essential and could easily take four or five months to incorporate into that time and would be essential for experts to look at.

Those were the areas that Dr. Greenspan provided, and based on his substantial experience in this field, Your Honor, I trust what he has shared. I impressed upon him we had a trial date in April. He said that is unlikely and unrealistic. I also impressed upon him that this case must move forward efficiently. But, again, Your Honor, we will not allow that to affect our effectiveness for our client in the

areas that we have.

Your Honor, I think as this Court knows, ADKT 411 is the Blue Book, for lack of a better term, regarding proceeding in a death penalty noticed case. That ADKT 411 basically adopted word for word verbatim the ABA guidelines. I will share this with you from the ABA guidelines regarding the work that we have:

Locating and interviewing the client's family members who may suffer from some of the same impairment as the client and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors and others. Must obtain records from the court, governmental agencies. And also information documenting or providing clues to childhood abuse, the intellectual disability, brain damage and/or mental illness along with corroborating witness recollection. We must request records not only of our client but multi-generational concerning not only the client but his parents, grandparents, siblings, cousins and children. We obtained releases regarding all these records and are working with the El Salvadorean Consulate.

THE COURT: Mr. Arrascada, I am familiar with ADKT 411. I am familiar these are recommendations not requirements.

MR. ARRASCADA: Your Honor, these are minimum practices.

THE COURT: Recommendations. You don't have to go through that check list on every case.

MR. ARRASCADA: Your Honor, this case, though, meets every one of the boxes that needs to be checked based on he grew up in El Salvador and all the work we have to do.

THE COURT: So what I am hearing you say, because he's an El Salvadorean national, he grew up there, he was there until three years ago, there is no way to try this case in less than two years, because you have already been at it now seven months.

MR. ARRASCADA: No, Your Honor. That is a misnomer. We have not been at it seven months.

THE COURT: You haven't been at this part. You didn't go to El Salvador day one, but this case, the prosecution of this case, began some time ago. And I know that I have had it set, so we started this case and started working on it.

MR. ARRASCADA: When this case began, Your Honor, we did not know about the intellectual disability issue existed. We were unaware.

THE COURT: That wasn't what I said, Mr. Arrascada.

MR. ARRASCADA: I agree with you as far as what you

stated. When we set this case, Your Honor, I stated it was ambitious, and we would do everything we could to meet those demands, and we would do everything we possibly could to move forward and meet that trial date.

I shared with you at our last status conference, even when agreeing to the trial date with the State, I requested an October trial date. I'm not saying I think we are two years out from trial, Your Honor. But I think we could set a trial date sometime in late 2020 or in mid 2021, Your Honor, beginning of 2021. I am providing this information because the Court requested it.

As the Court knows, we did not know the intellectual disability issue would be there and were conducting our mitigation interviews until we learned what we did from Dr. Mahaffey's report which then triggered this event.

Your Honor, I think we need to keep a few items in perspective here. When Mr. Guzman was arrested, he was in Carson City. Carson City, to my understanding and knowledge, was not going to stay the case of Mr. Guzman on the property offenses in Carson to extradite him to Washoe to face charges. They were going to go forward with the property crimes. Mr. Guzman and the defense team recognized the significance of this case to the State, to the Court, to the families of the deceased and our community, and he agreed to continue the

charges in Carson City to allow his extradition to Washoe County. If that had not occurred, Your Honor, we would not be here, and the State would still be waiting as the Carson charges were being resolved or if they could have done something in the interim to get it to this point. As I said, when we agreed upon the trial date, I said it was ambitious. I wanted it to be in October 2020. But most significant, at that time, we were not aware of the reality of the Atkins issue. When we were put on notice of the Atkins issue, out of our candor to the Court and respect to the tribunal, the State and all parties involved, we put the Court on notice.

Your Honor NRS 174.098 does not place upon us an obligation to advise the Court or counsel of that potential. We did so out of our great respect for the criminal-justice system, the Court and the State. We could file 174.098 at any time ten days before trial. In Covington, it was actually filed in the midst of trial. And Covington, just so the court is aware, did not go to trial from the time of his Arraignment for three years. We are not going to be Covington, Your Honor. We are not going to be three years.

But so what could have happened, Your Honor, is we could have gone about our way and been doing this intellectual disability investigation, our 174.098 investigation and not told anyone and ten days before trial we could have filed the

motion which requires by statute, and also I reviewed the Courtroom Handbook on Nevada Evidence, it requires an automatic stay of proceedings. We did not do that, Your Honor. As I said, out of our respect and our feeling of duty of candor, because I could think of nothing worse than everyone preparing for trial and being ready to go and then having this motion ten days before trial dropped upon everyone, and then an automatic stay being put in place. None of this, Your Honor, is being done for purpose of delay. We are meeting our duties and obligations in accordance with ADKT 411 which are also the ABA standards.

Your Honor, as I stated, how long Covington took, we are not going to be there. We are not going to be Covington. However, we do need a continuance. Your Honor, I did not anticipate making an oral Motion for Continuance today and will do a written motion to the Court and have it on file within two weeks if that is how the Court would like to proceed. But in an extreme abundance of caution and our sense of fairness, we felt we needed to place the Court and the State on notice where we are right now. And we did that because we are not going to wait until a month before trial or ten days before trial to file the 174.098 motion which would stay the proceedings. It would be a huge waste of resources and it is a huge impact upon everyone's emotions and work and

all of that.

So, Your Honor, we are doing everything correctly, and we are here again in all candor to the Court stating where we are.

THE COURT: So just a couple of questions for you. You don't know -- What is the name of this intellectual disability person you're talking to?

MR. ARRASCADA: Doctor Anton Puente, P-U-E-N-T-E.

THE COURT: You don't know when he's available today?

MR. ARRASCADA: Today as I sit here, I do not.

THE COURT: And your Dr. Greenspan is not available until sometime in 2020?

MR. ARRASCADA: The earliest he will be available is toward the end of this year, beginning of 2020.

THE COURT: But his opinion is you will not have all the rest of the information you need in time for an April trial?

MR. ARRASCADA: That's correct.

THE COURT: We currently have Pretrial motions set. We have that window set aside for that. Are you anticipating you would not be able to follow through with those Pretrial motions?

MR. ARRASCADA: No, Your Honor. We are going to be

continuing on. Regarding the guilt phase motions, for lack of a better term, they are in the hopper. We are working on them. Regarding the guilt phase motions, we would be more than happy to be prepared to argue those motions in November.

THE COURT: So are you waiving any argument that your client was unable to assist you in preparing for the guilt phase of the trial because of his intellectual disabilities?

MR. ARRASCADA: Your Honor, the motions that we have so far anticipated in the guilt phase are motions that are pure legal that we will be filing. If there are motions that we need assistance from our client on, we'll advise the Court and ask for those to be moved to a different point in time if he can't assist us.

THE COURT: So you do not anticipate filing your motion before the November date?

MR. ARRASCADA: NRS 174.098?

THE COURT: Correct.

MR. ARRASCADA: Your Honor, based on my discussion with Dr. Greenspan, no, I do not believe we would be able to file it by April. We'll do everything we can to file it by April, Your Honor, but I don't foresee how that can happen. Also, Your Honor, regarding 174.098 witnesses are also contemplated. We have an immigration attorney, immigration

specialist attorney in our office who has a dual role. Primarily she's an immigration specialist. She's working with us now to obtain appropriate Visas, etcetera for travel once we know a date.

THE COURT: There are, of course, ways to handle a hearing even if you can't get Visas.

MR. ARRASCADA: We also anticipated that. We are looking into the potential of like SKYPE I think is what the Court is referring to or realtime or something.

THE COURT: Correct.

MR. ARRASCADA: Yes.

THE COURT: Okay. So today was, everything you told me, was for informational purposes or are you making a formal motion?

MR. ARRASCADA: May I have the Court's indulgence?

THE COURT: Certainly.

MR. ARRASCADA: Your Honor, due to the nature of the case, I would like to say if the Court wanted to entertain this as a formal motion to do so, but I think, due to the nature of the case, we should provide a written Motion to Continue.

THE COURT: Okay. Thank you. Anything further?

MR. ARRASCADA: None unless the Court has further questions.

THE COURT: Not right at this minute. Mr. Jackson.

MR. JACKSON: Thank you, Your Honor. Your Honor, the State is prepared to proceed to trial in April of 2020. We have met all of the requirements that have been placed on us by the Court pursuant to the Pretrial Order that was issued back on July 29th. We will be filing all of our motions on or before November 1st. I appreciate the fact that the defense brought up this particular issue. And the State's position would be that the defense follow the previous Order of this Court in the Pretrial motion, that all motions must be in writing unless exigent circumstances exist. We don't see this as an exigent circumstance. And also, in order to comply with 174.125, any motion that resulted in a continuance of the trial is required to be in writing and filed with the Court with the appropriate Affidavit. So a lot of information Mr. Arrascada provided to the Court he could put in the form of an Affidavit.

Some of the information Mr. Arrascada provided to the Court is somewhat a position and argumentative and stating for example Mr. Greenspan, Dr. Greenspan is the expert among experts. The State would disagree with that. He is not. He's considered an expert among the experts by defense counsel across the United States on certain types of issues because he's retained by defense counsel on those particular types of

issues, and they probably already know the type of opinion that he would render with respect to the second prong under Atkins. It is also important for the Court to understand, while they are entitled to put on a defense, the U.S. Supreme Court has said they don't necessarily get the expert of their choice. In Ake versus Oklahoma, A-K-E, 470 U.S. 68, it is a 1985 case where they are entitled to a competent psychiatrist or psychologist in dealing with circumstances involving mental health, but an indigent defendant is not entitled to an expert of their choice.

It is important for the Court to note that we have been provided with the report from the defense which is Dr. Mahaffey's report on the evaluation of intellectual functioning, and this is to the first prong with respect to the IQ test and tests which were administered by Dr. Mahaffey to the defendant Guzman. This was provided to the State on September 4th of 2019. Dr. Mahaffey has been an expert on intellectual disability. She has in other cases rendered opinions related to intellectual disability and the second prong, the functional adaptability that the defense is talking about. Dr. Mahaffey is available. She's here and knowledgeable about the case. There is nothing that would prevent Dr. Mahaffey continuing on on this case with respect to the defense and what they're proffering to the Court as to

all of the prongs under Atkins versus Virginia type of hearing. Again, it goes back to they are not entitled to an expert of their choice. They have an expert that is available.

The Indictment in this case was issued by the Grand Jury in February, so the Court was right when you reminded defense counsel it has been seven months in the hopper and they have been involved. Mr. Arrascada went and visited with the defendant when he was incarcerated in Carson City it is our understanding. He relayed that to the Court in a previous hearing. So they have been involved in this. And Dr. Mahaffey's report, again it was provided to us on September 4th, shows that her evaluations in connection with the intellectual functioning were conducted on March 3rd, 7th, 8th and 9th, May 24th, and the last one on June 3rd. The information was provided to the Court as well as the State by Mr. Arrascada during our July status conference hearing. So the defense knew well before that status conference that they were going to be going after this intellectual disability and providing notice, even though they say now they weren't required to do so and could have done so up to ten days before trial.

So, we would ask, if there is any motion, obviously that it be required it be filed and we will be responding to

the Court to that. But the State is prepared to move forward to trial.

THE COURT: Mr. Jackson, has the State secured an expert to deal with the intellectual disability defense we know is coming?

MR. JACKSON: We have not retained one. We are in discussion with two separate experts, one out of the State of Florida and one out of the State of Texas. We will be meeting after this hearing today to have further discussion regarding those experts.

THE COURT: Do you have any other experts that you plan to have involved?

MR. JACKSON: With respect to the intellectual disability?

THE COURT: Are you going to use a different expert to handle the issues of functionality and functional adaptability versus the IQ tests, etcetera, or are you anticipating using one single expert?

MR. JACKSON: One single expert that would be able to perform the testing as to the intelligence, the first prong, as well as the functional adaptability, second prong much like Dr. Mahaffey did in a previous case here in Washoe County.

THE COURT: All right. Thank you. Yes,

Mr. Arrascada?

MR. ARRASCADA: Just a couple matters regarding Carson City. I did travel to Carson City when I learned Mr. Guzman had been arrested. I was not allowed to see Mr. Guzman. At the time, the Sheriff said that, "We have been told you are not allowed to see him because you are not yet his appointed counsel." So I had no contact with him, and I actually reached out to Mr. Hicks regarding that. But I mean it is a different jurisdiction. We have to respect how they handle things. But that is what occurred.

Your Honor, regarding NRS 174.098, it is exactly what it states. It may be filed up to ten days. It may be filed up to ten days prior to trial. That is the statute, itself.

Also, Your Honor, regarding Mr. Jackson's comments with experts, ABA guidelines which is what ADKT 411 is mirrored after, states the following regarding experts:

Expert testimony may explain a permanent, neurological damage caused by fetal alcoholism, childhood abuse, hereditary nature, mental illness, and the effects of these impairments upon the client's judgment and impulse control. This is most significant: Counsel should choose experts who are tailored specifically to the needs of the case rather than relying on an all-purpose expert who may have

insufficient knowledge or experience to testify.

Your Honor, Dr. Mahaffey is a fine psychologist. Our office uses her quite a bit in cases as this Court knows. That said, Your Honor, Dr. Mahaffey -- I urge the Court to read Covington where Dr. Mahaffey was the State's expert and it addresses her practice in that case. I would ask that you read that. Judge, we are retaining, in accordance with the ABA guidelines, the experts tailored specifically to the needs of the case which is a non-English speaking El Salvadorean whose formative years -- because of the three prongs regarding intellectual disability, there is IQ test, functional capacity which is our focus now and age -- and his formative years up to 18, almost all of them except for one, were spent in El Salvador. And we are actually moving this process along very quickly, Your Honor.

We will file a motion. I think it is best for the case. I appreciate the State's comments, and we will have a motion on file. As I said, I will be down next week meeting with our expert, and if I could have a week after that in order to file the motion, I would appreciate it, Your Honor. I am anticipating a Declaration from him.

THE COURT: I want you to file Dr. Mahaffey's report into the record. I know you provided it to counsel, but I think it should be provided to the Court. You can file it

confidentially and it will remain that way. It is a report that needs to be filed in in that regard. You may of course file your motion, and I anticipate you will file it as soon as you possibly can. We will set another status conference for October 21st at 10:00 a.m. the contemplation in the statute of filing a motion under 174.098 up to ten days before trial does not mean that is best practice nor would that be acceptable practice. I think it would cause sanctions if anyone knew of something and waited and sat on it for a year and then filed such a motion. So I appreciate the defense's candor, but I don't believe that it is only required by the goodness of the defense's heart that you do it. It is required by the Code of Ethics, and this Court can certainly require it.

So I anticipate you will continue to work forward as best you possibly can.

MR. ARRASCADA: Your Honor, I hope no impression was given. We would not -- I was just saying perspective wise, based on the statute, that could have occurred. We don't practice that way nor will we.

THE COURT: No, and it would not occur if you knew about it and you failed to disclose it. And that is really what we are talking about here, is whether or not we are moving the case forward in the best possible way that it can

be moved forward.

MR. ARRASCADA: The main issue, Your Honor, is the functionality standpoint which we don't know the answer to that yet. We let the Court know we have the prong one which is the IQ prong, two which is the age, but that is the meat of what we are working on, Your Honor, and we are moving as quickly as possible. I give that assurance to the Court. I make that as a representation as an officer of the Court.

THE COURT: So at our last hearing we discussed you reporting all of the recordings of all of these interviews and preserving those recordings for the State's review and their expert's to review. Was that done?

MR. ARRASCADA: Your Honor, these were not clinical interviews. As I said, they are being done in the fields. These were more building trust that they will talk to us interviews to get to the point where we can go down and do the clinical interviews which will be recorded. They will be recorded regardless whether the Court orders that or not.

THE COURT: I think I did order it at the last hearing.

MR. ARRASCADA: No, I said I would work within best practices. We were there with investigators. They were not doing clinical interviews, so no interviews were recorded. Quite candidly, as I said, we were out in the field at times

doing these interviews. There was not a way that that could by done from a video standpoint.

THE COURT: I understand you couldn't do a video, but I doubt seriously you couldn't have recorded it, and I would be very surprised if I hear the investigators didn't do any audio recording in any of the interviews that you conducted. I would be very surprise to hear that. Even though you aren't doing video recording, it is not a clinical setting, because the experts are going to rely on what people tell you, what they tell you has to be available to the other side to traverse if they want to. And so that is the essence of what my Order was at our last status hearing and it continues. It could, of course, if you fail to preserve that kind of evidence, the end result could be that the evidence is not put on. That would be the worst case scenario, obviously. So make sure that the underlying information that is relied upon in the future by any expert or anyone else testifying is preserved in a format it can at least be reviewed so it is possible to conduct a cross-examination.

MR. ARRASCADA: Absolutely.

THE COURT: So that all being said, there is probably not much else we can do today unless the State has something else.

MR. JACKSON: Your Honor, I am glad you brought up

about your previous ruling at the last status conference and from the transcript, it is on page 16 lines 18 through 21 where you ordered that: "Any information that the defense expert is going to rely upon, be it notes, tests, documents or statements, that the defense have those statements recorded and the notes preserved for the State." And as I understood Mr. Arrascada at the very beginning talking about what occurred during the five days that he was in the country of El Salvador, he used the term he interviewed ten family members, we interviewed two teachers and a principal. He talked about a caretaker/guard at one of the schools, going to the three hospitals. There had to have been some form of notes at least that were taken in connection with those. And if they are going to be relied upon by any expert even going back, that information should be provided to the State.

Everyone of these hearings we provided the Court with an update or a status on the discovery, and we had that deadline of August 30th. To date, the State has provided 4,066 pages of paper discovery to the defense. In addition, we have provided sixty-seven media storage devices. These include CDs, thumb drives and external hard drives. These have been copied and provided to the defense. Those media storage devices, Your Honor, contain everything from photographs, audio recordings and video recordings. It has the bench notes

of the experts from the Washoe Crime Lab, also from SERI, S-E-R-I involved in this. Out of Washoe County, there are over a thousand pages of bench notes relied upon by the experts in order to formulate their opinions that they put down into a report. And the reason I am bringing that up is the report that was provided to the prosecution on September 4th of 2019 from Dr. Mahaffey is a nine-page report. So if anyone is keeping score, if we look at just the media, there are several thousand pages of documents the State provided, well in excess of six thousand pages of documents. The defense has access to the bodycam footage, from not only Douglas County but also access through Evidence.Com to obtain all the bodycam footage from the Washoe County Sheriff's Office. But in Dr. Mahaffey's report where she's rendering an opinion, she talks about what she relied upon which includes a clinical interview and five separate tests that were administered by Dr. Mahaffey to the defendant in order for her to render her opinion. There is notes. We don't have any notes. They have not been provided. Those tests have not been provided. Information from the clinical interview have not been provided. At the previous hearing, Mr. Arrascada talked about the process, what happens when these reports come through. I don't know if he fully understands what we did in this case, because he talked about these reports coming

through, being reviewed by the prosecution, then going off to the defense. That is not the case. The defense obtained them the same time that Mr. Hicks and I obtained them. Everything was funneled to a single point of contact at the Washoe County Sheriff's Office, and when that single point of contact obtained information, it was copied and it was distributed to the prosecuting attorneys and the defense at the same time. We didn't have the ability nor have we ever had the ability to go in and review and okay what will and will not be provided. We are providing everything including all the notes the experts will be relying upon. It complies with your Pretrial Order. We would ask moving forward so there aren't any further issues, everything that Dr. Mahaffey relied upon, including all those notes, they be provided to us by the end of this week.

THE COURT: Okay. Mr. Arrascada.

MR. ARRASCADA: Couple of things, Your Honor. No one should be keeping score in this case. This is not a game.

THE COURT: Why don't you get to whether or not you can produce that.

MR. ARRASCADA: Your Honor, nor are we going to allow for burden shifting. We will move forward.

THE COURT: Mr. Arrascada, can you produce by the end of this week Dr. Mahaffey's notes and tests that were

conducted with regard to her evaluation on Mr. Guzman?

MR. ARRASCADA: I will find out from Dr. Mahaffey. There may be -- Your Honor, I will file a written status and report back with the Court regarding that. I think we need to keep in perspective, we receive, you know, their expert's notes and everything after they have prepared their report, then we get everything. And I stated in the last hearing we'll proceed in the same format which is information is gathered, evidence is collected, it goes to an expert, an expert does their analysis, writes a report then they provide their background information along with their report. That is what we'll do.

THE COURT: Mr. Arrascada, I asked you a straight question. I just want a straight answer.

MR. ARRASCADA: Regarding Dr. Mahaffey?

THE COURT: Yes, by the end of the weak.

MR. ARRASCADA: Your Honor, I mean, again, I think, I just bring this up, I know you want a straight answer, again we provided this report because we have, in our opinion, we have been working very diligently to be candid with the Court and the State.

THE COURT: Okay.

MR. ARRASCADA: Your Honor, the issue is not ripe yet until we file the motion in and of itself regarding

Dr. Mahaffey's background, notes or notes of the testing, etcetera that she relied upon. Potentially, Your Honor, once we complete the functional capacity investigation part of prong two, we don't file a motion for I.D., we don't know. I anticipate that we will be, and at that time when that report is filed, we'll provide all of the background information that Dr. Mahaffey relied upon in the testing that she performed.

THE COURT: I understand what your preference is, but I also understand that you provided a report without background and the notes and the tests she replied upon. Those all have to be provided, and I want them provided by next week or file a motion why they should we protected.

MR. ARRASCADA: Very well.

THE COURT: So that will be September 23rd, one week. Then you're going to file your Motion to Continue Trial, and you thought you would do that by the 27th, am I right?

MR. ARRASCADA: Court's indulgence. May I pull up my calendar?

THE COURT: Yes.

MR. ARRASCADA: Thank you, Your Honor.

Your Honor, I am not certain as to what date. As I said, Dr. Puente is traveling. I am not certain the day next week I am meeting with him. So I would ask Your Honor I be

allowed to file the Motion to Continue, if it is all right with the Court, October 7th. I can get it filed October 4th.

THE COURT: It has to be October 4th so they have enough time to respond before our October 21st hearing.

MR. ARRASCADA: Very well, Your Honor.

THE COURT: I would like to see their response.

MR. ARRASCADA: I get that. We'll get it done.

THE COURT: October 4th would be the deadline for filing any motions you want considered at the October 21st hearing which we anticipate will be, at a minimum, a Motion to Continue the trial.

Okay. Anything else from the State?

MR. JACKSON: Nothing further from the State, Your Honor.

THE COURT: Anything else from the defense?

MR. ARRASCADA: No, Your Honor.

THE COURT: Okay. Then those deadlines are set. We will anticipate your motions, and we will see you back on the 21st at 10:00 a.m. Thank you.

Court's in recess.

(Whereupon, the proceedings were concluded.)

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STATE OF NEVADA,)
) ss.
COUNTY OF WASHOE.)

I, Judith Ann Schonlau, Official Reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, DO HEREBY CERTIFY:

That as such reporter I was present in Department No. 4 of the above-entitled court on MONDAY, SEPTEMBER 16, 2019 at the hour of 10:00 a.m. of said day and that I then and there took verbatim stenotype notes of the proceedings had in the matter of THE STATE OF NEVADA vs. WILBER MARTINEZ GUZMAN, Case Number CR19-0447.

That the foregoing transcript, consisting of pages numbered 1-33 inclusive, is a full, true and correct transcription of my said stenotypy notes, so taken as aforesaid, and is a full, true and correct statement of the proceedings had and testimony given upon the trial of the above-entitled action to the best of my knowledge, skill and ability.

DATED: At Reno, Nevada this 16th day of September, 2019.

/s/ Judith Ann Schonlau
JUDITH ANN SCHONLAU CSR #18

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

THE STATE OF NEVADA,
Plaintiff,

v.

WILBER ERNESTO MARTINEZ GUZMAN,
Defendant.
_____/

CASE NO: CR19-0447

DEPT. NO.: 4

MOTION TO CONTINUE TRIAL DATE (D-2)

The Defendant, Wilber Ernesto Martinez Guzman, by and through his attorneys of record, John L. Arrascada, Gianna Verness, Joseph Goodnight and Katheryn Hickman, hereby moves this Court for an Order continuing the trial date in this capital case which is currently set to commence on April 6, 2020. This motion is based upon the following Points and Authorities, the attached declarations of John L. Arrascada Esq. (E*xhibit 1*), Stephen Greenspan Ph. d. (*Exhibit 2*), and Russell Stetler (*Exhibit 3)*, National Mitigation Coordinator for the Federal Death Penalty Project, all pleadings papers and hearings and any oral or documentary evidence that may be presented at a hearing on this matter. Further, if necessary, Mr. Martinez Guzman requests a hearing on this motion.

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POINTS AND AUTHORITIES

Background

On March 13, 2019, Defendant, Wilbur Ernesto Martinez-Guzman (hereinafter "Guzman") was indicted in Washoe County on ten felony counts including four counts of open murder.[1] Mr. Guzman was arraigned on the Indictment on March 19, 2019. At the same time, the State also issued its Notice of Intent to Seek Death for each of the murder counts. Trial was set, in agreement by the parties, for April 6, 2020. At that time, Counsel Arrascada stated, "Your Honor, in my experience, our trial date is a bit ambitious, but I believe we can meet that date. However, by having monthly status conferences, we can also advise the Court of our progress in preparation." See Hearing-March 19, 2019 (TR p.9 line ll-14.) Monthly status conferences have been held since that date.

Prior to the Indictment, defense counsel retained clinical psychologist Martha B. Mahaffey to begin evaluating Guzman's intellectual functioning "IQ". See Evaluation of intellectual functioning: Preliminary Report filed with this Court on September 18, 2019. Dr. Mahaffey met with Guzman four times in March, once in May and once in June of 2019. At the status hearing on June 24, 2019, the Court inquired of counsel regarding Guzman's mental health. See Tr. p.10, ll. 8-15. Counsel advised the court that they have been exploring the mental health aspect since day one and were consulting with experts nationally. Counsel also shared with the Court that constitutionally required mitigation investigation, including obtaining records from El Salvador was challenging See Tr. p.11, l.8-

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[1] A writ petition challenging the ruling on the territorial jurisdiction of the grand jury is still pending. It has been transferred from a panel to the full Court for decision.

p.12, l.5. Further, counsel advised the Court that they would notify the Court if issues arise. Id.

A status hearing was again held on July 29, 2019. At that hearing, counsel and the Court discussed mitigation and the myriad of challenges counsel would face in obtaining information. Given these challenges, the Court was informed that mitigation specialists with expertise in El Salvador were hired to assist. See Tr. p.7, l.5- p. 13. Further, counsel advised the Court that it had learned orally of the preliminary results of Mr. Guzman's IQ which was relayed as appearing to be a 66. Id. Subsequently, counsel learned from the written report that Mr. Guzman's IQ was much lower. Mr. Guzman's IQ is actually a 62.[2] See Evaluation of Intellectual Functioning. The Court was advised that based on the low IQ, counsel was investigating Mr. Guzman's relevant background and records to prepare, if appropriate, a motion pursuant to NRS 174.098 and Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), which renders capital punishment "cruel and unusual" for individuals that are intellectually disabled, in violation of the Eighth Amendment and makes a person who is intellectually disabled (ID) ineligible for execution. Id. 536 U.S. at 321, 122 S. Ct. at 2253.

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[2] This is an indicative example of counsel's candor with the court regarding status. Counsel alerted the court when it gained "real time" information that could affect the trial date.

Counsel again reiterated to the Court the challenges it faced regarding the moving pieces and parts of the investigation including people and calendars which counsel did not have control over. Tr. P.7..[3]

At the August 26, 2019 status hearing, counsel advised the Court he was travelling to El Salvador with mitigation/intellectual disability specialists who were experts in their field to investigate Mr. Guzman's background related to his intellectual disability and case mitigation. See Tr. p. 14-17. This Court stated its concern with the gathering of NRS 174.098 evidence that the experts will have to look at and the delay in the trial that motion might bring. Id. Counsel asked that he be allowed to report on the trip upon return to address whether a continuance would be necessary. A hearing was set for September 16, 2019. Id.

At the September hearing, counsel advised the Court that a continuance was necessary, provided a detailed overview of the travel to El Salvador and that counsel was constitutionally obligated to complete a full and complete ID investigation and preparation was required. Counsel further provided an overview of his discussion with teaching expert, Steven Greenspan Ph.D., who provided a timeline for ID experts to work up the case in light of the good faith belief that Mr. Guzman is intellectually disabled. The experts must be tailored specifically to the needs of the case rather than relying on an all-purpose expert who may have insufficient knowledge or experience to testify and the basis for the continuance.

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[3] For example, coordinating calendars with the mitigation/ID investigators, for travel took substantial time and effort. Providing these details tacks very closely to impinging upon Guzman's right to effective assistance of counsel. See Sechrest v. Ignacio, 549 F.3d 789, 815-819 (9th Cir. 2008). Counsel is trying to balance his obligation of candor to the court with the ethical obligations of effective assistance of counsel, work product and attorney client privilege. In order to avoid a Sechrest violation counsel suggests that if the court desires additional details that an in camera exparte hearing be conducted.

See Tr. p.3- 15. The court ordered written briefing. This motion to continue is filed pursuant to the Court's order.

Discussion

A motion to continue a criminal case shall only be granted for good cause. See Second Judicial District Local Rule 13. "Each case must turn on its own circumstances, with emphasis upon the reasons presented to the trial judge at the time the request [for continuance] is made. A myopic insistence upon expediency in the face of a justifiable request for delay can make the right to defend with counsel of little value." Zessman v. State, 94 Nev. 28, 31, 573 P.2d 1174, 1177 (1978).

The courts have not defined good cause per se. Good cause is frequently invoked and seldom defined. Nunnery v. State, 127 Nev. 749, 764, 263 P.3d 235, 245 (2011). "What is "good cause," may be difficult to define with precision, since it must, in a great measure, be determined by reference to the particular circumstances appearing in each case. There should, undoubtedly, be some fact or circumstance disclosed to the court upon which its authority in this respect…could be brought into exercise. Its discretion is not to be arbitrary, but should proceed upon such knowledge or information as would enable it to determine for itself whether or not public justice requires…". Ex parte Isbell, 11 Nev. 295, 298 (1876) (discussing good cause in relation to a speedy trial right). Good cause exists to continue this case as a matter of public justice. A myopic insistence upon expediency would render Mr. Guzman's defense of little value. Based on the investigation to date, there is a good faith basis to believe that Mr. Guzman is ineligible for the death penalty because he may be intellectually disabled pursuant to NRS 174.089 and Atkins v. Virginia. There could be no greater insult to public justice than to execute someone that as a matter of law is ineligible for capital

punishment. It is unconstitutional to pursue death, or to execute, a person, such as Mr. Guzman, that is intellectually disabled.

This motion to continue is not brought for purpose of delay or due to dilatory conduct of counsel. A continuance is required so that counsel may provide Mr. Guzman effective assistance under the Sixth Amendment to the United States Constitution in conformance with the prevailing norms of practice. The prevailing norms of practice in a capital case are reflected in the American Bar Association (ABA) standards which are a guide to determine what is reasonable. Wiggins v. Smith, 539 U.S. 510, 522, 123 S. Ct. 2527, 2536, 156 L. Ed. 2d 471 (2003); See also Strickland v. Washington, 466 U.S. 668, 688 (1984); See also Rodriguez v. State, 125 Nev. 1074, 281 P.3d 1214 (2009)(unpublished).[4]

The ABA guidelines set the norms for the appointment and performance of defense counsel in capital cases. The performance standards were adopted by the Nevada Supreme Court in ADKT 411. In reviewing cases, the United States Supreme Court refers to the ABA standards as guides to determining what is reasonable. Wiggins v. Smith, 539 U.S. 510, 524, 123 S. Ct. 2527, 2536-37, 156 L. Ed. 2d 471 (2003); see also Padilla v. Kentucky, 559 U.S. 356, 366-67 (2010) ("We have long recognized that '[p]revailing norms of practice as reflected in American Bar Association standards and the like…are guides to determining what is reasonable…"). Guilt and penalty phase preparation in a capital case requires extensive and generally unparalleled investigation into a defendant's personal and family history.

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[4] Rodriguez is an unpublished decision outside the scope of NRAP 36(c). However it signifies our State's reliance upon the ABA standards in relation to death penalty practice standards.

Mitigation can be anything in the defendant's life, which may convince a jury to give a sentence less that death. As such, "a capital defendant has an unqualified right to present any facet of his character, background, or record that might call for a sentence less than death". ABA Guidelines for the Appointment and performance of Defense Counsel in Death Penalty Cases 1.1 commentary, p 927 (2003). "The ABA Guidelines provide that investigations into mitigating evidence should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." Wiggins,, 539 U.S. at 524, 123 S. Ct. at 2536-37 (2003)(citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.11, p 93 (1989)(internal quotations omitted). Mitigation investigation begins, with the client, at conception. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7 commentary (penalty), p 1022 (2003).

In addition to any prenatal problems the parents may have caused the child, counsel has to explore the client's complete: (1) medical history; (2) family and social history; (3) educational history; (4) military service; (5) employment and training history; (6) prior juvenile and correctional experience. Id. The Nevada Indigent Defense Standards or Performance for Capital Case Representation further affirm that mitigation investigation begins from conception and continues to the time of sentencing. ADKT No. 411 Standard 14, Order November 2007.

Proper preparation for ID/mitigation necessarily includes locating and interviewing the client's family members, and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors and others. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7 commentary (penalty), p 1024(2003).

ID/mitigation investigation further includes the gathering of records from courts, government agencies, employers and others. Id. The records collected should also include the client's parents, grandparents, siblings, cousins and children. Id. at 1025. The investigation must also include a multi-generational investigation extending as far as possible vertically and horizontally to establish a diagnosis or underscore the hereditary nature of a particular impairment. Id. "[W]hen 'tantalizing indications in the record' suggest that certain mitigating evidence may be available, those leads must be pursued." Lambright v. Schriro, 490 F.3d 1103 at 1117 (quoting Stankewitz v. Woodford, 365 F.3d 706, 719–20 (9th Cir.2004)). Meeting these standards for an April 2020 trial date is not possible.

Counsel and the mitigation/ID specialist have begun this labor intensive task by travelling to El Salvador to locate witnesses and records. The conclusions drawn from the trip were that there are "tantalizing indications" that Mr. Guzman is intellectually disabled, and constitutionally barred from capital prosecution.

The defense must pursue those leads and utilize experts specific to this case, such as a neuropsychologist to render an opinion regarding Mr. Guzman's intellectual disability. See Ex.1 paragraph 13 (Declaration of Stephen Greenspan Ph. d).

The scope and depth of information needed is substantial, and complicated by the fact that the necessary information is located in rural El Salvador. This clearly poses significant challenges that may not be present in other cases, and such challenges make it impossible for the work necessary to complete the investigation into Mr. Guzman's intellectual disability to be completed prior to the current trial date. See Ex. 1 (Declaration of Russell Stetler).

Proper preparation to present whether a client is intellectually disabled requires investigation into the client's functioning. This requires compiling a

client's extended multi-generational family history which incorporates all of the investigation and interviews that must be located and completed in rural El Salvador. Id. at 1061; See Declaration of Russell Stetler.

Further, the investigation and litigation regarding intellectual disability requires the retention of expert witnesses to explain the client's complete social history from conception to the present, to explain permanent neurological damage caused by fetal alcohol syndrome or childhood abuse or the hereditary nature of mental illness, and the effects of these impairments on the client's judgment and impulse control. Id.

In a capital case, defense counsel has an obligation to conduct a thorough investigation and a duty to investigate and present mitigating evidence of mental impairment. Bean v. Calderon, 163 F.3d 1073 at 1080 (9th. Cir. 1998). This includes examination of mental health records and an affirmative duty to provide mental health experts with information needed to develop an accurate profile of defendant's mental health. Caro v. Woodford, 280 F.3d 1247, 1254 (9th Cir. 2002). Counsel should choose experts who are tailored specifically to the needs of the case, rather than relying on an "all purpose" expert who may have insufficient knowledge or experience. Id.

In order to provide Mr. Guzman with the effective assistance of counsel pursuant to the Sixth Amendment and pursuant to the prevailing norms and standards of practice stated above, a continuance of the trial date from April 6, 2020 to February of 2021 is necessary.

Counsel began investigation of Guzman's mental health and intellectual functioning and mitigation prior to the Grand Jury indictment.[5] Counsel, at the

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[5] Counsel incorporates the statements he made necessitating a continuance from the September 16, 2019 status hearing.

risk of violating his ethical duties and committing Sechrest error has provided the Court and the State with "real time" status of the investigation and preparation.

Counsel retained mitigation/intellectual disability specialists with expertise and experience in El Salvador as required by the guidelines. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7 commentary (penalty), p 1024(2003). Counsel has been, and continues to, work diligently. However, the complexity of the mitigation work, including investigation in rural El Salvador, requires more time to fully investigate Mr. Guzman's background in preparation for the litigation of his intellectual disability as well as mitigation.

Counsel has retained a neuropsychologist who is Spanish speaking with experience in El Salvador. The neuropsychologist cannot issue a report and be prepared to testify regarding intellectual disability prior to the trial date due to the significant further investigation and testing that needs to be completed. "When experts request necessary information and are denied it, when testing requested by expert witnesses is not performed, and when experts are placed on the stand with virtually no preparation or foundation, a capital defendant has not received effective penalty phase assistance of counsel." Bean v. Calderon, 163 F.3d 1073 at 1079 (9th. Cir. 1998). To deny the continuance would, in effect, deny the expert the necessary information and testing required to prepare and complete his report. Further, if the trial date remains, he would testify with virtually no preparation or foundation because the tests and interviews would be incomplete.

The independent neuropsychologist hired by Mr. Guzman meets all of the standards referenced above. He is an expert specifically tailored to the needs of this case as opposed to a "jack of all trades" clinical psychologist, and will be able to travel to conduct interviews and perform necessary tests to render an opinion

regarding intellectual disability. However, given the dearth of Spanish speaking neuropsychologists qualified to render the opinions requested in this case, his schedule is dictated by other cases in other jurisdictions in which he has been previously retained. The expert has estimated that, all going perfect that he could provide a report by May 2020.

The neuropsychologist and mitigation specialist are both available to testify in the summer of 2020. The time between report and hearing would also provide the State's experts adequate time to prepare their report. A continuance will also allow counsel adequate time to complete the requirements for mitigation as referenced in the ABA guidelines.

As stated at the September status hearing, this case presents virtually every challenge envisioned in the ABA guidelines. Mr. Guzman spent the entirety of his formative years in El Salvador. He does not speak English. Virtually all of the witnesses needed to be interviewed are in El Salvador. Even with the aid and support of the El Salvadorian Consulate and internal government agencies, medical and school records have proven difficult to obtain. Counsel continues to investigate and develop leads and relationships needed to properly and effectively provide clinical interviews and corroboration by the neuropsychologist.

If convicted, Mr. Guzman is facing capital punishment. Public justice requires that he be afforded the effective assistance of counsel at every step of the way. Fairness and justice requires a continuance of the trial. It is respectfully requested that this matter be continued for a new trial date in February 2021.

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CONCLUSION

Based on the foregoing, the Douglas County Charges should be dismissed.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated this 4th day of October, 2019.

JOHN L. ARRASCADA
Washoe County Public Defender

By /s/JOHN L. ARRASCADA
JOHN L. ARRASCADA
Washoe County Public Defender

By /s/GIANNA VERNESS
GIANNA VERNESS
Chief Deputy Public Defender

By /s/KATHERYN HICKMAN
KATHERYN HICKMAN
Chief Deputy Public Defender

By /s/JOSEPH GOODNIGHT
JOSEPH GOODNIGHT
Chief Deputy Public Defender

I hereby certify that I am an employee of the Washoe County Public Defender's Office, Reno, Washoe County, Nevada, and that on this date electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

Chris Hicks, District Attorney
District Attorney's Office

Travis Lucia
Deputy District Attorney

Marc Jackson
Deputy District Attorney

Dated this 4th day of October, 2019.

/s/ ZULMA REYES
ZULMA REYES

INDEX OF EXHIBITS

EXHIBIT 1

EXHIBIT 1

DECLARATION OF JOHN L. ARRASCADA ESQ.

1. Declarant is above the age of 18 and is an attorney licensed in Nevada in good standing.

2. I am the appointed Public Defender for Washoe County, Nevada.

3. I am qualified to defend individuals charged with a capital offense in accordance with Supreme Court Rule 250.

4. I am lead counsel in the case of State v. Wilbur Ernesto Martinez-Guzman CR19-0447 in Department 4 of the Second Judicial District.

5. I am familiar with the duties and responsibilities of Capital Defense counsel and professional norms in the investigation and preparation of the penalty phase of a capital case. Including Supreme Court Rule 250, ADKT 411 and the ABA Guidelines for the Appointment and performance of Defense Counsel in Death Penalty Cases

6. I have read and reviewed the declaration of Russell Stetler, National Mitigation Coordinator for the Federal Death Penalty Projects and adopt his statements as reflecting the reasonable duties, responsibilities and work that counsel must perform in a capital case.

7. That prior to Mr. Guzman's indictment we began investigation and mitigation including the retention of Martha Mahaffey Ph. D., to perform an evaluation of Mr. Guzman's intellectual functioning, IQ.

8. That I have presented full and complete status of our investigation and mitigation to the court in virtual real time while still being aware of my ethical duties and obligations to Mr. Guzman and my duties pursuant to Sechrest v. Ignacio, 549 F.3d 789, 815-819 (9th Cir. 2008).

9. That when this case was set for trial, I expressed to the court that the trial date of April 6, 2020 was ambitious, based on my experience, and that we would keep the court informed if issues regarding the trial date arose.

10. Prior to the status hearing of July 28, 2019, I was orally advised that Mr. Guzman's IQ appeared to be a 66. I subsequently learned from Dr. Mahaffey's final written report of September 3, 2019, that Mr. Guzman's IQ was much lower, 62.

11. That at the July status hearing I advised the court and counsel of the IQ testing preliminary results and that it appeared that Mr. Guzman may be ineligible for capital punishment pursuant to NRS 174.098 and Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242 (2002).

12. That based on my experience in capital cases, the dynamics and depth of investigation changed dramatically due to the ID issue.

13. I furthered advised the court that the defense had retained a group of mitigation/intellectual disability specialists to conduct investigation of the ID issue.

14. Since learning of the potential of the ID issue, the Guzman defense team has begun preparation of a comprehensive biopsychosocial developmental history of Mr. Guzman and his generational family and relatives. This has included travelling to El Salvador for a week to conduct preliminary interviews and investigation into school and medical records to determine whether a good faith belief existed to move forward with the ID investigation as outlined in the ABA Guidelines for the Appointment and performance of Defense Counsel in Death Penalty Cases.

15. Upon conclusion of the travel to El Salvador, I advised the Court at the September 16, 2019 status conference that there was a good faith belief to continue and move forward with the determination of Mr. Guzman's adaptive functioning.

16. Pursuant to ABA Guidelines for the Appointment and performance of Defense Counsel in Death Penalty Cases and the standards of practice, consultation with a neuropsychologist is necessary to perform the appropriate testing and interviews of Mr. Guzman and witnesses to form an opinion regarding Mr. Guzman's adaptive functioning.

17. The required testing and interviews must be done by a neuropsychologist that is Spanish speaking with experience in the El Salvodorian culture. There are a very few neuropsychologists in the United States that meet these requirements and their calendars and availability are limited.

18. That counsel has retained a qualified neuropsychologist for this case. Counsel met with the expert and urged that all efforts be made to meet the deadlines in this court's trial order. The expert is not able to be ready to perform all of the required tasks prior to the April 6, 2020 trial date. Mr.

Guzman is entitled to effective assistance of counsel pursuant to the 6th Amendment of the United States Constitution and the Constitution of Nevada in accordance with the prevailing norms of practice in a capital case. The prevailing norms of practice in a capital case are reflected in the American Bar Association (ABA) standards which are a guide to determine what is reasonable. Wiggins v. Smith, 539 U.S. 510, 522, 123 S. Ct. 2527, 2536, 156 L. Ed. 2d 471 (2003).

19. Mr. Guzman's counsel cannot meet the prevailing norms of practice to address and litigate the issue of ID prior to the April 6, 2020 trial date. If trial is held on this date, based on the prevailing norms of practice in a capital case, counsel will be per-se ineffective because the experts will not be provided with the information requested or be able to perform the required tests and would thus testify without proper preparation. See Bean v. Calderon, 163 F.3d 1073 at 1079 (9th. Cir. 1998).

20. Based on the specialized work that must be performed by experts in their field counsel is respectfully requesting a trial date in February 2021.

21. This continuance is not sought for purpose of delay and is based upon the good cause as stated in this declaration and the Motion to Continue.

22. That counsel has a duty and obligation to his client to not divulge expert information or information about the investigation, interviews and testing unless it will be used in trial or at a hearing. See Sechrest v. Ignacio, 549 F.3d 789, 815-819 (9th Cir. 2008). Thus, counsel is willing to provide additional detail and support, if needed, to the court in camera and ex parte.

23. That further declarant sayeth naught.

John L. Arrascada Esq.

EXHIBIT 2

EXHIBIT 2

DECLARATION OF STEPHEN GREENSPAN, Ph.D.

I, Stephen Greenspan, declare and state as follows:

All of the facts contained in this declaration are known to me personally and if called as a witness, I could and would testify thereto.

Background of My Involvement

1. I was recently contacted by attorney John L. Arrascada, the Public Defender for Washoe County, Nevada, regarding his client Wilbur Ernesto Martinez-Guzman. Mr. Guzman is facing a capital trial which I am informed and believe is scheduled to take place on April 6, 2020. I was informed a few weeks ago Mr. Guzman's attorneys received a final intelligence test results which suggest that Mr. Guzman might have Intellectual Disability (ID, formerly known as Mental Retardation). I was asked if it would be possible for me to participate in an ID assessment of Mr. Guzman, who spent much of his childhood in El Salvador. Such an assessment would be for the purpose of determining if he is eligible for death penalty exemption under the *Atkins v Virginia* standard. I was told that a hearing on this issue would likely occur just before the April trial, and that any report I might write would have to be submitted probably in March of 2020 (six months from now).

2. I told Mr. Arrascada that such a timetable would not be possible, and that in my experience a competent and comprehensive Atkins evaluation takes a minimum of nine months, with a year being more the norm. Such a timetable means that a hearing on the Atkins matter should occur no earlier than July or August, 2020. Mr. Arrascada asked me to explain why and I sent him a one-page memo listing the several reasons. He then asked me to put the memo in the form of a declaration, and the current document is the result.

3. Before I started to prepare this declaration, Mr. Arrascada sent me a timetable prepared by another expert he is consulting with: Dr. Antonio Puente. Dr. Puente (with whom I have had no contact) independently came up with an identical target testimony date of July to August, 2020.

My Qualifications

4. My qualifications are set out in more detail in my curriculum vitae. Over the past 14 or so years, I have been qualified as an expert in psychology and intellectual disability by approximately 25 state or federal judges, in so-called "Atkins" (death penalty exemption) proceedings, at various stages: pre-trial, penalty, habeas, and clemency. In addition, I have consulted in other cases where I did not testify, typically because I did not find evidence

for a viable ID claim. So my opinion about what it takes to conduct an adequate Atkins evaluation is based on considerable experience.

5. I am a psychologist with a PhD in Developmental Psychology from the University of Rochester and a postdoctoral certificate in developmental disabilities from UCLA. I have been a professor at Vanderbilt, the University of Nebraska and the University of Connecticut (where I directed a center for ID studies). I am the most-cited authority in the last two editions (10 and 11) of the AAIDD classification manual and the most-cited authority in the ID section of DSM-5 (in the online edition, as the printed version did not list cites). I served for a period of time on the committee that authored AAIDD-10 and was an official adviser to DSM-5.

6. I have been elected "Fellow" (a designation given only to the most qualified members) by the ID division of the American Psychological Association and by the American Association on Intellectual and Developmental Disabilities (AAIDD). I was also elected to a term as President of the Academy on Mental Retardation (at that time, one of the most prestigious research organizations in the field). I have received a license to practice psychology in the State of Nebraska (expiration renewed recently to 2021) and have been awarded temporary visiting licenses to practice psychology in other states.

7. I have published extensively on Intellectual Disability, with special emphasis on "adaptive behavior." I am a leading scholar in the ID field, and my 2006 book "What is Mental Retardation?", co-edited with H. Switzky, is considered one of the standard reference works in the ID field. A 2015 edited book published by AAIDD, "The Death Penalty and Intellectual Disability," contains chapters by leading experts who have testified in Atkins proceedings. I am first or sole author of four chapters. In 2008, AAIDD granted me its highest honor, the Gunnar and Rosemary Dybwad Award for Humanitarianism. In August 2011, the Intellectual Disability Division of the American Psychological Association awarded me one of its two highest honors, the John Jacobson Award for contributions to ID.

Reasons Why a Minimum of Nine Months is Required

8. Qualified experts such as Dr. Puente have a number of other assessments in the pipeline and cannot drop everything and make this case their immediate main focus (in my own case, I am not available for at least two months). Experts who are qualified to diagnose ID in Atkins cases, especially experts with excellent Spanish language skills, are in short supply, and one must accommodate their scheduling needs.

9. In a case, such as this, where the defendant spent a major part of this developmental period (prior to age 18) in another country, multiple international trips by experts and mitigation investigators are required for the purpose of tracking down important documents (often hard to find even without leaving the country) and locating and interviewing percipient witnesses. This process is inherently time-consuming.

10. When there is, as in this case, potential reason to believe an underlying biological condition (such as Fetal Alcohol Spectrum Disorder (FASD), a special interest of mine) may exist, it is necessary to line up a qualified medical expert, who would also probably order various medical tests. Lining all of this up typically is very time-consuming and complicated.

11. A critical requirement in an Atkins case is compiling a comprehensive biopsychosocial developmental history. This is relied upon heavily by experts such as me. Compiling such a document can take many months.

12. Various psychological tests will need to be administered to assess both intellectual functioning as well as adaptive functioning. The second diagnostic prong, adaptive functioning (the topic on which my publications mainly focus) is especially difficult to assess, as it involves many interviews, and administration of rating instrument, with percipient witnesses who knew Mr. Guzman well at various points in his life. It goes without saying that this is a complex task that cannot be done quickly, especially as many of the witnesses are in a foreign country.

13. A critical requirement in an Atkins case is the hiring of a neuropsychologist, and particularly one who is a specialist in neurodevelopmental disorders such as ID and FASD (the most prevalent known cause of ID). Upon information and belief, Dr. Puente is neuropsychologist and a specialist in neurodevelopmental disorders. A neuropsychologist is critical for conducting a proper ID examination and evaluation because of their knowledge, training and experience to delve deeply into neurodevelopmental disorders. As opposed to a forensic clinical psychologist who, although qualified to perform an IQ test, is not necessarily qualified to dive deep and perform and complete the complex testing and analysis of whether neurodevelopmental disorders exist. Hiring a qualified neuropsychologist with Spanish skills and who has a specialty in neurodevelopmental disorders, such as Dr. Puente will meet the Atkins' requirements.

Conclusion

14. The proposed date for an Atkins proceeding to occur in April 2020 just before the scheduled trial, is not doable for reasons spelled out above. I respectfully urge the court to consider a date for the Atkins hearing to occur no earlier than the summer of 2020.

.....

I swear under penalty of perjury that the statements in this Declaration are all true to the best of my knowledge. Signed in Nicasio, California on September 30, 2019.

Stephen Greenspan, PhD
Psychological Consultant

EXHIBIT 3

EXHIBIT 3

DECLARATION OF RUSSELL STETLER

I, RUSSELL STETLER, declare as follows:

Summary of Opinions

1. I was asked by counsel in a pending capital prosecution in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, *State v. Wilbur Ernesto Martinez Guzman,* Case CR19-0447, to provide this declaration in support of their application to continue the trial date from April 2020 to February 2021, based in part on the complexity of their mitigation investigation in El Salvador and the need to develop evidence of the defendant's potential exemption from execution under *Atkins v. Virginia*, 536 U.S. 304 (2002) (barring execution of people with intellectual disability) and its progeny. I was asked to address four interrelated issues:

(1) To summarize the prevailing professional norms in the investigation and preparation of the penalty phase of capital cases, including the need for investigation on the ground in El Salvador, where the defendant was born and lived during his developmental years;

(2) To summarize the standard of care in capital mental health evaluations in general, with particular attention to the importance of the social history investigation;

(3) To identify some of the unique problems that arise in the mitigation investigation in cases involving foreign nationals in general and in El Salvador in particular; and

(4) To discuss the importance of the mitigation investigation for the adaptive behavior prong of intellectual disability under *Atkins*.

2. The prevailing norms in mitigation investigation are addressed in detail in this declaration, but the critical points can be summarized succinctly. Counsel's duty to conduct a thorough mitigation investigation is well established. *See Williams v. Taylor*, 529 U.S. 362, 396

(2000) (ineffective assistance where capital counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background). In *Williams,* writing for the Court's majority, Justice Stevens cited the American Bar Associations STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1980) concerning the need to investigate sentencing issues thoroughly. *Id.* at 396. Standard 4.4-1 of the Defense Function stated: "[i]t 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.*" *Id.* at 4:53 (emphasis added). In discussing mitigation, the Commentary continued, "[i]nformation concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself." *Id.* at 4:55.

3. The need to investigate mental illness as mitigating evidence is also well established. *See Ake v. Oklahoma*, 470 U.S. 68, 80 (1985) (due process right to psychiatric assistance when mental condition is relevant to culpability *or punishment*).[1] The United States Supreme Court has mandated individualized sentencing in death penalty cases since 1976. *See Gregg v. Georgia*, 428 U.S. 153, 156 (1976) (finding Georgia's death penalty statute constitutional in part because it allowed for mercy based on individualized consideration); *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976) (finding mandatory death penalty statute unconstitutional because it allowed the blind infliction of the death penalty on members of a faceless undifferentiated mass).

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[1]The Court noted that "[m]ore than 40 States, as well as the Federal Government, have decided either through legislation or judicial decision that indigent defendants are entitled, under certain circumstances, to the assistance of a psychiatrist's expertise," citing among other statutes NEV. REV. STAT. § 7.135 (1983), *Ake*, 470 U.S. at 78, n.4.

4. Effective capital defense throughout the post-*Furman* era has required counsel to conduct a thorough investigation of the client's life. The investigation of his family relationships, especially during the developmental years, is a critical part of this inquiry. This investigation generally involves a multigenerational inquiry into the biological, psychological, and social influences on the development and adult functioning of the accused. Mitigation investigation involves parallel tracks of collecting and analyzing life-history records, and conducting *multiple*, in-person, face-to-face interviews. The purpose of this thorough investigation is to develop evidence that will allow the decision-maker to consider circumstances of the defendant's upbringing and his or her particular frailties in order to make a sound decision on whether a death sentence is appropriate.

5. The social history investigation is the foundation of a reliable capital mental health assessment. It enables counsel to make informed decisions about what expert(s) may be required and what referral questions experts should address. It is critical to conduct a thorough social history investigation before Mr. Martinez Guzman's counsel complete their assessment of any mental health or cognitive vulnerabilities relevant to sentencing. As two experts have noted,

> The mitigation specialist is required to seek and analyze copies of every record relating to mitigating circumstances and rebutting the prosecution's case in aggravation. This means gathering all documents, including photographs, videos, and memorabilia, related to the defendant. While there is no checklist, this includes records related to births and deaths in the family, school (particularly special education), religious training, participation in sports and recreation, medical and mental health history and treatment, substance abuse history and treatment, psychological evaluations and treatment, social services, juvenile and adult criminal charges, military service, incarceration, immigration, and toxic environmental factors. Collection and analysis of life history records often confirm the recollections of witnesses as well as point to additional witnesses to interview.

Richard G. Dudley, Jr., & Pamela Blume Leonard, *Getting It Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*, 36 HOFSTRA L. REV. 963, 971 (2008).

6. It is critical to gather as much documentary information as possible to conduct in-depth interviews with witnesses. The defense teams for Mr. Martinez Guzman will have to overcome extraordinary obstacles in their effort to obtain documentary evidence of any multigenerational mental health issues on either side of Mr. Martinez Guzman's family in El Salvador, as well as any records relating to his birth, perinatal development, childhood, adolescence, and adult functioning. Records in El Salvador are sparse compared to the typical life-history documentation of individuals in the United States, but it is nonetheless critical to obtain whatever is available, including, but not limited to, records about the physical environment, social and economic factors prompting Mr. Martinez Guzman to emigrate to the United States, and exposure to traumatic violence in the communities in which he spent his formative years.

7. Only after the thorough life-history investigation is complete can counsel address mental health and cognitive assessments in relation to mitigation. As Dudley and Leonard have noted, "As in all criminal proceedings, decisions about whether and when to engage a mental health expert are in the hands of counsel, who must consider the client's mental state at every stage of the criminal proceedings. As a general rule, it is never appropriate to expect a mental health expert to deliver a comprehensive mental health assessment of the client until the history investigation is complete." *Id.* at 975. They also describe the harm that results from ignoring the wisdom of this well-established practice:

> All too often, defense teams permit premature and inappropriate mental health evaluations to take place. Sometimes this includes needless and potentially harmful psychological testing. For example, unless the client has, or may have, a

> mental condition that relies on intelligence test scores, it is unnecessary to engage an expert to conduct such testing. Counsel should never allow a mental health assessment to take the place of a comprehensive life history investigation. Like brain imaging, psychological testing of any kind must always be approached with caution – never unless needed, always with full knowledge of its limitations, and in any event only after the mental health professional who been carefully selected by counsel to do the testing has been thoroughly prepared with the background information necessary to make the testing meaningful.

Id. (citation omitted).

8. It is my understanding that counsel for Mr. Martinez Guzman are seeking to extend the trial date based in part on the unique complexity of the social history investigation required in El Salvador and related mental health consultations, particularly those relating to adaptive functioning assessments of individuals from outside the United States. This is the proper course to comply with prevailing professional norms and standards as reflected in the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. 2003), 31 HOFSTRA L. REV. 913 (2003), *available at*: www.ambar.org/2003guidelines, and discussed in detail in this declaration. I understand that counsel for this defendant and their mitigation specialists are diligently attempting to organize the social history investigation that will, in turn, determine the scope and course of their mental health investigation and preparation.

9. Mitigation investigation is particularly complex when the client does not share the attorney's cultural background.[2] It is easy to overlook symptoms of impairment, attributing them to language difficulties or cultural differences. Cultural issues may involve not only race and ethnicity, but sexual orientation, gender, socioeconomic status, or any other characteristics that

[2]*See* Scharlette Holdman & Christopher Seeds, *Cultural Competency in Capital Mitigation,* 36 HOFSTRA L. REV. 883 (2008).

define social identity. In my experience over nearly four decades of capital defense work, the process of compiling an accurate social history is more time-consuming and delicate when interviewing clients and family members from foreign cultures because of inevitable cultural misunderstandings about the nature of the legal process and the purpose of the investigation. Every aspect of the investigation is more difficult in foreign countries, from gathering records to gaining the trust and cooperation of family members and other witnesses. Records often do not exist, and when they do exist, they are harder to obtain. Cultural differences make interviews more complicated generally, and mitigation interviews are particularly difficult because the whole idea of mitigating evidence may have no counterpart in the country where the client was born. I am familiar with the unique difficulties of conducting investigations in foreign countries from my own personal experience. I have personally traveled to Canada, Germany, Honduras, Nigeria, Puerto Rico, and the Virgin Islands on investigative assignments. I have supervised staff investigators and mitigation specialists in capital cases who have had to conduct investigation in Colombia, the Dominican Republic, Jamaica, Mexico, Peru, and Thailand. I base my opinions herein on my personal experience on the ground in foreign countries and on my supervision of the staff that I assigned to conduct investigations abroad. These assignments are consistently viewed as the most arduous even among the most seasoned and skilled practitioners. In the instant case, the time-consuming investigation in El Salvador will be crucial to the social history evidence required to explore Mr. Martinez Guzman's potential heritable disorders, neurological conditions, and cognitive deficits. It is my considered professional opinion that a thorough social history investigation is reasonably necessary before counsel can make informed decisions about the evaluation and development of any mental health evidence to be presented, including the

selection of appropriate experts and the framing of appropriate referral questions for them to address.

10. The critical importance of the mitigation investigation period in developing evidence of exemption from execution under *Atkins v. Virginia,* 536 U.S. 304 (2002), is discussed in detail *infra* ¶¶ 21-25. Cases which do not proceed to trial seeking the death penalty result in immense savings in terms of judicial economy and overall litigation costs. Providing the defense adequate time to conduct robust mitigation investigation related to the *Atkins* issue may in the long run result in greatly reduced costs in both dollars and court time. The diagnosis requires the presence of deficits in both intellectual functioning and adaptive behavior which originated during the developmental period. Adaptive behavior is defined as the collection of conceptual, social, and practical skills that have been learned by people in their everyday lives, and is a required diagnostic criterion in all systems defining intellectual disability (formerly known as mental retardation). *See* Marc J. Tassé, *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 APPLIED NEUROPSYCHOLOGY 114, 114 (2009). *See also* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS ("DSM"), 33 (5th ed. 2013). Thus, it is of utmost importance that counsel and the defense team perform a thorough investigation of Mr. Martinez Guzman's functioning with special attention paid to his developmental years in El Salvador.

Background and Qualifications

11. I am the National Mitigation Coordinator for the federal death penalty projects,[3] which are described more fully at their web site, www.capdefnet.org. This national position was created in 2005 in response to the increased demand for effective mitigation preparation in death penalty cases following the U.S. Supreme Court's decision in *Wiggins v. Smith*, 539 U.S. 510 (2003), and the February 2003 revision of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. In this capacity, I have consulted with lawyers, investigators, mitigation specialists, experts, and judges in connection with death penalty cases that are pending in the federal courts at trial or on habeas corpus (under 28 U.S.C. §§ 2254 and 2255).

12. From 1995 to 2005, I served as the Director of Investigation and Mitigation at the New York Capital Defender Office, which was established under New York State's death penalty statute with a mandate to ensure that indigent defendants in capital cases received effective assistance of counsel. The Capital Defender Office was charged with creating an effective system of capital defense throughout New York State by providing direct representation and offering assistance to private counsel assigned by the courts to represent indigent capital defendants. I supervised a statewide staff of investigators and mitigation specialists, and I consulted with lawyers, investigators, mitigation specialists, and experts who were retained or

[3] *See* JON B. GOULD & LISA GREENMAN, REPORT TO THE COMMITTEE ON DEFENDER SERVICES, JUDICIAL CONFERENCE OF THE UNITED STATES, UPDATE ON THE COST AND QUALITY OF DEFENSE REPRESENTATION IN FEDERAL DEATH PENALTY CASES, 111-112, September 2010 (Commentary describes authorization of this position "to assist in expanding the availability and quality of mitigation work in death penalty cases in the federal courts" and the role of the National Mitigation Coordinator in case consultations and training).

employed by the Capital Defender Office or the private bar in connection with death penalty cases.

13. From 1990 to 1995, I served as Chief Investigator at the California Appellate Project, a nonprofit law office in San Francisco that coordinated appellate and post-conviction representation of all the prisoners under sentence of death in California. In that capacity, I also supervised an in-house staff and consulted with staff attorneys and court-appointed counsel, as well as investigators, mitigation specialists, and experts outside the office who were retained to assist counsel representing death-sentenced prisoners.

14. I have investigated all aspects of death-penalty cases since 1980, first working in a private office in California and later in institutional offices. Since 1980, I have regularly attended seminars and conferences relating to the defense of capital cases at trial, on appeal, and in post-conviction proceedings. Most of these conferences were organized and attended by attorneys specializing in capital work. I investigated mitigation evidence in over two dozen death penalty cases in California in the 1980s.

15. Since 1990, I have lectured extensively on capital case investigation, particularly the investigation of mitigation evidence. I have lectured on these subjects not only in New York and California, but in many other death-penalty jurisdictions, including Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming, as well as in Puerto Rico, a jurisdiction where only federal death

penalty cases are prosecuted.[4] I have also lectured over a hundred times under the auspices of the Administrative Office of the United States Courts (in connection with federal death-penalty cases and habeas corpus litigation) and at the Fourth Capital Litigation Workshop of the U.S. Army Trial Defense Service. I conducted a capital case orientation on the mitigation function for a judicial training program in the Eastern District of Louisiana, New Orleans, Louisiana, in 2012. Over the past three decades, I have lectured at over four hundred continuing legal education programs around the country (including seven CLE programs in Nevada), as well as dozens of additional programs at law schools and related professional conferences in the United States, Europe, and Asia.

16. Since 1990, I have lectured on mitigation investigation in death penalty cases at multiple national training conferences sponsored by the following organizations: the NAACP Legal Defense Fund (annual capital punishment conference), the National Legal Aid and Defender Association ("Life in the Balance"), and the National Association of Criminal Defense Lawyers ("Making the Case for Life"). At various times over the past three decades, I have served on the planning committees for these national conferences, as well as the annual Capital Case Defense Seminar sponsored by California Attorneys for Criminal Justice (CACJ) and the California Public Defenders Association (CPDA), which is attended by over a thousand practitioners. I was a co-chair of the planning committee for this seminar in 2009 and from 2011 to 2015. All of these capital defense training programs routinely include sessions on the special

[4]At the time I lectured on these subjects in Connecticut, Delaware, Illinois, Maryland, New Jersey, New Mexico, New York, and Washington capital punishment was permissible in those jurisdictions. These states have since abolished capital punishment.

problems relating to the representation of foreign nationals and the complexity of conducting mitigation investigation abroad.[5] I have also taught at the death penalty colleges at the Santa Clara University School of Law in California and the DePaul University College of Law in Illinois. I have taught at over a dozen capital defense seminars throughout the country under the auspices of the National Institute of Trial Advocacy, and over a dozen "bring-your-own-case" capital brainstorming seminars under the auspices of the National Consortium for Capital Defense Training and its regional counterparts. I also designed and organized the annual Capital Mitigation Skills Workshop, which has been held ten times since 2012 under the auspices of the federal Habeas Assistance and Training Counsel Project.

17. Since 1993, I have contributed extensively to the California Death Penalty Defense Manual published by the California defense bar (CACJ and CPDA). This multi-volume reference has a volume devoted to the investigation and presentation of mitigation evidence which I helped to shape in the 1990s. In 1999, I published articles on *Mitigation Evidence in Death Penalty Cases* and *Mental Disabilities and Mitigation* in *The Champion*, the monthly magazine of the National Association of Criminal Defense Lawyers, as well as an article entitled *Why Capital Cases Require Mitigation Specialists* in INDIGENT DEFENSE, published by the National Legal Aid and Defender Association. These and other articles of mine were cited in the Commentary to the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. 2003). At the request of HOFSTRA LAW REVIEW, I wrote an article for their symposium issue on the revised ABA Guidelines, entitled *Commentary on Counsel's Duty to*

[5] *See* Gregory J. Kuykendall et al., *Mitigation Abroad: Preparing a Successful Case for Life for the Foreign National Client,* 36 HOFSTRA L. REV. 989 (2008).

Seek and Negotiate a Disposition in Capital Cases (ABA Guideline 10.9.1), 31 HOFSTRA LAW REVIEW 1157 (2003). At the request of HOFSTRA LAW REVIEW, I also wrote an article for their symposium issue on the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, 36 HOFSTRA L. REV. 1067 (2008). At the request of UMKC LAW REVIEW, I contributed an article to their symposium issue devoted to "Death Penalty Stories," *The Unknown Story of a Motherless Child*, 77 UMKC L. REV. 947 (2009). I have published three additional articles on prevailing norms in the development of mitigation and mental health evidence: *The ABA Guidelines and the Norms of Capital Defense Representation* (written in collaboration with Professor W. Bradley Wendel), 41 HOFSTRA L. REV. 635 (2013); *Mental Health Evidence and the Capital Defense Function: Prevailing Norms*, 82 UMKC L. REV. 407 (2014); and *The ABA Guidelines: A Historical Perspective* (written in collaboration with Aurélie Tabuteau), 43 HOFSTRA L. REV. 731 (2015). Most recently, I published two articles on the historical development of the mitigation function: *The Past, Present, and Future of the Mitigation Profession: Fulfilling the Constitutional Requirement of Individualized Sentencing in Capital Cases,* 46 HOFSTRA L. REV. 1161 (2018) and Lockett v. Ohio *and the Rise of Mitigation Specialists*, 10 CONLAWNOW 51 (2018), the online journal of *Akron Law Review*. At the invitation of the editor of *The Champion*, I co-authored a review (published in the November 2018 issue) of the most recent treatise on intellectual disability litigation, *Intellectual Disability and the Death Penalty* by Marc J. Tassé and John H. Blume (2018).

18. I am the coauthor of chapters on psychiatric issues in death penalty cases in two books: *Dead Men Talking: Mental Illness and Capital Punishment*, in FORENSIC MENTAL HEALTH: WORKING WITH OFFENDERS WITH MENTAL ILLNESS (Gerald Landsberg, D.S.W., &

Amy Smiley, Ph.D., eds.; Kingston, New Jersey: Civic Research Institute, Inc., 2001) and *Punishment*, in PRINCIPLES AND PRACTICE OF FORENSIC PSYCHIATRY, 2d ed. (Richard Rosner, M.D., ed.; London: Arnold Medical Publishing, 2003; U.S. distribution by Oxford University Press). I am also a coauthor of A PRACTITIONER'S GUIDE TO REPRESENTING CAPITAL CLIENTS WITH MENTAL DISORDERS AND IMPAIRMENTS (Bishop Auckland, U.K.: International Justice Project, 2008) and the opening chapter, *Mitigation Works,* of TELL THE CLIENT'S STORY: MITIGATION IN CRIMINAL AND DEATH PENALTY CASES (Edward Monahan & James Clark, eds., 2017), published by the American Bar Association.

19. I have been accepted and qualified as an expert witness in multiple state and federal courts and have provided opinion evidence on standard of care for defense counsel (especially in the investigation and presentation of mitigation evidence) by testimony or affidavit over two hundred-fifty times in numerous jurisdictions, including Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nevada, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. I have testified as an expert witness thirty-three times, including expert testimony in eleven federal districts (Arizona, Arkansas-Eastern, California-Eastern, Georgia-Southern, Idaho, Iowa-Northern, Louisiana-Middle, Missouri-Western, Tennessee-Middle, Texas-Northern, and Wyoming), as well as in state capital pre-trial and post-conviction proceedings in Alabama, Arizona, Arkansas, California, Colorado, Louisiana, Nevada, Pennsylvania, South Carolina, Texas, and Wyoming. The United States District Court for the Middle District of Louisiana in

Wessinger v. Cain,[6] Case No. 3:04-637-JJB-SCR (July 27, 2013) and the United States District Court for the District of Wyoming in *Eaton v. Wilson*, Case No. 09-CV-261-J (November 20, 2014), issued orders in which I was recognized as an expert in the investigation and presentation of mitigating evidence, and competent to testify about the quality of the petitioner's trial counsel's performance. Both courts found counsel's performance deficient.

20. I have been directly involved in hundreds of capital cases in California and New York, including scores of trials and post-conviction hearings. I have also been consulted in various capacities on capital cases in numerous other jurisdictions around the country, including cases in both state and federal court.

***Relevance of Mitigation Investigation to Eligibility for Execution under* Atkins v. Virginia**

21. The mitigation investigation is critical to the questions relevant to whether Mr. Martinez Guzman is ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002) (barring execution of people with intellectual disability) and its progeny, especially *Hall v. Florida,* 572 U.S. 701, 723 (2014) (noting that intellectual disability is "a condition, not a number," thus requiring exhaustive investigation of a defendant's adaptive behavior to determine eligibility for the exemption). In addition, even for defendants who meet a minimal eligibility threshold, the local prosecutor's weighty decision about whether to go forward seeking the death

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[6]*Rev'd Wessinger v. Vannoy,* United States Court of Appeals for the Fifth Circuit, No. 15-70027, Doc. 00514082668, at 8-9 (finding state post-conviction counsel's failure to investigate was caused by state post-conviction court's decisions to deny a hearing, discovery, and funds, not counsel's inexperience or error) (July 20, 2017), *cert. denied*, 583 U.S. ___, No. 17-6844 (Mar. 5, 2018).

penalty or agree to a negotiated disposition may be highly dependent on information submitted as a result of this investigation.

22. Adaptive functioning is harder to measure than intellectual functioning. While several standardized instruments have been designed to assist in the assessment of adaptive functioning, no current instrument measures all adaptive behavior domains. In addition, the standardized instruments are not tests to be administered to the potentially disabled client, but rather a series of questions about adaptive functioning to be answered by the most reliable witnesses who can be identified as reliable informants concerning the client's developmental years -- such as relatives, family friends, and school teachers. The first and most important step in the diagnosis of intellectual disability is a comprehensive patient and family history. Evaluators must rely on multiple data sources, including interviews of family members, neighbors, friends, and employers; review of any available school records; and, if feasible, administration of an adaptive behavior scale to third-party reporters.

23. A reliable adaptive behavior assessment requires input from respondents who know the individual well but might not be able to provide comprehensive information sufficient to complete all domains on an adaptive behavior scale. This entails qualitative adaptive behavior interviews with multiple informants who have observed the assessed person in different contexts, such as home, school, work, leisure, and community. The ideal respondents are those who have the most knowledge of the individual's functioning across settings, such as parents, grandparents, older siblings, aunts/uncles, neighbors, teachers, friends, and other adults who have had multiple opportunities over an extended period of time to observe the individual in his

everyday functioning in one or more contexts. It is also vital to find those with knowledge of the individual's family history. It is essential to investigate Mr. Martinez Guzman's mother's prenatal history, including inquiry into multiple teratogenic exposures such as alcohol, cigarettes, and street drugs; prescription drugs; nutrition; maternal diseases; and any physical trauma. It is also important to investigate any history of intellectual disability in other relatives.[7] Perinatal and postnatal causes also require careful investigation (for example, of labor- and delivery-related events, infections, social deprivation, and environmental exposure to neurotoxins.[8]

24. Perinatal events require reliable informants on length of pregnancy, birth complications, illnesses, feeding or sleeping difficulties, problems with sucking or swallowing, and general disposition. *See* Donna K. Daily, M.D., et al. *Identification and Evaluation of Mental Retardation,* AMERICAN FAMILY PHYSICIAN 1059 (Feb. 15, 2000), *available at* http://www.aafp.org/afp/20000215/1059.html. *See also* DSM-5 at 39.

25. Family history is another critical part of the intellectual disability investigation. Information should be obtained about the family unit, parents' occupations and education, developmental status of siblings, role of the client in the family, discipline of the children and identify of the child's caretaker when the parents were not at home, etc. *See supra* Daily (2000), ¶ 24. It is also necessary to locate and interview people who have interacted with the client over time or at a critical time in the course of his life. They hold firsthand information about the client's developmental course, as well as having knowledge of adverse environmental conditions

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[7]The DSM-5 notes that "[p]renatal etiologies [for intellectual disability] include genetic syndromes." DSM-5 at 39.

[8]*Id.*

such as lead poisoning, toxic farm or industrial substances, or other serious health risks (such as substandard housing that resulted in respiratory problems, insects or vermin that created medical problems, or safety hazards that resulted in physical injuries).

Prevailing Norms in the Development of Mitigating Evidence in Capital Cases in 2019

26. Since the early 1980s, it has been standard practice for competent defense counsel to determine whether their capital client suffers from organic brain injury, psychiatric disorders, or trauma outside the realm of ordinary human experience. Whenever brain-behavior relationships are at issue, a thorough investigation of the etiology or causes of brain damage is required to determine the interplay of genetics, intra-uterine exposure to trauma and toxins, environmental exposures, head injuries, etc. In a capital case, such investigation is particularly important because of the additional mitigating factors that may be discovered beyond the fact of psychiatric disorder or organic brain damage. *See*, for example, John Hill and Mike Healy, *The Death Penalty and the Handicapped*, FORUM (May-June 1986) at 18-20 (discussing implications of childhood disorders affecting the brain and other disabilities for penalty phases in capital cases); and David C. Stebbins, *Psychologists and Mitigation: Diagnosis to Explanation*, THE CHAMPION (April 1988) at 34, 36 (discussing need for adequate time to overcome clients' distrust and the value of a neuropsychologist or neurologist in cases with head trauma).

27. Since 2000, the Supreme Court has found trial counsel ineffective in five cases for failing to investigate potential mitigation evidence: *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Porter v.*

McCollum, 558 U.S. 30 (2009) (per curiam); and *Sears v. Upton*, 561 U.S. 945 (2010) (per curiam). Every case but *Sears* was tried in the 1980s, and *Sears* was tried more than twenty years ago, in 1993. In *Williams,* the Court reaffirmed an all-encompassing view of mitigation and found trial counsel ineffective for failing to prepare the mitigation case until a week before trial in 1986 and failing to conduct an investigation of the readily available mitigating evidence (nightmarish childhood, borderline retardation, model prisoner status, etc.). In *Wiggins*, a case tried in 1989, trial counsel were found deficient in their performance, even though they had had their client examined by one mental health expert, because they failed to conduct a complete social history investigation in accordance with the ABA Guidelines. "Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." 539 U.S. at 524. In *Rompilla*, tried in 1988, counsel were found deficient "even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available" and despite consulting three mental health experts. 545 U.S. at 377, 379. Similarly, in *Porter*, also tried in 1988, counsel were found deficient despite a "fatalistic and uncooperative" client because "that does not obviate the need for defense counsel" to conduct mitigation investigation. 558 U.S. at 40. Quoting *Williams*, the Court in *Porter* reaffirmed this duty: "It is unquestioned that under the prevailing professional norms at the time of Porter's trial, counsel had an 'obligation to conduct a thorough investigation of the defendant's background.'" *Id.* at 39 (citation omitted). Among the mitigation that Porter's counsel failed to present was "brain damage that could manifest in impulsive, violent behavior." *Id.* at 36. In *Sears*, the Court found

trial counsel ineffective in a 1993 trial even though they had presented seven witnesses in the penalty proceedings. The Court noted, "We have never limited the prejudice inquiry under *Strickland* to cases in which there was only 'little or no mitigation evidence' presented . . ." 561 U.S. at 954. Post-conviction evidence emphasized the defendant's significant frontal lobe brain damage causing deficiencies in cognitive functioning and reasoning. *Id.* at 946. Four of these five individuals have subsequently received sentences of less than death, and the fifth case is pending as of this writing.[9] All five cases involved mental health evidence that was not discovered and presented at trial.

Evolution of Prevailing Norms

28. The 1989 edition of the ABA Guidelines reflected a national consensus among capital defense scholars and practitioners based on practices in the 1980s. These Guidelines were the

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[9]Terry Williams received a life sentence by negotiated disposition in Danville, Virginia in 2000. *See* Frank Green, *Death Penalty Cases Scrutinized: More Hearings are Being Ordered in Virginia,* RICHMOND TIMES-DISPATCH (Apr. 9, 2011) at A1, *available at* http://truthinjustice.org/va-dpreview.htm. On October 15, 2004, the State of Maryland agreed to a disposition sending Kevin Wiggins to a state facility for mental health treatment and rehabilitation services, but making him eligible for parole immediately based on time already served. *See* Jenner & Block, *12 Year Battle for Kevin Wiggins Comes to an End* (Oct. 15, 2004) https://jenner.com/library.news.7810 (last visited Sept. 4, 2019). On August 13, 2007, the Lehigh County (Pennsylvania) District Attorney's Office stipulated to a life sentence for Ronald Rompilla. *See* Genevieve Marshall & Daniel Patrick Sheehan, *Murderer to Spend Life in Prison,* MORNING CALL (Aug. 14, 2007, *available at* http://www.mccall.com/news/mc-xpm-2007-08-14-3753906-story.html (last visited Sept. 4, 2019). On July 21, 2010, the Brevard-Seminole (Florida) State Attorney's Office announced that it would allow George Porter, Jr., to be resentenced to life. *See* Kaustu Basu, *Aging Killer May Get Reprieve from Death Row,* FLA. TODAY (July 21, 2010). *See also* Sears v. Sellers, 2019 U.S. App. LEXIS 5581 (11th Cir. Feb. 25, 2019) (granting motion for expanded COA covering five issues).

result of years of work by the National Legal Aid and Defender Association (NLADA) to develop standards reflecting the prevailing norms in indigent capital defense. NLADA published its Standards for the Appointment of Defense Counsel in Death Penalty Cases (available at www.americanbar.org/content/dam/aba/migrated/DeathPenalty/RepresentationProject/PublicDocuments/NLADA_Counsel_Standards_1985.authcheckdam.pdf) in 1985. With initial support from the ABA's Standing Committee on Legal Aid and Indigent Defendants (SCLAID), NLADA developed its expanded Standards for the Appointment *and Performance* of Defense Counsel in Death Penalty Cases (emphasis added) over the course of several years. In February 1988, NLADA referred the Standards to SCLAID, which reviewed them and circulated them to appropriate ABA sections and committees. SCLAID incorporated the only substantive concerns expressed (by the Criminal Justice Section) and changed the nomenclature to "Guidelines" as more appropriate than "Standards." Each black-letter guideline is explained by a commentary, with references to supporting authorities. *See* Introduction to ABA Guidelines, 1989 ed.

29. Courts have found the various editions of the ABA Criminal Justice Standards and Death Penalty Guidelines useful in assessing the reasonableness of counsel performance. As Justice Stevens noted for the Court's majority in *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010): "We long have recognized that 'prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . .'" Justice Stevens cited *Strickland*, 466 U.S. 668, 688 (1984), *Bobby v. Van Hook*, 558 U.S. 4 (2009) (*per curiam*); *Florida v. Nixon*, 543 U.S. 175, 191, and n.6 (2004); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); and *Williams v. Taylor*, 529 U.S. 362, 396 (2000). Justice Stevens concluded:

"Although they are 'only guides,' *Strickland*, 466 U.S., at 688, and not 'inexorable commands,' *Bobby*, 558 U.S. at 8, these standards may be valuable measures of the prevailing norms of effective representation . . ." Justice Stevens also cited law review articles and the publications of criminal defense and public defender organizations (the National Association of Criminal Defense Lawyers and the National Legal Aid and Defender Association) as guides to prevailing professional norms. *Id.* at 367.

30. The ABA Guidelines reflect prevailing norms and have received recognition in the federal courts. The Defender Services Program has four goals in its strategic plan: timely provision of assigned counsel, delivery of counsel services consistent with the best practices of the legal profession, cost-effective services, and protection of the independence of the defense function. Among its strategies for achieving the "best practices" goal, the Defender Services Program adopted a specific strategy for capital representation which states that appointed counsel should comply with the February 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases and the 2008 Supplementary Guidelines for the Mitigation Function. *See also* Guide to Judiciary Policy, Vol. 7A, Appx. 2A: Model Plan for Implementation and Administration of the Criminal Justice Act, XIV.B.9: Specifically, "All attorneys appointed in federal capital cases should comply with the American Bar Association's 2003 Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Guidelines 1.1 and 10.2 et seq.) and the 2008 Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases." Id. at 28 (Adopted by the

Judicial Conference of the United States, Oct. 3, 2016; *available at*: http://www.uscourts.gov/sites/DEFAULT/files/vol07a-ch02-appx2a.pdf)..

31. Without the thorough social history investigation that a skilled mitigation specialist (required by the ABA Guidelines) can provide, it is impossible to ascertain the existence of previous head injuries, childhood trauma, and a host of other life experiences that may provide a compelling reason for the Government not to seek death or the jury to vote for a life sentence. Moreover, without a social history, counsel cannot make an informed and thoughtful decision about which experts to retain, in order to gauge the nature and extent of a client's possible mental disorders and impairments. Mental health experts, in turn, require social history information to conduct a complete and reliable evaluation. *See* Dudley & Leonard, *Getting It Right, supra* ¶ 5; Douglas Liebert & David Foster, *The Mental Health Evaluation in Capital Cases: Standards of Practice*, 15:4 AM. J. FORENSIC PSYCHIATRY 43 (1994). *See also* George W. Woods et al., *Neurobehavioral assessment in forensic practice*, 35 INT'L J. OF L. & PSYCHIATRY 432 (2012); Russell Stetler, *Mental Health Evidence and the Capital Defense Function: Prevailing Norms*, 82 UMKC LAW REVIEW 407 (2014).

32. The social history investigation should include a thorough collection of objective, reliable documentation about the client and his family, typically including medical, educational, employment, social service, and court records. Such contemporaneous records are intrinsically credible and may document events which the client and other family members were too young to remember, too impaired to understand and record in memory, or too traumatized, ashamed, or biased to articulate. The collection of records and analysis of this documentation involve a slow

and time-intensive process. Many government record repositories (especially those of foreign governments) routinely take months to comply with appropriately authorized requests. Great diligence is required to ensure compliance. Careful review of records often discloses the existence of collateral documentation which, in turn, needs to be pursued.

33. The Commentary to ABA Guideline 10.7 (Investigation) notes, "Records should be requested concerning not only the client, but also his parents, grandparents, siblings, cousins, and children. . . . The collection of corroborating information from multiple sources – a time-consuming task – is important wherever possible to ensure the reliability and thus the persuasiveness of the evidence. Counsel should use all appropriate avenues including signed releases, subpoenas, court orders, and requests or litigation pursuant to applicable open records statutes . . ." 31 HOFSTRA L. REV. at 1024-25).

34. Records invariably provide valuable background information on clients and their families. *See Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (court file – a readily available public document – contained "a range of mitigation leads that no other source had opened up"). In an earlier ineffectiveness case, *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court found the life-history records such powerful mitigating evidence that the Court added a footnote to quote a caseworker report verbatim:

> The home was a complete wreck. . . . There were several places on the floor where someone had had a bowel movement. Urine was standing in several places in the bedrooms. There were dirty dishes scattered over the kitchen, and it was impossible to step any place on the kitchen floor where there was no trash. . . . The children were all dirty and none of them had on under-pants. Noah and Lula were so intoxicated, they could not find any clothes for the children, nor were they able to put the clothes on them. . . . The children had to be put in Winslow

> Hospital, as four of them, by that time, were definitely under the influence of whiskey. 529 U.S. at 395, n.19.

This excerpt provides a lucid example of a vivid illustration of family dysfunction – and a story which even the most skilled interviewer could never have elicited simply by talking with family members. The records documented an event that Terry Williams and his siblings were too young to remember, and his parents were too intoxicated to register in memory. Records have no inherent bias, and contemporaneous records are in any event more credible than witnesses who share previously undisclosed memories.

35. Life-history records enable capital defense teams to interview all witnesses more effectively – not only the witnesses who created the records in the first place (like the teachers who produced report cards) but also family members and friends who can organize their memories more accurately if there is hard documentation of dates and places. The frailty of human memory obliges us all to rely on records, and they provide the essential skeletal framework for the social history investigation. They are helpful in preparing witnesses to testify.

36. A social history cannot be completed in a matter of days, or weeks, or months. In addition to the bureaucratic obstacles to the acquisition of essential documentation, it takes time to establish rapport with the client, his family, and others who may have important information to share about the client's history. It is quite typical, in the first interview with clients or their family members, to obtain incomplete, superficial, and defensive responses to questions about family dynamics, socioeconomic status, religious and cultural practices, the existence of intra-familial abuse, and mentally ill family members. These inquiries invade the darkest, and most shameful secrets of the client's family, expose raw nerves, and often re-traumatize those being

interviewed. Barriers to disclosure of sensitive information may include race, nationality, ethnicity, culture, language, accent, class, education, age, religion, politics, social values, gender, and sexual orientation.

37. I have been involved in hundreds of capital cases, including scores of trials and post-conviction hearings, throughout the country. I have provided evidence as an expert on the standard of care in investigating capital cases and mitigation by live testimony or affidavit in over two hundred fifty cases around the country. *See supra* ¶ 19. My personal experience of the effectiveness of mitigation evidence, both in persuading prosecutors not to seek death and jurors not to impose it, accords with the empirical research of social scientists who have studied the decision-making processes of actual jurors in death-penalty cases. *See*, for example, Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 COLUM. L. REV. 1538 (1998) and *The Emotional Economy of Capital Sentencing,* 75 N.Y.U. L. REV. 26 (2000) (concluding that mitigation does matter, especially mental impairment and mental illness). *See also* John H. Blume, Sheri Lynn Johnson & Scott E. Sundby, *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV. 1035, at 1038 (2008) ("The [Capital Jury Project] studies reveal that many different types of mitigation resonate with jurors. Low intelligence, mental illness, child abuse, extreme poverty, remorse, lack of a significant prior record, and lesser culpability are just some of the categories of mitigation that, in a particular case, can lead jurors to choose life over death."); *id.* at 1051 ("[E]vidence that the defendant was under the influence of extreme emotional disturbance or mentally ill at the time of the crime is also mitigating to almost half of

all jurors. Almost a third of jurors found exposure to serious child abuse mitigating, and a like number found childhood poverty mitigating.").

Standard of Care in Capital Mental Health Evaluations

38. Both anecdotal reports from capital defense practitioners and social science research indicate that defense experts are viewed with great skepticism and often regarded as "hired guns" unless their conclusions are supported by abundant, credible evidence from lay witnesses and historical experts (i.e., the professionals who encountered the capital client long before the alleged offense). *See*, for example, Scott Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109 (1997), finding that two-thirds of the witnesses jurors thought "backfired" were defense experts. Thus, if only for pragmatic reasons, capital defense counsel are well advised not to rely on expert testimony without the corroborative lay witnesses whose identity and potential evidence can only be discovered through life-history investigation. However, it is equally important to offer well-prepared expert testimony to explain the effects of life experiences on an individual's functioning and behavior. Lay witnesses on their own are unlikely to understand the significance of the symptoms and behaviors they describe, and only an expert is likely to be able to provide an overview of the factors that shaped the client over the course of her life and to be able to offer an empathic framework for understanding the resultant disorders and disabilities.[12] Expert

[12]It has long been recognized that lay and expert testimony must be harmonized to be credible to the trier of fact. As one capital defense lawyer pointed out in 1988, "[T]estimony about the psycho-social development of the defendant explains the psychological diagnosis in human terms that the jury can understand." He continued, "Typical psychological testimony on

testimony is essential for placing the factual details elicited from lay witnesses into an interpretive context that explains how various life events shaped the capital client's brain and behavior. Historical experts – the professionals who encountered the client and other family members – can be critical.[13]

39. The proper standard of care for a competent mental health evaluation also requires an accurate medical and social history as its foundation. Because psychiatrically disordered or

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sanity, competency, or diminished capacity sounds like it comes out of a textbook. Despite the best efforts of the mental health professional and the attorneys, most of this type of testimony is incomprehensible to a lay juror. There is also an unfortunate tendency to get caught up in technical terms that bore the jurors and do nothing to humanize the client. It makes little sense to spend several days putting on the testimony of relatives and friends of the defendant about the human characteristics of the defendant, and then put on a psychologist or psychiatrist who immediately turns this around by making the person sound like a casebook study out of some obscure and arcane psychology textbook." David C. Stebbins, *Psychologists and Mitigation: Diagnosis to Explanation*, CHAMPION (Apr. 1988), at 34, 38. Although many of these articles focus on the impact of mitigation on jurors, my experience confirms a corresponding impact on prosecutorial, pre-authorization decision-making.

[13]During the operative years of the New York death penalty statute (1995 to 2004), for example, the Capital Defender Office offered the testimony of historical experts in several cases. A school psychologist who had tested a client routinely as part of mandated triennial review for Special Education explained the significance of his borderline intellectual functioning (FS IQ 76-81). People v. George Davis Bell (Ind. 128-97, Judge Cooperman, Queens County, N.Y., 1999). In another case, a different school psychologist explained the impact of learning disabilities (at age 11, reading just above a second grade level; at 14, just above fourth grade; and at 17, just above fifth grade). People v. José J. Santiago (Ind. 1210/99, Judge Bristol, Monroe County, N.Y., 2000). In a third case, a psychiatrist had treated the client's mother after her suicide attempt when the client was nine – thirty years before the capital trial. From the records, the psychiatrist testified to the history of mood disorders and suicidality in the maternal lineage, as well as family dysfunction, including fights over promiscuity, gambling, and drinking. From her current perspective, the psychiatrist opined about the devastating impact on the children of the mother's mood disorder, suicidality, and psychiatric removal from the family. People v. John F. Owen (Ind. 547-99 cons. with 414-99, Judge Egan, Monroe County, N.Y., 2001). *See* Russell Stetler, *The Mystery of Mitigation : What Jurors Need to Make a Reasoned Moral Response in Capital Sentencing*, 11 U. PA. J. L. & SOC. CHANGE 237, 258 (n.92) (2007-08).

cognitively impaired individuals are by definition likely to be poor historians, a reliable evaluation requires historical data from sources independent of the client.

40. Except when clients exhibit such florid symptomatology that immediate clinical intervention is patently warranted, capital defense counsel must conduct a thorough social history investigation before retaining mental health experts. Only after the social history data have been meticulously digested and the multiple risk factors in the client's biography have been identified will counsel be in a position to determine what kind of culturally competent expert is appropriate to the needs of the case, what role that expert will play, and what referral questions will be asked of the expert. Psychiatrists and psychologists have different training and expertise, and within each profession are numerous subspecialties including the disciplines that study the effects of trauma on human development. The potential roles of experts include consultants; fact gatherers needed to measure cognitive capacities or to elicit client disclosures (and/or to assess their credibility); and testifying witnesses, to name but a few. To make informed decisions about the kind of experts that may be needed and the referral questions they will address, counsel first needs to have conducted a reliable social history investigation.

41. The importance of independently corroborated social history data was also well recognized among mental health practitioners as early as the 1980s. A leading psychiatric text in that period described an accurate and complete medical and social history as the "single most valuable element to help the clinician reach an accurate diagnosis." H. KAPLAN & B. SADOCK, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 837 (4th ed. 1985). The same text noted that the individuals being evaluated are often poor historians: "The past personal history is somewhat distorted by the patient's memory of events and by knowledge that the patient obtained from

family members." *Id.* at 488. Thus, "retrospective falsification, in which the patient changes the reporting of past events or is selective in what is able to be remembered, is a constant hazard of which the psychiatrist must be aware." *Id.* This problem is particularly acute in the forensic context, as two other leading authorities pointed out in 1980:

> The thorough forensic clinician seeks out additional information on the alleged offense and data on the subject's previous antisocial behavior, together with general "historical" information on the defendant, relevant medical and psychiatric history, and pertinent information in the clinical and criminological literature. To verify what the defendant tells him about these subjects and to obtain information unknown to the defendant, the clinician must consult, and rely upon, sources other than the defendant.

Richard J. Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427, 508-509 (1980). Capital defense lawyers also appreciated this need: "A psychologist armed with all of the records of the client's history is much better equipped to present a sympathetic and truthful explanation of the client's psychological make-up and of how the crime occurred." David C. Stebbins, *Psychologists and Mitigation: Diagnosis to Explanation*, THE CHAMPION (April 1988) at 34, 37.

The Specific Complexity of Mitigation Investigation in El Salvador

42. Mitigation investigation anywhere often involves physical risks, but within the United States defense teams can often rely on the assistance of local public defenders to assess the level of risk or to assist in conducting investigations in crime-infested neighborhoods or public housing. In El Salvador, defense personnel are on their own. The State Department's El Salvador Travel Advisory (issued January 29, 2019) states bluntly, "Reconsider travel to El Salvador due to crime." It continues, "Violent crime, such as murder, assault, rape, and armed robbery, is

common. Gang activity, such as extortion, violent street crime and narcotics and arms trafficking is widespread. Local police may lack the resources to respond effectively to serious criminal incidents." U.S. citizens are specifically warned not to drive at night or to display signs of wealth.

43. Drug wars in this region have been widely publicized. Safety concerns often require mitigation specialists and other defense team members to stay hours away from where witnesses live because they must leave these areas before dark. Witnesses often live in remote areas where roads are unpaved and unmarked, but it is prudent not to travel in SUVs or similarly suitable all-terrain vehicles simply because they elevate the risk or kidnapping and carjacking. When witnesses work sunrise to sundown, it is extremely difficult to find time for the lengthy rapport-building interviews that are necessary to overcome the barriers to disclosure of sensitive life-history information discussed *supra* ¶ 36. The known witnesses already identified by counsel invariably point to additional witnesses who live elsewhere in the country, so the defense teams cannot assess in advance with certainty the safety issues that will affect a thorough investigation.

44. It is difficult to locate witnesses in El Salvador in every sense. In the United States, we rely on computerized databases to find addresses for witnesses, but there is nothing comparable in El Salvador. When the locations are known by word of mouth, there are often no maps or GPS tracking that will help the defense team *find* the location. Local guides and security may be needed to negotiate the unpaved and unmarked roads in rural areas. These areas are often barely accessible by car, and travel may be extremely slow. It may take an hour to drive a few miles.

45. One key aspect of mitigation investigation in El Salvador involves meticulous observation of the living conditions in which clients were raised. The physical environment may involve tiny and crowded living quarters, where the whole family slept in one room. Homes may have had dirt floors, no indoor plumbing or running water, no electricity, and little or no furniture. Instead of conclusory labels ("the family was poor"), the mitigation investigation needs to document the physical conditions, obtain historical photographs where possible, and take photographs today even if living conditions have improved from the time of the clients' formative years.

46. In the United States, we rely heavily on detailed, multigenerational life-history records that are often centralized, saved electronically, and obtainable remotely through mailed requests and telephone follow-up. In El Salvador, everything is more difficult. There are likely to be fewer records, and they are invariably harder to obtain. They are unlikely to be in any centralized facility, so it is often necessary to track them down and request them in person from the specific institution that created them. When they are available, they generally provide much less detail than can be found in U.S. records. Record-keeping protocols are not standardized. The poverty of many clients' families exacerbate the problems. They may be too poor to have sought medical care or to travel to the nearest clinic. There may be no records for poor people in rural areas, and there may be no medical records because the family had no money to seek care. Clients may have left school at an early age because they needed to help support their families. In the absence of abundant individual records, documentation about the physical environments of the regions where clients lived in their formative years assumes greater importance, including records of neurotoxin exposure or community violence.

47. Because of the probable scarcity of records, mitigation interviews assume greater importance, but the interviewers confront cultural obstacles in addition to the universal barriers to disclosure (*supra* ¶ 36) and the physical obstacles to developing relationships with family members and other witnesses. Understandably, Salvadorean nationals are unlikely to have any understanding of the U.S. legal system, and mitigation will be a particularly foreign concept. Because of aggressive U.S. efforts to thwart drug trafficking and immigration, many witnesses do not wish to be seen talking with Americans, who may be suspected of involvement with law enforcement rather than the defense function. Cultural attitudes toward mental illness, trauma, masculinity and sexuality, and child rearing (including discipline) may all require skill, patience, and time to elicit critical information.

Conclusions

48. I was asked by counsel for Mr. Martinez Guzman to address various related issues in this declaration. First, I was asked to set forth the prevailing professional norms in regard to the investigation and development of mitigation evidence in a death penalty prosecutions. These norms have been set out *supra* in ¶¶ 26-37. Second, I was asked to address the standard of care in capital mental health evaluations, with particular attention to the importance of the social history investigation. These standards have been set out *supra* in ¶¶ 38-41. The specific requirements of an *Atkins* investigation are set out *supra* at ¶¶ 21-25. The special complexity of investigation in El Salvador is summarized *supra* at ¶¶ 42-47. In light of those norms and standards, it is my considered professional opinion that counsel's request to continue the trial date is reasonable and necessary in light of extraordinary factors unique to this case. It is also my

opinion that a trial date of April 2020 would make it impossible for defense counsel to provide effective assistance.

49. It is my considered professional opinion that counsel's request for additional time to undertake their mitigation investigation is reasonable and necessary under the circumstances of the case. If denied this additional time, it is my opinion that counsel will not be able to provide effective representation under prevailing professional norms in the area of mitigation and potential capital mental health evidence. As the Supreme Court of the United States has noted, "The right to the effective assistance of counsel at trial is a bedrock principle in our justice system. It is deemed as an 'obvious truth' the idea that 'any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.'" *Martinez v. Ryan*, 566 U.S. 1, 12 (2012) (citation omitted). To develop mitigating evidence, Mr. Martinez Guzman needs the guiding hand of counsel, and their counsel, in turn, need adequate time to conduct the thorough investigation that is constitutionally mandated by the Sixth Amendment.

I have provided this declaration on a *pro bono* basis.

I declare under penalty of perjury pursuant to 28 U.S.C. §1746, and under the laws of the States of California and Nevada that the foregoing is true and correct and was executed this 30 day of September at Oakland, California.

RUSSELL STETLER

CODE 1650
JOHN L. ARRASCADA, # 4517
GIANNA VERNESS, # 7084
KATHERYN HICKMAN, #11460
JOSEPH GOODNIGHT, #8472
350 S. CENTER STREET, 5TH FLOOR
RENO, NV 89501
(775) 337-4800
Attorney for Defendant

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

THE STATE OF NEVADA,
Plaintiff,

v.

WILBER ERNESTO MARTINEZ GUZMAN,
Defendant.
_____/

CASE NO: CR19-0447

DEPT. NO.: 4

ERRATA RELATED TO MOTION TO CONTINUE TRIAL DATE (D-2)

The Defendant, Wilber Ernesto Martinez Guzman ("Martinez Guzman"), by and through his attorneys of record, John L. Arrascada, Gianna Verness, Joseph Goodnight and Katheryn Hickman, hereby moves to correct Mr. Martinez Guzman's *Motion to Continue Trial Date (D-2)* filed on October 4, 2019, on page 12, line 2, which states "Based on the foregoing, the Douglas County Charges should be dismissed". This sentence should be corrected to: "Based on the foregoing, Mr. Martinez Guzman requests that the trial currently scheduled to commence on April 6, 2020 be continued to March 2021".

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AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated this 8th day of October, 2019.

JOHN L. ARRASCADA
Washoe County Public Defender

By /s/JOHN L. ARRASCADA
JOHN L. ARRASCADA
Washoe County Public Defender

By /s/GIANNA VERNESS
GIANNA VERNESS
Chief Deputy Public Defender

By /s/KATHERYN HICKMAN
KATHERYN HICKMAN
Chief Deputy Public Defender

By /s/JOSEPH GOODNIGHT
JOSEPH GOODNIGHT
Chief Deputy Public Defender

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Washoe County Public Defender's Office, Reno, Washoe County, Nevada, and that on this date electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

Chris Hicks, District Attorney
District Attorney's Office

Travis Lucia
Deputy District Attorney

Marc Jackson
Deputy District Attorney

Dated this 8th day of October, 2019.

/s/ ZULMA REYES
ZULMA REYES

CODE No. 2645
CHRISTOPHER J. HICKS
#7747
One South Sierra Street
Reno, Nevada 89501
(775) 328-3200
Attorney for Plaintiff

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

IN AND FOR THE COUNTY OF WASHOE

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR19-0447

WILBER ERNESTO MARTINEZ GUZMAN, Dept. No. 4

Defendant.
_____/

OPPOSITION TO MOTION TO CONTINUE TRIAL DATE (D-2)

COMES NOW, the State of Nevada, by and through CHRISTOPHER J. HICKS, Washoe County District Attorney, and MARK JACKSON, Douglas County District Attorney, and opposes the Motion to Continue Trial Date (D-2) filed by Defendant Wilber Ernesto Martinez Guzman (hereinafter, "Guzman"). This Opposition is based on the pleadings and papers on file with this Court, the following points and authorities, and any argument this Court chooses to consider on this matter.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Relevant Factual Background

Guzman was indicted on March 13, 2019. Prior to his arraignment, prosecutors and defense counsel met to agree upon a trial date. At his arraignment on March 19, 2019, a trial date of April 6, 2020, was selected by all parties involved. The State of Nevada (hereinafter, "the State") explained to the Court that the reason the parties opted for a date over a year away was because the parties fully expected it to be the trial date. *See* Trans. Arraignment, Mar. 19, 2019, p. 8-9. Defense counsel confirmed that representation. *Id.* at 9.

Prior to the indictment, defense counsel retained clinical psychologist Martha B. Mahaffey to determine if Defendant is intellectually disabled pursuant to NRS 174.098 and 175.554. *See* Evalution (*sic*) of Intellectual Functioning Preliminary Report, State of Nevada vs. Wilbur Martinez Guzman, by Martha B. Mahaffey, Ph.D. (on file under seal with the Court). In this capacity, Dr. Mahaffey evaluated the defendant on March 3, 7, 8, and 9, and on May 24 and June 3. *Id.* In that time frame, Dr. Mahaffey conducted a clinical interview of Guzman and administered multiple instruments to test his intellectual functioning. *Id*.

Dr. Mahaffey is a well-known clinical psychologist having practiced for over 30 years in Nevada. *See e.g.* Ex. 1,

Curriculum Vitae of Martha B. Mahaffey, P.h.D. She is Hispanic and bilingual. *Id.* at pg. 1. Dr. Mahaffey has testified as an expert witness over 85 times in multiple state and federal courts throughout Nevada. *Id.* at pg. 5-7. She has served as an expert in multiple intellectual disability challenges to the death penalty. *Id.* at pg. 5-6. She also assists in capital defense mitigation.

On July 29, 2019, nearly 5 months after Dr. Mahaffey began her intellectual disability evaluation of Guzman, defense counsel informed the Court that they anticipated filing a motion to declare Guzman intellectually disabled. *See* Trans. Status Hearing, Jul. 19, 2019, p. 8. Furthermore, it was asserted that Guzman had an IQ of 66. Additionally, defense counsel confirmed for the Court that Dr. Mahaffey was available for the set trial date and pretrial hearings. *Id.* at p. 4. The Court concluded the hearing by encouraging the parties to meet and discuss the purported IQ results.

At the time of the next Status Conference on August 26, 2019, Dr. Mahaffey's report had yet to be provided to the State. *See* Trans. Status Hearing, Aug. 26, 2019, p. 5. The Court ordered it be provided within 10 days. *Id.* at p. 15. Also, at the hearing defense counsel informed the Court that a defense team consisting of Guzman's counsel and two mitigation/intellectual capacity experts was travelling to El

Salvador from September 4th through September 10th to conduct a mitigation and intellectual capacity investigation. *Id.* at p. 5. The Court set an expediated hearing on September 16, 2019, upon the team's return for a report of their progress.[1]

At that hearing, it was reported that the traveling defense team interviewed ten (10) of Guzman's purported family members, two separate teachers, a principal, and a janitor/caregiver or caretaker/guard for the school. Trans. Status Hearing, Sep. 19, 2019, p. 4. The team went to three hospitals and confirmed that records existed and provided releases for those records. *Id.* Further, Guzman's team obtained information regarding pesticides and fertilizers that Guzman may have been exposed to while working in the fields. *Id.* at pp. 4-5. It was also explained to the Court that the defense team is working with El Salvadorian counsel, the El Salvadorian Minister of Foreign Affairs and the Director General for Human Rights, all based in El Salvador. *Id*.

II. Legal Standard

A decision regarding a continuance is within the sound discretion of the trial judge and "not every denial of a request for additional time violates due process." *Zessman v. State*, 94

[1] The Court also entered an order "that any information your expert is going to rely upon, be it notes, tests, documents or statements, you have to have the statements recorded and the notes preserved for the State". *See* Trans. Status Hearing, Aug. 26, 2019, p. 16. To date, the State has received no discovery from the El Salvador trip.

Nev. 28, 31, 573 P.2d 1174, 1177 (1978) (citations omitted). On review, the Nevada Supreme Court requires a defendant to demonstrate prejudice in order to find the lower court erred by denying a motion to continue. *Id.* The district court must evaluate the circumstances of the case, with an emphasis on the reasons provided at the time the request for a continuance is made. *Id.; see also Higgs v. State*, 126 Nev. 1, 9, 222 P.3d 648, 653 (2010). The district court must also evaluate the considerations set forth in D.C.R. 14, including "whether or not the same facts can be proven by other witnesses… *whose attendance…might have been obtained*." *Banks v. State*, 101 Nev. 771, 773, 710 P.2d 723, 725 (1985) (citing D.C.R. 14(2)(c)). Another relevant consideration comes from the local rules, which requires a party moving for a continuance to demonstrate good cause. WDCR 13(1).

III. Discussion

In his motion, Guzman incorrectly relies on the ABA's 2003 Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("ABA's 2003 Guidelines"). He fails to satisfy D.C.R. 14 or establish good cause for a continuance in this matter. Guzman's motion relies on generalities associated with defending capital cases and El Salvadorian defendants. The motion does not contain any specific information that demonstrates a continuance is justified or reasonable in this

case. Lastly, Guzman's purported necessity to retain and present unavailable *Atkins*/mitigation expert testimony is baseless. He has already retained a qualified *Atkins*/mitigation expert who is available within the current trial timeline and who has already begun the *Atkins* evaluation of Guzman. The motion to continue should be denied.

A. Guzman's reliance on the ABA's 2003 Guidelines as being determinative of his counsel's effectiveness and to support a continuance is misplaced.

In his motion, Guzman repeatedly suggests that the ABA's 2003 Guidelines establish the standards of practice for performance under the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984).[2] As the title suggests, they may be "guidelines," but they are not determinative of counsel's effectiveness in death penalty cases. Despite Guzman's suggestion to the contrary, the Nevada Supreme Court did not adopt the ABA's 2003 Guidelines in ADKT 411. Nor have the ABA's 2003 Guidelines been accepted as requirements for capital representation in other jurisdictions.

In fact, in the per curiam opinion in *Bobby v. Van Hook*, the Supreme Court of the United States criticized the Sixth Circuit for treating "the ABA's 2003 Guidelines not merely as evidence of what reasonably diligent attorneys would do, but as

[2] In particular, the supporting declarations from counsel Arrascada and Russell Stetler rely on the ABA's 2003 Guidelines as requirements for defense attorneys in capital cases.

inexorable commands with which all capital defense counsel must fully comply." 558 U.S. 4, 8 (2009) (citations and internal quotations omitted). The Supreme Court did not condone the use of the ABA's 2003 Guidelines as evidence of what reasonable attorneys should do in capital cases. *Id.* at n. 1. (noting that its opinion "should not be regarded as accepting the legitimacy of a less categorical use of the Guidelines to evaluate post-2003 representation.").[3] In other words, contrary to Guzman's suggestion, the ABA's 2003 Guidelines have not been accepted as a reliable authority on reasonable standards of practice in capital cases. It is still up to the courts to determine whether counsel was effective within the meaning of *Strickland*, *supra,* and its progeny. *See Bobby*, 558 U.S. at 13 ("[i]t is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution, and I see no reason why the ABA Guidelines should be given a privileged position in making that determination.") (Alito, J.,

[3] The cases cited by Guzman to support the proposition that the ABA standards determine what is reasonable were decided before the Supreme Court of the United States decided *Bobby v. Van Hook*, *supra*. *See* Mot. p. 6, l. 8-11. Guzman also cites *Padilla v. Kentucky*, 559 U.S. 356 (2010), because it refers to the ABA standards of practice as prevailing professional norms. However, the Court in *Padilla*, *supra*, does not address the ABA's 2003 Guidelines on death penalty representation. The *Padilla* Court also reaffirms that such standards, if they apply, "are 'only guides,' and not 'inexorable commands….'" *Padilla*, 559 U.S. at 367 (citing *Strickland*, 466 U.S. at 688 and *Bobby*, 558 U.S. at 13).

concurring); *Padilla*, 559 U.S. at 377 ("[a]lthough we may appropriately consult standards promulgated by private bar groups, we cannot delegate to these groups our task of determining what the Constitution commands.") (Roberts, C.J., and Alito, J., concurring). Thus, Guzman's suggestion that his counsel must perform every task included in the ABA's 2003 Guidelines to be effective is without merit and should have no bearing on this Court's analysis of Guzman's current motion.

B. Guzman has not provided a sufficient factual basis to support a continuance in this case.

In his motion, Guzman asserts there are "tantalizing indications in the record" suggesting he is intellectually disabled which need further exploration. Yet the record, the motion, and the attached declarations are completely devoid of support for Guzman's assertion. As such, there is an insufficient factual basis to support a continuance.[4]

While D.C.R. 14 and the good cause standard do not require counsel to disclose confidential information, they do require counsel to disclose some specific information about their proposed witnesses and reasons for a continuance. In fact, the

[4] The State expects Guzman to argue that he cannot provide the information discussed in D.C.R. 14 in more detail without violating *Sechrest v. Ignacio*, 549 F.3d 789, 815-819 (9th Cir. 2008). Such a suggestion is unfounded. *Sechrest*, *supra*, concerned defense counsel's disclosure of a confidential report from an expert witness that the defense was not going to call and defense counsel's stipulation to allow the government to call the witness at trial.

Federal Courts have imposed similar standards to D.C.R. 14. *See e.g. U.S. v. Hoyos*, 573 F.2d 1111 (9th Cir. 1978) ("[w]hen a continuance is sought to obtain witnesses, the accused must show who they are, what their testimony will be, that the testimony will be competent and relevant, that the witnesses can probably be obtained if the continuance is granted, and due diligence has been used to obtain their attendance on the day set for trial.") (citations omitted); *see also U.S. v. Darby*, 744 F.2d 1508, n. 6 ("a movant must show that due diligence has been exercised to obtain the attendance of the witness, that substantial favorable testimony would be tendered by the witness, that the witness is available and willing to testify, and that the denial of a continuance would materially prejudice the defendant.") (citations omitted).

Guzman's motion and supporting declarations focus on capital cases in general and the alleged difficulties inherent in representing defendants from El Salvador. However, Guzman's motion fails to address any specifics of this case to support a continuance.

By contrast, the record reveals that many of the time-consuming activities discussed in Guzman's motion as reasons for a continuance have already been undertaken by the defense team and go well beyond the prevailing professional norms of practice in Nevada. Guzman's counsel and two bilingual mitigation

experts have already gone to El Salvador and interviewed multiple purported family members, two of his teachers, his principal and a janitor/caretaker for the school. Moreover, the defense team has already visited three El Salvadorian hospitals where they confirmed records existed and provided forms to release those records. Further, Guzman's team obtained information regarding pesticides and fertilizers that Guzman may have been exposed to while working in the fields. Lastly, the defense team is working with local El Salvadorian officials.

Guzman's motion does not establish good cause because he fails to identify what information is still outstanding or whether additional witnesses need to be interviewed, and why those matters cannot be accomplished consistent with the current trial schedule. Guzman's motion does not satisfy D.C.R. 14 or the good cause requirement.

C. Guzman fails to show why his desired neuropsychologist is a necessary witness and, even if he did, Guzman fails to show that a continuance is needed because his other retained expert is competent and available.

Guzman indicates that he has retained a neuropsychologist who is Spanish speaking and has experience in El Salvador (mot. p. 10), but he does not provide a declaration from his alleged neuropsychologist expert to explain what information is still needed and why the alleged expert cannot perform his evaluation before the trial currently set. Instead, Guzman generally

suggests that this unknown expert has indicated he could provide a report by May of 2020 and would be available in the summer of 2020 to testify.[5] *See* Mot. p. 11. D.C.R. 14 requires a party moving for a continuance based on witness attendance to identify the witness and the diligence used to procure the witness' attendance. Guzman has failed to satisfy these basic requirements.

Secondly, Guzman appears to suggest that counsel will not be effective unless they call the neuropsychologist they have allegedly retained. However, Guzman does not point to any authority requiring that counsel call a neuropsychologist in an intellectual disability case. Simply because Guzman wishes to call a particular expert does not equate to an entitlement for him to do so. Guzman is entitled to "the basic tools of an adequate defense." *Britt v. North Carolina*, 404 U.S. 226, 227 (1971); *see also Ross v. Moffitt*, 417 U.S. 600, 616 (1974) (providing an indigent defendant does not have the right to "the

[5] This suggestion appears to be based on Dr. Steven Greenspan's assessment that nine months is required for a comprehensive *Atkins* review. However, his suggestion does not account for the information already developed by Guzman's defense team to date. Guzman's team has been investigating the intellectual disability issue since before he was indicted in March of 2019, or for at least seven (7) months.

Further, the State submits that Dr. Greenspan's proposed testimony is also unnecessary, as the Court is aware of the applicable standards in intellectual disability cases. Nevertheless, Dr. Greenspan appears to be available in a teaching capacity before and during the currently scheduled trial, so Guzman's request for a continuance cannot legitimately be based on Dr. Greenspan's schedule. *See* Mot., Ex. 2, p. 2.

legal arsenal that may be privately retained by a criminal defendant."). In *Ake v. Oklahoma*, the Supreme Court of the United States held that an indigent defendant was entitled to access to a "competent psychiatrist" when his sanity at the time of the offense was a significant factor in trial, but concluded that he was not entitled to an expert of his choice. 470 U.S. 68, 63 (1985).

Guzman does not address "whether or not the same facts can be proven by other witnesses… *whose attendance…might have been obtained*." *Banks*, 101 Nev. at 773, 710 P.2d at 725. Dr. Mahaffey is one of the most qualified *Atkins* experts in Nevada. She has been recognized as a reliable *Atkins* expert because of her experience in conducting the examinations and her testing procedures. *See e.g.* Ex. 2, *Bean v. State*, 2019 WL 4619533, *1-3 (Nev. September 20, 2019) (unpublished). Dr. Mahaffey is bilingual and Hispanic. She has already met with Guzman on several occasions, and has already performed one prong of the *Atkins* evaluation. Guzman does not offer a cognizable reason why Dr. Mahaffey cannot complete the analysis in line with the current trial date.

The only potential prejudice argument Guzman can make from the denial of his motion is that he was not be able to use the expert of his choice, but he is not entitled to an expert of his choice. *See Ake*, *supra*. If the Court denies Guzman's request

for a continuance, he will still have more than adequate time to pursue his intellectual disability claim through Dr. Mahaffey and to prepare a mitigation case.

IV. Conclusion

The State recognizes that a "myopic insistence upon expedience in the face of a justifiable request for delay" will not normally be tolerated and that a defendant "must be afforded a *reasonable opportunity* to obtain witnesses" in his favor. *Zessman*, 94 Nev. at 31, 573 P.2d at 1177 (*emphasis added* and citations omitted). Guzman suggests that denying his request will be a myopic insistence upon expedience. Guzman's suggestion is misplaced.

Guzman was indicted in March 2019, and at that time trial was scheduled over a year later. Guzman's counsel began investigating an intellectual disability claim before he was indicted. Guzman's counsel has visited El Salvador and apparently obtained mitigation information from several sources. Guzman has had a more than reasonable opportunity to obtain a competent *Atkins* expert to evaluate him and render an opinion before the current trial date.

Guzman is not requesting a day, week, or month continuance. Guzman is requesting a trial date sixteen (16) to seventeen (17)

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months from now[6] to accommodate an unidentified witness' schedule. A continuance of that length of time would result in a setting approximately two years after Guzman was indicted. Guzman has not shown how such a lengthy continuance is justifiable or reasonable in this case. The Court should deny Guzman's motion for a continuance.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED: October 14, 2019.

/s/ MARK JACKSON
MARK JACKSON
Douglas County District Attorney

/s/ CHRISTOPHER J. HICKS
CHRISTOPHER J. HICKS
Washoe County District Attorney

[6] In Guzman's motion, he requests a continuance to February of 2021. Mot. p. 11. However, in Guzman's Errata, he suggests that a trial date in March of 2021 is appropriate. These settings would amount to a ten (10) or eleven (11) month continuance of the current trial date.

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Second Judicial District Court on October 14, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

John Reese Petty
Katheryn Hickman
Gianna Verness
Joseph W. Goodnight

Chief Deputy Public Defenders

John L. Arrascada
Washoe County Public Defender

/s/ Margaret Ford
MARGARET FORD

INDEX OF EXHIBITS

EXHIBIT 1

EXHIBIT 1

VITA

MARTHA B. MAHAFFEY, Ph.D.

Address: 834 Willow St., Reno, Nevada 89502
Phone: (775) 323-6766
FAX: (775) 323-2716

Ethnic Status: Hispanic
Languages: Spanish and English fluently spoken, written, and read

EDUCATION

University of Nevada, Reno
Reno, Nevada
Ph.D., Clinical Psychology
7/80 – 12/86

Santa Clara University
Santa Clara, California
B.S., Psychology
9/77 – 6/80

College of San Mateo
San Mateo, California
9/76 – 6/77

CREDENTIALS

Nevada Psychology License #190, 1988 to Present
Diplomate in Forensic Psychology, American Board of Psychological Specialties, 1999 to Present
Certification as Evaluator for Competency to Stand Trial, State of Nevada, 2004 to Present

CLINICAL EXPERIENCE

Clinical Psychologist, Private Practice, Reno, Nevada, 11/96 to Present
Clinical Psychologist and Psychological Associate, Private Practice, Reno, Nevada, 4/87-12/89

Forensic Evaluations

- Criminal: Competency to stand trial, criminal responsibility, exculpatory and mitigating defenses, death penalty mitigation, death penalty and intellectual disability, psychosexual and risk assessment, violence risk, child abuse/neglect risk, domestic violence risk, stalking risk, comprehension of Miranda Rights, juvenile diminished culpability, post-conviction, sentencing
- Civil: Immigration asylum and cancellation of removal, fitness for duty, impaired provider, workplace violence, workman's compensation, personal injury, wrongful death, wrongful termination, discrimination, sexual harassment, transactional capacity
- Family: Child custody; parental capacity, juvenile proceedings

Other Psychological Evaluations: Psychological and learning disabilities; intellectual disability; neurocognitive impairment; general psychological evaluations

Consultation to Community Organizations

- Washoe County Public Defender
- Washoe County Alternate Public Defender
- Clark County Public Defender
- Clark County Special Public Defender
- Nevada State Public Defender
- District of Nevada Federal Public Defender
- Clark County District Attorney
- Washoe County District Attorney
- Humboldt County District Attorney
- Lyon County District Attorney
- Elko County District Attorney
- Douglas County District Attorney
- Division of Parole and Probation
- Washoe County Juvenile Services
- Nevada Youth Parole
- Washoe County Social Services
- Division of Child and Family Services
- State of Oregon Department of Human Services
- Washoe County Student Attendance Review Board
- Bureau of Disability Adjudication
- Bureau of Vocational Rehabilitation
- Sierra & Rural Regional Centers
- State of Nevada Board of Psychology
- State of Nevada Board of Nursing
- State of Nevada Board of Social Work
- American Registry for Diagnostic Sonography
- Nevada System of Higher Education-UNR
- Washoe County School District
- Carson City School District
- Bureau of Land Management
- Union Pacific Railroad
- City of Sparks
- Southwest Airlines
- Surrogacy Choices, LLC

Psychotherapy of English and Spanish-speaking individuals, couples, and families

Staff Psychologist, V.A. Medical Center, Reno, Nevada, 2/88–2/98

Director of Training, Psychology Service, 3/90-2/98
- Administration of the APA accredited psychology predoctoral internship program and summer summer practicum program
- Administrative supervision of training staff
- Coordination with psychiatry residency program and social work internship program
- Acting Chief, Psychology Service, as needed

Psychologist, Day Treatment Center, 2/88-2/98
- Consultation, psychotherapy, and assessment of chronic mentally ill adult outpatients and their families, including patients with psychotic disorders, affective disorders, personality disorders, dual psychiatric and substance abuse disorders, post traumatic stress disorders, medical disorders
- Program and research development
- Quality assurance coordination
- Acting Coordinator, Day Treatment Center, as needed

Other responsibilities:
- Chair, Mental Health Quality Assurance Committee
- Psychotherapy, conflict resolution, and personnel consultation for Nursing Service, Employee Assistance Program
- Compensation and pension disability evaluations

Staff Psychologist, Nevada Mental Health Institute, State of Nevada, Reno, Nevada, 10/87-2/88
- *Intensive Care and Intercare Psychiatric Inpatient Units.* Consultation, psychotherapy, and assessment of acutely and chronically disturbed adult inpatients
- *Geriatric Inpatient Unit.* Geropsychiatric program development and consultation.
- *Continuing Care and Outpatient Services.* Program analysis.

Counselor, Drug and Alcohol Rehabilitation Unit, V.A. Medical Center, Menlo Park, California, 9/85-11/85
- Coordination of evening inpatient detoxification program and psychotherapy

Psychology Intern, V.A. Medical Center, Palo Alto, California (APA accredited), 9/84-8/85
- *Family Program.* Couples and family therapy, sex therapy
- *Medical Psychology Program.* Consultation, psychotherapy, and assessment to outpatient medical psychology program, oncology clinic, and general medicine and surgery units
- *Psychiatric Intensive Care Unit.* Psychotherapy and forensic evaluation of adults in acute psychological crisis manifested by extreme psychosis, self-destructive and assaultive behavior
- *Psychological Assessment Unit.* Psychological testing and neuropsychological screening to general outpatient and inpatient units

School Consultant and Counselor, Storey County School District, Virginia City, Nev., 9/83-6/84
- Consultation to principals, teachers, special education instructors, and parents regarding elementary, junior, and senior high school students
- Psychotherapy and behavioral assessment of children and adolescents

Psychology Intern, Carson Mental Health Center, Carson City, Nevada, 7/82–1/83
- Development of Spanish-speaking therapy program; consultation to community agencies; and psychotherapy and assessment of adults, adolescents, and children

Psychology Trainee, Psychological Services Center and Children's Behavioral Services, University of Nevada, Reno, 9/80-6/82
- Psychotherapy and assessment of adults, adolescents, and children.

Research Trainee, V. A. Medical Center, Reno, Nevada, 6/80-7/80
- Neuropsychological research

Psychology Trainee, Children's Health Council, Palo Alto, California, 9/79-12/79
- Formulation and implementation of academic/behavioral treatment plans for children with emotional, learning, language, neurological, and/or mental disabilities

TEACHING EXPERIENCE

***Instructor,** Psychology Internship, V.A. Medical Center, Reno, Nevada, 2/98-7/05*
***Supervisor and Instructor,** Psychology Internship and Psychiatry Residency, V. A. Medical Center, Reno, Nevada, 2/88-2/98*
***Adjunct Professor,** Department of Psychology, University of Nevada, Reno, 11/87-6/00*
***Clinical Professor,** Department of Psychiatry and Behavioral Sciences, University of Nevada School of Medicine, 12/94-6/98*
***Assistant Professor,** Department of Psychiatry and Behavioral Sciences, University of Nevada School of Medicine, 2/88-12/94*
***Instructor,** Department of Arts & Sciences, Truckee Meadows Community College, Reno, 9/87-12/87*
***Instructor,** Department of Psychology, University of Nevada, Reno, 7/83-8/83*

OTHER PROFESSIONAL EXPERIENCE

***Examination Commissioner,** State of NV Board of Psychological Examiners, 2002-2013*
***Consultant,** Child Custody Evaluations, State of NV Board of Psychological Examiners, 2005*
***Examiner,** State of NV Board of Psychological Examiners, 1992-2002*
***Grant Consultant,** NIMH grant, Parent-Child Attachment Tool for Child Custody, 2002*
***Site Visitor,** Committee on Accreditation, American Psychological Association, 1996-2002*
***Temporary Board Member,** State of NV Board of Psychological Examiners, Governor appointed, 5/95*
***Member,** Social and Behavioral Sciences Human Subjects Review Committee, University of Nevada, Reno, 9/82-6/83*

PUBLICATIONS, PRESENTATIONS, AND RESEARCH

Mahaffey, M.B. (2013). Psychology state examination: Changes across a decade. State of Nevada Board of Psychological Examiners Office Notes.

Mahaffey, M.B. (Jan 2010; July 2010; Jan 2011; July 2011; Jan 2012; June 2012, Jan 2013, April 2013). State of Nevada Board of Psychological Examiners State Examination for Licensure: Candidate Guide.

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Mahaffey, M.B. (2005). A glimpse into the Nevada psychology oral examination. Silver State Psychology News.

Mahaffey, M. B. (2003). Issues of ethnicity in forensic psychology: A model for Hispanics in the United States. In W. O'Donohue and E. Levensky (Eds.), Handbook of forensic psychology. San Diego, CA: Elsevier Academic Press.

Mahaffey, M. B. (1998). Graduation within a psychiatric Day Treatment Center: Addressing managed care. V.A. Medical Center, Reno, Nevada.

Mahaffey, M. B., Batten, S. V., & Sheldon-Brown, T. (1996). Screening and retention in a psychiatric Day Treatment Center. V.A. Medical Center, Reno, Nevada.

Mahaffey, M. B., Zappe, C., Sheldon-Brown, T., & Batten, S. V. (1996). Day Treatment Center: Program development and patient characteristics. V.A. Medical Center, Reno, Nevada.

Mahaffey, M. B., Zappe, C., & Sheldon-Brown, T. (1994, April). Day Treatment Center: The first five years. Paper presented at the annual meeting of the Western Psychological Association, Kona, Hawaii.

Follete, V., Tyler, J., Parson, M., Mahaffey, M., Phoenix, J., and Peer, A. (1992, September). Panel on diversity: Issues related to women, ethnic minority, and gay-lesbian populations and therapists. Presented at the Paul McReynolds Lecture, Reno, Nevada.

Antonuccio, C. O., Boutilier, L.R., Varble, D., & Mahaffey, M. B. (1991, July). Smoking cessation in the U.S. veteran population. Symposium presented at the meeting of the Inter-American Congress of Psychology San Jose, Costa Rica.

Mahaffey, M. B. (1990, August). Locus of control in Hispanic American adults. Paper presented at the meeting of the American Psychological Association, Boston, Massachusetts.

Mahaffey, M. B. (1989, April). Acculturation, generation level, and locus of control in Mexican Americans. Paper presented at the joint convention of the Western Psychological Association and Rocky Mountain Psychological Association, Reno, Nevada.

Mahaffey, M. B. (1987). Locus of control in Mexican, Central, and South American adults. (Doctoral Dissertation, University of Nevada, Reno, 1986). Dissertation Abstracts International, 47, 12.

Mahaffey, M. B. (1985). Abusive relationships: A comparison of battered and exbattered women. Reno, NV: University of Nevada, Reno (ERIC Document Reproduction Services No. ED 250 638).

Mahaffey, M. B. (1984, April). Abusive relationships: A comparison of battered and exbattered women. Paper presented at meeting of the Rocky Mountain Psychological Association, Las Vegas, NV.

Mahaffey, M. B. (1980, May). Causal attributions in sex-linked occupations as a function of sex and age. Paper presented at meeting of the Western Undergraduate Psychology Conference, Santa Clara, CA.

HONORS AND AWARDS

James Mikawa Award for Outstanding Contribution in the Field of Psychology, Nevada Psychological Assoc., 2014
UNR Grants-in-Aid of Research, Sigma Xi, Scientific Research Society
Psi Chi, National Honor Society in Psychology
National Institute of Mental Health Training Grant
SCU Magna Cum Laude
Phi Beta Kappa, Honor Society
Sigma Xi, Scientific Research Society
Senior Psychology Award for Outstanding Achievement

PROFESSIONAL AFFILIATIONS

American Psychological Association
Nevada Psychological Association
American Board of Psychological Specialties

FORENSIC EXPERIENCE

CASES INVOLVING EXPERT WITNESS TESTIMONY = 85

Miguel Ojeda Enriquez vs. State of Nevada, Second Judicial District Court, Washoe County, Nevada, CR11-0482, Post Conviction, Psychosexual Evaluation, 2016

Hilltop Church, et al. v. Media Enterprises, LLC, et al, Second Judicial District Court, Washoe County, Nevada, CV14-00650, Transactional Capacity, 2015

In the matter of Robert Markley, Jr., Second Judicial District Court, Washoe County, Nevada. JV14-00088A, Parental Capacity, 2015

State of Nevada vs. Cristian Guerrero Mena, Second Judicial District Court, Washoe County, Nevada, CR14-1763, Voluntary Manslaughter, Psychological Evaluation and Adolescent Developmental Theory, 2015

State of Nevada vs. Jeremiah Diaz Bean, Third Judicial District Court, Lyon County, Nevada, CR8252, Capital Murder, Atkins and Intellectual Disability and Penalty Phase, 2015 (2)

State of Nevada vs. Arsenio Martinez Lamas, Eighth Judicial District Court, Clark County, Nevada, C266635-1, Sex Offense, Alzheimer's Disease, 2014

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State of Nevada vs. Christopher Hartle, Second Judicial District Court, Washoe County, Nevada, CR13-1759, Psychosexual and Risk Assessment, 2014

State of Nevada vs. Allison Alamo, Second Judicial District Court, Washoe County, Nevada, CR13-1585 B, Child Neglect, Psychological and Risk Assessment, 2014

Joseph Hager vs. State of Nevada, First Judicial District Court, Storey County, Nevada, 12-CR-00001 lE, Post Conviction, Burglary and Grand Larceny, Psychological Evaluation, 2013

United States of America vs. Byron Davis, United States District Court, District of Nevada, 3:13-CR-00011-HDM-WGC, Sex Offense, Psychosexual and Risk Assessment, 2013

Christopher Castillo vs. State of Nevada, Second Judicial District Court, Washoe County, Nevada, CR08P0604, Post Conviction, Robbery with Use of a Firearm, Juvenile Developmental Theory, 2013

United States of America vs. Mark Juliano, United States District Court, Western District of Pennsylvania, 11-00090-001, False Statements to the Government, Criminal Responsibility, 2013

State of Nevada vs. Arsenio Martinez Lamas, Eighth Judicial District Court, Clark County, Nevada, C266635-1, Sex Offense, Competency to Stand Trial, 2013 (2)

State of Nevada vs. Pedro Rodriguez, Second Judicial District Court, Washoe County, Nevada, CR98-1033B, Capital Murder, Psychological and Violence Risk Assessment, 2013

State of Nevada vs. Quinton Boyles, Sixth Judicial District Court, Humboldt County, Nevada, CR11-6029, Domestic Violence, Domestic Violence and Risk Assessment, 2012

State of Nevada vs. James Matlean, Ninth Judicial District Court, Douglas County, Nevada, 10-CR-0145, Murder, Psychological Evaluation, 2012

State of Nevada vs. Victor Orlando Cruz Garcia, Eighth Judicial District Court, Clark County, Nevada, 08C240509, Capital Murder, Atkins and Intellectual Disability, Criminal Responsibility (NGRI), 2012 (2)

State of California vs. Charles Benbow, Superior Court of California, Plumas County, F11-00046, Sex Offense, Psychosexual and Risk Assessment, 2011

Bryson Lokken vs. State of Nevada, Second Judicial District Court, Washoe County, Nevada, CR06P1923, Post Conviction, Sex Offense, Psychosexual and Risk Assessment, 2011

David Newell vs. April Newell, Second Judicial District Court, Washoe County, Nevada, DV07-00426, Child Custody, 2011

Hamid Hashemi vs. State of Nevada, Second Judicial District Court, Washoe County, Nevada, CR03P0373, Post Conviction, Sex Offense, Psychosexual and Risk Assessment, 2011

Santiago Moreno vs. State of Nevada, Second Judicial District Court, Washoe County, Nevada, CR08P0989 & CR08P0974, Post Conviction, Robbery, Psychological and Neuropsychological Evaluation, 2011

Jerry Selbach vs. State of Nevada, Second Judicial District Court, Washoe County, Nevada, CR06P-2828, Post Conviction, Sex Offense, Psychosexual and Risk Assessment, 2009

Jorge Pena vs. State of Nevada, Second Judicial District Court, Washoe County, Nevada, CR05P-2451, Post Conviction, Sex Offense, Psychosexual and Risk Assessment, 2008

Carrie A. Bryan vs. Clinton G. Bryan, Second Judicial District Court, Washoe County, Nevada, DV07-01764, Child Custody, 2008

State of Nevada vs. Ubaldo Urbina-Maldonado, Second Judicial District Court, Washoe County, Nevada, CR06-2098, Sex Offense, Understanding of Miranda Rights, 2007 and 2008

State of Nevada vs. Foster Gordon, Second Judicial District Court, Washoe County, Nevada, CR06-0416, Sex Offense, Competency to Testify and Intellectual Disability, 2007

State of Nevada vs. Willie Herman, Second Judicial District Court, Washoe County, Nevada, CR02-1181, Murder, Violence Risk Assessment, 2007

Jay McGrath vs. State of Nevada, Second Judicial District Court, Washoe County, Nevada, CR05P-1861, Post Conviction, Assault with Deadly Weapon, Psychological Evaluation & Battered Person Syndrome, 2007

Michael Botelho vs. State of Nevada, Second Judicial District Court, Washoe County, Nevada, CR03P2156, Post Conviction, Sex Offense, Psychosexual and Risk Assessment, 2007

Alicia Sullivan vs. State of Nevada, Second Judicial District Court, Washoe County, Nevada, CR01P-2045B, Post Conviction, Robbery, Mental State at the Time of the Offense, 2006

Tiffany Basa vs. State of Nevada, Second Judicial District Court, Washoe County, Nevada, Post Conviction, Child Neglect Causing Death, Psychological Evaluation and Battered Person Syndrome, 2006

State of Nevada vs. Jimmy Todd Kirksey, Eighth Judicial District Court, Clark County, Nevada, C87945, Capital Murder, Atkins and Intellectual Disability, 2006

In the matter of Micah David Leval, Juvenile Division, First Judicial District Court, Carson City, Nevada, 01-10033J, Sex Offense, Psychosexual and Risk Assessment, 2005

State of Nevada vs. Arnold Preston Bertnick, Second Judicial District Court, Washoe County, Nevada, CR02-0467, Child Abuse Causing Death, Psychological Evaluation, 2005

Jason Hamel vs. State of Nevada, Second Judicial District Court, Washoe County, Nevada, CR03P-1236, Battery Causing Substantial Bodily Harm, Psychological and Substance Abuse Evaluation, 2005

Raymond Rosas vs. State of Nevada, Second Judicial District Court, Washoe County, Nevada, CR99P1843B, Post Conviction, Murder, Psychological Evaluation, 2004

Jose Escobedo-Guevarra vs. State of Nevada, Second Judicial District Court, Washoe County, Nevada, CR00-0990, Post Conviction, Sex Offense, Psychosexual and Risk Assessment, 2004 (2 x)

State of Nevada vs. Vornelius Phillips, Eighth Judicial District Court, Clark County, Nevada, C175468, Capital Murder, Mental Retardation, 2003

State of Nevada vs. Maria Alvarado, Second Judicial District Court, Washoe County, Nevada, CR01-2358, Child Abuse, Psychological and Risk Assessment, 2003

United States of America vs. Sheryl Jean Clark, United States District Court, District of Nevada, CR-N-02-165-HDM (VPC), Bank Robbery, Psychological Evaluation, 2003

United States of America vs. Alan William Stokvis, United States District Court for the District of Nevada, CR-N-02-115-DWH (RAM), Bank Robbery, Psychological Evaluation, 2003

Fred Money II vs. Heather Money, Lassen County Superior Court, California, 30603, Child Custody, 2002

State of California vs. Ronald Dennis Blamey, Nevada County Superior Court, California, CV01-01930, Murder, Psychological and Risk Assessment, 2001

State of Nevada vs. Orlando Vallejos, Third Judicial District Court, Lyon County, Nevada, CR5394, Sex Offense, 2001

State of Nevada vs. Melissa Harney, Second Judicial District Court, Washoe County, Nevada, CR99-2232, Murder, Psychological Evaluation, 2000

State of Nevada vs. Anthony Barela, Second Judicial District Court, Washoe County, Nevada, CR98-2926, Attempted Murder, Psychological and Risk Assessment, 2000

State of Nevada vs. Mary Rivinius, Second Judicial District Court, Washoe County, Nevada, CR99-1645, Child Abuse, Psychological and Risk Assessment, 1999

State of Nevada vs. Latisha Marie Babb, Weston Edward Sirex, and Shawn Russell Harte, Second Judicial District Court, Washoe County, Nevada, Capital Murder, Psychological Evaluation, 1999

Deborah Zellisse vs. Thomas Miller, Second Judicial District Court, Washoe County, Nevada, DV95-02342, Child Custody, 1999

Walter Haynie vs. Bonnie Clark, Second Judicial District Court, Washoe County, Nevada, DV90-1831, Child Custody, 1997

State of Nevada vs. Mario Sotelo Reyes, Second Judicial District Court, Washoe County, Nevada, CR96-0704, Attempted Murder, Psychological Evaluation, 1996
State of Nevada v. Arthur Haviland, Sixth Judicial District Court, Humboldt County, NV, Sex Offense, 1989
Immigration Cases, United States Immigration Court, Reno, Nevada

In the matter of Francisco Magallanes, 2012
In the matter of Graciela Godinez, 2002
In the matter of Camarena Sanchez, 1999
In the matter of Andrade Hernandez, 1999
In the matter of Benjamin Garcia and Mirna Garcia, '98
In the matter of Martin Torres and Maria Murillo, 1998
In the matter of Ricardo Barajas, 1998
In the matter of Rosio Lopez and Alejandro Garcia, '98
In the matter of Maria Arceo, 1998
In the matter of Guadalupe Rojas, 1998
In the matter of Leocadeo Bustos, 1998
In the matter of Manuel Puga, 1998
In the matter of Dagoberto Rodriguez, 1998
In the matter of Ruben Gonzales, 1998
In the matter of Samuel Borgarin, 1998
In the matter of Maurino Pastelin Fierro, 1998
In the matter of Juan Gonzalez, 1998
In the matter of Alfredo Gonzalez, 1998
In the matter of Jose Lopez, 1998

CASES INVOLVING EXPERT WITNESS DEPOSITION = 8

Hilltop Church, et al., vs. Media Enterprises, et al., Second Judicial District Court, Washoe County, Nevada, Transactional Capacity, 2015
Jane Doe and John Doe vs. Summerlin Medical Center, L.P.; Universal Health Services, Inc.; UHS Holding Company, Inc.; Roy Alan O'Guinn; and Does I through X, inclusive, Eighth Judicial District Court, Clark County, Nevada, A411913, Personal Injury, 2003
Jesus Mendoza vs. Stanley Fail, Jr., and Does I-X, United States District Court, District of Nevada, CV-N-02-0289-HDM-RAM, Personal Injury, 2002
Mary M. Bradley and Terry Lee Bradley, Jr., vs. H.M. Byars Construction, et al., Second Judicial District Court, Washoe County, Nevada, CV00-03024, Personal Injury and Wrongful Death, 2002
Stephen Fellows, Patricia Fellow vs. Suburban Propane, L.P., Robert Coleman, Alison Coleman, and Does to 20, Inclusive, SCB8679 (SCV9035, TCV 000405), Placer County Superior Court, California, Personal Injury, 2001
John E. Goodwill vs. Carolin Goodwill, Second Judicial District Court, Washoe County, Nevada, DV99-00598, Child Custody, 1999
Magdalena Zelaya vs. Eastern & Western Hotel Corporation, U.S. District Court, Las Vegas, Nevada, CV-S-96-00989-DWH (RLH), Sexual Harassment and Wrongful Termination, 1997
Eduardo H. Uribe vs. Marvin Dean Rubin, et al., Ninth Judicial District Court, Douglas County, Nevada, Personal Injury, 1989

COURTS INVOLVING TESTIMONY, DEPOSITION, EVALUATIONS, CONSULTATIONS, REPORTS

First Judicial District Court, Carson City and Storey County, Nevada
Second Judicial District Court, Washoe County, Nevada
Third Judicial District Court, Lyon County, Nevada
Fourth Judicial District Court, Elko County, Nevada
Sixth Judicial District Court, Humboldt County, Nevada
Eighth Judicial District Court, Clark County, Nevada
Ninth Judicial District Court, Douglas County, Nevada
Reno Justice Court, Nevada
Sparks Justice Court, Nevada
Elko Justice Court, Nevada
Superior Court of California, Nevada County
Superior Court of California, Placer County
Superior Court of California, Eldorado County
Superior Court of California, Lassen County
Superior Court of California, Plumas County
Multnomah County District Court, Gresham, Oregon
United States District Court, District of Nevada
United States District Court, Western District of Pennsylvania
United States Immigration Court, Nevada

FORENSIC EVALUATIONS / CONSULTATIONS, 1996 TO PRESENT = 1190

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Employment Litigation (Sexual Harassment, Discrimination, Wrongful Termination)	3
Personal Injury, Workman's Compensation	18
Fitness for Duty / Impaired Provider	18
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Criminal Cases

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Capital Murder, Atkins and Intellec Disability	11
Murder/Attempted Murder/Manslaughter	37
Competency to Stand Trial	228
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Psychosexual and Risk Assessment	378
Other Risk Assessments - Violence, Child Abuse/Neglect, Domestic Violence, Stalking	98
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Immigration Cases

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Family Court Cases

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Parental Capacity Evaluations	35
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Substance Abuse Evaluations	11
Comprehension of Miranda Rights	6
Juvenile Sentencing Evaluations	90
Juvenile Psychosexual Evaluations	9
Juvenile Certification for Trial as Adult	8
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Intellectual Disability Evaluations	103
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Revised 3/2/2016

EXHIBIT 2

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IN THE SUPREME COURT OF THE STATE OF NEVADA

JEREMIAH DIAZ BEAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69232

FILED

SEP 20 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction in a death penalty case. Third Judicial District Court, Lyon County; John Schlegelmilch, Judge.

Appellant Jeremiah Bean entered the home of Robert and Dorothy Pape in Fernley, Nevada, shot them to death, took property from their home, and drove away in their truck. Bean became stranded on Interstate 80, shot Elliezear Graham to death after Graham stopped to help him, and returned to Fernley driving Graham's truck. Bean parked the truck in the Pape's garage and set it on fire. He later entered the home of Angie Duff and Lester Leiber where he shot and stabbed Leiber to death, stabbed Duff to death, and left the home with their pistol. A jury convicted Bean of four counts of first-degree murder with the use of a deadly weapon, victim 60 years of age or older; first-degree murder with the use of a deadly weapon; burglary with the use of a firearm; grand larceny; grand larceny of a motor vehicle; first-degree arson; robbery with the use of a deadly weapon; burglary obtaining a firearm; and grand larceny of a firearm. Bean was sentenced to death for each count of first-degree murder and various consecutive terms of imprisonment for the other offenses.

On appeal, Bean raises eight issues: (1) the district court erred in denying the defense motion to declare Bean intellectually disabled, (2) the district court abused its discretion in limiting defense questions during jury selection, (3) the district court abused its discretion in denying the defense motion for a change of venue based on pretrial publicity, (4) the district court abused its discretion by admitting evidence of Bean's drug use, (5) the district court abused its discretion in admitting evidence of Bean's juvenile record, (6) the district court abused its discretion in excluding evidence that Bean offered in mitigation, (7) the death penalty is unconstitutional or otherwise unlawful, and (8) cumulative error warrants reversal of the judgment of conviction. We conclude that none of these claims or our mandatory review under NRS 177.055(2) warrants relief from the judgment of conviction and death sentences. We therefore affirm.

Intellectual disability

Bean argues that the district court erred in denying his motion to strike the death penalty due to intellectual disability. We review the district court's legal conclusions de novo but will defer to its factual findings that are supported by the record. *Ybarra v. State*, 127 Nev. 47, 58, 247 P.3d 269, 276 (2011).

To prevail on his motion, Bean had to prove by a preponderance of the evidence that he is intellectually disabled. NRS 174.098(5)(b). The definition of "intellectually disabled" has three components: (1) "significant subaverage general intellectual functioning;" (2) "deficits in adaptive behavior;" and (3) onset of both intellectual and adaptive deficits "during the developmental period." NRS 174.098(7); *see also* Am. Ass'n on Intellectual & Developmental Disabilities, Intellectual Disability:

Definition, Classification, and Systems of Supports 5 (11th ed. 2010) [hereinafter AAIDD-11].

The first component—significant subaverage intellectual functioning—is not defined in NRS 174.098. The clinical definition of "subaverage intellectual functioning" is "an IQ score that is approximately two standard deviations below the mean." AAIDD-11, *supra*, at 31. Two standard deviations below the mean (100) is approximately 30 points, which equates to a score of approximately 70 points or lower. *Hall v. Florida*, 572 U.S. 701, 711-12 (2014); *Ybarra*, 127 Nev. at 54-55, 247 P.3d at 274. Because the court must also take into account the test's standard error of measurement (SEM), which reflects "the inherent imprecision of the test itself," *Moore v. Texas*, 137 S. Ct. 1039, 1049 (2017) (internal quotation marks omitted); *see also Ybarra*, 127 Nev. at 54-55, 247 P.3d at 274, a person's IQ score is best understood as a range that takes into account the SEM rather than as a single fixed number, *Hall*, 572 U.S. at 712, 723. Where the lower end of the range falls two standard deviations below the mean, the person has significant subaverage intellectual functioning. *Moore*, 137 S. Ct. at 1049; *see also Ybarra*, 127 Nev. at 54-55, 247 P.3d at 274.

Bean first argues that the district court refused to consider the SEM. We are troubled by the district court's repeated references to fixed scores or intelligence range labels during the hearing and in its order while expressing antipathy toward consideration of the SEM. But even assuming the district court ignored the SEM, that error was harmless because the outcome would be the same. In particular, the district court credited test results that placed Bean's IQ between 78 and 83 when the SEM is taken

into account, thus placing Bean less than two standard deviations below the mean even at the low end of the range.

Bean next complains that the district court did not take into account the "Flynn effect." The Flynn effect accounts for the theory that the average IQ score on a particular test gradually increases over time and therefore "a person who takes an IQ test that has not recently been normed against a representative sample of the population will receive an artificially *inflated* IQ score." *Smith v. Ryan*, 813 F.3d 1175, 1184 (9th Cir. 2016). The Supreme Court has never discussed whether or how courts should adjust IQ scores for the Flynn effect, and there is no consensus in other jurisdictions.[1] Moreover, the manuals for the IQ tests used in this case

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[1]*Compare Black v. Bell*, 664 F.3d 81, 96 (6th Cir. 2011) (recognizing that Tennessee law required district court to consider evidence of Flynn effect), *U.S. v. Parker*, 65 M.J. 626, 629-30 (N-M Ct. Crim. App. 2007) ("In determining whether an offender [is intellectually disabled], standardized IQ scores scaled by the SEM and Flynn effect will be considered"), *and Walker v. True*, 399 F.3d 315, 319, 322-23 (4th Cir. 2005) (recognizing that Virginia law required consideration of the Flynn effect in litigating an intellectual disability claim), *with McManus v. Neal*, 779 F.3d 634, 653 (7th Cir. 2015) (concluding district court could properly disregard Flynn effect as it was not required by *Atkins v. Virginia*, 536 U.S. 304 (2002)), *Hooks v. Workman*, 689 F.3d 1148, 1170 (10th Cir. 2012) ("*Atkins* does not mandate an adjustment for the Flynn effect. Moreover, there is no scientific consensus on its validity."), *Richardson v. Branker*, 668 F.3d 128, 152 (4th Cir. 2012) (noting that *Atkins* does not require courts to account for the Flynn effect in evaluating intellectual disability), *In re Mathis*, 483 F.3d 395, 398 n.1 (5th Cir. 2007) (noting that Fifth Circuit has not recognized scientific validity of Flynn effect), *and Reeves v. State*, 226 So. 3d 711, 739 (Ala. Crim. App. 2016) (concluding that trial court was not required to adjust for Flynn effect given lack of scientific consensus supporting the theory).

apparently do not recommend subtracting points for the Flynn effect. *See* Leah D. Hagan & Thomas J. Guilmette, *The Death Penalty and Intellectual Disability: Not So Simple*, 32 Crim. Justice 21, 24 (Fall 2017). Absent controlling legal authority or consensus in the medical community, we conclude that the district court did not err in considering the IQ scores without adjustments for the Flynn effect. *See Moore*, 137 S. Ct. at 1048-49 (acknowledging that a court's determination regarding intellectual functioning should be informed by the medical community's diagnostic framework).

Finally, Bean challenges the district court's decision that he failed to demonstrate significant subaverage intellectual functioning. During the evidentiary hearing, the district court heard two expert opinions: the State's expert, Dr. Mahaffey, concluded that Bean was not intellectually disabled and Bean's expert, Dr. Weiher, concluded that he was. Several objective factors support the district court's conclusion that Dr. Mahaffey's test results and opinion were more reliable. Dr. Mahaffey had more experience conducting *Atkins* examinations. The testing protocol she used had a smaller SEM and therefore could more precisely reflect Bean's IQ range, which she concluded fell between 78 and 83. Dr. Mahaffey tested for malingering on the same day she administered the intellectual functioning test and adhered to testing procedure, whereas Dr. Weiher did not conduct his malingering test concurrently with his cognitive testing and materially deviated from other testing protocols. Finally, Dr. Mahaffey's results were consistent with Bean's prior academic achievement and scores on other objective measures of cognitive ability, all of which indicated that Bean had more cognitive ability than reflected in Dr. Weiher's testing. Evidence of Bean's cognitive functioning that is consistent with Dr.

Mahaffey's test results includes the following: school records indicating that Bean was considered a good student during his early elementary school years; low test results in the ninth grade that were consistent with his two-year absence from school but were not so low as to suggest cognitive deficits; testimony that Bean was an avid reader and was known to write long letters and short stories as a child; and Bean's attempt to feign mental illness while speaking with officers, which is inconsistent with significantly subaverage intellectual functioning. Accordingly, substantial evidence supports the district court's findings that Dr. Mahaffey's test results and opinion as to Bean's intellectual functioning were more credible and reliable.

The test results that the district court credited reflect an IQ range of 78-83, placing Bean less than two standard deviations below the mean. Bean therefore did not establish significant subaverage intellectual functioning by a preponderance of the evidence. Because we agree with the district court that Bean did not meet his burden of proof as to the first component of the intellectual-disability analysis, we need not address the other two components.[2]

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[2]We note, however, that the district court's analysis as to the adaptive-deficits component is flawed in at least two respects that reflect a misunderstanding of the relevant clinical standards. First, the court erred by focusing on Bean's adaptive behavior in comparison to his drug addicted peer group and gang subculture rather than his larger ethnic or national origin. *See* Marc J. Tasse, *Adaptive Behavior Assessment & the Diagnosis of Mental Retardation in Capital Cases*, 16 Applied Neuropsychology 114, 120 (Feb. 2009); *see also See United States v. Wilson*, 170 F. Supp. 3d 347, 369 (E.D.N.Y. 2016) (explaining that a court should not base its finding regarding intellectual disability on "'criminal adaptive functioning'" (quoting Am. Ass'n on Intellectual & Developmental Disabilities, User's Guide: Intellectual Disability: Definition, Classification, and Systems of Supports 20 (11th ed. 2012)). Second, the district court erred by attributing

Voir dire

Bean argues that the district court improperly limited voir dire during jury selection by prohibiting case-specific questions about veniremembers' ability to consider all available sentencing options and the kind of circumstances they would consider to be mitigating. We review the district court's rulings concerning the conduct of voir dire for an abuse of discretion. *Cunningham v. State*, 94 Nev. 128, 130, 575 P.2d 936, 938 (1978).

Voir dire allows the court and the parties to determine whether veniremembers can impartially consider the facts and apply the law as directed by the court. *Johnson v. State*, 122 Nev. 1344, 1354, 148 P.3d 767, 774 (2006). To achieve that purpose, parties may ask "whether [a potential juror's] views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainright v. Witt*, 469 U.S. 412, 424 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)).

Bean's adaptive deficits solely to a conduct disorder. *See Moore*, 137 S. Ct. at 1051 (recognizing that many intellectually disabled people also have other mental or physical impairments and courts should not require defendant to show that deficits were unrelated to a personality disorder); *United States v. Wilson*, 170 F. Supp. 3d 347, 371 (E.D.N.Y. 2016) ("stating that "a defendant is not required to rule out other contributing causes of his adaptive deficits in order to meet the standard for intellectual disability"); The Death Penalty and Intellectual Disability 279 (Edward Polloway, ed. 2015) (noting more than forty percent of people with an intellectual disability also have another form of mental disorder).

The district court permitted Bean to ask whether the veniremembers could consider all of the potential penalties if Bean was convicted of multiple murders and whether the veniremembers could consider all of the penalties if Bean was convicted of killing an older victim. But the court drew the line at a hypothetical question incorporating both inquiries because it too closely mirrored the facts of the case. We conclude that the district court could have precluded both lines of inquiry because they went beyond what was necessary to determine whether the veniremembers could apply the law to the facts of this case and instead touched on anticipated instructions and the verdict that the veniremembers might return given specific facts. *Cf. Witter v. State*, 112 Nev. 908, 915, 921 P.2d 886, 892 (1996) (concluding that parties may not ask "how a potential juror would vote during the penalty phase of trial" because such a question goes "well beyond determining whether a potential juror would be able to apply the law to the facts of the case"), *abrogated on other grounds by Nunnery v. State*, 127 Nev. 749, 263 P.3d 235 (2011).

The district court also prevented Bean from asking veniremembers to imagine what circumstances they might consider as mitigating. Bean's question went beyond acquiring information about whether the veniremembers could consider mitigating evidence and invited them to stake their own positions regarding what information they would consider to be mitigating before they had been instructed on the governing legal principles. That kind of question is improper. *See Hogan v. State*, 103 Nev. 21, 23, 732 P.2d 422, 423 (1987) (explaining that the court may exclude questions that are not directed at acquiring information about the veniremembers' ability to be fair and impartial or are "aimed more at indoctrination than acquisition of information"); *State v. Phillips*, 268

S.E.2d 452, 455 (N.C. 1980) ("Counsel should not fish for answers to legal questions before the judge has instructed the juror on applicable legal principles by which the juror should be guided."). We therefore conclude that the district court did not abuse its discretion in sustaining the objection.

Venue

Bean argues that the district court should have granted his motion for a change of venue because the murders were highly publicized and therefore he could not get a fair trial in the small community where the murders occurred. We review the district court's decision for an abuse of discretion. *Libby v. State*, 109 Nev. 905, 913, 859 P.2d 1050, 1055 (1993), *vacated on other grounds by Libby v. Nevada*, 516 U.S. 1037 (1996).

A defendant seeking a change of venue must demonstrate two things: "inflammatory pretrial publicity" and "actual bias on the part of the jury empaneled." *Floyd v. State*, 118 Nev. 156, 165, 42 P.3d 249, 255 (2002), *abrogated on other grounds by Grey v. State*, 124 Nev. 110, 178 P.3d 154 (2008); *see also Sonner v. State*, 112 Nev. 1328, 1336, 930 P.2d 707, 712 (1996) (providing that a defendant seeking a change of venue must present evidence of both inflammatory pretrial publicity and actual bias on the part of the jury), *modified on rehearing on other grounds by* 114 Nev. 321, 955 P.2d 673 (1998). Bean showed neither. The voir dire transcript does not demonstrate that the media coverage had become so saturated that a fair and impartial jury could not be seated. Many veniremembers had seen little or no media reports of the crime. No veniremembers were dismissed because they could not be impartial due to exposure to news reports. None of the empaneled jurors indicated that the publicity would prevent them from acting impartially. *See Floyd*, 118 Nev. at 165, 42 P.3d at 255 ("Even

where pretrial publicity has been pervasive, this court has upheld the denial of motions for change of venue where the jurors assured the trial court during voir dire that they would be fair and impartial in their deliberations."). We therefore conclude that the district court did not abuse its discretion in denying the motion.

Prior bad acts

Bean argues that the district court erred in admitting evidence of his uncharged drug use during the weekend of the murders. We disagree.

A party seeking to introduce evidence of uncharged bad acts must establish "(1) the prior bad act is relevant to the crime charged and for a purpose other than proving the defendant's propensity, (2) the act is proven by clear and convincing evidence, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." *Newman v. State*, 129 Nev. 222, 230-31, 298 P.3d 1171, 1178 (2013) (internal quotation marks omitted). Evidence of Bean's drug use was relevant to his motive to commit the crimes as witnesses testified that Bean pawned property and purchased drugs with the proceeds. The drug use was proven by clear and convincing evidence: witnesses saw Bean ingest drugs, and a drug test conducted two days after his arrest indicated that there were still drugs in his system. While this evidence implicates Bean in uncharged illegal conduct, drug use is not so serious an offense that the prejudicial effect of discussing it outweighed its probative value. We therefore conclude that the district court did not abuse its discretion in admitting the evidence. *See Diomampo v. State*, 124 Nev. 414, 429-30, 185 P.3d 1031, 1041 (2008) (reviewing the district court's decision to admit prior bad act evidence for an abuse of discretion).

Juvenile convictions

Bean argues that the district court erred in admitting evidence of his juvenile convictions during the penalty phase of trial because juvenile adjudications do not require procedural safeguards equivalent to criminal convictions and therefore are not as reliable. We disagree.

Character evidence is admissible during a penalty hearing so long as it is not impalpable or highly suspect and the danger of unfair prejudice does not substantially outweigh its probative value. *Johnson*, 122 Nev. at 1354, 148 P.3d at 774; *see Nunnery*, 127 Nev. at 769, 263 P.3d at 249 (noting that relevant evidence may be excluded from penalty hearing if it is impalpable or highly suspect); *Hollaway v. State*, 116 Nev. 732, 746, 6 P.3d 987, 997 (2000), *overruled on other grounds by Lisle v. State*, 131 Nev., Adv. Op. 39, 351 P.3d 725 (2015); *see also* NRS 175.552(3). Here, Bean's juvenile record showed that shortly before he turned 18, he had committed burglary and possessed stolen property. This was relevant to the jury's sentencing decision as it evinced an escalation in Bean's criminal behavior and reflected on his amenability to rehabilitation. *Johnson*, 122 Nev. at 1354, 148 P.3d at 774. The prior adjudication is not rendered impalpable or highly suspect by the process employed in the juvenile system. None of the decisions Bean cites address the use of a juvenile adjudication during a capital penalty hearing. For these reasons, we conclude that the district court did not abuse its discretion in admitting this evidence. *See McConnell v. State*, 120 Nev. 1043, 1057, 102 P.3d 606, 616 (2004).

Mitigating evidence

Bean argues that the district court erred in limiting testimony from his gang expert on how members of a gang with which he was affiliated view his crimes. We disagree.

"Mitigation evidence includes '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.'" *Watson v. State*, 130 Nev. 764, 784, 335 P.3d 157, 171 (2014) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)). It may include "any aspect of the defendant's character, background, or record; any factor that extenuates or reduces the degree of the defendant's moral culpability . . . ; any circumstances of the offense; or any desire [a juror] may have to extend mercy to the defendant." *Id.* at 787 n.9, 335 P.3d at 174 n.9. Despite the broad scope of mitigating evidence, the evidence excluded here falls outside of that scope and was therefore irrelevant. *See* NRS 48.015 (defining relevant evidence as that which tends "to make the existence of any fact that is of consequence to the determination of the action more or less probable"). In particular, the potential actions of gang members who may find themselves incarcerated with Bean do not implicate aspects of Bean's character or record or the circumstances of the offense; instead, the evidence relates to the character of those with whom Bean may be incarcerated. Considering the nature of the proffered evidence, we conclude that the district court did not abuse its discretion in sustaining the State's objection. *See McConnell*, 120 Nev. at 1057, 102 P.3d at 616.

Challenges to the death penalty

Bean argues that the death penalty violates the Eighth Amendment's prohibition against cruel and unusual punishment and international law, is disproportionately imposed on minority defendants, is rife with erroneous dispositions, does not satisfy the goals of deterrence or rehabilitation, and has become less popular with the general public. We have rejected similar arguments, *see, e.g.*, *Thomas v. State*, 122 Nev. 1361,

1373, 148 P.3d 727, 735-36 (2006) (reaffirming that Nevada's death penalty statutes sufficiently narrow the class of persons eligible for the death penalty); *Colwell v. State*, 112 Nev. 807, 814-15, 919 P.2d 403, 408 (1996) (rejecting claims that Nevada's death penalty scheme violates the United States or Nevada Constitutions); *Bishop v. State*, 95 Nev. 511, 517-18, 597 P.2d 273, 276-77 (1979) (similar); *see also Flanagan v. State*, 112 Nev. 1409, 1423, 930 P.2d 691, 700 (1996) (rejecting claims that extended confinement before execution was cruel and unusual punishment), and see no reason to do otherwise here. And Bean's challenge to the lethal injection protocol is not properly before us at this time. *See McConnell*, 120 Nev. at 1055, 102 P.3d at 615-16.

Cumulative error

Bean argues that the cumulative effect of the errors warrants reversal of the judgment of conviction. Because we have found no errors, there is nothing to cumulate. *Lipsitz v. State*, 135 Nev., Adv. Op. 17, 442 P.3d 138, 145 n.2 (2019).

Mandatory review

Under NRS 177.055(2), we are required to review every death sentence and consider "(c) Whether the evidence supports the finding of an aggravating circumstance or circumstances; (d) Whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor; and (e) Whether the sentence of death is excessive, considering both the crime and the defendant."

Aggravating circumstances supported by the evidence

We conclude that sufficient evidence supports the aggravating circumstances found as to each murder. The jury found three aggravating circumstances that applied to all five murders—(1) Bean had been convicted of more than one count of murder in the proceeding and that the murders

had been committed (2) during the commission of or flight from a burglary and (3) to receive money or another thing of monetary value. These aggravating circumstances are supported by the guilt phase evidence and verdicts. First, the jury found Bean guilty of five murders. Second, the State presented evidence that Bean entered the Pape residence and the Duff/Leiber residence with the intent to commit a felony and he killed Graham during his flight after burglarizing the Pape residence. And finally, the State presented evidence that Bean murdered all five victims to obtain something of monetary value—the jewelry, vehicle, and other property taken from the Pape residence; the vehicle that Graham was driving when he stopped to assist Bean; and the gun that Bean took from the Duff/Leiber residence.

The jury also found an additional felony aggravating circumstance as to the murders of Graham, Duff, and Leiber: that Graham was killed during the commission of a robbery and that Duff and Leiber were killed during Bean's flight after committing first-degree arson. The evidence presented during the guilt phase shows that Bean, who had gotten stuck while driving the truck he stole from the Papes, flagged down Graham (a passing motorist) and took Graham's vehicle from him by means of force or violence—shooting him in the head three times. Based on that evidence, a rational juror could find beyond a reasonable doubt that Bean murdered Graham during the commission of a robbery. As to Duff and Leiber, the evidence shows that Bean set fire to the Papes' home, fled to his friend Patrick's home where Patrick kicked him out, and then entered the Duff/Leiber residence, found a weapon, and murdered Duff and Leiber when they confronted him. Based on that evidence, a rational juror could find

beyond a reasonable doubt that Bean murdered Duff and Leiber during his flight from the arson.

The jury further found that Graham, Duff, and Leiber were murdered to "avoid or prevent a lawful arrest." NRS 200.033(5). An arrest need not be imminent nor must the victim be involved in effecting the arrest. *Evans v. State*, 112 Nev. 1172, 1196, 926 P.2d 265, 280 (1996); *Cavanaugh v. State*, 102 Nev. 478, 486, 729 P.2d 481, 486 (1986). The circumstance can apply when the suspect kills the victim because that victim could have identified him as the suspect in another crime. *See Blake v. State*, 121 Nev. 779, 794, 121 P.3d 567, 577 (2005). Here, the evidence showed that Bean had murdered the Papes and left Fernley in their truck. After getting stuck on the highway, he murdered Graham. Bean's possession of the Papes' truck linked him to their murder and made him more susceptible to arrest. By murdering Graham and taking his truck, he distanced himself from that evidence. As to Duff and Leiber's murder, Bean had returned to the Papes' home with Graham's truck and set the truck and home ablaze. He immediately returned to Patrick's home, but Patrick sent him away. He then entered Duff and Leiber's home in an apparent attempt to hide, but instead found a weapon and shot the victims when he was confronted. He attempted to hide on another property in the neighborhood while authorities responded to the blaze and was eventually arrested after reentering Duff and Leiber's garage. Based on this evidence, a rational juror could conclude that these murders occurred while trying to prevent a lawful arrest.

Finally, the jury found that Bean "knowingly created a great risk of death to more than one person," NRS 200.033(3), with regard to the murders of the Papes, Duff, and Leiber. The great-risk-of-death

aggravating circumstance "includes a 'course of action' consisting of two intentional shootings closely related in time and place, particularly where the second attack may have been motivated by a desire to escape detection in the original shooting." *Hogan v. State*, 103 Nev. 21, 24-25, 732 P.2d 422, 424 (1987). Applying the definition here, the evidence supports the aggravating circumstance with respect to the murders of Duff, Leiber, and the Papes. As to the Duff/Leiber murders, Bean found a .38 caliber gun in the home after entering through an unlocked door; shot Duff as she fled toward the kitchen; struggled with Leiber, eventually shooting him in the head; and then stabbed Duff to death with a knife she tried to use to defend herself. These two intentional shootings closely related in time and place are sufficient to support the jury's finding of the great-risk-of death aggravating circumstance with respect to the murders of Duff and Leiber. *See id.* at 24-25 & n.2, 732 P.2d at 424 & n.2 (concluding great-risk-of-death aggravating circumstance applied where defendant shot his girlfriend in the presence of her daughter and then shot her daughter while she was trying to flee). As to the Pape murders, Bean entered the home while Dorothy was inside sleeping and Robert was outside; locked the door to hinder Robert's entry; shot Dorothy in the head; positioned himself to catch Robert unaware when he entered; and then shot Robert in the head when he responded to the noise. Although the shootings are not as close in time as in the Duff/Leiber incident, this evidence shows a course of conduct involving two intentional shootings closely related in time and place, and the shooting of Robert appears to have been motivated by a desire to eliminate a possible witness to Dorothy's killing and facilitate his escape. The evidence is sufficient to support the jury's finding of the great-risk-of-death aggravating circumstance with respect to the Pape murders.

Passion or prejudice

As to the second question under this court's mandatory review, nothing in the record suggests the jury acted under the influence of passion, prejudice, or any other arbitrary factor. To the contrary, the record suggests a thoughtful and deliberative jury as evidenced by at least one juror finding a number of mitigating circumstances: (1) Bean's family loves him and would suffer if he is sentenced to death; (2) Bean has intelligence deficits; (3) Bean was cooperative with the investigation; (4) Bean has shown a peaceful adjustment to incarceration; and (5) drug abuse.

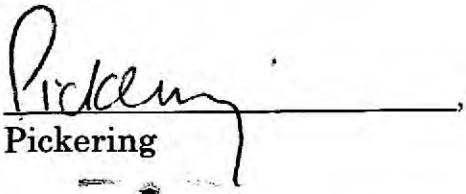
Excessiveness

With regard to the final question pursuant to NRS 177.055(2)(e), this court "consider[s] only the crime and the defendant at hand," and asks whether "the crime and defendant . . . [are] of the class or kind that warrants imposition of death." *Dennis v. State*, 116 Nev. 1075, 1084-85, 13 P.3d 434, 440 (2000). We conclude that the death penalty is not excessive in this case. Over the course of a single weekend, Bean murdered five strangers in three separate incidents, two of which involved residential burglaries. Bean had been convicted of another burglary a short time before he turned 18. Bean was 25 years old at the time of the murders. He engaged the crimes of his own initiative and was not assisted or influenced by anyone else. We acknowledge that experts agreed that Bean had some intellectual deficits and significant adaptive deficits and recognize that those deficits may have contributed to Bean's impulsive decision to embark on the course of conduct. But we conclude that those deficits are insufficient to render his death sentences for the five murders excessive.

Having rejected Bean's contentions and conducted the review required by NRS 177.055(2), we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons



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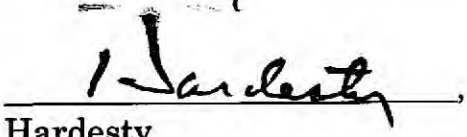

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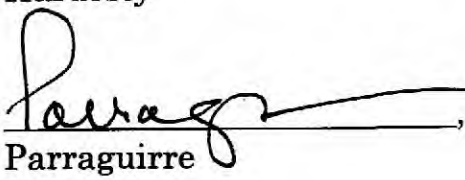

_____, J.
Parraguirre

_____, J.
Stiglich

_____, J.
Cadish

_____, J.
Silver

cc: Hon. John Schlegelmilch, District Judge
Law Office of Thomas L. Qualls, Ltd.
Attorney General/Carson City
Lyon County District Attorney
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

THE STATE OF NEVADA,
Plaintiff,

v.

WILBER ERNESTO MARTINEZ GUZMAN,
Defendant.
_____/

CASE NO: CR19-0447

DEPT. NO.: 4

REPLY IN SUPPORT OF MOTION TO CONTINUE (D-2)

Wilber Ernesto Martinez-Guzman, by and through his attorneys, John L. Arrascada, Gianna Verness, Joseph Goodnight and Katheryn Hickman, files this reply in support of the Motion to Continue the Trial, currently set for April 6, 2020.

POINTS AND AUTHORITIES

Mr. Martinez-Guzman is entitled to the effective assistance of counsel at all stages of his trial, including pre-trial, trial and the penalty phase. In order to provide Mr. Martinez-Guzman with his Constitutional right to the effective assistance of counsel at all stages, a continuance is required.

The State's arguments regarding the ABA 2003 Guidelines regarding capital defense representation misses the issue raised by Mr. Martinez-Guzman. The issue is not that counsel for Mr. Martinez-Guzman must perform every task included in

the guidelines in order to be found effective, or that the list is a rigid checklist that will ensure that Mr. Martinez-Guzman's Constitutional right to the effective assistance of counsel is met. Instead, the guidelines shed light on the comprehensive investigation that must be done, and the massive workload that counsel must undertake when the State chooses to pursue death against an accused.

The State cites to *Bobby v. Van Hook* to support its position that the ABA guidelines are not determinative of counsel's effectiveness in death penalty cases and that those guidelines should have no bearing on this Court's analysis of the current motion. However, *Bobby* supports the argument set forth by Mr. Martinez-Guzman, in that the guidelines are illustrative of the scope of the work and investigation that must be pursued, but not a rigid set of detailed rules that must be followed in every case. *Bobby v. Van Hook*, 130 S.Ct. 1, 175 L.Ed.2d 255, (2009). (In evaluating counsel's performance as compared to these "prevailing professional norms," we may refer to American Bar Association ("ABA") guidelines in effect at the time of the representation "as evidence of what reasonably diligent attorneys would do."); *see also Strickland v. Washington,* 466 U.S. 668, 104, 104 S.Ct. 2052, 2052, 80 L.ed.2d 674 (1984). The issue in *Bobby* was not the reliance on the 2003 guidelines, it was the reliance on the 2003 guidelines in a case from 1985, "without even pausing to consider whether they reflected the prevailing professional practice at the time of trial. *Bobby*, 558 U.S. at 8. The Guidelines reflect the prevailing professional practice in 2019 and give counsel and the Court guidance as to what reasonable, diligent attorneys would do- which is what defense counsel in this case are endeavoring to be.

To illustrate the mitigation investigation required, and the consequences if it is not correctly done, the Court can look to *Nika v. Gittere*, 3:09-cv-oo178-JCM-WGC (2019), a case originating out of Second Judicial District Court. Nika's death

sentence was overturned, and a new penalty hearing was ordered, based on counsel's deficient performance in investigating and presenting mitigation evidence. Significant is that this order is post-*Bobby* and, although it is unpublished and not binding on this Court, the State did not appeal the Federal District Court's Order. (See "Order" attached as Exhibit One).

In its order the Court cited to the "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases," *Padilla v. Kentucky*, 559 U.S. 356, 366-67 (2010), and *Porter v. McCollum*, 558 U.S. 30, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009), ("It is unquestioned that under prevailing professional norms at the time of Porter's trial [in 1988], counsel had an obligation to conduct a thorough investigation of the defendant's background."). Twenty-five years after Mr. Nika's conviction and death sentence, the Court was presented with evidence from a culturally competent neuropsychologist, indicating that the defendant has cognitive difficulties, affidavits of family, childhood friends, teachers and others. The Court was also presented with mitigating military records, school records, and photographs. The failure to perform mitigation investigation, as outlined in the Guidelines, was a violation of the defendant's Federal Constitutional right to the effective assistance of counsel.

Defense counsel has diligently pursued its duty to Mr. Martinez-Guzman, not in an attempt to simply blindly follow the ABA guidelines, but to provide Constitutionally competent representation to Mr. Martinez-Guzman. Further, counsel has kept the court updated as to the progress of its investigation, as it has progressed and changed. At the point that counsel for Mr. Martinez-Guzman developed the necessary predicate to request a continuance- through consulting with experts, traveling to El Salvador, conducting preliminary interviews with potential witnesses, and contacting schools, hospitals, and other agencies- the instant motion

was filed. When the trial date was originally set, counsel did not know Mr. Martinez-Guzman's extremely low IQ, and did not set the trial to accommodate the vast investigation and litigation required in this case, now that it has become reasonably apparent that Mr. Martinez-Guzman is intellectually disabled, and that the death penalty would constitute cruel and unusual punishment if imposed on him. To argue that this has been anything less than diligent is contradicted by the record, both made by counsel at the monthly status hearings, and by the State in its opposition.

Finally, the State's argument regarding unavailable experts lacks merit. First, while Dr. Mahaffey may be *available,* it does not correlate that she, or the rest of the required experts, will be *ready,* which is a significant difference that the State's argument does not account for. Dr. Mahaffey has made recommendations to defense counsel in line with the affidavits already provided to the Court. (See Affidavit of Dr. Martha B. Mahaffey, Ph.D., Exhibit 2). She recommends that Mr. Martinez-Guzman hire a neuropsychologist, both to further assess Mr. Martinez-Guzman's cognitive deficits, and to relate those deficits to adaptive functioning behavior. Dr. Mahaffey is unable to perform the recommended tests or relate the results from such tests to adaptive functioning behavior, as she is not a neuropsychologist. To deny a continuance would deny Mr. Martinez-Guzman the ability to present this information to the court.

Dr. Mahaffey further recommends that an MRI be obtained to assess for functional brain impairments to explain impairment in intellectual and/or adaptive functioning, and she recommends that a team travel to El Salvador to conduct the relevant investigations. She further advises that an evaluation can take a *minimum* of ten months when information is readily available, and more time when it is in a foreign country.

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Dr. Mahaffey cannot provide the testimony required by NRS 174.098 and *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 153 L.Ed.2d 335 (2002), because, while she is qualified in her area, she is not qualified to present the information needed in this case.

Here, counsel for Mr. Martinez-Guzman has been assiduous and meticulous in the work that has been ongoing. A culturally competent neuropsychologist has been retained. An initial trip and preliminary interviews have been conducted. IQ testing has been done. Counsel has been working through thousands of pages of discovery, hours of interviews and hundreds of photos. However, the scope of the investigation and work that defense counsel has done is just scratching the surface of what must be completed prior to trial commencing, and it is apparent at this point in time that Mr. Martinez-Guzman will not be prepared to proceed to trial in April of 2020, despite counsel's best efforts. Therefore, Mr. Martinez-Guzman requests that this Court grant Mr. Martinez-Guzman's motion, and continue the trial until February of 2021.

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CONCLUSION

Based on the foregoing, Mr. Martinez-Guzman respectfully requests that this Honorable Court grant the motion and continue the trial until February of 2021.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 18th day of October, 2019.

JOHN L. ARRASCADA
Washoe County Public Defender

By /s/ John L. Arrascada
JOHN L. ARRASCADA
Washoe County Public Defender

By /s/ Gianna Verness
GIANNA VERNESS
Chief Deputy Public Defender

By /s/ Joseph Goodnight
JOSEPH GOODNIGHT
Chief Deputy Public Defender

By /s/ Katheryn Hickman
KATHERYN HICKMAN
Chief Deputy Public Defender

CERTIFICATE OF SERVICE

I, Jeremy Rutherford, hereby certify that I am an employee of the Washoe County Public Defender's Office, Reno, Washoe County, Nevada, and that on this date I forwarded a true copy of the foregoing document through inter-office mail to:

Chris Hicks, District Attorney
Travis Lucia, Deputy District Attorney
Mark Jackson, Douglas County District Attorney

DATED this 18th Day of October, 2019.

By /s/ Jeremy Rutherford
JEREMY RUTHERFORD

INDEX OF EXHIBITS

EXHIBIT 1

EXHIBIT 1

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

AVRAM VINETO NIKA, Petitioner, v. WILLIAM GITTERE, *et al.*, Respondents.	Case No. 3:09-cv-00178-JCM-WGC **ORDER**

Introduction

This action is a petition for a writ of habeas corpus by Avram Vineto Nika, a Nevada prisoner sentenced to death. The case is fully briefed and before the Court for adjudication of the merits of the claims remaining in Nika's second amended habeas petition. Having considered the briefing and the exhibits submitted by the parties, the Court will grant Nika's petition in part and deny it in part. The Court will conditionally grant Nika habeas corpus relief regarding his death sentence, requiring the State to resentence Nika to a non-capital sentence or grant him a new penalty-phase trial. The Court will deny Nika relief in all other respects, will grant Nika a certificate of appealability regarding certain claims on which relief is denied, and will deny Nika's motions for leave to conduct discovery and for an evidentiary hearing.

Background Facts and Procedural History

Nika's conviction and death sentence result from the murder of Edward Smith, on August 26, 1994, on the side of a highway east of Reno. On Nika's direct appeal, the Nevada Supreme Court described the crime, as revealed by the evidence at trial, as follows:

Appellant Avram Nika ("Nika") left Aptos, California, where he lived with his wife Rodika, between noon and 1 p.m. on August 26, 1994, and was traveling to Chicago so that he could fly from there to Romania to visit his sick mother. Nika's car was full of clothes, tools, electronic items, and a small television. According to Rodika, Nika was from Romania and spoke fluent Serbo-Croatian, spoke almost fluent Romanian, and spoke only broken English. Rodika also stated that Nika did not speak colloquial English and that she had to be present when he had dealings with merchants, government officials, and other people. Nika was driving a brown Chrysler New Yorker, and testimony indicated that it takes approximately five and one-half hours to drive from Aptos to Reno. Nika's car broke down at mile marker 34, approximately twenty miles east of Reno.

Edward Smith ("Smith") was employed as a manager at a Burger King in Reno. Smith left work to go home at approximately 8 p.m. to 8:10 p.m. on August 26, 1994. The Smith family lived in Fallon, and Smith had made plans with his wife and child to attend a movie that started at approximately 9:45 p.m. Smith drove a silver 1983 BMW, and Mrs. Smith testified that the BMW often would not start, that they had to push start it, and that they had recently bought a new battery for the BMW in July 1994. Testimony indicated that it takes approximately one hour to one hour and fifteen minutes to get from the Burger King in Reno to the Smith's home in Fallon and that it takes approximately forty to forty-five minutes to get from the Burger King to mile marker 34.

Several people saw Nika standing by his car at mile marker 34 on August 26, 1994. [Footnote: Robbie Morrow stated that around 6:20 p.m. she noticed a "junky" looking brown Chrysler on the side of the road with the hood and trunk cover up. Morrow stated that she saw someone who appeared "dirty and grubby" in very short cut-off pants, a yellow tank top shirt, and white tennis shoes lying under the front of the car, apparently checking the engine. Robin Aguire, who was in prison at the time of trial on an unrelated drug charge, testified that she and her mother were driving on I-80 between 6 p.m. and 6:30 p.m. and saw a brown car with its hood up. She identified Nika as the man standing next to the car. Susan Tarbet stated that at approximately 7:20 p.m. or 7:25 p.m. she saw a man leaning against a brown car with his arms crossed. She also testified that she believed that the man she saw on the side of the road was Nika. Jewell Waters was following her husband home from Reno and passed mile marker 34 at approximately 7:30 p.m. Jewell saw the brown Chrysler and identified Nika as the person in the car. Michael Waters, Jewell's husband who was driving ahead of Jewell, also indicated that Nika was the man that he saw by the car.] Edward Sanchez was driving a maroon Nissan Sentra and was flagged down by Nika at approximately 7:45 p.m. Sanchez pulled his car in front of Nika's and backed up toward the brown Chrysler. Nika approached Sanchez's passenger window and said his car had broken down and that he needed help. Sanchez got out of his car and attempted to find out what was wrong with Nika's car. Sanchez stated that Nika had a thick accent, strong body odor, a day's beard growth and wore blue cut-off jeans. Sanchez offered to give Nika a ride, but Nika could not decide if he wanted to accept the ride and instead had Sanchez call a tow truck for him. Sanchez stated it was shortly after 8 p.m. when he got back into his car, perhaps 8:02 p.m. Sanchez stopped at a truck stop in Fernley and asked one of the clerks to call a tow truck for Nika.

Davina Boling was driving with her boyfriend on I-80 and saw the brown Chrysler on the side of the road around 8:30 p.m. They pulled over to help Nika, whom Boling described as looking frustrated, and Nika told them he had been there for three or four hours and needed a tow truck. They offered him a ride, which he declined, but he requested that they call a tow truck for him. As they left, Nika told them "Good-bye. Thank you, God bless."

Debra Fauvell ("Debra") stated that at approximately 8:40 p.m. she and her husband passed mile marker 34. She stated that she saw two cars on the side of the road, the first was a tan or light colored, four-door sedan which did not have any lights on and which had both driver's side doors open. About 150 feet in front (east) of the tan car she saw a dark brown sedan-type car with its hazard lights on. She saw two people standing by the first (most westerly) car. The person standing by the rear passenger side of the first car had a medium build, was about five feet ten inches tall, and was wearing a white T-shirt and light colored, faded jean-type pants. The second person was twenty feet in front of the first person, was bigger and had bushier hair than the first person, and was walking in a southeasterly direction away from the cars. Debra was shown a picture of Smith and stated that the second man's stature was consistent with Smith's. Daniel Fauvell, Debra's husband, testified that he was driving the car. He stated that he was focused on driving and did not see much, but the first car that they passed did not have any lights on, the second car had its hazard lights on, and one person was standing next to the first car.

Trooper Terry Whitehead of the Nevada Highway Patrol testified as follows. He came into contact with Nika while patrolling the highway on August 26, 1994. Whitehead was traveling westbound on I-80 when he saw a stranded BMW on the eastbound shoulder with its hazard lights on. He made a U-turn across the highway and went to help the stranded motorist. As Whitehead approached the BMW, he passed a brown Chrysler with no lights on. Because the Chrysler had no lights on, the hood was not open, and nobody was in the car, he drove further and pulled behind the BMW. The dispatch log indicates that he ran a license plate check on the BMW at 8:51 p.m. (the license plate was a Nevada plate), and he also looked at the BMW to see if it had indications that it was stolen. There were no people or items of personal property in the BMW. Because the dispatcher did not return his inquiry, he assumed that the BMW was not stolen and started to back up to check out the Chrysler, which was about 400 feet behind (west of) the BMW. As Whitehead backed up, he saw someone waving a flashlight from a southeasterly direction apparently trying to get his attention. The flashlight was coming from the area where Smith's dead body was found the next day. Whitehead got out of his car and asked Nika what was wrong wit his car; Nika pointed to the BMW and stated, "Everything's wrong with it." Whitehead asked Nika if he needed a ride. Nika declined and instead asked for a tow truck. Whitehead said he would call one and asked Nika if there was anything else he could do for him. Nika stated he could use a ride to Chicago. Whitehead stated he did not patrol that far. At 8:53 p.m. Whitehead requested a tow truck for Nika. Whitehead stated that Nika was wearing white high-top tennis shoes and did not seem more nervous than any other person who had been stranded at night on the side of the road. He also stated that he did not see any blood on Nika's shoes or fanny pack and that he never asked Nika his name. Whitehead left the scene at 8:56 p.m. to answer a call for back-up assistance on a DUI case.

Karl Younger testified for the defense. He stated that he worked for Anderson Towing and received a call at his home in Reno on August 26, 1994, at 8:45 p.m. requesting tow truck assistance at mile marker 34 for a Chrysler New Yorker. [Footnote: This call was apparently made by either Sanchez or Boling.] At approximately 9:15 p.m., Younger saw the Chrysler and backed up toward it to prepare to tow it, at which time he noticed two other cars about sixty yards in front of (east) the tow truck. The first car in front of Younger was a silver BMW with out-of-state license plates and its lights on. The second car, a blue or brown Nissan or Datsun which also had its lights on, was in front of the first car. As he backed up to the Chrysler, two people approached the tow truck and told him that the Chrysler needed oil, that they had taken the driver to town to get the oil, and that the tow truck was no longer needed. Neither of these two men spoke with a thick accent and both spoke perfect English. Younger also noticed five to seven other people with flashlights in the area where Smith's body was eventually found. Younger then left the scene.

Loni Kowalski testified that she worked at Hanneman's Tow Service and received a call at 8:53 p.m. from the Highway Patrol requesting a tow truck for a silver BMW. At 8:57 p.m. she called Jerry Turley, an employee who was on call but at his own home, to tell him to respond to the request. Turley testified that he drove west from Fernley toward mile marker 34, looking on both sides of the highway for the silver BMW. He did not see the BMW and called Kowalski to inform her of such. Kowalski told Turley to keep looking, and Turley eventually saw two cars on the eastbound shoulder, exited the freeway and re-entered going eastbound, and put his flashers on as he arrived at the two cars. He noticed that neither car was a silver BMW, turned his flashlights off, and called Kowalski at 9:49 p.m. to tell her that he could not find the BMW. Turley stated that one car was a large dark car that could have been a Chrysler and that the other car was a smaller domestic car, like a Mercury Monarch or Ford Granada, which had its flashers on. He saw two people standing by the Chrysler but could not describe them.

On August 27, 1994, Ray Hansen, a brakeman for Southern Pacific Railroad, noticed what he thought was a body lying next to the fence between the railroad tracks and I-80. The police were called, and a trooper found the body. Careflight was also called because it was first believed that a motorcycle accident had occurred and that medical attention was required. The Careflight helicopter landed approximately fifteen to fifty feet from the body, and the medics checked the body and discovered that the person was dead.

David Billau was the crime scene investigator. He stated that the Careflight helicopter which landed near the crime scene could have disturbed the crime scene. He described the crime scene as follows: the Chrysler was parked off the shoulder of the eastbound lane of I-80; south of the car was a small hillside; south of the hillside was a barbed wire fence under which Smith's body was dumped; and south of the fence and the body were the railroad tracks. Drag marks in the dirt extended from the Chrysler to where the body was found. By the Chrysler's rear passenger tire was a rock with pooled blood on it. By the front tire was an area of red stained dirt in which a bullet and human hair were found. A spent shell casing was found a few feet in front of the red stained dirt. Smith's body was found under the barbed wire fence and his pants were hanging from

the fence. His wallet was found with money still in it lying next to his body. Smith had been shot in the forehead.

The police traced the brown Chrysler to Avram Nika and an address in Chicago. On August 29, 1994, the Washoe County Sheriff's office called the Chicago police for assistance in locating Nika. Chicago Police Detective Tony Villardita and his partner discovered several addresses for Nika and attempted to locate him. They saw Nika exit a silver BMW, and when they asked him his name, Nika gave them a false name. Based on this information they arrested Nika for possession of a stolen vehicle and read him his *Miranda* rights. Nika apparently told the police that he understood his rights and that he would waive those rights and speak to them.

Nika first denied any knowledge of the BMW and said that he had walked to his house. When the police told him that they saw him in the car and that they had found the car key in his pocket, Nika said that the car belonged to his friend, but that he did not know his friend's name. The police then told Nika that the BMW was involved in a murder outside Reno. Nika said that he had left Aptos in his Chrysler, arrived in Reno at around 2 p.m., went to a casino to eat, and when he came out of the casino his car was gone but his license plates were still there. At that point three males pulled up and offered to sell the BMW to him for $300.00. He took the offer, put his plates on the car, and drove to Chicago. He also stated that he made no other stops in Reno and that the car had no mechanical problems.

The police then told Nika that the BMW was seen on the side of I-80, and Nika then said that the BMW had an oil and antifreeze problem about thirty miles east of Reno, several people stopped to help him, and he eventually got the car restarted. Nika said that he did not see his stolen Chrysler where the BMW broke down. The police told him that witnesses had seen both cars on the side of the road. Nika then told the police that he was "ready to tell the truth," and he said that he left the casino in his Chrysler and had car problems about thirty miles east of Reno. He said several people stopped to help him, and then the same three males he described earlier stopped to help him and offered to sell him the BMW for $300.00. He bought the car, changed the license plates, and loaded his personal property into the BMW. Nika also stated that just as he was ready to leave and while the three males were still at the scene, a police officer stopped to help him. Nika told the officer that the BMW was experiencing problems but that he was able to start it, and then he drove to Chicago. Nika also stated that he went to his mother-in-law's garage in Chicago to unload his personal property, drove to get something to eat, and then was arrested by Villardita and his partner. After this questioning was conducted, John Yaryan ("Yaryan"), the Washoe County Sheriff's deputy who had flown to Chicago, questioned Nika. However, the district judge suppressed this statement based on the fact that Nika had invoked his right to remain silent and his right to counsel and that Yaryan continued to question Nika at length. The State has not argued that the suppression was improper.

The police obtained consent to search the garage of Nika's mother-in-law. They found a fanny pack, tennis shoes, and blue denim cut-off jeans, all of which were tested by forensic investigators. The forensic investigators found blood spatter on all three items, and DNA testing

indicated that the blood was consistent with that of Smith and excluded Nika as a source. The forensic investigators stated that at a minimum, 1 in 8,800 people had the same DNA pattern they discovered.

Nika was extradited from Chicago to Reno and was booked into Washoe County jail on September 1, 1994. During Nika's incarceration, Nathanial Wilson ("Wilson"), an inmate at the Washoe County jail, befriended Nika. Wilson testified to statements made by Nika regarding the events on I-80. Specifically, Nika told Wilson that his car had broken down, a man stopped to help him, the man called him a "motherf-----," he hit the man in the head with a crowbar, and then shot him in the head. Nika stated that in Romania, his country of origin, you did not use the word "motherf-----," and that you could be killed for calling somebody that name. Nika stated that the victim was lying on the ground when he was shot in the head, that he tried to hide the body in some bushes, and that he killed the man because "he needed to get to Chicago." Nika stated that he hid the gun, which was an automatic pistol, about five miles from the crime scene. (The gun was never found despite an extensive search.) Nika told him that he had taken the battery out of his car and put it in the BMW because the BMW would not start. [Footnote: Evidence showed that when the BMW was found in Chicago, it had a "National" brand battery and that the battery purchased by the Smiths in July 1994 was not a National brand battery.]

Wilson was in jail on one count of selling cocaine and stated that he did not receive any deal from the prosecution in exchange for his testimony. However, Wilson spoke to the police for the first time on October 11, 1994, and was released from jail and granted probation on November 18, 1994, after pleading guilty to what he called "possession for sale," a lesser crime than that with which he was originally charged.

Dr. Anton Sohn ("Dr. Sohn") conducted the autopsy on Smith. He found three blunt trauma wounds on the back of Smith's head where Smith had been hit with an object heavy enough and with enough force to fracture the skull beneath each wound. Dr. Sohn testified that at least one of the blunt trauma wounds was delivered to the skull while Smith was lying on the ground face down. On Smith's forehead was a bullet wound which Dr. Sohn classified as a "contact wound," stating that it was created when the muzzle of the gun was placed directly against the forehead and the gun was fired. Dr. Sohn found an exit wound in the back of Smith's head and found other lacerations on Smith's face. Dr. Sohn found scrapes or "drag marks" on Smith's chest which were consistent with Smith's body being dragged in the dirt. Dr. Sohn stated that the gunshot to the head was the cause of death and that the blunt force traumas were inflicted before Smith was shot.

At the conclusion of the trial, the jury found Nika guilty of first degree murder with the use of a deadly weapon. At the penalty hearing, the prosecution sought the death penalty and alleged three aggravating circumstances as follows:

> 1. Evidence that the murder was committed by AVRAM NIKA during the commission of or attempt to commit a robbery. NRS 200.033(4).

2. Evidence that the murder was committed to avoid or prevent a lawful arrest. NRS 200.033(5).

3. Evidence that the murder was committed upon one or more persons at random and without apparent motive. NRS 200.033 (9).

Anna Boka ("Anna"), Nika's mother-in-law, testified at the penalty hearing as follows. Nika had a violent temper, and in 1991 when she did not give Nika money for a trip, he threatened to kill both her and Rodika, Anna's daughter and Nika's wife. Peter Boka ("Peter"), Anna's husband, told Anna that in September 1993 he and Nika had gotten into an argument and Nika put a gun to Peter's head. (Peter later testified that he never saw a gun and that Nika only threatened to shoot him.) Anna stated on cross-examination that Peter was a very heavy drinker and had instigated the fight in September 1993. In October 1993, Nika stated that he would kill Anna if Rodika did not come back to live with him. Also in October 1993, Nika wanted to see his and Rodika's baby who was staying at Anna's house, but Peter refused to allow Nika in the house. At that point Nika flashed a gun and told Anna that if Peter did not let him see the baby, he would kill Peter. Finally, in November 1993, Nika told Anna that if Rodika did not leave Anna's house in Chicago and come back to him, he would burn down Anna's house.

Mary Ellen Izzo testified that Nika had raped her in an apartment building in Chicago in December 1989. She stated that he was helping people move into or out of the building, that she met him in the hallway, and that he later told her that his mother, who was the manager of the apartment, wished to see her. [Footnote: The woman whom Izzo believed to be Nika's mother was in fact Nika's aunt. Apparently, Nika was the maintenance man in the apartment building.] She went into the manager's apartment with Nika and he locked the door and told her to come into the bedroom because that was where his mother was. When she was in the bedroom, Nika pushed her on the bed, hit her, and sexually penetrated her. Izzo escaped after Nika let her up, and she then called the police. Nika was never prosecuted for the alleged crime, and Izzo stated that she did not proceed with the prosecution because Nika's aunt threatened to evict her if she proceeded, she had three children to take care of, and she did not have enough money to move. Izzo stated on cross-examination that she had bruises on her face and breasts as a result of the rape; however, a hospital report indicated that she had only red marks on her neck. The defense attorney asked Izzo if she was a drug user, and Izzo stated that she was not. Izzo stated that shortly after this event she received government housing and moved.

Rodika, Nika's wife, testified for the defense as follows. In reference to the alleged sexual assault, Izzo had approached Rodika's family and stated that if they did not want to see Nika jailed for rape, they had better pay her some "big money." She had heard that Izzo had a drug problem and had hung her children out of her second story window. In reference to the September 1993 incident between Nika and Peter, the police were called, and they never found a gun. She acknowledged on cross-examination that Nika was violent and had made death threats against her and her family on several occasions.

> Dorina Vukadin, Rodika's sister, also testified for the defense. She stated that Nika played sports with her children and that her children liked Nika, but she also stated that he was a stern disciplinarian.
>
> On July 10, 1995, the jury found beyond a reasonable doubt that the murder committed by Nika was aggravated by the fact that the murder was committed upon Smith at random and without apparent motive. The jury also found that no mitigating circumstances existed. [Footnote: The mitigating circumstances offered to the jury were as follows:
>
> > 1. The defendant has no significant history of prior criminal activity.
> >
> > 2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
> >
> > 3. The victim was a participant in the defendant's criminal conduct or consented to the act.
> >
> > 4. The defendant was an accomplice in a murder committed by another person and his participation in the murder was relatively minor.
> >
> > 5. The defendant acted under duress or under the domination of another person.
> >
> > 6. The youth of the defendant at the time of the crime.
> >
> > 7. Any other mitigating circumstance.]
>
> Consequently, the mitigating circumstances did not outweigh the aggravating circumstances found; and therefore, a sentence of death was imposed.

Opinion, Respondents' Exh. 81, pp. 1-13 (ECF No. 111-5, pp. 2-14) (published as *Nika v. State*, 113 Nev. 1424, 951 P.2d 1047 (1997)).

Nika appealed. On August 23, 1995, the Nevada Supreme Court ordered that "the effectiveness of trial counsel should be reviewed on direct appeal," and referred the matter to the state district court for further proceedings. *See* Order, Respondents' Exh. 60 (ECF No. 109-9). On November 7 and 8, 1996, the state district court held an evidentiary hearing regarding the issue whether Nika received effective assistance of trial counsel. *See* Transcript of Proceedings, Respondents' Exhs. 76, 77 (ECF Nos. 110-1, 111-1). The state district court ruled that Nika did not receive ineffective assistance of trial counsel and ordered the record of those proceedings transmitted to

the Nevada Supreme Court. *See* Transcript of Proceedings, Respondents' Exh. 77, pp. 99-117 (ECF No. 111-1, pp. 100-18). On December 30, 1997, the Nevada Supreme Court affirmed the judgment of conviction and sentence. *See Nika v. State*, 113 Nev. 1424, 951 P.2d 1047 (1997). On that date, the Nevada Supreme Court also dismissed Nika's separate appeal from the district court's ruling that he did not receive ineffective assistance of trial counsel. *See* Order Dismissing Appeal, Respondents' Exh. 82 (ECF No. 112-1).

On April 15, 1998, Nika filed a petition for writ of habeas corpus in the state district court. *See* Petition for Writ of Habeas Corpus, Respondents' Exh. 86 (ECF No. 112-5). Counsel was appointed, and, with counsel, Nika filed a supplement to his petition on September 29, 2000. *See* Supplement to Petition for Writ of Habeas Corpus, Respondents' Exh. 99 (ECF No. 113-1). The state district court dismissed all but one of Nika's claims, and, following an evidentiary hearing, denied relief on the remaining claim. *See* Order filed March 15, 2001, Respondents' Exh. 107 (ECF No. 114-8); Transcript of Proceedings, Respondents' Exhs. 122, 123 (ECF Nos. 116-12, 117-1); Order Denying Petition for Post-Conviction, Respondents' Exh. 125 (ECF No. 117-3); Findings of Fact, Conclusions of Law and Judgment, Respondents' Exh. 129 (ECF No. 117-7).

Nika appealed, and on September 16, 2004, the Nevada Supreme Court reversed and remanded the case to the state district court for further proceedings on the claims that had been dismissed. *See* Opinion, Respondents' Exh. 141 (ECF No. 118-9) (published as *Nika v. State*, 120 Nev. 600, 97 P.3d 1140 (2004)). The Nevada Supreme Court ruled that the proceeding regarding issues of alleged ineffective assistance of counsel in conjunction with Nika's direct appeal had been an inadequate forum to adjudicate those issues. *See Nika*, 120 Nev. at 602, 97 P.3d at 1142. The Nevada Supreme Court affirmed the state district court's denial of relief on the remaining claim. *See id.*, 120 Nev. at 607-11, 97 P.3d at 1145-48.

On remand, Nika filed a second supplemental habeas petition on June 23, 2005. *See* Second Supplemental Petition for Writ of Habeas Corpus, Respondents' Exh. 146 (ECF No. 119-1). On January 6, 2006, the state district court filed an order denying Nika relief on the remanded claims. *See* Order Granting Motion to Dismiss, Respondents' Exh. 150 (ECF No. 120-3). Nika again appealed, and the Nevada Supreme Court affirmed on December 31, 2008. *See* Opinion, Respondents' Exh. 165 (ECF No. 122-1) (published as *Nika v. State*, 124 Nev. 1272, 198 P.3d 839 (2008)). Nika then petitioned the United States Supreme Court for certiorari, and his certiorari petition was denied on October 13, 2009. *See* Notice of Denial of Petition for Writ of Certiorari, Respondents' Exh. 172 (ECF No. 122-8).

Nika initiated this federal habeas corpus action on April 7, 2009, and counsel was appointed (ECF Nos. 1, 11). With counsel, Nika filed an amended habeas petition on March 1, 2010 (ECF No. 18).

On April 30, 2010, Respondents filed a motion to dismiss (ECF No. 41). Nika then filed a motion for stay (ECF No. 42). On August 27, 2010, the Court granted Nika's motion for stay, stayed this case pending Nika's further exhaustion of claims in state court, and denied the motion to dismiss as moot (ECF No. 47).

On April 20, 2010, Nika filed a second state-court petition for a writ of habeas corpus. *See* Petition for Writ of Habeas Corpus (Post-Conviction), Respondents' Exh. 174 (ECF No. 123-1). On November 2, 2011, the state district court dismissed the petition. *See* Order, Respondents' Exh. 190 (ECF No. 124-10). Nika appealed, and on July 30, 2014, the Nevada Supreme Court affirmed. *See* Order of Affirmance, Respondents' Exh. 196 (ECF No. 125-4). The Nevada Supreme Court denied Nika's petition for rehearing on October 23, 2014. *See* Order Denying Rehearing, Respondents' Exh. 200 (ECF No. 125-8). Nika petitioned the United States Supreme Court for certiorari, and that petition was denied on April 27, 2015. *See* Notice of Denial of Petition for Writ of Certiorari, Respondents' Exh. 204 (ECF No. 125-12).

On May 29, 2015, Nika moved to lift the stay of this case (ECF No. 62). The Court granted that motion and lifted the stay on June 18, 2015 (ECF No. 68).

On August 3, 2015, with leave of court, the Republic of Serbia filed a brief, as amicus curiae, in support of Nika's petition (ECF Nos. 69, 72, 84).

Also on August 3, 2015, Nika filed a second amended petition for writ of habeas corpus (ECF No. 73), which is now Nika's operative petition. Nika's second amended petition asserts the following grounds for relief:

1. Nika's federal constitutional rights were violated as a result of ineffective assistance of his trial counsel.

A. "The county contract under which trial counsel were paid created a conflict of interest that prevented trial counsel from performing effectively."

B. "Trial counsel were ineffective for failing to investigate and present compelling evidence of Mr. Nika's background, culture, and life history."

C. "Trial counsel were ineffective in litigating the motion to suppress Mr. Nika's statements to police."

D. "Trial counsel were ineffective for failing to conduct adequate voir dire."

E. "Trial counsel were ineffective for failing to move for a change of venue."

F. "Trial counsel were ineffective throughout the guilt phase of Mr. Nika's trial."

1. "Trial counsel were ineffective for failing to investigate and present an argument that Mr. Nika was provoked and acted in the heat of passion, or in self-defense."

2. "Trial counsel were ineffective for failing to investigate and present evidence that Nathaniel Wilson was acting as an agent of the State, and received benefits in exchange for his testimony."

3. "Trial counsel were ineffective during their opening arguments."

4. "Trial counsel were ineffective for waiving spousal privilege."

5. "Trial counsel were ineffective for failing to object to unrecorded bench conferences."

6. "Trial counsel were ineffective for failing to object to improper jury instructions."

7. "Trial counsel were ineffective during their closing arguments."

G. "Trial counsel were ineffective for failing to investigate and present powerful mitigating evidence at the penalty phase of the trial."

H. "Trial counsel were ineffective throughout the trial proceedings."

2. Nika's federal constitutional rights were violated "because the guilt phase jury instructions failed to require the jury to find all of the mens rea elements of first-degree murder."

3. Nika's federal constitutional rights were violated "due to the jury's finding the statutory aggravating circumstance that the murder was committed at random and without apparent motive, which is facially unconstitutional and invalid as applied to Mr. Nika."

4. Nika's federal constitutional rights were violated "due to the State's actions in actively concealing the executory promise of benefits it made to Nathaniel Wilson, in allowing false testimony in that regard, and in convincing a defense witness that her testimony was no longer needed."

A. "The State committed misconduct by failing to disclose an executory promise of benefits made to witness Nathanial Wilson."

B. "The State committed misconduct by preventing the defense from calling Samantha McKendall."

5. Nika's federal constitutional rights were violated "due to the improper admission of Mr. Nika's custodial incriminating statements in violation of *Miranda v. Arizona.*"

6. Nika's federal constitutional rights, and his rights under an international treaty and international law, were violated because "[t]he State of Nevada and Mr. Nika's trial counsel failed to inform Mr. Nika that he had a right under Article 36 of the Vienna Convention on Consular Relations to notify Serbian consular officials of his arrest and detention."

7. Nika's federal constitutional rights were violated "because the trial court gave the jury erroneous and unconstitutional jury instructions during Mr. Nika's trial."

A. The jury instructions "fail[ed] to require that the jury find the statutory aggravation is not outweighed by mitigation beyond a reasonable doubt."

B. The jury instructions "fail[ed] to instruct the jury that aggravating circumstances needed to be found unanimously, and that mitigating circumstances did not need to be found unanimously."

C. "The reasonable doubt instruction was unconstitutional."

D. "The malice instructions were unconstitutional."

E. "The trial court unconstitutionally instructed the jury on 'guilt' and 'innocence.'"

F. The jury instruction regarding commutation violated Nika's federal constitutional rights.

G. "The 'anti-sympathy' instruction was unconstitutional."

H. The cumulative effect of the erroneous jury instructions resulted in a violation of Nika's federal constitutional rights.

8. Nika's federal constitutional rights were violated "due to the trial court's improper, repeated ex parte contacts with the State regarding an executory promise of benefits to State's witness Nathanial Wilson."

9. Nika's federal constitutional rights were violated as a result of prosecutorial misconduct.

A. "The State made several improper arguments during Mr. Nika's trial."

B. "The State improperly used its peremptory challenges to remove persons from the venire on the basis of gender."

C. "The State asked improper questions and made improper comments during voir dire."

10. Nika's federal constitutional rights were violated as a result of "the undue influence of publicity on Mr. Nika's trial."

11. Nika's federal constitutional rights were violated "because Mr. Nika's capital trial and 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, and who failed to conduct fair and adequate appellate review."

12. Nika's federal constitutional rights were violated "because Mr. Nika's direct appeal counsel were ineffective."

13. Nika's federal constitutional rights were violated as a result of the cumulative effect of the errors Nika alleges.

14. Nika's death sentence is in violation of the federal constitution "because Nevada's lethal injection scheme constitutes cruel and unusual punishment."

Second Amended Petition (ECF No. 73), pp. 9-196 (capitalization and punctuation altered in quotations of headings).

On May 12, 2016, Respondents filed a motion to dismiss Nika's second amended petition (ECF No. 95). The Court granted that motion in part, and denied it in part, on March 16, 2017; the Court dismissed Grounds 7A, 7C, 7E, 7F, 7G, 10 and 11 of Nika's second amended petition. *See* Order entered March 16, 2017 (ECF No. 151).

The respondents filed an answer, responding to Nika's remaining claims, on October 20, 2017 (ECF No. 160). Nika filed a reply to the answer on March 26, 2018 (ECF No. 169). Respondents filed a response to Nika's reply on September 14, 2018 (ECF No. 181).

Along with his reply, on March 26, 2018, Nika also filed a motion for discovery (ECF No. 166) and a motion for an evidentiary hearing (ECF No. 168). Respondents filed an opposition to both of those motions on April 9, 2018 (ECF No. 172). Nika replied on October 4, 2018 (ECF No. 183).

Discussion

Standard of Review

Because this action was initiated after April 24, 1996, the amendments to 28 U.S.C. § 2254 enacted as part of the Antiterrorism and Effective Death Penalty Act (AEDPA) apply. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997); *Van Tran v. Lindsey*, 212 F.3d 1143, 1148 (9th Cir. 2000), overruled on other grounds by *Lockyer v. Andrade*, 538 U.S. 63 (2003).

28 U.S.C. § 2254(d) sets forth the primary standard of review under the AEDPA:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). A state court decision is contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254(d)(1), "if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme Court's] precedent." *Lockyer*, 538 U.S. at 73 (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)). A state court decision is an unreasonable application of clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254(d)(1), "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Lockyer*, 538 U.S. at 75 (quoting *Williams*, 529 U.S. at 413). The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous; the state court's application of clearly established law must be objectively unreasonable. *Id*. (*quoting Williams*, 529 U.S. at 409). The analysis under section 2254(d) looks to the law that was clearly established by United States Supreme Court precedent at the time of the state court's decision. *Wiggins v. Smith*, 539 U.S. 510, 520 (2003).

The Supreme Court has instructed that "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court has also instructed that "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id*. at 102 (citing *Lockyer*, 538 U.S. at 75); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (AEDPA standard is "a difficult to meet and highly deferential standard for evaluating state-court rulings, which

demands that state-court decisions be given the benefit of the doubt" (internal quotation marks and citations omitted)).

The state courts' "last reasoned decision" is the ruling subject to section 2254(d) review. *Cheney v. Washington*, 614 F.3d 987, 995 (9th Cir. 2010). If the last reasoned state-court decision adopts or substantially incorporates the reasoning from a previous state-court decision, a federal habeas court may consider both decisions to ascertain the state courts' reasoning. *See Edwards v. Lamarque*, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc).

If the state court denies a claim but provides no explanation for its ruling, the federal court still affords the ruling the deference mandated by section 2254(d); in such a case, the petitioner is entitled to habeas relief only if "there was no reasonable basis for the state court to deny relief." *Harrington*, 562 U.S. at 98.

In considering the petitioner's claims under section 2254(d), the federal court generally takes into account only the evidence presented in state court. *Pinholster*, 563 U.S. at 185-87. However, if the petitioner meets the standard imposed by section 2254(d), the federal court may then allow factual development, possibly including an evidentiary hearing, and the federal court's review is then de novo. *See Panetti v. Quarterman*, 551 U.S. 930, 948 (2007); *Wiggins*, 539 U.S. at 528-29; *Runningeagle v. Ryan*, 686 F.3d 758, 786-88 (9th Cir. 2012).

The federal court's review is de novo for claims not adjudicated on their merits by the state courts. *See Cone v. Bell*, 556 U.S. 449, 472 (2009); *Porter v. McCollum*, 558 U.S. 30, 39 (2009).

Procedural Default and *Martinez*

In *Coleman v. Thompson*, the Supreme Court held that a state prisoner who fails to comply with the state's procedural requirements in presenting his claims is barred by the adequate and independent state ground doctrine from obtaining a writ of habeas corpus in federal court. *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991) ("Just as in those cases in which a state prisoner fails to exhaust state remedies, a habeas

petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance."). Where such a procedural default constitutes an adequate and independent state ground for denial of habeas corpus, the default may be excused only if "a constitutional violation has probably resulted in the conviction of one who is actually innocent," or if the prisoner demonstrates cause for the default and prejudice resulting from it. *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

To demonstrate cause for a procedural default, the petitioner must "show that some objective factor external to the defense impeded" his efforts to comply with the state procedural rule. *Murray*, 477 U.S. at 488. For cause to exist, the external impediment must have prevented the petitioner from raising the claim. *See McCleskey v. Zant*, 499 U.S. 467, 497 (1991). With respect to the prejudice prong, the petitioner bears "the burden of showing not merely that the errors [complained of] constituted a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire [proceeding] with errors of constitutional dimension." *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989), citing *United States v. Frady*, 456 U.S. 152, 170 (1982).

In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court ruled that ineffective assistance of post-conviction counsel may serve as cause to overcome the procedural default of a claim of ineffective assistance of trial counsel. The *Coleman* Court had held that the absence or ineffective assistance of state post-conviction counsel generally could not establish cause to excuse a procedural default because there is no constitutional right to counsel in state post-conviction proceedings. *See Coleman*, 501 U.S. at 752-54. In *Martinez*, however, the Supreme Court established an equitable exception, holding that the absence or ineffective assistance of counsel at an initial-review collateral proceeding may establish cause to excuse a petitioner's procedural default of substantial claims of ineffective assistance of trial counsel. *See Martinez*, 566 U.S. at 9. The Court described "initial-review collateral proceedings" as "collateral

proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." *Id*. at 8.

In the March 16, 2017, order, the Court recognized that Nika raised certain of his claims—Grounds 1A, 1C, 1D, 1E, 1F3, 1F4, 1F5, 1H, 4B, 6, 9A, 9B and 12—for the first time in his second state habeas action, and the Nevada Supreme Court ruled that those claims were procedurally barred and that Nika did not make any showing to overcome the procedural bar. *See* Order entered March 16, 2017 (ECF No. 151), pp. 7-8. The Court ruled further that, under *Martinez*, Nika might be able to overcome the procedural default of those claims but declined to rule on the question of the procedural defaults until the merits of the claims were briefed. *See id*.at 8.

Respondents argue that *Martinez* does not provide a means for Nika to overcome any procedural default that results from the state courts' application of the state-law statute of limitations. *See* Answer (ECF No. 160), pp. 9-10. This argument is without merit. Nika was represented by his first state post-conviction counsel from 1998 until 2009; he filed his second state-court petition for a writ of habeas corpus on April 20, 2010. *See* Petition for Writ of Habeas Corpus (Post-Conviction), Respondents' Exh. 174 (ECF No. 123-1). In this Court's view, under the circumstances in this case, ineffective assistance of Nika's first state post-conviction counsel may operate as cause to excuse his procedural defaults based on the state-law statute of limitations. Respondents do not articulate any compelling reason why the equitable rule of *Martinez* should not apply here.

With respect to Nika's claims of ineffective assistance of appellate counsel in Ground 12, Respondents point out that at the time of the March 16, 2017, order in this case, the Ninth Circuit Court of Appeals had, in *Nguyen v. Curry*, 736 F.3d 1287 (9th Cir. 2013), extended the *Martinez* exception to claims of ineffective assistance of direct appeal counsel, but *Nguyen* has since been abrogated by the Supreme Court, in *Davila v. Davis*, 137 S. Ct. 2058 (2017). *See* Answer (ECF No. 160), p. 54. Respondents' argument in this regard is well-taken; *Nguyen* is no longer good law.

Therefore, Nika's claims of ineffective assistance of appellate counsel are procedurally defaulted, without any showing of cause and prejudice by Nika. In his reply, Nika argues that, in his first state habeas action, he asserted certain claims of ineffective assistance of appellate counsel, and the Nevada Supreme Court denied those claims on their merits, so those parts of Ground 12 are not procedurally defaulted. *See* Reply (ECF No. 169), pp. 274-75; *see also Nika*, 124 Nev. at 1293, 1295-98, 198 P.3d at 853, 855-57. This argument, however, is inconsistent with the argument Nika made regarding Ground 12 in response to the respondents' motion to dismiss. There, Nika argued:

> The State argues that portions of Claim Twelve are procedurally defaulted, while other portions are not, without identifying which is which. ECF No. 95 at 59-60. As with Claim One, Nika's position is that his claim of IAC of direct appeal counsel is a single claim, and that the new factual allegations raised in the instant claim fundamentally alter the claim so as to render it new and different.

Opposition to Respondents' Motion to Dismiss (ECF No. 132), p. 94. The Court accepted Nika's position, and treated Ground 12 as different from the claim in his first state habeas action, and subject, in whole, to the procedural default doctrine in this case. The case then proceeded, and the respondents answered, based on Nika's position and the Court's ruling. Nika's attempt to change his position in this manner now is barred by the doctrine of judicial estoppel. *See Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990). Ground 12 is procedurally defaulted, and Nika makes no showing to overcome the procedural default. Ground 12 will be denied as barred by the procedural default doctrine.

Nika's remaining claims for ineffective assistance of trial counsel are addressed below.

Claims Warranting Habeas Corpus Relief

Ground 7B - Jury Instructions and Verdict Forms Concerning Mitigating Circumstances

In Ground 7B, Nika claims that his federal constitutional rights were violated in the penalty phase of his trial because the jury instructions "fail[ed] to instruct the jury

that aggravating circumstances needed to be found unanimously, and that mitigating circumstances did not need to be found unanimously." *See* Second Amended Petition (ECF No. 73), pp. 152-53. The crux of this claim is that in the penalty phase of Nika's trial, the jury instructions and verdict form did not inform the jury that they did not have to find mitigating circumstances unanimously, that is, that each juror could individually consider any mitigating circumstance whether or not any other jurors agreed about the existence of that mitigating circumstance.

Regarding the findings the jury was to make in the penalty phase of Nika's trial, the trial court instructed the jury as follows:

> The State has alleged certain aggravating circumstances are present in this case.
>
> The defendant has alleged certain mitigating circumstances are present in this case.
>
> It shall be your duty to determine:
>
> (a) whether an aggravating circumstance or circumstances has/have been proven beyond a reasonable doubt;
>
> (b) whether a mitigating circumstance or circumstances are found to exist; and,
>
> (c) based upon these findings, whether the defendant should be sentenced to life imprisonment or death.
>
> The jury may impose a sentence of death only if you find at least one aggravating circumstance and further find there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.
>
> Otherwise the punishment imposed shall be imprisonment in the Nevada State Prison for life with or without the possibility of parole.
>
> * * *
>
> The State has the burden of proving beyond a reasonable doubt the aggravating circumstance or circumstances in this case.
>
> 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, not mere possibility or speculation.

> If you have a reasonable doubt as to the aggravating circumstance or circumstances in this case, or find the mitigating circumstance or circumstances are sufficient to outweigh the aggravating circumstance or circumstances found, the defendant is entitled to a verdict of life imprisonment and you are to specify whether such imprisonment shall be with or without the possibility of parole.
>
> * * *
>
> When you retire to consider your verdict, you must first determine whether the State has proven beyond a reasonable doubt that an aggravating circumstance or circumstances exist in this case and whether a mitigating circumstance or circumstances exist in this case. A verdict form has been provided to you for this purpose.
>
> Based upon your findings in the verdict you must then determine whether the defendant should be sentenced to life imprisonment or death. If you determine life imprisonment is a proper verdict in this case, you must determine whether the imprisonment shall be with the possibility of parole or without the possibility of parole.
>
> During your deliberations, you will have all the exhibits which were admitted into evidence during the trial and during this hearing, these written instructions and forms of verdict which have been prepared for your convenience.
>
> Your verdict must be unanimous. As soon as you have agreed upon a verdict, have it signed and dated by your foreperson and return with it to this room.

Penalty Phase Jury Instructions, Respondents' Exh. 48, Instructions No. 10, 11 and 20 (ECF No. 108-3, pp. 11, 12 and 21). The verdict form provided to the jury was as follows:

> We the jury in the above-entitled action, find beyond a reasonable doubt that the murder committed by the defendant was aggravated by the following circumstance or circumstances which have been checked below.
>
> ___ (1) The murder of Edward V. Smith was committed by defendant Avaram Nika while he was engaged in the commission of or an attempt to commit robbery and Avaram Nika killed Edward V. Smith.
>
> ___ (2) The murder of Edward V. Smith was committed to avoid or prevent a lawful arrest.
>
> ___ (3) The murder was committed upon Edward V. Smith at random and without apparent motive.

We, the jury in the above-entitled action find the following mitigating circumstance or circumstances which are existing in this case and have checked the same below.

___ 1. The defendant has no significant history of prior criminal activity.

___ 2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

___ 3. The victim was a participant in the defendant's criminal conduct or consented to the act.

___ 4. The defendant was an accomplice in a murder committed by another person and his participation in the murder was relatively minor.

___ 5. The defendant acted under duress or under the domination of another person.

___ 6. The youth of the defendant at the time of the crime.

___ 7. Any other mitigating circumstance.

_____
FOREMAN

LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE

We, the jury in the above-entitled action, having found the defendant, Avram Nika, guilty of Murder in the First Degree With The Use Of a Deadly weapon, set the penalty to be imposed at life in the Nevada State Prison without the possibility of parole, plus a consecutive term of life in the Nevada State Prison without the possibility of parole for the use of a deadly weapon.

DATED this ___ day of _____, 1995.

_____
FOREMAN

LIFE IMPRISONMENT WITH THE POSSIBILITY OF PAROLE

We, the jury in the above-entitled action, having previously found the defendant, Avram Nika, guilty of Murder in the First Degree With The Use Of a Deadly Weapon, set the penalty to be imposed at life in the Nevada State Prison with the possibility of parole, plus a consecutive term of life in the Nevada State Prison with the possibility of parole for the use of a deadly weapon.

DATED this ___ day of _____, 1995.

_____
FOREMAN

DEATH PENALTY

We, the jury in the above-entitled action, having previously found the defendant, Avram Nika, guilty of Murder in the First Degree With The Use Of a Deadly Weapon, and having found beyond a reasonable doubt that an aggravating circumstance or circumstances exists in this case and that any mitigating circumstance or circumstances are not sufficient to outweigh the aggravating circumstance or circumstances found, therefore, by reason thereof, set the penalty of sentence to be imposed upon the defendant, of Murder in the First Degree With The Use Of a Deadly Weapon at death.

DATED this ___ day of _____, 1995.

_____
FOREMAN

Verdict, Respondents' Exh. 50 (ECF No. 108-5).

In *Mills v. Maryland*, 486 U.S. 367 (1988), the Supreme Court held there to be a federal constitutional violation where "there is a substantial probability that reasonable jurors, upon receiving the judge's instructions in this case, and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." *Mills*, 486 U.S. at 384; *see also McKoy v. North Carolina*, 494 U.S. 433, 442-43 (1990) ("*Mills* requires that each juror be permitted to consider

and give effect to ... all mitigating evidence in deciding ... whether aggravating circumstances outweigh mitigating circumstances...."). The *Mills* Court based its ruling, in part, on the observation that "[n]o instruction was given indicating what the jury should do if some but not all of the jurors were willing to recognize something about petitioner, his background, or the circumstances of the crime, as a mitigating factor." *Mills*, 486 U.S. at 379. The *Mills* Court relied on a line of Supreme Court precedent holding that "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." *Id.* at 374-75 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982), and *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion)) (emphasis in original). The Court acknowledged that it could not be certain that the jury in the *Mills* case interpreted the instructions to preclude consideration of mitigating factors unless they were found unanimously, but ruled that "[t]he possibility that a single juror could block" consideration of mitigating evidence "is one we dare not risk." *Mills*, 486 U.S. at 384. The Court stated: "Unless we can rule out the substantial possibility that the jury may have rested its verdict on the 'improper' ground, we must remand for resentencing." *Id.* at 377.

Nika asserted this claim in his first state habeas action. *See* Second Supplemental Petition for Writ of Habeas Corpus, Respondents' Exh. 146, pp. 137-44 (ECF No. 119-1, pp. 138-45). The state district court's ruling on the claim—apparently focusing on a related claim of ineffective assistance of trial counsel—was, in its entirety, as follows:

> Claim #16 deals with the subject of failure to request a specific instruction on the unanimity of a verdict on aggravating and mitigating circumstances. Nika has failed to specify how this claim would entitle him to any relief. It is therefore rejected.

Order Granting Motion to Dismiss, Respondents' Exh. 150, p. 3 (ECF No. 120-3, p. 4). Nika appealed and raised this issue in the Nevada Supreme Court. *See* Appellant's Opening Brief, Respondents' Exh. 152, pp. 4, 15-19 (ECF No. 120-5,

pp. 23, 34-38). The Nevada Supreme Court denied relief on Nika's claim—focusing its discussion on a related claim of ineffective assistance of appellate counsel—as follows:

> Nika contends that the district court erred by dismissing his claim that appellate counsel was ineffective for failing to challenge the district court's refusal to give the jury his proffered instruction regarding mitigating circumstances. In particular, he argues that the jury instructions given failed to advise the jury that while it must agree unanimously on the existence of aggravating circumstances, it did not have to agree unanimously on the existence of mitigating circumstances. Nika is correct—the specific instructions informing the jury about its findings and weighing of aggravating and mitigating circumstances did not expressly state that aggravating circumstances had to be found unanimously and that mitigating circumstances did not. Nika asserts that appellate counsel should have challenged the omission of this instruction pursuant to *Mills v. Maryland* [footnote: 486 U.S. 367 (1988)] and argued that the failure to instruct constituted plain error. We disagree.
>
> Nika's reliance on *Mills* is misplaced. In that case, the United States Supreme Court concluded that a substantial probability existed that in an attempt to complete the verdict form as instructed, the jury believed that it could not consider any mitigating evidence unless it unanimously found the existence of a particular mitigating circumstance. [Footnote: *Id*. at 377-80.] Such is not the case here. Nika's jury was instructed that it had to find the existence of any aggravator beyond a reasonable doubt and its verdict must be unanimous. Further, the verdict form began with language—"[w]e, the jury"—that, as this court concluded in *Geary v. State*, a reasonable jury would understand "required a unanimous finding of the aggravating circumstances." [Footnote: 114 Nev. 100, 105, 952 P.2d 431, 433 (1998).] And no instruction placed constraints on the jury's ability to find mitigating circumstances. As this court has held in similar circumstances, the failure to adequately instruct the jury on unanimity may be harmless where the jury is informed that aggravating circumstances must be unanimously found beyond a reasonable doubt and no constraints are placed on the jury's ability to find mitigating circumstances. [Footnote: *Jimenez v. State*, 112 Nev. 610, 624-25, 918 P.2d 687, 695-96 (1996); *see Geary*, 114 Nev. at 104-05, 952 P.2d at 433.] On this basis, Nika failed to demonstrate that this instructional error would have had a reasonable probability of success on appeal. Therefore, the district court did not err by summarily dismissing this claim.
>
> [Footnote: To the extent Nika argues that trial counsel were ineffective for not requesting his proposed instruction, we conclude that he failed to adequately substantiate his claim that trial counsel's performance was deficient or resulted in prejudice. *Strickland*, 466 U.S. at 687; *Kirksey*, 112 Nev. at 987, 923 P.2d at 1107. Therefore, the district court did not err by summarily dismissing this claim.]

Nika, 124 Nev. at 1297-98,198 P.3d at 856-57. Two justices dissented from this ruling, as follows:

> ... I believe that appellate counsel was ineffective for failing to challenge the district court's refusal to give a proffered instruction advising the jury that it did not have to agree unanimously on the existence of mitigating circumstances. Without that instruction, the jury was left to presume that it could not consider any mitigating evidence unless it unanimously found the existence of a particular mitigating circumstance. Such a presumption is clearly contrary to law [footnote: *Jimenez v. State*, 112 Nev. 610, 624-25, 918 P.2d 687, 695-96 (1996)] and prejudicial.

Id., 124 Nev. at 1302, 198 P.2d at 860 (Cherry, J., with whom Saitta, J., agreed, concurring in part and dissenting in part).

The Nevada Supreme Court focused its discussion on a claim of ineffective assistance of appellate counsel, and briefly discussed Nika's claim of ineffective assistance of trial counsel in a footnote; the court denied Nika's claim of trial court error without any discussion of that claim specifically. When a state supreme court denies a claim without explanation, the federal court still affords the ruling the deference mandated by section 2254(d); in such a case, the petitioner is entitled to habeas relief only if "there was no reasonable basis for the state court to deny relief." *Harrington*, 562 U.S. at 98.

The Nevada Supreme Court's ruling was unreasonable, with respect to both the determination of the facts in light of the evidence and the application of *Mills*. It was an unreasonable determination of the facts to conclude that "no instruction placed constraints on the jury's ability to find mitigating circumstances." *See Nika*, 124 Nev. at 1297, 198 P.3d at 856. And, it was an unreasonable application of *Mills* for the Nevada Supreme Court to conclude that this case is different from *Mills* because no "substantial probability existed that in an attempt to complete the verdict form as instructed, the jury believed that it could not consider any mitigating evidence unless it unanimously found the existence of a particular mitigating circumstance." *See id*. Given the language of the relevant jury instructions and the verdict forms, and the clear directive of *Mills*, this Court sees no reasonable basis for the state court to deny Nika relief on this claim.

In this case, on the same page of the jury instructions stating that the jury was to determine "whether a mitigating circumstance or circumstances exist," the jury was

instructed: "Your verdict must be unanimous." Penalty Phase Jury Instructions, Respondents' Exh. 48, Instruction No. 20 (ECF No. 108-3, p. 21). This jury instruction, Instruction Number 20, left no room for the jurors to surmise that they could individually consider mitigating circumstances not found unanimously. Neither Instruction Number 20 nor any other instruction clarified this for the jury. *See Geary v. State*, 114 Nev. 100, 105, 952 P.2d 431, 433 (1998) (in a case decided after Nika's conviction was final, setting forth jury instructions to be used in Nevada in capital cases to avoid *Mills* error).

Furthermore, Instruction Number 20 referred the jurors to the verdict form: "A verdict form has been provided to you for this purpose." Penalty Phase Jury Instructions, Respondents' Exh. 48, Instruction No. 20 (ECF No. 108-3, p. 21). Then, on the verdict form, there was a section where the foreman of the jury was to place a checkmark next to the listed mitigating circumstances found by the jury. There, the verdict form stated: "We, the jury in the above-entitled action find the following mitigating circumstance or circumstances which are existing in this case and have checked the same below." Verdict, Respondents' Exh. 50, p. 2 (ECF No. 108-5, p. 3). It is an inescapable conclusion that the jurors must have understood that as an instruction to identify mitigating circumstances that the jury unanimously agreed upon, and that they were to weigh against the aggravating circumstance. It is unimaginable that the jurors could have understood the verdict form to call for a listing of mitigating circumstances found by any jurors, individually, and weighed against the aggravating circumstance by the jurors who found them; there is nothing in the jury instructions or verdict form to suggest such an unusual approach to completing that part of the verdict form.

In the *Geary* case, which was cited by the Nevada Supreme Court in its ruling in this case, the Nevada Supreme Court held that the jury was properly instructed that aggravating circumstances must be found unanimously; the Nevada Supreme Court concluded, in that case, "that after having been instructed that its verdict must be unanimous, a reasonable jury would properly understand that the phrase '[w]e, the jury' required a unanimous finding of the aggravating circumstances." *Geary*, 114 Nev. at

104-05, 952 P.2d at 433. That reasoning applies just as well to the section of the verdict form in this case calling for the jury to identify the mitigating circumstances that they found.

Respondents cite *Smith v. Spisak*, 558 U.S. 139 (2010), a case in which the Supreme Court held that the jury instructions and verdict forms did not unconstitutionally require the jury to consider only mitigating circumstances found unanimously. *See* Answer (ECF No. 160), pp. 109-10. Respondents argue that in this case, as in *Spisak*, there is no reasonable probability that the jury was led to believe that it could consider only mitigating circumstances found unanimously. *See id.* In *Spisak*, though, the jury instructions, and especially the verdict forms, were materially different from those in this case. In *Spisak*, there was no indication in the jury instructions that mitigating circumstances had to be found unanimously. *See Spisak*, 558 U.S. at 145-48. And, perhaps most importantly, the verdict forms provided to the jury in *Spisak* did not call for the jury—"we the jury"—to identify the mitigating circumstances that they found. *See id.*

This Court concludes that the jury instructions and verdict forms used in this case violated Nika's rights under the Eighth and Fourteenth Amendments of the United States Constitution, by raising a substantial probability that reasonable jurors thought they were precluded from considering mitigating evidence unless all jurors agreed on the existence of a particular mitigating circumstance. There is no reasonable basis for the Nevada Supreme Court's denial of relief on this claim.

Ground 1G - Trial Counsel's Mitigation Presentation

In Ground 1G, Nika claims that his federal constitutional rights were violated as a result of ineffective assistance of his trial counsel because "[t]rial counsel were ineffective for failing to investigate and present powerful mitigating evidence at the penalty phase of the trial." *See* Second Amended Petition (ECF No. 73), pp. 89-95.

Nika was originally required by the Nevada Supreme Court to litigate his claims of ineffective assistance of counsel while his direct appeal was pending. While Nika's direct appeal was pending, on August 23, 1995, the Nevada Supreme Court, invoking

Nevada's former Supreme Court Rule 250(IV)(H), remanded Nika's case to the state district court "to determine the effectiveness of trial counsel." *See* Order, Respondents' Exh. 60 (ECF No. 109-9). The state district court held an evidentiary hearing, *see* Transcript of Proceedings, Respondents' Exhs. 76, 77 (ECF Nos. 110-1, 111-1), then ruled that Nika received effective assistance of trial counsel and ordered the record of those proceedings transmitted to the Nevada Supreme Court. *See* Transcript of Proceedings, Respondents' Exh. 77, pp. 99-117 (ECF No. 111-1, pp. 100-18). On December 30, 1997, the Nevada Supreme Court dismissed Nika's appeal from the district court's ruling that Nika received effective assistance of trial counsel. *See* Order Dismissing Appeal, Respondents' Exh. 82 (ECF No. 112-1).

Subsequently, on Nika's first appeal in his first state habeas action, the Nevada Supreme Court ruled that the proceeding regarding issues of alleged ineffective assistance of counsel in conjunction with Nika's direct appeal "did not provide him with a full and fair opportunity to raise claims of ineffective trial counsel." *Nika*, 120 Nev. at 606, 97 P.3d at 1145. The Nevada Supreme Court stated:

> As this case illustrates, determining the effectiveness of trial counsel during a direct appeal was impracticable in several ways. Normally, post-conviction counsel has the opportunity to peruse this court's decision on direct appeal as a guide and aid in determining what issues should be investigated and raised in a post-conviction habeas petition. Nika's SCR 250 counsel did not have this resource. That counsel also did not have the length of time to investigate possible avenues of relief that post-conviction counsel usually has. Moreover, with simultaneous litigation of both the direct appeal and the SCR 250 proceeding, Nika and his trial counsel were placed in an untenable position. In regard to the direct appeal, trial counsel should have been unconstrained advocates of Nika's position, willing and able to provide advice and support to Nika's direct appeal counsel. However, in the SCR 250 proceeding they found themselves defending their own conduct of the trial against challenges by Nika. In fact, Nika was required to waive his privilege of attorney-client confidentiality in that proceeding even though his direct appeal was not yet decided. We therefore conclude that the SCR 250 proceeding in this case was not, under NRS 34.810(1)(b), a proceeding in which Nika could have fully and adequately raised grounds of ineffective trial counsel. For the same reasons, we also decline to rely on our 1997 order dismissing Nika's appeal following the SCR 250 proceeding as the law of the case. [Footnote: *See Pellegrini v. State*, 117 Nev. 860, 885, 34 P.3d 519, 535-36 (2001) (recognizing this court's discretion to reconsider its law of a case when warranted).]

Id., 120 Nev. at 606-07, 97 P.3d at 1145. The Nevada Supreme Court remanded the case to the state district court for further proceedings with respect to Nika's claims of ineffective assistance of counsel. *See id.*, 120 Nev. at 607-11, 97 P.3d at 1145-48. Regarding the remanded claims, the Nevada Supreme Court stated:

> We reverse the district court's summary dismissal of Nika's habeas claims and remand for that court to determine whether Nika's claims, including claims that trial counsel were ineffective, warrant an evidentiary hearing. Whether or not a claim is decided after an evidentiary hearing, the district court must provide specific findings of fact and conclusions of law supporting its disposition of the claims.

Id., 120 Nev. at 607, 97 P.3d at 1145.

On the remand, however, the state district court allowed no factual development regarding Nika's claim that his trial counsel was ineffective with respect to their development and presentation of mitigating evidence in the penalty phase of the trial. The state district court simply did not rule on motions filed by Nika seeking funding for investigation and psychiatric and psychological expert assistance. *See* Motion, Petitioner's Exh. 129 (ECF No. 37-4); *see also* Motion for Discovery, Respondents' Exh. 105 (ECF No. 114-6); Declaration of Glynn B. Cartledge, Petitioner's Exh. 160 (ECF No. 73-2, pp. 139-41). Furthermore, the state district court did not hold an evidentiary hearing, and, in a four-page order, summarily denied all Nika's claims of ineffective assistance of counsel. In the district court's order, there was no discussion of Nika's claim that his trial counsel were ineffective with respect to his mitigation case. *See* Order Granting Motion to Dismiss, Respondents' Exh. 150 (ECF No. 120-3). Nika again appealed, and the Nevada Supreme Court affirmed, stating:

> Nika contends that the district court erred by dismissing his claim that trial counsel were ineffective for failing to conduct an adequate investigation of his case, including failing to consider numerous evidentiary matters and his mental health and childhood history, use services from the Yugoslavian consulate, and allow Nika to speak to the jury to demonstrate his difficulty in speaking English. However, Nika failed to adequately explain how the additional investigation he now proposes would have altered the outcome of his trial. Consequently, the district court did not err by summarily dismissing this claim.

Id., 124 Nev. at 1291; 198 P.3d at 852.

In his second state habeas action, Nika asserted this claim again, and it was ruled procedurally barred. On the appeal in that case, the Nevada Supreme Court ruled, as follows, on Nika's attempt to establish cause and prejudice to overcome the procedural bar by showing that his post-conviction counsel was ineffective:

> Nika argues that the district court erred in denying his claim that post-conviction counsel failed to conduct sufficient investigation into his background to support the claim in his prior petition that trial counsel provided ineffective assistance. He contends that counsel failed to speak with relatives and neighbors, collect school and military records, or have him evaluated by a mental health expert.
>
> We conclude that this claim lacks merit. Nika did not demonstrate that the additional evidence would have altered the outcome of trial and thus formed the basis of a successful trial-counsel claim. At the penalty hearing, the jury found that the murder was committed at random and without apparent motive. This is a compelling aggravating circumstance. Smith stopped to assist Nika on the side of the highway. Thereafter, Nika struck him several times on the back of the head—at least once while Smith was lying face down on the ground. Nika then rolled Smith onto his back, placed the gun against Smith's head, and shot him. We concluded that the murder occurred in a calculated manner. *Nika III*, 124 Nev. at 1295, 198 P.3d at 854. In addition, the jury was aware that Nika was prone to violent outbursts and threats of violence within his own family, and he had sexually assaulted a woman in 1989. Trial counsel had presented testimony from Nika's wife and his sister-in-law that he was loyal to his friends, a child at heart, and liked by the children in the family. The jury found this evidence insufficiently mitigating. The additional mitigation evidence concerning his upbringing, family history, and cognitive impairments is not powerful enough to demonstrate a reasonable probability of a different outcome had trial counsel presented it. For this reason, we conclude that Nika failed to meet the prejudice prong of his post-conviction-counsel claim.

Order of Affirmance, Respondents' Exh. 196, pp. 5-6 (ECF No. 125-4, pp. 6-7).

While this claim was—at least ostensibly—adjudicated by the state courts in Nika's first state habeas action, because the fact-finding process in that case was defective, and Nika did not have a fair opportunity to develop the facts supporting the claim, the Court does not apply the standard prescribed by 28 U.S.C. § 2254(d), but rather considers the claim de novo. *See Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004) (§ 2254(d) does not apply where the fact-finding "process employed by the state court is defective.") "If, for example, a state court makes evidentiary findings without holding a hearing and giving petitioner an opportunity to present evidence, such findings

clearly result in an 'unreasonable determination' of the facts." *Id.* at 1001; *see also Nunes v. Mueller*, 350 F.3d 1045, 1055 (9th Cir. 2003); *Killian v. Poole*, 282 F.3d 1204, 1208 (9th Cir. 2002).

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court propounded a two prong test for analysis of claims of ineffective assistance of counsel: the petitioner must demonstrate (1) that the attorney's representation "fell below an objective standard of reasonableness," and (2) that the attorney's deficient performance prejudiced the defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694. A court considering a claim of ineffective assistance of counsel must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. *Id.* at 689. The petitioner's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. And, to establish prejudice under *Strickland*, it is not enough for the habeas petitioner "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Rather, the errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687.

In the penalty phase of his trial, Nika's counsel presented little evidence of any kind in mitigation; counsel presented no evidence concerning Nika's background before he came to the United States from Serbia some five years before his arrest and no evidence concerning Nika's intellectual capacity.

In the penalty phase of the trial, the prosecution called as a witness the wife of the murder victim, Edward Smith, and she testified about Smith's good character, their family, his military service, and the loss that she and her daughter suffered. *See* Testimony of Tracy Smith, Transcript of Proceedings, July 10, 1995, Respondents' Exh. 46, pp. 13-18 (ECF No. 108-1, pp. 16-21). The State also called Smith's daughter, who testified about her memories of her father and her loss. *See* Testimony of Amber Smith,

Transcript of Proceedings, July 10, 1995, Respondents' Exh. 46, pp. 19-21 (ECF No. 108-1, pp. 22-24). The State also called Nika's mother-in-law and his father-in-law, who testified about Nika's violent temper, and about occasions when Nika threatened them and their daughter, Nika's wife, including occasions when he threatened family members with a gun. *See* Testimony of Anna Boka, Transcript of Proceedings, July 10, 1995, Respondents' Exh. 46, pp. 22-38 (ECF No. 108-1, pp. 25-41); Testimony of Peter Boka, Transcript of Proceedings, July 10, 1995, Respondents' Exh. 46, pp. 81-95 (ECF No. 108-1, pp. 84-98). The State also called Carlos Calzadilla, who testified about an incident in which Nika threatened him with a machete, mistakenly believing that he had burglarized Nika's family members' home. *See* Testimony of Carlos Alexis Calzadilla, Transcript of Proceedings, July 10, 1995, Respondents' Exh. 46, pp. 45-56 (ECF No. 108-1, pp. 48-59). The State also called a woman who testified that Nika sexually assaulted her. *See* Testimony, Transcript of Proceedings, July 10, 1995, Respondents' Exh. 46, pp. 58-80 (ECF No. 108-1, pp. 61-83).

In the defense case in the penalty phase of the trial, Nika's counsel called two witnesses. The first was Nika's wife, Rodika. *See* Testimony of Rodika Nika, Transcript of Proceedings, July 10, 1995, Respondents' Exh. 46, pp. 96-118 (ECF No. 108-1, pp. 99-121). Nika's counsel questioned Rodika about the allegation that Nika committed a sexual assault. *See id.* at 100-03 (ECF No. 108-1, pp. 103-06). Counsel also questioned her about the incident in which Nika threatened Calzadilla with a machete. *See id.* at 103-06 (ECF No. 108-1, pp. 106-09). And, counsel questioned her about an incident in which Nika got into a fight with her father and allegedly threatened him with a gun. *See id.* at 106-09 (ECF No. 108-1, pp. 109-12). In these lines of questioning, Nika's counsel attempted, mostly unsuccessfully, to cast doubt on the allegations about Nika's violent behavior. Beyond that, though, much of Rodika's testimony actually reflected negatively on Nika. *See, e.g., Id.* at 97-99 (her parents did not want her to marry Nika, and they generally did not like him), 98 (Nika would hit things, but not her, when he was angry) (ECF No. 108-1, pp. 100-102). Rodika did testify, generally, that Nika was a good

person and a good father, and she loved him. *See id.* at 110, 116-17 (ECF No. 108-1, pp. 113, 119-20). On cross-examination, Rodika acknowledged that she was not present and did not know what happened in the incident in which Nika was accused of sexual assault, in the incident involving him threatening a man with a machete, and in his fight with her father. *Id.* at 112-14 (ECF No. 108-1, pp. 115-17). Also, on cross-examination, the prosecutor elicited testimony from Rodika suggesting that Nika committed a battery on a woman who was seven months pregnant. *See id.* at 117-18 (ECF No. 108-1, pp. 120-21).

The other witness called by Nika's counsel in the penalty phase of his trial was Dorina Vukadin, Nika's sister-in-law. *See* Testimony of Dorina Vukadin, Transcript of Proceedings, July 10, 1995, Respondents' Exh. 46, pp. 119-24 (ECF No. 108-1, pp. 122-27). She testified that Nika was helpful to Rodika's parents, taking care of their yard, and that he was good with her children, but she did not let her children watch the violent movies and television programs that Nika liked to watch. *See id.* at 120-24 (ECF No. 108-1, pp. 123-27).

That was the full extent of Nika's counsel's mitigation presentation.

Nearly all the evidence presented by the defense in the penalty phase was aimed at attempting to neutralize the State's evidence that Nika made threats against family members, that he threatened a man with a machete, and that he committed a sexual assault. *See* Defendant's Opening Statement, Transcript of Proceedings, July 10, 1995, Respondents' Exh. 46, pp. 8-12 (ECF No. 108-1, pp. 11-15). The only affirmative mitigation evidence presented by the defense were some very general statements about Nika made by his wife and his sister in law—that his wife thought Nika was a good person and loved him, and that his sister-in-law thought Nika was good with her children. Defense counsel made no attempt to explain to the jury Nika's apparent violent tendencies. Defense counsel presented no evidence regarding Nika's background in Serbia, his mental health, or his intellectual capacity.

Indeed, on Nika's direct appeal, the Nevada Supreme Court, ruling under NRS 177.055(2)(c) that Nika's death sentence was not imposed "under the influence of passion, prejudice or any arbitrary factor," stated:

> NRS 177.055(2)(c) requires this court to review "[w]hether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor." Nika argues that the jury's rejection of any mitigating factors demonstrates that the sentence was imposed under the influence of passion and prejudice. The prosecution argues that the jury's failure to find any mitigating factors resulted from the fact that no mitigating evidence was produced at the sentencing hearing. We conclude that the jury's failure to find any mitigating factors does not prove it acted under the influence of passion or prejudice.
>
> The only mitigating evidence produced by Nika came from his family members, and that testimony was very limited. Rodika, Nika's wife, testified that she believed that Nika was generally a good person, but she also admitted that Nika was violent and had threatened to kill her, her mother, and her father on separate occasions. Dorina Vukadin, Rodika's sister, also testified for the defense. She stated that Nika played sports with her children and that her children liked him, but also that he was a stern disciplinarian. She also stated that he sometimes exposed her children to violent movies and television programs. Anna, Nika's mother-in-law, testified for the prosecution, and her testimony was primarily concerned with Nika's death threats against her and members of her family. On cross-examination, the only positive statement she made regarding Nika was that Nika and Rodika's child loved Nika. We conclude, therefore, that the jury could reasonably have found that the mitigating circumstances did not outweigh the aggravating circumstances and that the sentence of death was not imposed under the influence of passion, prejudice or any arbitrary factor.

Nika, 113 Nev. at 1439-40, 951 P.2d at 1057.

About six years before Nika's trial, the American Bar Association published "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases" ("Guidelines"), and those have been generally accepted as reflecting standards of practice in death penalty cases. *See* Guidelines, Petitioner's Exh. 122 (ECF No. 36-3); *see also Padilla v. Kentucky*, 559 U.S. 356, 366-67 (2010) ("We long have recognized that '[p]revailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable ....'") (quoting *Strickland*, 466 U.S. at 688); *Porter*, 558 U.S. at 39-40 ("It is unquestioned that under the prevailing professional norms at the time of Porter's trial [in 1988], counsel had an 'obligation to conduct a thorough investigation of the defendant's background.'") (quoting *Williams*,

529 U.S. at 396). Under the Guidelines, "[t]he investigation for preparation of the sentencing phase ... should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." Guidelines, Petitioner's Exh. 122, Guideline 11.4.1 (ECF No. 36-3, p. 14). The Guidelines suggest that defense counsel should develop mitigating evidence regarding the client's background, including medical history (including mental and physical illness or injury, alcohol and drug use, birth trauma, and developmental delays), educational history, special education needs (including cognitive limitations and learning disabilities), military history, employment and training history, family and social history (including physical, sexual or emotional abuse), adult and juvenile record, correctional experience, and religious and cultural influences. *See id.* (ECF No. 36-3, p. 15); *see also id.*, Guidelines 11.8.3, 11.8.6 (ECF No. 36-3, pp. 24-27).

Nika grew up in Vladimirovac, Serbia. He was nineteen years old when he moved to the United States. His entire biological family and all the records related to his childhood remained in Serbia. He had only been in the United States, and had only known his wife and her family, for about five years at the time of his arrest. Yet, Nika's trial counsel obtained no mitigation evidence regarding his background in Serbia.

Nika has presented in this case extensive detailed evidence showing the sort of mitigation evidence that could have—and should have—been developed and presented in the penalty phase of his trial. This is information about Nika that was left unknown to the jury that sentenced him to death.

Nika has presented evidence demonstrating that several of Nika's family members and acquaintances in Serbia would have been willing to testify on his behalf, including his brothers Sveta and Dejan, his sister-in-law Anka, his aunts Bobica and Maria, his uncles Bosko and Gusti, his cousin Strugerel, childhood friends, a teacher, and others. Nika has also shown that his trial counsel could have found, in Serbia, mitigating military records, school records, and photographs. And, Nika has shown that

if his trial counsel had retained an appropriate expert, they could have developed mitigating evidence regarding Nika's mental health and intellectual capacity.

Nika, known as "Vinetu" among his friends and in Serbia, is Roma ("Gypsy"). During his childhood in Serbia, the Roma there were marginalized; they were considered to be of low social status, were discriminated against, and were typically poor. *See* Declaration of Elena Damijan, Petitioner's Exh. 78, ¶ 2 (ECF No. 21-1); Declaration of Petar Trifu, Petitioner's Exh. 79, ¶¶ 4, 5 (ECF No. 21-2); Declaration of Dejan Nika, Petitioner's Exh. 80, ¶¶ 3, 13 (ECF No. 21-3); Declaration of Marin Topale, Petitioner's Exh. 85, ¶ 10 (ECF No. 22-2); Declaration of Rodika Nika, Petitioner's Exh. 142, ¶ 7 (ECF No. 39-5).

The evidence presented by Nika shows that he grew up in terrible poverty. He lived for about the first seven years of his life, with his family, in a small one-room, packed-earth house, with no electricity or running water. Nika's family burned manure to heat their home, and when it rained the roof leaked. Nika's family sometimes was without enough food, and at times Nika had to beg and scavenge for food. Both Nika's parents worked long hours, and the children, including Nika, began working from a young age. The family's poverty limited the education available to Nika and his brothers. *See* Declaration of Petar Trifu, Petitioner's Exh. 79, ¶ 11 (ECF No. 21-2); Declaration of Dejan Nika, Petitioner's Exh. 80, ¶¶ 6, 8 (ECF No. 21-3); Declaration of Izjava Sevke Milosevic, Petitioner's Exh. 81, ¶ 2 (ECF No. 21-4); Declaration of Marija Miklesku, Petitioner's Exh. 83, ¶¶ 5, 6 (ECF No. 21-6); Declaration of Strugerel Miklesku, Petitioner's Exh. 89, ¶ 3 (ECF No. 22-6); Declaration of Sveta Nika, Petitioner's Exh. 90, ¶¶ 4, 5, 7 (ECF No. 23); Declaration of Izjava-Sorin Olar, Petitioner's Exh. 91, ¶¶ 3, 4 (ECF No. 23-2); Declaration of Tammy R. Smith, Petitioner's Exh. 141, ¶¶ 3-7 (ECF No. 39-4); Declaration of Rodika Nika, Petitioner's Exh. 142, ¶¶ 21-24 (ECF No. 39-5).

Nika's evidence shows that his father, Avram, was an alcoholic who cheated on, and physically abused, Nika's mother. The evidence also shows that Nika and his brothers suffered ruthless physical abuse by their father. Nika's father eventually quit

drinking, but the beatings continued. *See* Declaration of Petar Trifu, Petitioner's Exh. 79, ¶ 8 (ECF No. 21-2); Declaration of Dejan Nika, Petitioner's Exh. 80, ¶¶ 9, 10 (ECF No. 21-3); Declaration of Makas "Gusti" Konstandin, Petitioner's Exh. 82, ¶¶ 7, 8 (ECF No. 21-5); Declaration of Marija Miklesku, Petitioner's Exh. 83, ¶¶ 3, 4 (ECF No. 21-6); Declaration of Nedelka "Bobica" Konstandinov and George "Bosko" Konstantin, Petitioner's Exh. 86, ¶ 11 (ECF No. 22-3); Declaration of Strugerel Miklesku, Petitioner's Exh. 89, ¶ 4 (ECF No. 22-6); Declaration of Sveta Nika, Petitioner's Exh. 90, ¶¶ 8-15 (ECF No. 23); Declaration of Rodika Nika, Petitioner's Exh. 142, ¶ 26 (ECF No. 39-5).

Nika's evidence shows that his intellectual capacity was limited from a very early age, and that he was exposed to a number of risk factors for brain damage including low birth weight, malnutrition, exposure to pesticides, exposure to lead, and head trauma. *See* Declaration of Anka Nika, Petitioner's Exh. 77, ¶ 4 (ECF No. 20-6); Declaration of Dejan Nika, Petitioner's Exh. 80, ¶¶ 13, 14 (ECF No. 21-3); Declaration of Sveta Nika, Petitioner's Exh. 90, ¶¶ 5, 7, 20 (ECF No. 23). Nika attended school only through the eighth grade and barely received passing grades. *See* School Records, Petitioner's Exh. 94 (ECF No. 23-5); School Records, Petitioner's Exh. 123 (ECF No. 36-4). If trial counsel had inquired of Nika's wife, Rodika, they would have discovered that she thought Nika to be of extremely low intelligence:

> Avram was always very gullible and easily frustrated. He was unable to see the subtleties in anything. He had very minimal intellectual capabilities. On a scale from one to ten, with ten being the most intelligent, Avram was a two, and that's being generous.... [H]e never was able to fill out paperwork for himself so I had to do all of that for him.

Declaration of Rodika Nika, Petitioner's Exh. 142, ¶ 9 (ECF No. 39-5, p. 3).

Nika has presented a neuropsychological evaluation, by Tatjana Novakovic-Agopian, Ph.D., who concluded:

> Mr. Nika's performance on the current neuropsychological evaluation, administered in his native language (Serbian), indicated that he has significant cognitive difficulties which were particularly prominent in the domains of memory, executive functioning and language-based tasks. His performance was impaired, at the lowest 1st and 2nd percentile of his age group, on tasks requiring him to learn and recall new information, particularly when presented in the verbal modality. He showed evidence of

> concrete thinking, mental inflexibility, and decreased problem solving and planning, particularly for novel and more complex tasks, and performed in the lowest 2nd to 5th percentile of his age group on tests assessing the above domains.

Neuropsychological Evaluation, Petitioner's Exh. 76, p. 11 (ECF No. 20-5, p. 12).

Dr. Novakovic-Agopian also wrote:

> Executive control functioning is typically defined as functions guiding goal directed behavior, including planning, problem solving (particularly in novel complex situations), self monitoring, mental flexibility, and being able to consider alternatives. Individuals with executive dysfunction may exhibit difficulties in one or more of these areas. These can be particularly pronounced when confronted with a stressful situation. In such cases these individuals may feel overwhelmed, not be able to comprehend and process the aspects of the situation, and act impulsively.
>
> On the current neuropsychological evaluation, Mr. Nika exhibited several characteristics of executive dysfunction, including concrete thinking, mental inflexibility, and limited planning and problem solving abilities, particularly in novel and more complex situations. Based on available information and the evaluation, these are chronic impairments and would have been present at the time of the offense in August 1994.

Id. at 12-13 (ECF No. 20-5, pp. 13-14).

This Court finds that Nika's trial counsel performed ineffectively in not investigating Nika's background to discover mitigating evidence, such as that described above, and the Court finds, further, that had counsel done so, and presented such mitigating evidence to the jury, there is a reasonable probability that the jury would not have sentenced Nika to death. The jury would have heard of Nika's upbringing as a member of a marginalized group, in abject poverty, in a cold and leaky one-room mud-brick house with no indoor plumbing. The jury would have heard that Nika worked as a child to help support his family and had to beg and scavenge for food. The jury would have heard that Nika's father was an alcoholic for much of Nika's childhood, and that he engaged in extramarital affairs. The jury would have heard that Nika was brutally beaten by his father throughout his childhood. The jury would have heard about Nika's cognitive and impulse-control deficits, and his minimal education. The jury would have heard of Nika's military service. The jury would have heard that, in Serbia, Nika had an extended family and circle of friends that cared about him. In short, available mitigating evidence would have humanized Nika before the jury and would have provided some explanation

for Nika's behavior. It is reasonably probable that such mitigation evidence could have changed the balance of aggravating and mitigating circumstances, or the ultimate sentencing decision, for at least one juror. *See Porter*, 558 U.S. at 39-44; *Wiggins*, 539 U.S. at 537 ("Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance."); *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) ("'[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse'") (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)); *Eddings*, 455 U.S. at 112 (consideration of defendant's life history is "'part of the process of inflicting the penalty of death'"); *Lambright v. Schriro*, 490 F.3d 1103, 1116-28 (9th Cir. 2007). The Court finds that Nika's federal constitutional right to effective assistance of counsel was violated as Nika claims in Ground 1G.

Nika requests discovery and an evidentiary hearing regarding Ground 1G. *See* Motion for Discovery (ECF No. 166), pp. 14-24; Motion for Evidentiary Hearing (ECF No. 168), pp. 5-6. However, as the Court grants Nika relief with respect to Ground 1G without need for further factual development, the Court will deny his requests for discovery and an evidentiary hearing relative to the claim.

Ground 6 - Vienna Convention

In Ground 6, Nika claims that his federal constitutional rights, and his rights under an international treaty and international law, were violated because "[t]he State of Nevada and Mr. Nika's trial counsel failed to inform Mr. Nika that he had a right under Article 36 of the Vienna Convention on Consular Relations to notify Serbian consular officials of his arrest and detention." *See* Second Amended Petition (ECF No. 73), pp. 144-50.

Nika is from Vladimirovac, Serbia. At the time of his arrest and conviction, Nika was a citizen of the Federal Republic of Yugoslavia. The United States and Yugoslavia were signatories to an international treaty known as the 1963 Vienna Convention on Consular Relations ("Vienna Convention"). Nika claims that his rights were violated because the State of Nevada did not notify the Yugoslavian consulate of his arrest, and because he received ineffective assistance of counsel as a result of his trial counsel's failure to notify him of his rights under the Vienna Convention and failure to contact the Yugoslavian consulate.

Nika raised these claims in his first state habeas action, and on his appeal in that action the Nevada Supreme Court ruled as follows:

> Nika argues that the district court erred by dismissing his claim that trial counsel were ineffective for failing to contact the Yugoslavian consulate because had counsel done so, the consulate would have provided "immense help in securing mitigation." [Footnote omitted.] Nika failed to identify what mitigation evidence the consulate could have provided other than to assert that the consulate could have explained that the vulgar name Smith allegedly called Nika would have incited the "reasonable passions of an average, reasonable Romanian, Serbian or Yugoslavian." Nika contends that this evidence would have shown in the guilt phase and penalty hearing that Smith's murder was at most a "heat of passion," impulsive killing. However, we conclude that Nika failed to demonstrate that there was a reasonable probability of a different outcome but for counsel's failure to contact the consulate. The evidence showed that Smith suffered three blunt force trauma wounds and skull fractures on the back of his head, one of which was inflicted while Smith was lying down. Smith also suffered a contact bullet wound to his forehead. These wounds evince a calculated, deliberate act. It is not clear what additional evidence the consulate could have provided or that there was a reasonable probability of a different outcome had evidence of Yugoslavian social mores been obtained. Therefore, we conclude that the district court did not err by summarily dismissing this claim. [Footnote: To the extent Nika argued that officials failed to contact the Yugoslavian consulate in violation of international law, this claim was appropriate for direct appeal, and we conclude that he failed to demonstrate good cause for his failure to raise it previously or prejudice. *See* NRS 34.810(1)(b). Therefore, the district court did not err by summarily dismissing this claim.]

Nika, 124 Nev. at 1294-95, 198 P.3d at 854-55. Two justices dissented from this ruling:

> ... I believe that trial counsel were ineffective for not seeking assistance from the Yugoslavian consulate to unearth mitigation evidence. The record reveals that Nika is from Romania and spoke only limited English. In my view, educating the jury respecting Nika's cultural background was essential to explaining his character and conduct. The

> absence of this evidence prejudiced Nika because the jury was left with an incomplete depiction of his character.

Nika, 124 Nev. at 1302, 198 P.3d at 859-60 (Cherry, J., with whom Saitta, J., agreed, concurring in part and dissenting in part).

Nika raised these claims again in his second state habeas action. The Nevada Supreme Court held the ineffective assistance of counsel claim to be procedurally barred in that action. *See* Order of Affirmance, Respondents' Exh. 196 (ECF No. 125-4). The Nevada Supreme Court ruled, as follows, that Nika did not make a showing of cause and prejudice to overcome the procedural bar:

> Nika contends that the district court erred in denying his claim that post-conviction counsel were ineffective for failing to engage the services of the Serbian consulate in litigating his prior post-conviction petition. He asserts that the consulate would have paid for a mental health expert, investigated his background in Serbia, and aided witnesses in traveling to testify. He contends that the consulate's assistance would have aided in demonstrating that trial counsel were ineffective for failing to seek the consulate's assistance in litigating the suppression hearing, guilt phase of trial, and the case in mitigation. We conclude that Nika failed to demonstrate prejudice from post-conviction counsels' litigation of this claim. As discussed above, the evidence of Nika's psychological condition was not so persuasive as to undermine the evidence received at the suppression hearing that Nika responded appropriately to questioning and did not seem confused or incapable of waiving his right to remain silent. As to the guilt phase of trial, evidence of his cognitive disorder was not so persuasive that it would undermine the physical evidence demonstrating that the murder was calculated and deliberate. Lastly, Nika did not demonstrate that any mitigation evidence that the consulate could have aided in producing would have had an effect on the outcome of the penalty hearing. Therefore, the district court did not err in denying this post-conviction-counsel claim. [Footnote: Nika argues that he never received a full and fair opportunity to litigate his claims of ineffective assistance of trial counsel because the district court denied his petition without conducting an evidentiary hearing. As his claims of ineffective assistance of post-conviction counsel and trial counsel lack merit, the district court did not err in not conducting an evidentiary hearing.]

Id. at 20-21 (ECF No. 125-4, pp. 21-22).

Nika's claim in Ground 6 that his rights were violated because the State did not contact the Yugoslavian consulate or notify him of his rights under the Vienna Convention was, in Nika's first state habeas action, ruled procedurally barred in state court and is therefore subject to the procedural default doctrine in this case. Nika has not made any showing of cause and prejudice, or any other showing, to overcome this

procedural default. This part of Ground 6 will be denied on the ground of procedural default.

On the other hand, regarding the claim of ineffective assistance of trial counsel in Ground 6, the Court determines that Nika has made a showing sufficient to overcome the procedural bar of that claim. In *Martinez*, the Supreme Court ruled that ineffective assistance of post-conviction counsel may serve as cause, to overcome the procedural default of a claim of ineffective assistance of trial counsel. *Martinez*, 566 U.S. at 8-9. If the petitioner shows that his counsel was inadequate in the initial collateral review proceeding in state court, the petitioner can overcome the procedural default; to do so, the petitioner must establish that the claim of ineffective assistance of trial counsel is substantial and that post-conviction counsel was ineffective. *Martinez*, 566 U.S. at 16-17. In Nika's first state habeas action, his post-conviction counsel asserted the claim that Nika's trial counsel was ineffective for not contacting the consulate. However, while Nika's first post-conviction counsel did contact the Serbian consulate at Nika's request and had perfunctory communications with the consulate, counsel did not request any assistance from the consulate, and did not take any action to develop evidence to show what assistance the consulate could have provided to Nika's trial counsel. *See* Letter from Nika to Counsel, August 14, 2001, Petitioner's Exh. 163 (ECF No. 73-2, p. 150); Letter from Counsel to Serbian Embassy, August 21, 2001, Petitioner's Exh. 164 (ECF No. 73-2, pp. 152-53); Declaration of Dejan Radulovic, Acting Consul General of the Republic of Serbia in Chicago, Petitioner's Exh. 194 (ECF No. 132-18). The Court finds Nika's post-conviction counsel's performance to be unreasonable in this respect. And, as is discussed below, Nika's ineffective assistance of trial counsel claim in Ground 6 is meritorious; had Nika's post-conviction counsel requested assistance from the consulate, they would have found that the consulate could have provided valuable assistance regarding Nika's case in mitigation. Under *Martinez*, Nika overcomes the procedural default of the ineffective assistance of trial counsel claim in Ground 6, and

the Court proceeds to consider the merits of that claim de novo. *See Cone*, 556 U.S. at 472; *Porter*, 558 U.S. at 39.

Respondents argue that Ground 6—apparently including the ineffective assistance of trial counsel claim—is not cognizable in this federal habeas corpus action because "[t]he Supreme Court has never clearly established that the Vienna Convention creates judicially enforceable private rights as opposed to public rights enforceable by signatory nations to the treaty." Answer (ECF No. 160), pp. 42-43. This argument, in this Court's view, may apply to the claim that the State violated Nika's rights under the treaty, but, as that claim is denied as procedurally defaulted, the Court need not resolve the issue. On the other hand, this argument does not apply to Nika's claim that his right to effective assistance of trial counsel was violated. Nika's claim is that his trial counsel should have known of the Vienna Convention and should have contacted the Yugoslavian consulate on his behalf; such a claim does not turn on the existence of private rights enforceable under the Vienna Convention. The Supreme Court cases cited by Respondents—*Medellin v. Texas*, 552 U.S. 491 (2008), and *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006)—do not involve claims of ineffective assistance of counsel related to the Vienna Convention, and do not preclude Nika's ineffective assistance of counsel claim. *See Sanchez-Llamas*, 548 U.S. at 363-64 & n. 3 (Ginsburg, J., concurring) (noting that the defendant "did not include a Vienna-Convention-based, ineffective-assistance-of-counsel claim along with his direct Vienna Convention claim in his initial habeas petition"); *Osiagiede v. United States*, 543 F.3d 399, 406-08 (7th Cir. 2008).

The Court finds that Nika's trial counsel's performance, in not advising Nika of his rights under the Vienna Convention and in not contacting the Yugoslavian consulate, was objectively unreasonable.

In 1994 and 1995, when Nika was arrested and tried, the United States had been a signatory to the Vienna Convention for some 25 years. At that time, Yugoslavian consular services were available in the United States, at the Yugoslavian embassy in

Washington D.C. (For this reason, the Court uses the terms "consulate" and "embassy" interchangeably in referring to the location where Yugoslavian consular services were available in 1994 and 1995.). According to Desko Nikitovic, who was Serbia's Consul General in 2010:

> Within the period when Mr. Nika was tried for allegedly committing acts (1994-95), the Republic of Serbia and the Federal Republic of Yugoslavia, of which Serbia was a part, had an Embassy in Washington which could deal with consular protection of its citizens. Because of the known circumstances in the relations between the two countries, the Embassy was represented at the level of the Charge d'Affere, but the consular operations operated smoothly.

Letter from Desko Nikitovic, Consul General of the Republic of Serbia, to Counsel, February 3, 2010, Petitioner's Exh. 124 (ECF No. 36-5, p. 2); *see also* Declaration of Dejan Radulovic, Acting Consul General of the Republic of Serbia in Chicago, Petitioner's Exh. 161 (ECF No. 73-2, pp. 143-44); Declaration of Milutin Novovic, Petitioner's Exh. 162 (ECF No. 73-2, pp. 146-48).

When Nika's trial counsel took his case over from the Washoe County Public Defender's Office, there was a memorandum in the file, stating:

> In talking to Mansure [an interpreter], he tells me that all Yugoslav Embassys are closed in this country except perhaps one in Los Angeles and for certain one in Washington, D.C. I need to have some contact through the diplomatic services to the Yugoslav Embassy where ever to determine if we can find a court fluent interpreter. This is vital as using Mansure will require one sentence at a time proceeding.

Request for Investigation, Petitioner's Exh. 95 (ECF No. 23-6). The evidence indicates, however, that Nika's trial counsel never contacted the Yugoslavian consulate about finding an interpreter, or for any other purpose.

In 2010, in a letter to Nika's counsel, Desko Nikitovic, the Consul General of the Republic of Serbia, wrote the following about what the consulate could have done to assist with Nika's defense:

> [I]n the event that the attorneys for Mr. Nika addressed the Embassy, they would have been able to obtain assistance in the sense that they would have been able to contact the parents and relatives of Mr. [Nika] as well as the competent authorities of the Republic of Serbia and inform them about this case. Also, the Embassy could have requested

> additional information in possession of those authorities, and submit the data to Mr. [Nika's] attorneys.

Letter from Desko Nikitovic, Consul General of the Republic of Serbia, to Counsel, February 3, 2010, Petitioner's Exh. 124 (ECF No. 36-5, p. 2). In a declaration executed in 2015 the then acting Consul General of the Republic of Serbia, Dejan Radulovic, stated:

> The Ministry [of Foreign Affairs] is not aware of any other instance, anywhere in the world, in which a [Federal Republic of Yugoslavia ("FRY")] or Serbian national has been subjected to a capital sentence. But in other cases involving potentially long terms of incarceration, the country has provided significant funding for the accused's legal team, monitored ... the legal team's effectiveness, assisted in arranging psychosocial and medical evaluations and treatment, as well as interpretation and translation services, and supported the gathering of evidence from family and authorities in Serbia. The Ministry would have worked with the Embassy in Washington to provide these services to Mr. Nika if we had been notified of his arrest in 1994.

Declaration of Dejan Radulovic, Acting Consul General of the Republic of Serbia in Chicago, Petitioner's Exh. 161, p. 2 (ECF No. 73-2, p. 144). Milutin Novovic, who served as a consular officer at the Yugoslavian embassy, in Washington D.C., from 1991 to 1996, states in a declaration:

> If I had been informed that Mr. Nika suffers from a neuropsychological condition, or if consular staff observed or otherwise learned of such a condition, the Embassy would have taken steps to have Mr. Nika evaluated by a culturally competent specialist.
>
> * * *
>
> Had his counsel requested assistance in securing documentary or physical evidence in the FRY, the Embassy would have provided that assistance. Further, it would have facilitated communication with Mr. Nika's family in the FRY.

Declaration of Milutin Novovic, Petitioner's Exh. 162, p. 2 (ECF No. 73-2, pp. 147).

After Nika's current counsel contacted the Serbian consulate and requested assistance, Serbian officials: facilitated interviews with family and friends of Nika in Serbia; obtained Nika's school, medical and military records; helped secure a neuropsychological evaluation by a culturally competent expert; met with Nika on numerous occasions; filed amicus pleadings in state and federal court; attended court hearings; provided translation and interpretation assistance; put Nika's counsel in touch

with a former consular affairs officer; and provided additional information regarding Roma culture. *See* Amicus Brief of the Republic of Serbia (ECF No. 72), p. 6. "Serbia has worked closely with Mr. Nika's counsel to collect a substantial amount of evidence relevant to understanding Mr. Nika's life history and behavior before, during, and after his arrest." *Id*. at 7. With the assistance of the Serbian consulate, Nika's counsel has developed significant mitigation evidence concerning Nika's childhood and background in Serbia and his neuropsychological condition. *See* Discussion of Ground 1G, *supra*; *see also* Neuropsychological Evaluation, Petitioner's Exh. 76 (ECF No. 20-5); Declaration of Anka Nika, Petitioner's Exh. 77 (ECF No. 20-6); Declaration of Elena Damijan, Petitioner's Exh. 78 (ECF No. 21-1); Declaration of Petar Trifu, Petitioner's Exh. 79 (ECF No. 21-2); Declaration of Dejan Nika, Petitioner's Exh. 80 (ECF No. 21-3); Declaration of Izjava Sevke Milosevic, Petitioner's Exh. 81 (ECF No. 21-4); Declaration of Makas "Gusti" Konstandin, Petitioner's Exh. 82 (ECF No. 21-5); Declaration of Marija Miklesku, Petitioner's Exh. 83 (ECF No. 21-6); Declaration of Izjava Mile Popovica, Petitioner's Exh. 84 (ECF No. 22); (Declaration of Marin Topale, Petitioner's Exh. 85 (ECF No. 22-2); Declaration of Nedelka "Bobica" Konstandinov and George "Bosko" Konstantin, Petitioner's Exh. 86 (ECF No. 22-3); Statement from Jelena Sekesan and Pauna Sekesan, Petitioner's Exh. 87 (ECF No. 22-4); Declaration of Strugerel Miklesku, Petitioner's Exh. 89 (ECF No. 22-6); Declaration of Sveta Nika, Petitioner's Exh. 90 (ECF No. 23); Declaration of Izjava-Sorin Olar, Petitioner's Exh. 91 (ECF No. 23-2); Declaration of Adam Steflja and Darinka Steflja, Petitioner's Exh. 92 (ECF No. 23-3); Military Booklet, Petitioner's Exh. 93 (ECF No. 23-4); School Records, Petitioner's Exh. 94 (ECF No. 23-5); School Records, Petitioner's Exh. 123 (ECF No. 36-4); Letter from Desko Nikitovic, Consul General of the Republic of Serbia, to Counsel, February 3, 2010, Petitioner's Exh. 124 (ECF No. 36-5, p. 2); Declaration of Tammy R. Smith, Petitioner's Exh. 141 (ECF No. 39-4).

The Court finds that Nika's trial counsel unreasonably failed, before trial, to advise Nika of his rights under the Vienna Convention and to contact the Yugoslavian

consulate, and that, if Nika's trial counsel had contacted the Yugoslavian consulate before trial, and had, with the assistance of the consulate, developed evidence for presentation in mitigation in the penalty phase of Nika's trial, there is a reasonable probability that the outcome of the penalty phase of Nika's trial would have been different, that is, that the jury would not have imposed the death sentence. Therefore, with respect to the penalty phase of his trial, the Court finds that Nika's federal constitutional rights were violated because he received ineffective assistance of trial counsel, as a result of his trial counsel's failure to inform him of his rights under the Vienna Convention and contact the Yugoslavian consulate on his behalf.

Regarding the guilt phase of his trial, on the other hand, the Court finds, in view of the strong evidence against Nika, that Nika has not shown a reasonable probability of a different result had trial counsel informed him of his rights under the Vienna Convention or contacted the Yugoslavian consulate on his behalf. The Court denies Nika relief on Ground 6 with respect to the guilt phase of his trial.

Nika requests an evidentiary hearing with regard to the ineffective assistance of counsel claims in Ground 6. *See* Motion for Evidentiary Hearing (ECF No. 168), pp. 5-6. The Court grants relief on this claim with regard to the penalty phase of Nika's trial, without need for further factual development. And, regarding the ineffective assistance of counsel claim in Ground 6 relative to the guilt phase of Nika's trial, the Court finds the request for an evidentiary hearing to be insubstantial. Nika's request does not identify any particular question of fact to be resolved, and he gives no indication what sort of evidence he would offer. Nika's motion for an evidentiary hearing regarding Ground 6 will be denied.

The Constitutional Errors Relative to the Penalty Phase of Nika's Trial Were Not Harmless.

In order to obtain habeas corpus relief, the petitioner must show that constitutional errors caused "actual prejudice" or had "substantial and injurious effect or influence" in determining the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637

(1993) (citation omitted). "While the combined effect of multiple errors may violate due process even when no single error amounts to a constitutional violation or requires reversal, habeas relief is warranted only where the errors infect a trial with unfairness." *Peyton v. Cullen*, 658 F.3d 890, 896–97 (9th Cir. 2011) (citing *Chambers v. Mississippi*, 401 U.S. 284, 298, 302–03 (1973)). Nika meets this standard.

The errors identified by Nika in Grounds 1G and 6—ineffective assistance of counsel on account of trial counsel's failure to develop mitigating evidence concerning Nika's background and mental deficiencies, and on account of trial counsel's failure to inform him of his rights under the Vienna Convention and contact the Yugoslavian consulate on his behalf—go hand in hand. The result of both was the meager case in mitigation presented by the defense in the penalty phase of Nika's trial. As the Nevada Supreme Court recognized on Nika's direct appeal, only very limited mitigating evidence was presented on Nika's behalf. *See Nika*, 113 Nev. at 1439-40, 951 P.2d at 1057. There was essentially no mitigating evidence presented concerning Nika's background in Serbia and his neuropsychological condition. Nika has demonstrated that there was significant such mitigating evidence available, and that the available evidence was strong enough to have made a difference had Nika's counsel discovered it and presented it.

The jury found one aggravating circumstance: that the murder was committed at random and without apparent motive. *See* Verdict, Respondents' Exh. 50 (ECF No. 108-5). This Court finds that the weight of that aggravating circumstance was not great. Contrary the language of the aggravating circumstance, the murder in this case was not "random" and "without apparent motive" as those terms would normally be understood. Rather, it is undisputed that after the victim was killed, Nika took his car. However, the trial court instructed the jury that, under Nevada law, "[a] murder may be random and without apparent motive if the killing of a person was not necessary to complete a robbery." Penalty Phase Jury Instructions, Respondents' Exh. 48, Instruction No. 14 (ECF No. 108-3, p. 15). So, while any murder is an egregious crime, the one

aggravating circumstance found in this case was not one that made this murder far more egregious than other first-degree murders committed in conjunction with a theft.

Cognizant of the nature and weight of the one aggravating circumstance found by the jury, the Court finds that the failure of Nika's counsel to develop mitigating evidence concerning his background and mental deficits, and their failure and to inform Nika of his rights under the Vienna Convention and to contact the Yugoslavian consulate on his behalf, had a substantial and injurious effect in determining the jury's verdict imposing the death penalty. And, moreover, the effect of these errors on the part of Nika's counsel was exacerbated by the *Mills* error identified in Ground 7B. Because so little mitigating evidence was presented by counsel, and because the *Mills* error likely prevented the jury from weighing even that mitigating evidence against the aggravating circumstance unless the jurors unanimously agreed upon the existence of a mitigating circumstance, there ended up being little chance that any mitigating evidence at all was weighed against the aggravating circumstance.

In sum, the Court determines that the constitutional errors identified in Grounds 1G, 6 (the ineffective assistance of trial counsel with respect to the penalty phase of the trial) and 7B infected the penalty phase of Nika's trial with unfairness. The Court will, therefore, grant Nika habeas corpus relief, with respect to his death sentence, on Grounds 1G, 6 and 7B.

Nika's Other Claims

The Court denies Nika habeas corpus relief with respect to his other claims, as is discussed below.

Ground 3 - The Aggravating Circumstance

In Ground 3, Nika claims that his federal constitutional rights were violated "due to the jury's finding the statutory aggravating circumstance that the murder was committed at random and without apparent motive, which is facially unconstitutional and invalid as applied to Mr. Nika." *See* Second Amended Petition (ECF No. 73), pp. 111-19.

In the penalty phase of Nika's trial, the jury was instructed that first-degree murder could be aggravated, rendering Nika eligible for the death penalty, if the jury found that "[t]he murder was committed upon Edward V. Smith at random and without apparent motive." Penalty Phase Jury Instructions, Respondents' Exh. 48, Instruction No. 12 (ECF No. 108-3, p. 13). The jury was further instructed:

> A murder may be random and without apparent motive if the killing of a person was not necessary to complete a robbery.

Id., Instruction No. 14 (ECF No. 108-3, p. 15). The jury returned a verdict finding this aggravating circumstance and imposing the death penalty. *See* Verdict, Respondents' Exh. 50 (ECF No. 108-5). The jury did not find the murder to be aggravated as committed in the course of a robbery or attempted robbery. *See id.*

Nika asserted this claim on his direct appeal, and the Nevada Supreme Court denied the claim, stating in a divided opinion that Nika "fails to raise an issue not previously addressed by this court in its numerous other opinions upholding the constitutionality of NRS 200.033(9)," and declining to revisit the issue. *See* Opinion, Respondents' Exh. 81, p. 15 (ECF No. 111-5, p. 16) (citing *Lane v. State*, 110 Nev. 1156, 881 P.2d 1358 (1994); *Paine v. State,* 110 Nev. 609, 877 P.2d 1025 (1994), *cert. denied*, 514 U.S. 1038 (1995); *Bennett v. State*, 106 Nev. 135, 787 P.2d 797 (1990); *Moran v. State*, 103 Nev. 138, 734 P.2d 712 91987); and *Ford v. State*, 102 Nev. 126, 717 P.2d 27 (1986)). The Nevada Supreme Court ruled, further, that the evidence supported application of the aggravator because the jury could have found that the killing was not necessary to complete a robbery. *See id.* at 16-18 (ECF No. 111-5, pp. 17-19) (citing *Lane*, *supra*; *Paine*, *supra*; *Bennett*, *supra*; and *Moran*, *supra*). One justice concurred, stating his opinion that the aggravator could have properly applied whether or not the jury found that a robbery occurred. *See id.*, Maupin, J., concurring (ECF No. 111-5, pp. 24-25). One justice dissented, stating his opinion that the evidence did not support a finding that the murder was random and without motive, because there was evidence that Nika killed Smith out of anger or to commit a robbery. *See id.*, Springer,

J., dissenting (ECF No. 111-5, pp. 26-31). Another justice dissented, stating his opinion that NRS 200.033(9) should not be applied in the context of a robbery where a jury finds the killing unnecessary for the robbery, that the jury instructions should define the terms "random," "apparent," and "motive" consistent with their usual meanings, and that it was improper for the State to argue during the guilt phase of the trial that Nika acted with a motive—anger or robbery—and then argue during the penalty phase that he acted without a motive. *See id.*, Rose, J., dissenting (ECF No. 111-5, pp. 36-41).

Nika also asserted this claim in his first state habeas action. In that action, the Nevada Supreme Court again denied relief on the claim, distinguishing Nika's case from the case of *Leslie v Warden*, 118 Nev. 773, 59 P.3d 440 (2002), in which—after Nika's direct appeal but before the appeal in his first state habeas action—the Nevada Supreme Court disavowed the jury instruction applying the aggravator where a killing was unnecessary to complete a robbery, and ruled that the "aggravator only applies to situations in which the defendant selected his victim without a specific purpose or objective and his reasons for the killing are not obvious or easily understood." *Leslie*, 118 Nev. at 782, 59 P.3d at 446. The Nevada Supreme Court stated that the concerns expressed in *Leslie* are not present in Nika's case, because Nika was not charged with robbery and the jury rejected the robbery aggravator, and because the evidence in Nika's case supported the finding that Nika murdered Smith at random and without apparent motive, unrelated to the taking of Smith's property. The court concluded:

> Although *Leslie* altered the scope of the challenged aggravator, Nika fails to persuade us that the doctrine of the law of the case should be abandoned under the particular facts of his case. Consequently, we conclude that the district court did not err by summarily dismissing this claim.

Nika, 124 Nev. at 1298-1300, 198 P.3d at 857-58.

An aggravating circumstance must "genuinely 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." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). To do so, the aggravating circumstance "may not

apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder." *Tuilaepa v. California*, 512 U.S. 967, 972 (1994). And, it must not be unconstitutionally vague. *Id*.

The Court determines that the Nevada Supreme Court's denial of this claim was not contrary to, or an unreasonable application of, Supreme Court precedent and was not based on an unreasonable determination of the facts in light of the evidence. The Court finds that it was not unreasonable for the Nevada Supreme Court to conclude that the aggravator was not unconstitutionally vague, and that it narrowed, at least somewhat, the range of murders to which the death penalty applied. The terms "random" and "apparently without motive" do not necessarily need definition to be understandable. And, as the Nevada Supreme Court ruled on the appeal in Nika's first state habeas action, in view of the evidence at trial, the jury could have found that the murder was unnecessary for the commission of a robbery, and was "random and apparently without motive" as defined for the jury under Nevada law.

With respect to Nika's other arguments—that the application of the aggravator violated his constitutional right of equal protection under the law, that the aggravator subjects less culpable murders to the death penalty, and that the aggravator results in an unconstitutional shift of the burden of proof—Nika does not show the Nevada Supreme Court's rejection of any of those theories to have been contrary to, or an unreasonable application of, Supreme Court precedent.

The Court will deny Nika relief with respect to Ground 3.

Grounds 1C and 5 - Nika's Statements to the Police

In Ground 5, Nika claims that his federal constitutional rights were violated "due to the improper admission of Mr. Nika's custodial incriminating statements in violation of *Miranda v. Arizona.*" *See* Second Amended Petition (ECF No. 73), pp. 128-43. In Ground 1C, Nika claims that his federal constitutional rights were violated as a result of ineffective assistance of his trial counsel because "[t]rial counsel were ineffective in litigating the motion to suppress Mr. Nika's statements to police." *See id*. at 53-62.

Nika made incriminating statements on three occasions. On August 29, 1994, upon his arrest in Chicago, Nika made statements to Chicago police detectives, in which he repeatedly changed his story about how he came to possess the victim's car. The next day, August 30, 1994, Nevada police officers arrived in Chicago and questioned Nika, and he again made inconsistent statements and an admission. Then, two days later, on September 2, 1994, when he was being booked into the Washoe County Detention Center, after he was returned to Nevada, Nika made an admission in a response to a question asked by the jail booking officer. Evidence of the first and third of these statements was admitted into evidence in the guilt phase of Nika's trial. *See* Second Amended Petition (ECF No. 73), pp. 128-29, 136. The trial court suppressed evidence of the second of Nika's statements, the statement made to the Nevada police officers in Chicago. *See id*. at 136.

A person subjected to custodial interrogation must be advised that "he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). "To admit an inculpatory statement made by a defendant during custodial interrogation, the defendant's waiver of *Miranda* rights must be voluntary, knowing, and intelligent." *United States v. Shi*, 525 F.3d 709, 727 (9th Cir. 2008) (internal quotation marks and citation omitted). In determining the knowing and intelligent nature of the waiver, courts are to consider the totality of the circumstances. *See United States v. Crews*, 502 F.3d 1130, 1140 (9th Cir. 2007); *United States v. Gamez*, 301 F.3d 1138, 1144 (9th Cir. 2002). "[T[he waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). With respect to the voluntariness of the waiver, "the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Id*.

On Nika's direct appeal, the Nevada Supreme Court ruled, sua sponte, as follows, with respect to the statements Nika made to the officer at the Washoe County jail:

> On September 1, 1994, after being extradited to Nevada from Illinois, Nika was booked into the Washoe County jail. The following day, Washoe County Deputy Colleen Villa called Nika aside. Villa worked in the county jail's classification unit and it was her job to place prisoners in an environment where they did not present a danger to themselves or others. To facilitate the placement process, Villa asked every prisoner a series of questions from a pre-printed questionnaire. One of the questions on the form was, "Have you ever assaulted or battered anyone?" When Villa asked Nika this question, he answered that he had fought with a man one evening around 9 p.m. or 9:30 p.m. and that the man was dead. Nika also stated that a gun was placed to a head, but Villa was unsure of who placed the gun to whose head. Nevertheless, Villa did not pursue the answer nor ask for a clarification from Nika. She merely continued down the list of questions on the form.
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> The dissent contends that because Villa knew Nika was arrested for murder, she would reasonably foresee the questionnaire would elicit an incriminating response from Nika; and therefore, she engaged in a custodial interrogation by merely reading the questionnaire. Taken a step further, if Villa knew nothing about Nika, the exact same question would not be a custodial interrogation under this analysis. We find this factual distinction unpersuasive. Villa asked the same questions of every prisoner. Villa testified she never asked for clarification from a prisoner nor did she do anything other than move on to the next question. Interestingly, when Nika's counsel was questioned as to why this issue was not raised on appeal, he stated Nika conceded it was merely routine questioning for the purpose of classification and not a custodial interrogation.
>
> Moreover, the safety of prisoners in custody is the purpose behind these questions. There is no getting around this type of question when trying to determine the threat, if any, a particular prisoner may pose to another. While the State can control many things, it cannot control what a prisoner might say when asked a particular question. Therefore, the district court did not err in determining that no custodial interrogation occurred.

Nika, 113 Nev. at 1438-39, 951 P.2d at 1056-57. A dissenting justice wrote that, in his opinion, the questioning of Nika at the Washoe County jail was an interrogation, subject to the *Miranda* rule, and it was a violation of Nika's constitutional rights to not exclude Nika's response from evidence. *Id.*, 113 Nev. at 1445-48, 951 P.2d at 1061-63 (Rose, J., dissenting).

Nika then raised this claim in his first state habeas action. *See* Second Supplemental Petition for Writ of Habeas Corpus, Respondents' Exh. 146, pp. 21-36

(ECF No. 119-1, pp. 22-37). The state district court denied the claim (see Order Granting Motion to Dismiss, Respondents' Exh. 150 (ECF No. 120-3)), and the Nevada Supreme Court affirmed without discussion. *Nika*, 124 Nev. at 1291-92, 198 P.3d at 852-53.

The Nevada Supreme Court's ruling that the questioning by the jail booking officer was not an interrogation was not contrary to, or an unreasonable application of, United States Supreme Court precedent, and was not based on an unreasonable determination of the facts in light of the evidence. *See Pennsylvania v. Muniz*, 496 U.S. 582, 600-01 (1990); *Rhode Island v. Innis*, 446 U.S. 291, 298-302 (1980). It was not unreasonable for the Nevada Supreme Court to conclude that the booking officer's questioning was not such that she should have known it to be reasonably likely to elicit an incriminating response from Nika. *See Muniz*, 496 U.S. at 600-01; *Innis*, 446 U.S. at 298-302; *see also* Transcript of Proceedings, June 7, 1995, Respondents' Exh. 23, pp. 147-57 (ECF No. 98-1, pp. 148-58).

Regarding his statements to the Chicago police, Nika claims that his waiver of his *Miranda* rights with respect to those statements was not voluntary, knowing and intelligent, because of his limited English proficiency, limited education, limited contact with the American criminal justice system, and limited cultural awareness. It was not unreasonable for the Nevada Supreme Court to deny relief on this claim. Taking into account the evidence presented in the trial court (*see* Transcript of Proceedings, June 7, 1995, Respondents' Exh. 23, pp. 8-207 (ECF No. 98-1, pp. 9-208); Transcript of Proceedings, June 8, 1995, Respondents' Exh. 24, pp. 3-127 (ECF No. 99-1, pp. 4-128)), and all the circumstances, the Nevada Supreme Court could reasonably have ruled that Nika voluntarily, knowingly and intelligently waived his *Miranda* rights.

Nika claims, in Ground 1C, that his trial counsel were ineffective for failing to argue, in support of the motion to suppress his statements, that Nika could not have voluntarily, intelligently and knowingly waived his *Miranda* rights because of his upbringing in Yugoslavia, his cultural background and his cognitive deficits. *See* Second

Amended Petition (ECF No. 73), pp. 53-62. Nika also claims that his trial counsel were ineffective, with respect to the motion to suppress, because they did not effectively support his contention that that he had poor command of the English language, primarily because they retained an unqualified expert. *See id.*

Nika raised this claim of ineffective assistance of his trial counsel for the first time in state court in his second state habeas action, and it was ruled procedurally barred in that action. *See* Order entered March 16, 2017 (ECF No. 151), pp. 7-8. On the appeal in that action, the Nevada Supreme Court ruled, as follows, that Nika did not make a showing of cause and prejudice, under state law, to overcome the procedural bar:

> Nika contends that trial counsel were ineffective for failing to present the following witnesses to testify during his suppression hearing: (1) an expert witness to testify about cultural differences and his cognitive deficits, (2) lay witnesses to corroborate his poor English skills, (3) an expert familiar with the Yugoslavian legal system to testify that Nika would concede guilt because he feared torture and that Nika should have expected the automatic appointment of counsel in the case of a serious offense, and (4) a Roma cultural expert to demonstrate that Nika perceived that police officers would treat him unfairly as he was Roma. He asserts the district court erred in concluding that post-conviction counsel was not ineffective for failing to litigate this claim of ineffective assistance of trial counsel in an effective manner.
>
> We conclude that Nika failed to demonstrate that he was prejudiced by post-conviction counsels' omission of this trial-counsel claim. Nika's proposed new evidence is unpersuasive because it is largely internally inconsistent as some of that evidence showed that Nika had cognitive difficulties and confessed because he feared torture by the authorities, while other evidence portrayed him as sophisticated enough with the Serbian justice system to expect appointed counsel during his interrogation. The evidence is also inconsistent with the trial record—his proffered fear of torture was undermined by the fact that he made requests for food and cigarettes during the brief interrogation. Therefore, this evidence does not undermine the testimony presented in the trial court that Nika had communicated in English with jail staff, detectives, and another inmate or show that his waiver was not knowing or voluntary. *See Berghuis v. Thompkins*, 560 U.S. 370, 382 (2010) (admitting evidence where the prosecution demonstrates that an accused knowingly and voluntarily waived his right to remain silent). Moreover, there was sufficient evidence apart from the statement to sustain his conviction, including witnesses who placed him in the area of the murder with the victim, the victim's blood on Nika's clothing, the victim's belongings in Nika's possession, and Nika's self-incriminating statements to another inmate. Given these circumstances, we are not convinced that post-conviction counsels' omission of this trial-counsel claim was objectively unreasonable or resulted in prejudice. Therefore, Nika failed to demonstrate that the district court erred in denying this claim.

Order of Affirmance, Respondents' Exh. 196, pp. 7-8 (ECF No. 125-4, pp. 8-9).

This Court agrees with the Nevada Supreme Court's conclusion in this regard. Nika has not shown cause and prejudice, under *Martinez*, with respect to this claim. Nika's counsel in his first state habeas action was not ineffective for not asserting that trial counsel were ineffective with respect to their litigation of the motion to suppress, and Nika was not prejudiced.

Therefore, the Court will deny Nika relief with respect to Grounds 1C and 5.

Nika requests leave of court to conduct discovery regarding Grounds 1C and 5, and he requests an evidentiary hearing regarding Ground 1C. *See* Motion for Discovery (ECF No. 166), pp. 24-29, 47-48; Motion for Evidentiary Hearing (ECF No. 168), p. 12. Regarding Ground 5, as the Court resolves the claim under 28 U.S.C. § 2254(d), the Court will deny Nika's request for factual development regarding the claim. Regarding Ground 1C, Nika proposes discovery with respect to his English proficiency and cultural factors that allegedly affected his waivers, subjects unrelated to the grounds on which the claim is denied. The suggested discovery would have no effect on the Court's resolution of this claim. The Court finds that Nika has not shown good cause for discovery, and the Court will deny this request for discovery on this claim. As for Nika's request for an evidentiary hearing on Ground 1C, the Court finds that request to be insubstantial. Nika mentions Ground 1C only in passing in his motion for evidentiary hearing and does not provide any argument as to what factual issue should be addressed or what sort of evidence he would seek to present. The Court will deny Nika's motions for discovery and an evidentiary hearing with respect to these claims.

Grounds 1F2, 4A and 8 - Nika's Statements to Nathanial Wilson

In Ground 4A, Nika claims that his federal constitutional rights were violated because Nathanial Wilson, acting as an agent of the State, elicited statements from Nika in the Washoe County Jail, without Nika's counsel present, after Nika's right to counsel had attached, and because "[t]he State committed misconduct by failing to disclose an executory promise of benefits made to witness Nathanial Wilson." *See*

Second Amended Petition (ECF No. 73), pp. 120-26. In Ground 8, Nika claims that his federal constitutional rights were violated "due to the trial court's improper, repeated ex parte contacts with the State regarding an executory promise of benefits to State's witness Nathanial Wilson." *See id.*at 160-61. In Ground 1F2, Nika claims that his federal constitutional rights were violated as a result of ineffective assistance of his trial counsel because "[t]rial counsel were ineffective for failing to investigate and present evidence that Nataniel Wilson was acting as an agent of the State, and received benefits in exchange for his testimony." *See id.* at 77-78.

Nika asserted these claims in state court, and the Nevada Supreme Court ruled on them on their merits.

With respect to Nika's claims in Grounds 4A and 8, the state district court held an evidentiary hearing (*see* Transcript of Proceedings, Respondents' Exhs. 122, 123 (ECF Nos. 116-12, 117-1)), and denied the claims, and, on appeal, the Nevada Supreme Court affirmed, ruling as follows:

> Nika claims that the State's use of Wilson, the jailhouse informant, was unconstitutional. The district court held an evidentiary hearing on this claim and rejected it, providing factual findings and legal conclusions. The State has not disputed that Nika could not have raised this issue on direct appeal, apparently because he did not learn of and had no reason to know of the pretrial meetings regarding Wilson until sometime after his appeal was decided. The question is whether the claim warrants any relief. We conclude that it does not.
>
> * * *
>
> Nika's first contention is that the State's use of Wilson violated Nika's Sixth Amendment right to counsel. He cites *Massiah v. United States* [footnote: 377 U.S. 201, 205-07, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964); *see also Fellers v. United States*, 540 U.S. 519, 124 S.Ct. 1019, 157 L.Ed.2d 1016 (2004) (same)], which holds that the Sixth Amendment right to counsel prevents admission of evidence of a defendant's statements which have been deliberately elicited by a government agent after the right has attached. Nika enjoyed such a right when he spoke to Wilson because adversarial proceedings had begun [footnote: *Estelle v. Smith*, 451 U.S. 454, 469-70, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) (stating that the Sixth Amendment right to counsel attaches once adversarial proceedings have been initiated); *see also* U.S. Const. amend VI] and he was represented by the Public Defender. He fails, however, to show that Wilson acted as an agent of the State when he first gained incriminating information from Nika. Determining whether a person acted as a state agent depends on the facts and circumstances of each case

and presents a mixed question of fact and law. [Footnote: *Simmons v. State*, 112 Nev. 91, 99, 912 P.2d 217, 221 (1996).]

Nika speculates that the police "approached" Wilson and "baited" him into eliciting information about Nika. This speculation lacks hard evidence. Nika points out that when Wilson was interviewed on October 11, 1994, he first spoke about another inmate until the interviewing detective expressly asked about Nika. This does not indicate that Wilson was a state agent: he had already talked with Nika and had already told a deputy at the jail that he had information from Nika. Nika points out that the detective did not refuse Wilson's offer to gather more information. In the interview, when Wilson remarked that he could find out more about the gun Nika used, the detective did not respond. This detail is germane to Wilson's status after the interview when he gained further information from Nika; it does not somehow retroactively render him a state agent in his earlier conversations with Nika. Nika also claims that the transcript of the interview is not complete (or that prosecutor Stanton "blatantly lied") because the transcript differs from the description of the interview Stanton gave to the trial court more than two weeks later and because the transcript shows that the detective spoke to Wilson while the tape recorder was off despite stating otherwise. We conclude that these discrepancies are trivial. Nika also stresses that a report by a jail deputy referred to Wilson as "my informant" and speculates that other police reports are missing. But "informant" is not synonymous with "agent," and speculation unsupported by facts is of no value. In the end, Nika presents no proof, most notably no testimony or even affidavit by Wilson, to contradict the evidence that Wilson did not act on behest of the State initially. This evidence includes Wilson's trial testimony, prosecutor Stanton's testimony at the post-conviction hearing and his original representations to the trial court, prosecutor Viloria's post-conviction testimony, and the timing and substance of events in Wilson's own case, discussed below.

Wilson's status after his first interview with the detective and after Stanton ensured that the Public Defender would be discharged and that Wilson would continue to have access to Nika is not so clear. When during the interview Wilson remarked that he could find out more about the gun, he revealed that he thought his role might be to gather more information for officials. Neither the detective nor anyone else dissuaded him from this idea, and his trial testimony indicates that he then actively elicited more information from Nika. Furthermore, when Stanton made sure that Wilson stayed in proximity to Nika, Stanton was aware of Wilson's remark, having observed the interview. Stanton was also aware that the two inmates had formed a relationship in which Nika confided in Wilson. But even assuming these facts establish that after the interview Wilson acted as an agent of the State [footnote: *Cf., e.g., People v. Whitt*, 36 Cal.3d 724, 205 Cal.Rptr. 810, 685 P.2d 1161, 1168-73 (1984) (concluding that though question was close and difficult, inmate informant's conduct was not attributable to the state), *limitation on other grounds recognized by People v. Marquez*, 1 Cal.4th 553, 3 Cal.Rptr.2d 710, 822 P.2d 418 (1992)], Nika was not prejudiced because Wilson obtained the primary incriminating evidence—that Nika admitted in some detail to shooting the victim—before approaching the authorities. The little information that Wilson obtained later, mainly that the murder weapon was an automatic, was insignificant.

Nika also suggests that Stanton made an implicit agreement with Wilson for his testimony without revealing it to the defense or the jury. This

would violate due process under *Brady v. Maryland* [footnote: 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)] and its progeny because acts which imply an agreement or understanding with a witness are relevant to credibility and must be disclosed. [Footnote: *See Giglio v. United States*, 405 U.S. 150, 155, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Jimenez v. State*, 112 Nev. 610, 622, 918 P.2d 687, 695 (1996).] But again Nika fails to provide facts to support his claim. The most that he demonstrates is that according to Stanton's pretrial representation to the trial court, Wilson at his interview "informed the detectives that he would like some consideration for his testimony, although no specifics were given or requested by him." However, prosecutors Stanton and Viloria both testified at the post-conviction hearing that regardless of any expectations on Wilson's part, they neither offered nor provided him with any benefits in exchange for his testimony.

Moreover, the timing and substance of events in Wilson's own case in 1994 repel Nika's assertion that Wilson expected and received leniency in return for his assistance in Nika's case. On September 29, Wilson pleaded guilty to unlawful sale of a controlled substance, having reached a plea agreement requiring the State to concur with the recommendation of the Division of Parole and Probation. About a week passed before Wilson approached officers at the jail, on or around October 7, with information about Nika, and the detective interviewed Wilson on October 11. The Division completed its presentence investigation report on Wilson on November 7, recommending a suspended sentence and probation. In Wilson's statement attached to the report, he proclaimed a general willingness to help police, but nothing in the report noted his assistance in Nika's case. Wilson was sentenced on November 16, more than seven months before Nika's trial, and again his assistance in Nika's case was not raised. Thus, Wilson first offered to give information against Nika only after reaching a plea agreement in his own case, and he testified against Nika long after being sentenced himself.

Nika infers from Stanton's presence at Wilson's sentencing that Stanton must have spoken to District Judge Kosach on Wilson's behalf. No other evidence supports this inference, and Stanton denied it. Stanton did not recall attending the sentencing, but there is no need to assume that he was there to benefit Wilson. It is possible that he attended to ensure that the Public Defender withdrew from representing Wilson and/or to see whether Wilson would be in prison or would have to be subpoenaed to testify at Nika's trial. (Wilson's eventual presence was secured from California by a material witness order and bench warrant.) Regardless, Nika fails to provide any proof that Stanton intervened on Wilson's behalf or that Wilson received any benefit from testifying against Nika.

Next, Nika contends that the pretrial meetings between the trial court, Stanton, and at times the Public Defender violated his due process right to disclosure of exculpatory information and his right to conflict-free counsel. In condemning the meetings, Nika relies again on his claims that Wilson was an agent of and had reached an agreement with the State. These contentions are unavailing. As explained above, Wilson initially acted on his own in gaining the primary incriminating evidence from Nika, the Public Defender acted to protect Nika's interests in warning him not to speak to other inmates, and there is no showing that Wilson made an agreement with the State. Nika also claims that Stanton told the defense nothing about Wilson, leaving the defense unable to impeach Wilson's

> claim that he had no ulterior motive in testifying against Nika. Actually, the State informed the defense before trial about Nika's admissions to Wilson. It appears that the only information not disclosed was Stanton's observation that Wilson told detectives that he would like some consideration for his testimony. Nika emphasizes that Wilson testified he came forward to police because Nika "just didn't have no heart" and that the prosecutor relied on this testimony in the penalty phase. Nevertheless, even assuming that Stanton should have informed the defense of Wilson's statement regarding consideration, we agree with the district court that Nika failed to demonstrate prejudice: even if Wilson approached officers hoping to gain some benefit and the jury had learned this, there was no reasonable probability of a different result in Nika's trial.
>
> The district court did not err in denying this claim.

Nika, 120 Nev. at 607-11, 97 P.3d at 1145-48.

With respect to Nika's claim based on *Massiah*, in Ground 4A, this Court determines that the Nevada Supreme Court's ruling was not contrary to, or an unreasonable application of, that case, and was not based on an unreasonable determination of the facts in light of the evidence. In light of the evidence, it was reasonable to conclude that, at least before Wilson met with the detective, he was not an agent of the State. And, further, it was reasonable to conclude that after that meeting, any additional information that Wilson learned from Nika had no significant impact at trial.

Similarly, with respect to Nika's claim based on *Brady*, in Ground 4A, the Nevada Supreme Court's ruling was not contrary to, or an unreasonable application of, that case, and was not based on an unreasonable determination of the facts in light of the evidence. Nika's claim is that the State did not disclose to the defense the existence of an agreement with Wilson, under which he would receive consideration in return for gathering evidence against Nika and/or testifying at trial, but, in light of the evidence, it was not unreasonable for the Nevada Supreme Court to conclude that there was no such agreement. Nika makes no showing that any exculpatory evidence was withheld from the defense.

Turning to Nika's claim, in Ground 8, that his constitutional rights were violated as a result of the trial court's *ex parte* communications with the prosecution regarding

Wilson, that claim fails because Nika does not point to any United States Supreme Court precedent that is contrary to, or that was misapplied in, the Nevada Supreme Court's ruling.

And, regarding Nika's related claim of ineffective assistance of his trial counsel, in Ground 1F2, Nika does not make a showing how his trial counsel performed unreasonably, and he does not make a showing how his trial counsel could have done anything different that might have brought a different outcome at trial. The Nevada Supreme Court's ruling, affirming denial of relief on this claim, was not contrary to, or an unreasonable application of *Strickland*, and was not based on an unreasonable determination of the facts in light of the evidence.

The Court will deny Nika habeas corpus relief on Grounds 1F2, 4A and 8.

Nika requests discovery regarding Grounds 1F2 and 4A. *See* Motion for Discovery (ECF No. 166), pp. 29-42. However, as the Court denies these claims under 28 U.S.C. § 2254(d), further factual development is foreclosed, and there is no good cause for the discovery. Nika's request for discovery here will be denied.

Ground 1F1 - Defense Theory

In Ground 1F1, Nika claims that his federal constitutional rights were violated as a result of ineffective assistance of his trial counsel because "[t]rial counsel were ineffective for failing to investigate and present an argument that Mr. Nika was provoked and acted in the heat of passion, or in self-defense." *See* Second Amended Petition (ECF No. 73), pp. 73-77.

Nika asserted this claim in his first state habeas action, and the Nevada Supreme Court affirmed the denial of relief on the claim, as follows:

> Nika contends that the district court improperly dismissed his claim that trial counsel provided ineffective assistance by pursuing a defense that someone else murdered Smith rather than the theory that Nika killed Smith in self-defense. We disagree. Nika told the police that he did not kill Smith and actually purchased Smith's car. And he repeatedly told trial counsel that he did not kill Smith. Further, jailhouse informant Wilson testified that Nika admitted to shooting Smith in the head after striking Smith with a crowbar. Moreover, the medical evidence showed that Smith suffered three blunt trauma wounds and skull fractures on the back of his

> head, one of which was inflicted while Smith was lying face down. And Smith suffered a single contact bullet wound on his forehead that was consistent with the gun being placed directly on his skin when it was fired. This evidence belies a self-defense theory. Based on Nika's statement to the police denying his involvement in Smith's murder and his repeated denials to counsel, challenging the State's evidence against Nika as insufficient to prove that he was the killer was reasonable. We conclude that Nika failed to adequately substantiate his claim that counsel's decision to pursue a defense that someone other than Nika killed Smith was unreasonable or that but for counsel's decision to pursue this defense, there was a reasonable probability of a different outcome. Therefore, we conclude that the district court did not err by summarily dismissing this claim.

Nika, 124 Nev. at 1292, 198 P.3d at 853.

Nika asserted such a claim again in his second state habeas action, and the Nevada Supreme Court ruled that the claim was procedurally barred, and that Nika did not show cause and prejudice to overcome the procedural bar, as follows:

> Nika argues that the district court erred in denying his claim that post-conviction counsel were ineffective for failing to litigate trial counsels' failure to refute the evidence of first-degree murder. He asserts that trial counsel were ineffective for failing to develop evidence that Nika may have acted in self-defense or the heat of passion in response to the victim attempting to rob him at gunpoint or evidence that might explain why he was not forthcoming with the police.
>
> We have previously concluded that the physical evidence in this case belies a claim of self-defense and instead shows a calculated effort to kill the victim. *Nika v. State* (*Nika III*), 124 Nev. 1272, 1295, 198 P.3d 839, 854 (2008). The victim was shot while he was lying helpless on the ground after being felled by three strikes to the back of his head. *Id.* at 1277, 198 P.3d at 843. As he could not have been a threat at the time he was shot, self-defense is not a viable defense. *See Runion v. State*, 116 Nev. 1041, 1051, 13 P.3d 52, 59 (2000) (acknowledging that the killing of another in self-defense is justified where the person who does the killing "actually and reasonably believes" that he is in imminent danger of death or great bodily injury from the assailant and the use of force that might cause death of the assailant is "absolutely necessary under the circumstances ... for the purpose of avoiding death or great bodily injury to himself"). Further, as the victim was struck at least once while lying face down and then turned over and shot in the forehead, there was undoubtedly time to reflect and deliberate on the course of action. Therefore, Nika did not demonstrate that psychological evidence or argument for a lesser degree of homicide would have altered the outcome of trial. For these reasons, a trial-counsel claim based on the failure to refute the evidence of first-degree murder with evidence of self-defense or heat of passion would not have had merit. We cannot fault post-conviction counsel for omitting it.

> Nika also failed to demonstrate that post-conviction counsel were ineffective for failing to introduce the testimony of a Roma cultural expert to explain how his distrust of the police prevented him from asserting that he acted in self-defense during his first interview. However, expert testimony explaining Nika's propensity to lie to police does not render any account that he gave to police any more credible than any other account. Moreover, the physical evidence at the scene belied any claim of self-defense. Therefore, Nika failed to demonstrate that the testimony would have affected the outcome of the trial and that postconviction counsel were ineffective for failing to introduce it during his prior post-conviction proceedings.

Order of Affirmance, Respondents' Exh. 196, pp. 11-13 (ECF No. 125-4, pp. 12-14).

This Court finds this claim to be without merit. Given the strong evidence undermining a heat-of-passion or self-defense theory, as described by the Nevada Supreme Court, it was not unreasonable for trial counsel to eschew such a defense. The Nevada Supreme Court's ruling, in Nika's first state habeas action, was not contrary to, or an unreasonable application of, Supreme Court precedent and was not based on an unreasonable determination of the facts in light of the evidence.

Nika contends that, in light of the new evidence presented in this case and in his second state habeas action, including evidence regarding his cultural background and his neuropsychological condition, the Court should treat this claim as procedurally defaulted, should find under *Martinez* that his counsel was ineffective in his first state habeas action, or should find that the fact-finding process in Nika's first state habeas action with respect to this claim was defective, and should rule on the claim de novo, without granting the Nevada Supreme Court's ruling deference under 28 U.S.C. § 2254(d). This approach would not change the outcome. Viewing the claim de novo and taking into consideration all the evidence presented in support of the claim in this case, the result would be the same. In this Court's view, trial counsel was not unreasonable, in hindsight, for not asserting a heat-of-passion or self-defense theory that was contrary to representations made by Nika, and Nika was not prejudiced. The strong evidence weighing against a heat-of-passion or self-defense theory does not allow for such second-guessing of trial counsel's strategy.

The Court denies Nika relief with respect to Ground 1F1.

Nika requests discovery and an evidentiary hearing regarding Ground 1F1. *See* Motion for Discovery (ECF No. 166), pp. 29-40; Motion for Evidentiary Hearing (ECF No. 168), pp. 5, 12. However, as the Court denies the claim under 28 U.S.C. § 2254(d), and as it appears the proposed discovery and the evidence that would apparently be proffered at an evidentiary hearing would not affect the Court's reasons for denying the claim even if it were considered de novo, there is no good cause for the discovery, and there is no showing that an evidentiary hearing is warranted. Those requests will be denied.

Grounds 1D, 9B and 9C - Juror Voir Dire

Nika asserts three claims involving juror voir dire at his trial. In Ground 1D, Nika claims that his federal constitutional rights were violated as a result of ineffective assistance of his trial counsel because "[t]rial counsel were ineffective for failing to conduct adequate voir dire." *See* Second Amended Petition (ECF No. 73), pp. 62-71. In Grounds 9B and 9C, Nika claims that his federal constitutional rights were violated as a result of prosecutorial misconduct during juror voir dire. *See id.* at 162, 164-68.

Nika's specific claims of error by his trial counsel in juror voir dire, in Ground 1D, are as follows:

- "Trial counsel's questioning of the persons on the venire consisted for the most part of rambling personal stories followed by questions posed to the entire venire that did not invoke any responses." Second Amended Petition (ECF No. 73), p. 63.

- Trial counsel did not ask any questions of jurors Robert Greiner, John Moon, Denise Fitts and Kathryn Main. *Id.*

- Trial counsel failed to ask jurors Patrick Norris, Helen Coughlin, Linda Little, Raymond Freeman, William Schneider, Russell Horning and Kevin Lassen meaningful questions to determine their fairness and impartiality. *Id.* at 64.

- Trial counsel failed to sufficiently voir dire the venire regarding the military conflict in Serbia, to ensure that none were biased against Nika, as a Serb, as a result of media coverage of the conflict. *Id.* at 64-66.

- Trial counsel failed to ask questions of juror Raymond Freeman to discover that he was an Air National Guardsman who served at the same facility as the victim, and to discover his attitudes regarding the death penalty and foreigners. *Id.* at 66-67.

- Trial counsel failed "to strike venire member Mark Porsow for cause, instead electing to remove him by using one of the defense's peremptory challenges." *Id.* at 67-68.

- Trial counsel failed to take any steps to "life qualify" the jury. *Id.* at 68.

- Trial counsel made inflammatory comments that prejudiced the jury against Nika. *Id.* at 68-69.

- Trial counsel failed to object to the State's use of peremptory challenges to remove persons from the venire on the basis of gender. *Id.* at 69-70.

- Trial counsel failed to object to questioning by the prosecution that deprived Nika of the presumption of innocence, and that misstated the law. *Id.* at 70.

- Trial counsel failed to immediately move to strike venire member Dustin Speek when he made xenophobic comments. *Id.* at 70-71.

- Trial counsel failed to move to remove juror Russell Horning for cause, because he knew that his brother-in-law served in the Air National Guard with the victim, and that his brother-in-law was present in the courtroom during the trial. *Id.* at 71.

Nika raised these claims in state court for the first time in his second state habeas action, and they were ruled procedurally barred; Nika argued that ineffective assistance of his first post-conviction counsel was cause for the procedural bar, such as to excuse it, and the Nevada Supreme Court rejected that argument, as follows:

> Nika contends that the district court erred in denying his claim that post-conviction counsel were ineffective for failing to argue that trial counsel were ineffective during voir dire. He asserts that trial counsel were ineffective for (1) failing to question some veniremembers, (2) failing to ask meaningful questions of other veniremembers, (3) failing to inquire about veniremembers' knowledge of the Serbian military conflict, (4) failing to life-qualify the venire, (5) making inflammatory comments during jury selection, (6) failing to object pursuant to *Batson* [footnote: *Batson v. Kentucky*, 476 U.S. 79 (1986)] to the State's use of peremptory challenges to remove veniremembers based on their gender, (7) failing to object to prosecution questions that undermined the presumption of innocence, (8) failing to strike a veniremember earlier in the process to prevent him from contaminating the rest of the venire, and (9) failing to remove biased veniremembers. He also contends that trial counsel failed to adequately address State misconduct during voir dire. He asserts that if post-conviction counsel had raised these claims concerning voir dire as trial-counsel claims, the court would not have denied them as procedurally defaulted.
>
> We conclude that the district court did not err in denying these claims because Nika failed to show prejudice. Claims (1)-(4) are

based on trial counsels' failure to make particular inquiries during voir dire. In general, those decisions involve trial strategy and it is not clear that the strategy employed by counsel was not objectively reasonable. *See, e.g.*, *Stanford v. Parker*, 266 F.3d 442, 453-55 (6th Cir. 2001) (observing that defendant has right to life-qualify jury upon request but failure to do so may be reasonable trial strategy); *Brown v. Jones*, 255 F.3d 1273, 1279-80 (11th Cir. 2001) (reasonable trial strategy for counsel to focus jurors' attention on the death penalty as little as possible and therefore not life-qualify jurors); *Camargo v. State*, 55 S.W.3d 255, 260 (Ark. 2001) ("The decision to seat or exclude a particular juror may be a matter of trial strategy or technique."). And, as to all claims but (6), *supra*, Nika failed to demonstrate prejudice because he failed to show that the seated jury was not impartial. [Footnote set forth below.] *See Wesley v. State*, 112 Nev. 503, 511, 916 P.2d 793, 799 (1996) (stating that "[i]f the impaneled jury is impartial, the defendant cannot prove prejudice" resulting from district court's limitation of voir dire); *see also Ham v. State*, 7 S.W.3d 433, 439 (Mo. Ct. App. 1999) ("Even assuming it would have been better strategy to strike [a particular juror], we fail to see how [defendant] could have been prejudiced because one qualified juror sat rather than another."). Because a trial-counsel claim on any of these grounds would not have entitled Nika to relief, he cannot demonstrate prejudice based on post-conviction counsel's failure to raise them as such.

As to the *Batson*-based trial counsel claim, Nika failed to demonstrate that post-conviction counsels' performance was deficient or that he was prejudiced by the failure to argue trial counsels' ineffectiveness. Assuming that trial counsel could have demonstrated a prima facie case of discrimination, *see Libby v. State*, 113 Nev. 251, 255, 934 P.2d 220, 223 (1997) (explaining that State's use of seven of nine of its peremptory challenges to remove women supports an inference of discrimination), Nika bore the burden of ultimately demonstrating that any gender-neutral reason given for the strike was a pretext for discrimination, *Ford v. State*, 122 Nev. 398, 403, 132 P.3d 574, 577 (2006); *see Johnson v. California*, 545 U.S. 162, 171 (2005) (noting the "burden of persuasion 'rests with, and never shifts from, the opponent of the strike'" (quoting *Purkett v. Elem*, 514 U.S. 765, 768 (1995))). The type of questions asked of the potential jurors did not clearly indicate a discriminatory intent, women were not entirely eliminated from the jury or even underrepresented, and the case did not appear sensitive to bias based on gender. *See Ex Parte Trawick*, 698 So. 2d 162, 168 (Ala. 1997) (considering, among other factors, the manner in which a party questions potential jurors and disparate treatment during voir dire, as evidence of discriminatory intent); *State v. Martinez*, 42 P.3d 851, 855 (N.M. App. 2002) (considering, among other factors, whether cognizable group was underrepresented on the jury or the case was particularly sensitive to bias as evidence of discriminatory intent). Nika's speculation that the State would have been unable to proffer gender-neutral reasons for the strikes or its reasons would be exposed as a pretext for discrimination did not demonstrate that trial counsels' failure to pursue a *Batson* objection was objectively unreasonable based on the information available at the time of trial. *See Rhyne v. State*, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002) (observing that counsel's decision if and when to object is a tactical decision); *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) ("[T]actical decisions are virtually unchallengeable.").

> [Footnote: Nika only identifies two seated jurors who he contends were biased against him: Russell Horning and Raymond Freeman. As to Horning, the allegation of bias is based on Horning's discovery during trial that his brother-in-law worked at the same base where the victim was stationed. Because Horning indicated that he did not know the victim and that it would not affect his ability to impartially weigh the facts of the case, the record does not support the conclusion that Horning was biased. As to Freeman, the allegation of bias involves his views on penalty as reflected in an affidavit completed roughly fifteen years after the verdict. This information was not available to trial counsel and therefore could not be the basis for a claim that trial counsel were ineffective. *See* Strickland, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."). At the time of trial, Freeman did not indicate that he could not follow the instructions of the court, or that he would impose the death penalty in every case. Based on the information available to trial counsel, there were no grounds to remove Freeman.]

Order of Affirmance, Respondents' Exh. 196, pp. 8-11 (ECF No. 125-4, pp. 9-12).

This Court agrees with the conclusion of the Nevada District Court: Nika's post-conviction counsel was not ineffective for not asserting this ineffective assistance of trial counsel claim, and Nika was not prejudiced. Much of what Nika complains of, regarding his trial counsel's performance at jury selection, was plainly a matter of strategy. More importantly though, Nika does not show that he was prejudiced by the alleged shortcomings of his trial counsel with respect to jury selection.

"Establishing *Strickland* prejudice in the context of juror selection requires a showing that, as a result of trial counsel's failure to exercise peremptory challenges, the jury panel contained at least one juror who was biased." *Davis v. Woodford*, 384 F.3d 628, 643 (9th Cir. 2004) (citing *United States v. Quintero–Barraza*, 78 F.3d 1344, 1349 (9th Cir. 1995)). "The Supreme Court has suggested that the relevant test for determining whether a juror is biased is 'whether the juror[ ] ... had such fixed opinions that [he] could not judge impartially the guilt of the defendant.'" *Quintero–Barraza*, 78 F.3d at 1349 (quoting *Patton v. Yount*, 467 U.S. 1025, 1035 (1984)) (alterations in original). Nika does not show that any juror was biased. Juror Raymond Freeman's 2010 declaration does not, in this Court's view, support the contention that he was biased—that he had such fixed opinions that he could not impartially judge Nika's guilt

or innocence. *See* Declaration of Raymond Freeman, Petitioner's Exh. 128 (ECF No. 37-3). Regarding juror Russell Horning, this Court finds that the trial court's questioning of him, outside the presence of the jury, established that he was not biased. *See* Trial Transcript, July 5, 1995, Respondents' Exh. 39, pp. 65-70 (ECF No. 105-1, pp. 68-73). And, beyond those two jurors, Nika makes no allegation that any of the other jurors were biased.

As for trial counsel not objecting to the prosecution's alleged removal of potential jurors on the basis of gender, based on *Batson* and *J.E.B. v. Alabama*, 511 U.S. 127 (1994), there is no colorable showing that any such objection would have been successful.

And, regarding the prosecutor's alleged improper statements concerning the presumption of innocence and alleged misstatements of law, this Court determines that the comments of the prosecution were not improper and, at any rate, were not such as to render Nika's trial unfair, and there is no showing that any objection to those statements would have been successful or would have had any effect on the outcome of the trial.

Therefore, the Court finds that Nika does not overcome the procedural default of the claims in Ground 1D, under federal law, by showing ineffective assistance of post-conviction counsel as contemplated in *Martinez.*

Turning to the claims in Grounds 9B and 9C, to the extent that Nika asserts claims of ineffective assistance of trial counsel in Grounds 9B and 9C, those claims are the same as claims asserted in Ground 1D, and they are subject to denial as procedurally defaulted as discussed above.

To the extent that, in Ground 9B, Nika asserts a substantive claim, based on the *Batson* and *J.E.B.* cases, that his constitutional rights were violated by the prosecution's removal of potential jurors based on gender, and to the extent that, in Ground 9C, Nika asserts a substantive claim of prosecutorial misconduct based on comments made by the prosecution during jury selection, no such claims were raised in Nika's first state

habeas action, and, in Nika's second state habeas action, any such claims were ruled procedurally barred. *See* Second Supplemental Petition for Writ of Habeas Corpus, Respondents' Exh. 146 (ECF No. 119-1); Order of Affirmance, Respondents' Exh. 196 (ECF No. 125-4). These claims, then, are subject to denial on the ground of procedural default, and Nika does not assert any argument that there is cause and prejudice relative to the procedural default. As these substantive claims are not claims of ineffective assistance of trial counsel, *Martinez*, is inapplicable.

Grounds 1D, 9B and 9C will, therefore, be denied on the ground of procedural default.

Nika requests discovery and an evidentiary hearing regarding Ground 9B. *See* Motion for Discovery (ECF No. 166), pp. 48-49; Motion for Evidentiary Hearing (ECF No. 168), p. 19. However, as is explained above, Ground 9B is subject to denial on the ground of procedural default, and Nika makes no argument to overcome the procedural default. Therefore, there is no good cause for the discovery and an evidentiary hearing is unwarranted; Nika's requests will be denied.

Ground 1E - Venue

In Ground 1E, Nika claims that his federal constitutional rights were violated as a result of ineffective assistance of his trial counsel because "[t]rial counsel were ineffective for failing to move for a change of venue." *See* Second Amended Petition (ECF No. 73), p. 72. Nika alleges that his counsel should have moved for a change of venue because of reports in the media, before Nika's trial, about Smith's murder and about Nika, as well as media reports regarding the war in the Balkans. *See id.*

Nika asserted this claim in state court for the first time in his second state habeas action, and it was ruled procedurally barred. Nika argued that ineffective assistance of his first post-conviction counsel was cause for the procedural bar, such as to excuse it, and the Nevada Supreme Court rejected that argument, as follows:

> Nika contends that the district court erred in denying his claim that post-conviction counsel were ineffective for omitting a trial-counsel claim based on their failure to move for a change in venue. He argues that such

> a motion was warranted because media reports of his crime and the tensions in former Yugoslavia made it impossible for him to receive a fair trial.
>
> We conclude that Nika cannot demonstrate that postconviction counsels' omission of this trial-counsel claim was objectively unreasonable because there was no basis for trial counsel to request a change of venue. Nearly all of the veniremembers indicated that they had not seen any news reports related to the trial, and the two veniremembers who had been exposed to media reports indicated that those reports would not influence their decision. In addition, a veniremember who indicated that she was familiar with news reports of the hostilities in Yugoslavia stated that her knowledge of those events would not affect her ability to impartially judge the facts of Nika's case. From this record it appears that the publicity was not so pernicious as to have been on the mind of every potential juror. *See Sonner v. State*, 112 Nev. 1328, 1336, 930 P.2d 707, 712-13 (1996) (noting that even where pretrial publicity has been pervasive, this court has upheld the denial of motions for change of venue where the jurors assured the district court during voir dire that they would be fair and impartial in their deliberations because, in addition to presenting evidence of inflammatory pretrial publicity, a defendant seeking a change of venue must demonstrate actual bias on the part of the empanelled jury), *modified on rehearing on other grounds by* 114 Nev. 321, 955 P.2d 673 (1998). Because there is insufficient support for the omitted trial-counsel claim, the district court did not err in denying the claim that post-conviction counsel was ineffective for omitting it. [Footnote omitted.]

Order of Affirmance, Respondents' Exh. 196, pp. 14-15 (ECF No. 125-4, pp. 15-16).

In *Hayes v. Ayers*, 632 F.3d 500 (9th Cir. 2011), the Ninth Circuit Court of Appeals set forth the law governing when a change of venue is required under the United States Constitution:

> The Sixth and Fourteenth Amendments "guarantee[ ] to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). When a trial court is "unable to seat an impartial jury because of prejudicial pretrial publicity or an inflamed community atmosphere[,] ... due process requires that the trial court grant defendant's motion for a change of venue." *Harris v. Pulley*, 885 F.2d 1354, 1361 (9th Cir.1988) (citing *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963)).
>
> In this circuit, we have identified "two different types of prejudice in support of a motion to transfer venue: presumed or actual." *United States v. Sherwood*, 98 F.3d 402, 410 (9th Cir. 1996). Interference with a defendant's fair-trial right "is presumed when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime." *Harris*, 885 F.2d at 1361. Actual prejudice, on the other hand, exists when voir dire reveals that the jury pool harbors "actual partiality or hostility [against the defendant] that [cannot] be laid aside." *Id*. at 1363. The Supreme Court applied this two-pronged analytical approach in a case it decided at the end of its last term.

> *See Skilling v. United States*, 561 U.S. [358, 367] 130 S.Ct. 2896, 2907 (2010) (considering, first, whether pretrial publicity and community hostility established a presumption of juror prejudice, and then whether actual bias infected the jury).
>
> * * *
>
> "A presumption of prejudice" because of adverse press coverage "attends only the extreme case." *Skilling*, 130 S.Ct. at 2915; *see also Harris*, 885 F.2d at 1361 ("The presumed prejudice principle is rarely applicable and is reserved for an extreme situation." (citing *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976)) (citation and internal quotation marks omitted)).
>
> * * *
>
> Where circumstances are not so extreme as to warrant a presumption of prejudice, we must still consider whether publicity and community outrage resulted in a jury that was actually prejudiced against the defendant. This inquiry focuses on the nature and extent of the voir dire examination and prospective jurors' responses to it. *See Skilling*, 130 S.Ct. at 2917-23. Our task is to "determine if the jurors demonstrated actual partiality or hostility [toward the defendant] that could not be laid aside." *Harris*, 885 F.2d at 1363.

Hayes, 632 F.3d at 507-11.

Nika appears to claim that his trial was affected by presumed prejudice, resulting from prejudicial and inflammatory pretrial reports in the media about the crime, and also about the war in the Balkans. *See* Second Amended Petition (ECF No. 73), p. 72; *see also id*. at 169-71 (Ground 10, which is incorporated by reference into Ground 1E). Nika makes no allegation in Ground 1E that any juror was actually prejudiced.

The Court determines that Nika has not shown the media coverage of Nika's crime to be anywhere near the sort necessary to give rise to presumed prejudice as recognized in *Harris* and *Skilling*. As for the media coverage of the war in the Balkans, Nika does not explain how a change of venue would have ameliorated the effect of the coverage of that story, which plainly was of national interest and presumably covered in the media throughout Nevada. Moreover, Nika does not show that the coverage of the war was such as to give rise to presumed prejudice.

Nika's first post-conviction counsel was not ineffective, within the meaning of *Martinez*, for failing to assert a claim that trial counsel was ineffective for failing to move

for a change of venue, and Nika was not prejudiced. Ground 1E will be denied on procedural default grounds.

Ground 1F3 - Trial Counsel's Opening Statement, Guilt Phase

In Ground 1F3, Nika claims that his federal constitutional rights were violated as a result of ineffective assistance of his trial counsel because "[t]rial counsel were ineffective during their opening arguments." *See* Second Amended Petition (ECF No. 73), pp. 78-79. Nika claims that his trial counsel were ineffective for mentioning that the case had been characterized in the media as the "Good Samaritan Killing." *See id.*; *see also* Trial Transcript, June 27, 1995, Respondents' Exh. 35, pp. 17-40 (ECF No. 101-1, pp. 20-43) (defense opening statement).

Here again, Nika asserted this claim in state court for the first time in his second state habeas action, and it was ruled procedurally barred in that case. Nika argued that ineffective assistance of his first post-conviction counsel was cause for the procedural bar, such as to excuse it, and the Nevada Supreme Court rejected that argument, as follows:

> Nika argues that the district court erred in denying his claim that post-conviction counsel were ineffective for failing to claim that trial counsel were ineffective for referring to the case as the "Good Samaritan killing" during opening statement. We disagree. Given the context of the comment (an attempt to defuse the effect of the media's characterization of the crime), the brevity of the comment, and the substantial evidence of Nika's guilt, Nika cannot demonstrate a reasonable probability of a different outcome had trial counsel not made the comment. *Cf. Thomas v. State*, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004) (stating that prosecutor's statements are prejudicial when they "so infected the proceedings with unfairness as to make the results a denial of due process"). Because the omitted trial-counsel claim had no reasonable likelihood of success, we cannot fault post-conviction counsel for omitting it. The district court did not err in denying this claim.

Order of Affirmance, Respondents' Exh. 196, p. 16 (ECF No. 125-4, p. 17).

This Court finds this claim to be meritless. Nika's trial counsel's comments concerning the characterization of the killing as the "Good Samaritan Killing" were, on their face, attempts to challenge, or defuse, that view of the killing. Trial counsel's opening argument was not unreasonable. *See Strickland*, 466 U.S. at 689-90

(reasonable tactical decision by counsel with which the defendant disagrees cannot form the basis of an ineffective assistance of counsel claim). Nika's first post-conviction counsel was not ineffective for not asserting this claim.

Ground 1F3 is procedurally defaulted, and it will be denied on that ground.

Ground 1F4 - Spousal Privilege

In Ground 1F4, Nika claims that his federal constitutional rights were violated as a result of ineffective assistance of his trial counsel because "[t]rial counsel were ineffective for waiving the spousal privilege." *See* Second Amended Petition (ECF No. 73), p. 79.

With respect to this claim also, Nika asserted the claim in state court for the first time in his second state habeas action, and it was ruled procedurally barred. Nika argued in state court that ineffective assistance of his first post-conviction counsel was cause for the procedural bar, such as to excuse it, and the Nevada Supreme Court rejected that argument, as follows:

> Nika argues that the district court erred in denying his claim that post-conviction counsel were ineffective for not challenging trial counsel's waiver of Nika's spousal privilege. He claimed that but for the testimony of his wife, Rodika, the State would not have been able to prove when he left California, his reason for leaving, his mood at the time of leaving, and the fact that Nika is not very bright and prone to panic in stressful situations. We conclude that Nika failed to show that post-conviction counsel was ineffective. Rodika's direct testimony only addressed her observations of Nika's conduct and did not recount any conversations between her and Nika, therefore, the testimony would have been admissible regardless of Nika's consent. *See Contancio v. State*, 98 Nev. 22, 24-25, 639 P.2d 547, 549 (1982) (recognizing that spousal privilege under NRS 49.295(1)(b) prohibits testimony about communications made during the marriage). Further, Rodika's testimony did not incriminate Nika or prove any of the elements of first-degree murder.

Order of Affirmance, Respondents' Exh. 196, pp. 13-14 (ECF No. 125-4, pp. 14-15).

This Court agrees with the analysis of the Nevada Supreme Court. First, this Court finds it questionable whether Nika's wife's testimony could be construed as incriminating—whether the net effect of her testimony was prejudicial to Nika. But, more importantly, the Nevada Supreme Court's ruling that Nika's wife's testimony would have been admissible under NRS 49.295(1)(b), regardless of Nika's consent, is a matter of

the Nevada Supreme Court's construction of Nevada law, is authoritative, and is not subject to review in this federal habeas corpus action. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Bonin v. Calderon*, 59 F.3d 815, 841 (9th Cir. 1995). Therefore, it is plain that trial counsel was not ineffective for not asserting the privilege, and that Nika's first post-conviction counsel was not ineffective for not asserting this ineffective assistance of trial counsel claim.

Nika does not overcome the procedural default of Ground 1F4, under *Martinez*, by a showing of ineffective assistance of post-conviction counsel. Ground 1F4 will be denied on the ground of procedural default.

Ground 1F5 - Unrecorded Bench Conferences

In Ground 1F5, Nika claims that his federal constitutional rights were violated as a result of ineffective assistance of his trial counsel because "[t]rial counsel were ineffective for failing to object to unrecorded bench conferences." *See* Second Amended Petition (ECF No. 73), pp. 79-80.

With respect to this claim, too, it was first presented in Nika's second state habeas action, where it was procedurally barred, and the Nevada Supreme Court ruled that Nika did not show ineffective assistance of his first post-conviction counsel such as to overcome the procedural bar:

> Nika asserts that the district court erred in denying his claim that post-conviction counsel were ineffective for failing to claim that trial counsel were ineffective for failing to object to unrecorded bench conferences. Nika failed to explain how he was prejudiced. He did not specify the subject matter of the listed bench conferences or explain their significance. *See Daniel v. State*, 119 Nev. 498, 508, 78 P.3d 890, 897 (2003). Thus, he failed to support this claim with specific facts that, if true, would entitle him to relief. *See Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Therefore, the district court did not err in denying this claim.

Order of Affirmance, Respondents' Exh. 196, p. 13 (ECF No. 125-4, p. 14).

This Court determines, consistent with the Nevada Supreme Court's ruling, that Nika has not shown that his first post-conviction counsel were ineffective for not asserting this claim. Nika makes no allegation or showing to indicate what was

discussed in the bench conferences, or how he was prejudiced by the conferences not being reported. This claim is without merit. Because Nika does not show his post-conviction counsel to have been ineffective under *Martinez*, he does not overcome the procedural default of the claim in Ground 1F5, and it will be denied on that ground.

Ground 1F7 - Defense Closing Arguments, Guilt Phase

In Ground 1F7, Nika claims that his federal constitutional rights were violated as a result of ineffective assistance of his trial counsel because "[t]rial counsel were ineffective during their closing arguments." *See* Second Amended Petition (ECF No. 73), pp. 81-89. More specifically, Nika's claim in Ground 1F7 is as follows:

> Mr. Nika suffered prejudice from trial counsel's argument which caused the defense to lose even more credibility before the jury. Mr. Fox's [trial counsel's] closing argument was so deficient that he ceased to be an advocate for Mr. Nika, and instead his argument echoed the prosecution's argument for Mr. Nika's conviction. Mr. Fox began his argument by conceding that the instant case was a first-degree murder case and that the jury should not consider a second-degree murder verdict. Mr. Fox commented upon Mr. Nika's failure to testify in violation of his constitutional rights. Mr. Fox argued facts that were both inflammatory and outside of the evidence that were incriminating to Mr. Nika. Without any strategic justification, Mr. Fox disparaged the victim and his wife. Mr. Fox told the jury that Mr. Nika was guilty of committing other inadmissible bad acts that were not alleged or proven by the prosecution. Mr. Fox vouched for the credibility of State witnesses and spent considerable time directing the jury's attention to prejudicial pre-trial publicity that was not admissible at Mr. Nika's trial. Singly and cumulatively, trial counsel's ineffectiveness during closing argument was prejudicial.

Id. at 81.

Nika asserted this claim in his first state habeas action, and, on the appeal in that action, the Nevada Supreme Court ruled as follows:

> Nika argues that the district court erred by dismissing his claim that trial counsel's closing argument was deficient for a host of reasons and that these deficiencies prejudiced him. We have carefully reviewed counsel's closing argument and Nika's challenges to it. Although counsel's argument was at times disorganized and unfocused, we conclude that any deficiency in this regard did not prejudice Nika for two reasons. First, strong evidence supported Nika's conviction. Second, Nika's other trial counsel provided a separate, subsequent closing argument, which, along with the district court's admonishments to Nika's first counsel, defused any negative impact from the challenged closing argument. [Footnote: *See Rudin v. State*, 120 Nev. 121, 144, 86 P.3d 572, 587 (2004).] Consequently, Nika failed to adequately explain that but for counsel's closing argument a reasonable probability existed that he would not have

> been convicted of first-degree murder with the use of a deadly weapon. Therefore, we conclude that the district court did not err by summarily dismissing this claim.

Nika, 124 Nev. at 1292-93, 198 P.3d at 853.

The Court finds that the Nevada Supreme Court's adjudication of the claim was not unreasonable. Much of the argument of trial counsel that Nika complains about was plainly a matter of strategy, and, while Nika and reviewing courts might now, in hindsight, question that strategy, the standard for finding counsel's argument to have been constitutionally defective is high. Counsel has wide latitude in deciding how best to represent a client, and review of counsel's representation is highly deferential, in fact, "doubly deferential when it is conducted through the lens of federal habeas." *Yarborough v. Gentry*, 540 U.S. 1, 5-6 (2003). In view of the strong evidence against Nika, and cognizant of the considerable deference mandated by *Strickland* and the AEDPA, this Court determines that Nika has not shown that no reasonable jurist could find that counsel's closing argument was reasonable under the circumstances, or that, at any rate, Nika was not prejudiced. *See Strickland*, 466 U.S. at 689. The Court will, therefore, deny Nika habeas corpus relief with respect to Ground 1F7.

Grounds 1F6, 2 and 7D - Guilt Phase Jury Instructions

In Ground 2, Nika claims that his federal constitutional rights were violated "because the guilt phase jury instructions failed to require the jury to find all of the mens rea elements of first-degree murder." *See* Second Amended Petition (ECF No. 73), pp. 102-10. In Ground 7D, Nika claims that his federal constitutional rights were violated because "[t]he malice instructions were unconstitutional." *See id.* at 155-57. In Ground 1F6, Nika claims that his federal constitutional rights were violated as a result of ineffective assistance of his trial counsel because counsel failed to object to those instructions. *See id.* at 80-81.

In Claim 2, Nika places at issue the so-called "*Kazalyn* instruction," a jury instruction approved by the Nevada Supreme Court in *Powell v. State*, 108 Nev. 700, 838 P.2d 921 (1992), and disapproved by the same court eight years later in *Byford v.*

State, 116 Nev. 215, 994 P.2d 700 (2000). The *Kazalyn* instruction (so-called because it was discussed by the Nevada Supreme Court in *Kazalyn v. State*, 108 Nev. 67, 825 P.2d 578 (1992)), as given in the guilt phase of Nika's trial, was as follows:

> Premeditation is 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. It may be as instantaneous as successive thoughts of the mind. 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.

Instructions to the Jury, Petitioner's Exh. 10, Instruction No. 28 (ECF No. 5, p. 98). Nika argues that this instruction was unconstitutional because it collapsed three elements of first-degree murder—"willful, deliberate and premeditated"—into one element: "premeditated." *See* Second Amended Petition (ECF No. 73), pp. 102-10.

Nika asserted this claim in his first state habeas action. The Nevada Supreme Court held in that case that *Byford* represented a change in Nevada's law, not a clarification of the law, and that the *Kazalyn* instruction properly reflected the law in cases such as Nika's, in which the conviction became final before *Byford* was decided in 2000. *See Nika*, 124 Nev. at 1276, 1279-89, 198 P.3d at 842, 844-51.

Nika also asserted the claim in his second state habeas action, and, in that case, the Nevada Supreme Court ruled as follows:

> Nika argues that the district court erred in denying his claim that the premeditation and deliberation instruction was improper. He contends that this court should reconsider its prior decision on this claim in light of intervening federal authority. Nika failed to demonstrate circumstances to warrant departure from the law-of-the-case doctrine. The unpublished and federal district court decisions he cites calling *Nika III*, 124 Nev. 1272, 198 P.3d 839, into doubt are not binding on this court. *See* 9th Cir. R. 36-3(a); *Blanton v. N. Las Vegas Mun. Court*, 103 Nev. 623, 633, 748 P.2d 494, 500 (1987), *aff'd*, 489 U.S. 538 (1989); *United States v. Soto-Castelo,* 621 F.Supp.2d 1062, 1069 n.2 (D. Nev. 2008), *aff'd*, 361 F.App'x 782 (9th Cir. 2010); *see also* SCR 123. Further, the cited decisions are called into doubt by the Ninth Circuit's recent decision in *Babb v. Lazowsky*, 719 F.3d 1019 (9th Cir. 2013), *cert. denied*, ___ U.S. ___, 134 S.Ct. 526 (2013), which disapproved of the holding in *Polk v. Sandoval*, 503 F.3d 903 (9th Cir. 2007), and noted its effective overruling by *Nika III*. *Babb*, 719 F.3d at 2019-30. Nika has not cited any controlling authority that would warrant reconsideration of this claim.

Order of Affirmance, Respondents' Exh. 196, pp. 23-24 (ECF No. 125-4, pp. 24-25).

In *Polk v. Sandoval*, 503 F.3d 903 (9th Cir. 2007), which was decided before the Nevada Supreme Court ruled on the appeal in Nika's first state habeas action, the Ninth Circuit Court of Appeals held that the *Kazalyn* instruction was unconstitutional because it relieved the State "of its burden of proving every element of first-degree murder beyond a reasonable doubt." *Polk*, 503 F.3d at 909. Subsequently, however, in *Babb v. Lozowsky*, 719 F.3d 1019 (9th Cir. 2013), decided after Nika's first habeas action was completed, the court determined that its holding in *Polk* is no longer good law in light of the intervening Nevada Supreme Court decision in Nika's case. *See Babb*, 719 F.3d at 1029. In light of *Babb*, and other subsequent decisions of the Ninth Circuit Court of Appeals, it has now become well-established that in cases like this one, in which the conviction became final after the *Powell* decision but prior to the *Byford* decision—that is, between 1992 and 2000—the *Kazalyn* instruction accurately stated Nevada law and did not violate the defendant's federal constitutional rights. *See Babb*, 719 F.3d at 1029-30; *see also Riley v. McDaniel*, 786 F.3d 719 (9th Cir. 2015); *Moore v. Helling*, 763 F.3d 1011 (9th Cir. 2014).

The Nevada Supreme Court's holding that *Byford* represented a change in Nevada law is a ruling by the state supreme court on a question of state law, not subject to review in this federal habeas corpus action. *See Estelle*, 502 U.S. at 67-68; *Bonin*, 59 F.3d at 841. Nika's conviction became final on January 21, 1998, when the Nevada Supreme Court issued its remittitur after affirming his conviction on direct appeal. *See* Remittitur, Respondents' Exh. 84 (ECF No. 112-3). That was after *Powell* and before *Byford*. Nika's claim is, therefore, foreclosed by the holding in *Babb*. The instruction he challenges was not unconstitutional. The Nevada Supreme Court's ruling on the claim in Ground 2 was not contrary to, or an unreasonable application of, Supreme Court precedent and was not based on an unreasonable determination of the facts in light of the evidence.

Turning to Ground 1F6, regarding trial counsel's failure to object to the *Kazalyn* instruction, the Nevada Supreme Court ruled, in Nika's first state habeas action, that Nika's trial counsel had no basis upon which to object to the *Kazalyn* instruction, as it represented a correct statement of the law at the time of Nika's trial, and, therefore, Nika's trial counsel was not ineffective, under *Strickland*. That ruling was not unreasonable.

In Ground 2, Nika incudes several other claims, asserting other theories that the *Kazalyn* instruction violated his constitutional rights: for example, that the instruction violated his constitutional right to equal protection under the law, that the instruction invited arbitrary and capricious application of the death penalty, and that the instruction had the effect of relieving the State of the burden of proof on the question of his state of mind. *See* Second Amended Petition (ECF No. 73), pp. 104-07. These theories, though, were not asserted in Nika's first state habeas action. *See* Second Supplemental Petition for Writ of Habeas Corpus, Respondents' Exh. 146, pp. 50-54 (ECF No. 119-1, pp. 51-55); Appellant's Opening Brief, Respondents' Exh. 152, pp. 36-41 (ECF No. 120-5, pp. 55-60). These claims are, therefore, procedurally defaulted, and Nika makes no argument that he can overcome that procedurally default, so they will be denied on that ground. Alternatively, assuming, for the purpose of analysis, that Nika's arguments in state court did encompass these theories, the Nevada Supreme Court's denial of the claims was not an unreasonable application of *Bunkley v. Florida*, 538 U.S. 835 (2003); *Schriro v. Summerlin*, 542 U.S. 348 (2004); *Village of Willowbrook v. Olech,* 528 U.S. 562 (2000); *Stringer v. Black*, 503 U.S. 222 (1992); *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979); *In re Winship*, 397 U.S. 358 (1970); or any other United States Supreme Court precedent cited by Nika.

In Ground 7D, Nika claims that the following jury instructions, regarding "malice" were unconstitutional:

> Murder is the unlawful killing of a human being, with malice aforethought, either express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned.
>
> * * *
>
> NRS 200.020 defines malice, express and implied, as follows:
> 1. 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.
>
> 2. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

Instructions to the Jury, Petitioner's Exh. 10, Instructions No. 22, 24 (ECF No. 5, pp. 92, 94). Specifically, Nika claims that the second provision of Instruction No. 24 ("Malice shall be implied ...") imposes an impermissible mandatory presumption and renders the instructions unconstitutional. *See* Second Amended Petition (ECF No. 73), pp. 155-57. And, in Ground 1F6, Nika claims that his trial counsel was ineffective for not objecting to these instructions. *See id*. at 81.

In his first state habeas action, Nika asserted this claim, as well as a claim that his trial counsel was ineffective for not objecting to the malice instructions, and, on the appeal in that action, the Nevada Supreme Court ruled as follows:

> Nika contends that the district court erred by dismissing his claim that trial counsel were ineffective for failing to object to the jury instruction defining malice, which provided the statutory definitions of express and implied malice. [Footnote: NRS 200.202.] In particular, Nika asserts that the instruction inadequately defined malice aforethought and created a mandatory presumption of implied malice, allowing the jury to find malice solely on the basis that the jurors believed he was a bad person. We rejected a similar challenge to this malice instruction in *Cordova v. State* and specifically approved its use. [Footnote: 116 Nev. 664, 666-67, 6 P.3d 481, 483 (2000).] Nika acknowledges *Cordova* but argues that the decision in that case represents an unreasonable application of federal constitutional law. However, he advances no persuasive reason to depart from *Cordova*, Because Nika failed to show deficient performance or prejudice, we conclude that the district court did not err by summarily dismissing this claim.

Nika, 124 Nev. at 1289-90, 198 P.3d at 851.

The Nevada Supreme Court's denial of relief on these claims was reasonable. Both the claim of trial court error and the claim of trial counsel error fail because Nika cannot show that the implied malice instruction had any impact on the outcome of his

trial. The jury found Nika guilty of first-degree murder. The instructions given to the jury defined first degree murder as "any kind of willful, deliberate and premeditated killing." Instructions to the Jury, Petitioner's Exh. 10, Instruction No. 23 (ECF No. 5, pp. 93). Because the jury must have determined that the killing was willful, deliberate, and premeditated, the jury necessarily determined that Nika had the deliberate intention to kill, thus establishing express malice. *See Ficklin v. Hatcher*, 177 F.3d 1147, 1151 (9th Cir. 1999). Therefore, the Nevada Supreme Court's ruling on these claims was not contrary to, or an unreasonable application of, Supreme Court precedent and was not based on an unreasonable determination of the facts in light of the evidence.

The Court will deny Nika habeas corpus relief with respect to Grounds 1F6, 2 and 7D

Ground 4B - Samantha McKendall

In Ground 4B, Nika claims that his federal constitutional rights were violated because "[t]he State committed misconduct by preventing the defense from calling Samantha McKendall." *See* Second Amended Petition (ECF No. 73), pp. 126-27.

Nika asserted this claim in his second state habeas action, but not in his first state habeas action, so it is procedurally defaulted, and subject to denial on that ground, unless Nika can make a showing to overcome the procedural default. *See* Order entered March 16, 2017 (ECF No. 151), p. 9. Nika argues that there is cause for the procedural default, such that it may be overcome, because of the State's suppression of evidence related to the claim. *See id.*

The evidence proffered by Nika shows that McKendall, who worked with the victim, Smith, at a Reno Burger King restaurant, gave a written statement to the police a few days after Smith was killed. In that statement, McKendall wrote that Smith had mentioned that he had a gun in his car. *See* Petitioner's Exh. 28 (ECF No. 7-2).
A defense investigator contacted McKendall on December 1, 1994, and, according to a memorandum written by the investigator to trial counsel, McKendall told the investigator the following:

> McKendall [stated] that Smith told her of his weapon, a 44 caliber the night before his death. The conversation resulted from her interest in whether he was afraid to travel back and forth at night. McKendall indicated that his was the only time she spoke with Smith about the weapon, and that she never saw it. Although McKendall believes Smith stated he had a 44, she is not positive. She is sure Smith said it was a "forty something Caliber."

Petitioner's Exh. 121 (ECF No. 36-2, p. 12.) In that memorandum, the investigator wrote an address and three telephone numbers for McKendall. *See id.* On June 7, 1995, the defense investigator attempted to contact McKendall at her last-known workplace, the Burger King restaurant where she worked with Smith, to serve a subpoena on her, and he wrote the following about that attempt:

> I was advised by Kim Uffman, Mgr., that Samantha no longer works there, and is in California, whereabouts unknown. According to Uffman, she has been trying to contact McKendall in California for the last week. Uffman also stated that McKendall's parents don't know how to contact McKendall either, and have contacted her seeking information with which to contact her. Uffman took my card and stated that if she is in contact with McKendall, she will give her a message to contact me.
>
> On the same date, I telephoned Affordable Bus & Coach ... and spoke with Mrs. McKendall, Samantha's mother. Mrs. McKendall indicated that Samantha has been in California and is expected back in Reno on 6-8-95.
>
> Mrs. McKendall indicated that she is not [at] liberty to inform me of how Samantha can be located, but stated that Cindy Wyett, DA Investigator has been advised of information with which to contact Samantha McKendall. Mrs. McKendall took my name and phone number and stated that she would ask [Samantha] to contact me upon her return to Reno.

Id. (ECF No. 36-2, p. 29). Also, Nika states in his petition that the defense was provided a pager number for McKendall. *See* Second Amended Petition (ECF No. 73), p. 127 ("Though the investigator was eventually provided with Ms. McKendall's pager number ...."). Then, in a declaration signed by McKendall on June 16, 2009, she states:

> At the time of the trial, I was living in California. They paid me to come back to Reno to testify. I remember the trip vividly because at one point or another during the trip, all four of my tires went flat. They paid for me to stay in Reno for a week, but I never ended up testifying because they told me that the person who killed Smitty had received diplomatic immunity. I did not know exactly what that meant, but my impression was they never even had a trial in his case.

Declaration of Samantha McKendall, Petitioner's Exh. 88, ¶ 4 (ECF No. 22-5, p. 2).

With this factual background, Nika's argument that he can overcome the procedural default, because of suppression of evidence by the State, is as follows:

> Nika can overcome the alleged procedural default of this claim based on the State's suppression of the evidence. *Strickler v. Greene*, 527 U.S. 263, 282 (1999). Nika has demonstrated good cause under *Strickler* and *Banks* based on the State's failure to disclose McKendall's knowledge about the victim's gun and its active suppression of her whereabouts when it knew Nika's lawyer and investigator were looking for her. Nika has also demonstrated that he was prejudiced by this suppression: if the jury had heard McKendall's testimony, it would have supported Nika's claim that the victim provoked the incident that lead to his death, or at least that the victim was the one who originally produced the gun during the altercation.

Reply (ECF No. 169), p. 269.

The Court determines that Nika has not shown cause and prejudice, such as to overcome the procedural default. Nika does not make any allegation as to why McKendall could not be found, and her declaration obtained, before 2009, and in time to assert a claim such as this in his first state habeas action. Nika makes no allegation that the State hindered Nika from locating McKendall between the time of the trial and the conclusion of his first state habeas action in 2008. To demonstrate cause for a procedural default, the petitioner must "show that some objective factor external to the defense impeded" his efforts to comply with the state procedural rule." *Murray*, 477 U.S. at 488; *McCleskey*, 499 U.S. at 497. Nika does not make such a showing. Ground 4B will be denied on the ground of procedural default.

Nika requests discovery and an evidentiary hearing regarding Ground 4B. *See* Motion for Discovery (ECF No. 166), pp. 40-47; Motion for Discovery (ECF No. 168), pp. 6-7. However, neither the discovery nor the evidentiary hearing that Nika seeks with respect to this claim is related to the issue of the procedural default. Neither would have any effect on the Court's denial of the claim on procedural default grounds. The requests for discovery and an evidentiary hearing regarding this claim will be denied.

Ground 9A - Prosecution Arguments

In Ground 9A, Nika claims that the prosecutor made improper arguments in closing argument in both the guilt phase and penalty phase of his trial, and that his trial

counsel was ineffective for failing to object to those arguments. *See* Second Amended Petition (ECF No. 73), pp. 162-64. In particular, Nika claims that, in the guilt phase of his trial, the prosecutor made arguments disparaging his trial counsel, and, in the penalty phase of his trial, the prosecutor made arguments asking the jury to send a message to the community, minimizing the jury's responsibility for the verdict, and shifting the burden of proof. *See id*.

Nika raised these claims in state court for the first time in his second state habeas action. The claims were ruled procedurally barred in that action. The Nevada Supreme Court rejected Nika's argument that he could show cause and prejudice to overcome the procedural bars on account of ineffective assistance on his direct appeal and in his first state habeas action:

> Nika contends that the district court erred in denying his claim that post-conviction counsel were ineffective for failing to claim that trial and appellate counsel were ineffective for failing to argue that the State committed prosecutorial misconduct during its arguments. We conclude these arguments lack merit for the reasons discussed below.
>
> * * *
>
> Nika argues that post-conviction counsel should have raised a claim that trial counsel were ineffective in failing to object when the prosecutor disparaged defense counsel in stating that the defense "doesn't know the significance of the evidence," made mistakes in assessing the evidence, and made numerous suppositions. We disagree. Although a prosecutor may not "disparage defense counsel or legitimate defense tactics," *Browning v. State*, 124 Nev. 517, 534, 188 P.3d 60, 72 (2008); *see Butler v. State*, 120 Nev. 879, 898, 102 P.3d 71, 84 (2004), the prosecutor merely responded to arguments made and inferences drawn by the defense concerning the facts in evidence and were therefore not objectionable. Because the comments were not objectionable, post-conviction counsel could not have used them as a basis to challenge trial or appellate counsel's effectiveness. *Epps v. State*, 901 F.2d 1481, 1483 (9th Cir. 1990).
>
> * * *
>
> Nika argues that post-conviction counsel should have claimed that trial counsel were ineffective in failing to object when the prosecutor asked the jury to vote for death to send a message to the community. We disagree. "[A] prosecutor in a death penalty case properly may ask the jury, through its verdict, to set a standard or make a statement to the community." *Williams v. State*, 113 Nev. 1008, 1020, 945 P.2d 438, 445 (1997), *overruled on other grounds by Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). As the comment was not objectionable, it could not be

> the basis for a claim of ineffective assistance of trial, appellate, or post-conviction counsel. *Epps*, 901 F.2d at 1483. Therefore, the district court did not err in denying this claim.
>
> * * *
>
> Nika argues that post-conviction counsel should have claimed that trial counsel were ineffective in failing to object to comments he contends shifted the burden of proof and implied that the jurors were not personally responsible for the verdict. However, the comments about which Nika complains were fair responses to defense arguments. Because the comments were not objectionable, they could not form the basis for an ineffective assistance of trial, appellate, or post-conviction counsel. *Id.* Therefore, the district court did not err in denying this claim.

Order of Affirmance, Respondents' Exh. 196, pp. 16-18 (ECF No. 125-4, pp. 17-19).

A prosecutor's improper remarks render a conviction unconstitutional if they so infect the trial with unfairness as to make the resulting conviction a denial of due process. *Parker v. Matthews*, 567 U.S. 45, 48 (2012) (per curiam); *see also Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *Comer v. Schriro*, 480 F.3d 960, 988 (9th Cir. 2007). The ultimate question is whether the alleged misconduct rendered the trial fundamentally unfair. *Darden*, 477 U.S. at 183. In determining whether a prosecutor's arguments rendered a trial fundamentally unfair, a court must judge the remarks in the context of the entire trial. *See Boyde v. California*, 494 U.S. 370, 385 (1990); *Darden*, 477 U.S. at 179-82. In considering the effect of improper prosecutorial argument, the court considers whether the trial court instructed the jury that its decision is to be based solely upon the evidence, whether the trial court instructed the jury that counsel's remarks are not evidence, whether the defense objected, whether the comments were "invited" by the defense, and whether there was overwhelming evidence of guilt. *See Darden*, 477 U.S. at 182.

Regarding the substantive claims of prosecutorial misconduct in Ground 9A—the claims that Nika's constitutional rights were violated by the prosecution arguments—those claims are subject to the procedural default doctrine, and Nika has not made any showing to overcome the procedural default. *See* Reply (ECF No. 169), pp. 269-74. Those claims in Ground 9A will be denied on procedural default grounds.

Regarding the claims of ineffective assistance of trial counsel in Ground 9A—the claims that trial counsel was ineffective for failing to object to the alleged improper prosecution arguments—*Martinez* offers a possible means of overcoming the procedural default of those claims, but this Court finds that Nika does not meet the standard set by *Martinez* to allow consideration of the claims on their merits. This Court finds that, in large part, the arguments Nika complains of were not improper, and were, at any rate, invited by arguments made by defense counsel. Furthermore, the arguments, considered individually and cumulatively, and in the context of the entire trial, were not such as to approach the threshold set in *Darden* and *Parker*. The arguments that Nika complains of did not render his trial unfair. Nika's trial counsel were not ineffective for failing to object to the prosecution arguments, and Nika's first post-conviction counsel were not ineffective for failing to make these claims of ineffective assistance of trial counsel. The ineffective assistance of trial counsel claims in Ground 9A will be denied on procedural default grounds.

Grounds 1A, 1B and 1H—Other Claims Regarding Trial Counsel

In Ground 1A, Nika claims that his federal constitutional rights were violated as a result of ineffective assistance of his trial counsel because "[t]he county contract under which trial counsel were paid created a conflict of interest that prevented trial counsel from performing effectively." *See* Second Amended Petition (ECF No. 73), pp. 10-13.

Nika raised this claim for the first time in state court in his second state habeas action. The Nevada Supreme Court ruled the claim to be procedurally barred, and ruled, as follows, that Nika did not show ineffective assistance of his first post-conviction counsel, such as to overcome the procedural bar under state law:

> Nika argues that the district court erred in denying his claim that post-conviction counsel were ineffective for failing to discover a conflict of interest based on defense counsel's reimbursement contract. He alleges that the contract created a conflict of interest because it pitted the appointed attorney's interest in compensation against the need to spend funds on investigative services for the client, and that had this conflict not existed, trial counsel would have hired a mental health expert to evaluate Nika and testify at the penalty hearing. As discussed above, Nika failed to demonstrate a reasonable probability that the evidence developed by the

> mental health expert would have altered the outcome of the penalty hearing. Thus, Nika also failed to meet the prejudice prong of his post-conviction-counsel claim.

Order of Affirmance, Respondents' Exh. 196, p. 6 (ECF No. 125-4, p. 7).

This Court finds that Nika has not shown that his first post-conviction counsel were ineffective, within the meaning of *Martinez*, for failing to assert this claim. Nika has not made allegations sufficient to show that any conflict of interest adversely affected his trial counsel's performance. *See Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980); *see also Earp v. Ornoski*, 431 F.3d 1158, 1184 (9th Cir. 2005). Nika's claim regarding the effect of the terms of the contract between the county and Jack Alian on the performance of trial counsel, Ohlson and Fox, are purely speculative. As Nika's allegations, regarding the contract under which Ohlson and Fox worked, and its effect on their representation of Nika, falls short of showing a conflict that affected their work, Nika does not show that his first post-conviction counsel were ineffective for not raising this claim, such as to overcome the procedural default. Ground 1A will be denied on procedural default grounds.

Nika seeks to conduct discovery regarding Ground 1A. *See* Motion for Discovery (ECF No. 166), pp. 8-14. However, as the Court finds this claim to be insubstantial, there is no showing of good cause for the discovery he seeks. The motion for leave to conduct discovery regarding this claim will be denied.

In Ground 1B, Nika claims that his federal constitutional rights were violated as a result of ineffective assistance of his trial counsel because "[t]rial counsel were ineffective for failing to investigate and present compelling evidence of Mr. Nika's background, culture, and life history." *See* Second Amended Petition (ECF No. 73), pp. 13-53. The Court will deny this claim because it is repetitive of other, more specific, claims in Nika's second amended petition, most notably, claims in Grounds 1C, 1F1, 1G and 6. In considering the other claims asserted in Nika's second amended petition, including the claims in Grounds 1C, 1F1, 1G and 6, the Court takes into consideration the allegations in Ground 1B.

Nika requests discovery and an evidentiary hearing regarding Ground 1B. *See* Motion for Discovery (ECF No. 166), pp. 14-24; Motion for Evidentiary Hearing (ECF No. 168), p. 5. However, because the Court finds that this claim is redundant of other, more specific claims, asserted by Nika, the Court denies this request and considers his requests for discovery and an evidentiary hearing in conjunction with the other claims, as is discussed above.

In Ground 1H, Nika claims that his federal constitutional rights were violated as a result of ineffective assistance of his trial counsel because "[t]rial counsel were ineffective throughout the trial proceedings." *See* Second Amended Petition (ECF No. 73), pp. 95-99. In this ground, Nika includes claims that his trial counsel were ineffective: for "refusing to engage in plea discussions with the State" and for "failure to communicate the potential of a plea bargain" to Nika, for advising Nika to waive his right to allocution, for "failing to adequately litigate the issue of Mr. Nika's lack of criminal history," for "failing to request instructions explaining to the jury that the prior bad act evidence had to be proven beyond a reasonable doubt, that it could not be considered in support of any of the aggravators, and that it could only be considered once the jury had determined that the statutory aggravators outweighed the mitigators," for ineffectively cross-examining the victim's wife and daughter, for failing to object to improper jury instructions, for presenting ineffective closing argument in the penalty phase of the trial, and for failing to object to improper arguments of the prosecutor in closing argument in the penalty phase of the trial. *See id.*

The Court finds that the claims in Ground 1H are, to some extent, repetitive of other claims made elsewhere in Nika's second amended petition and discussed above, and are asserted in a *pro forma* manner and unsupported by any evidence proffered by Nika. Moreover, to the extent they are subject to the procedural default doctrine, Nika has made no showing that his first post-conviction counsel were ineffective in not asserting these claims. Ground 1H will be denied.

Ground 14 - Nevada's Lethal Injection Protocol

In Ground 14, Nika claims that his death sentence is in violation of the federal constitution "because Nevada's lethal injection scheme constitutes cruel and unusual punishment." *See* Second Amended Petition (ECF No. 73), pp. 179-96. As the Court understands Claim 14, Nika asserts that lethal injection, conducted in the manner in which Nevada authorities intend to conduct it in Nika's case, would be unconstitutional. *See id.*

Such a challenge to Nevada's protocol for carrying out a death sentence is not cognizable in this federal habeas corpus action. In *Nelson v. Campbell*, 541 U.S. 637 (2004), a state prisoner sentenced to death filed a civil rights action, under 42 U.S.C. § 1983, alleging that the state's proposed use of a certain procedure, not mandated by state law, to access his veins during a lethal injection would constitute cruel and unusual punishment. The Supreme Court reversed the lower courts' ruling that the claim sounded in habeas corpus and could not be brought as a Section 1983 action. The Supreme Court ruled that Section 1983 was an appropriate vehicle for the prisoner to challenge the lethal injection procedure prescribed by state officials. *Nelson*, 541 U.S. at 645. The Court stated that the prisoner's suit challenging "a particular means of effectuating a sentence of death does not directly call into question the 'fact' or 'validity' of the sentence itself [because by altering the lethal injection procedure] the State can go forward with the sentence." *Id.* at 644. In *Hill v. McDonough*, 547 U.S. 573 (2006), the Court reaffirmed the principles articulated in *Nelson*, ruling that an as-applied challenge to lethal injection was properly brought by means of a Section 1983 action. *Hill*, 547 U.S. at 580-83.

Nelson and *Hill* suggest that a Section 1983 claim is the more appropriate vehicle for such a challenge to a method of execution. *See also Glossip v. Gross*, 135 S.Ct. 2726, 2738 (2015) ("In *Hill*, the issue was whether a challenge to a method of execution must be brought by means of an application for a writ of habeas corpus or a civil action under § 1983. We held that a method-of-execution claim must be brought under § 1983

because such a claim does not attack the validity of the prisoner's conviction or death sentence." (citations to *Hill* omitted)); *Beardslee v. Woodford*, 395 F.3d 1064, 1068-69 (9th Cir. 2005) (holding that claim that California's lethal injection protocol violated Eighth Amendment "is more properly considered as a 'conditions of confinement' challenge, which is cognizable under § 1983, than as a challenge that would implicate the legality of his sentence, and thus be appropriate for federal habeas review").

Given the amount of time that passes before a death sentence is carried out, it is certainly possible—perhaps likely—that a state's execution protocol will change between the time when a death sentence is imposed and the time when it is carried out. See, *e.g.*, Reply (ECF No. 169), pp. 277-78 (explaining that Nevada's lethal injection protocol changed between the filing of Nika's second amended habeas petition, and the filing of his reply to Respondents' answer). Habeas corpus law and procedure have not developed and are unsuited to adjudicate the constitutionality of an execution protocol that may change after a court imposes the death sentence. The Court concludes that a challenge to a state's execution protocol is not a challenge to the constitutionality of the petitioner's custody or sentence. *See* 28 U.S.C. § 2254. A challenge to a state's execution protocol is more akin to a suit challenging the conditions of custody, which must be brought as a civil rights action under 42 U.S.C. § 1983. Therefore, Ground 14 will be denied as not cognizable in this federal habeas corpus action.

Grounds 7H and 13—Cumulative Error Claims

Grounds 7H and 13 of Nika's petition are cumulative error claims, that is, they are claims that incorporate other claims, and assert that, considered cumulatively, the errors alleged in Nika's other claims warrant federal habeas corpus relief. *See* Second Amended Petition (ECF No. 73), pp. 159, 177-78. Ground 7H is a cumulative error claim regarding Nika's claims of instructional error, and Ground 13 is a cumulative error claim regarding all Nika's other claims. *See id.*

The Court denies Nika relief with respect to Grounds 7H and 13, per se, as the Court does not understand these to be viable stand-alone claims.

Furthermore, with respect to Ground 7H, the claim of cumulative error concerning Nika's various claims of instructional error, the Court found instructional error as claimed by Nika in only Ground 7B; therefore, there are not multiple instances of instructional error to consider cumulatively.

And, with respect to Ground 13, Nika's claim of cumulative error covering all his claims, the Court finds constitutional error as alleged by Nika in Grounds 1G, 6 and 7B, and has considered the effect of those errors cumulatively, as is discussed above.

Nika's Motions for Leave to Conduct Discovery and for an Evidentiary Hearing

Nika has filed a motion for leave to conduct discovery (ECF No. 166) and a motion for an evidentiary hearing (ECF No. 168).

Respondents oppose both motions on the ground that they are similar to motions for leave to conduct discovery and for an evidentiary hearing that Nika filed in conjunction with his opposition to a motion to dismiss. *See* Opposition to Motion for Leave to Conduct Discovery and Motion for Evidentiary Hearing (ECF No. 172). That argument in opposition to Nika's motions is without merit. The March 16, 2017, order stated explicitly that the motions for leave to conduct discovery and for an evidentiary hearing were denied without prejudice to Nika requesting discovery or an evidentiary hearing at the appropriate time in conjunction with the further briefing of the merits of his remaining claims. *See* Order entered March 16, 2017 (ECF No. 151), p. 13; *see also* Scheduling Order entered June 18, 2015 (ECF No. 68).

In his motion for leave to conduct discovery, Nika requests leave of court to conduct discovery with respect to Grounds 1A, 1B, 1C, 1F1, 1F2, 1G, 4A, 4B, 5 and 9B. *See* Motion for Discovery (ECF No. 166). A habeas petitioner does not have a presumptive right to discovery; rather discovery is available in a habeas action, in the discretion of the court, if good cause is shown. *See Bracy v. Gramley*, 520 U.S. 899 (1997); *Smith v. Mahoney*, 611 F.3d 978, 996-97 (9th Cir. 2010); *Rich v. Calderon*, 187 F.3d 1064, 1068 (9th Cir. 1999) (as amended) ("discovery is available only in the discretion of the court and for good cause shown"); *see also* Rule 6 of the Rules

Governing Section 2254 Cases in the United States District Courts. As is discussed above, the Court denies relief on Grounds 1A, 1B, 1C, 1F1, 1F2, 4A, 4B, 5 and 9B, and finds there is no showing of good cause for discovery as to those claims. And, regarding Ground 1G, the Court grants Nika relief on that claim without need for further factual development. Therefore, the Court will deny Nika's motion for leave to conduct discovery.

In his motion for evidentiary hearing, Nika appears to request an evidentiary hearing regarding Grounds 1B, 1C, 1F1, 1G, 4B, 6 and 9B. *See* Motion for Evidentiary Hearing (ECF No. 168). The general standard for holding an evidentiary hearing in a federal habeas action is governed by 28 U.S.C. § 2254:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> (1) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (2) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). Evidentiary hearings are not authorized for claims adjudicated on the merits in the state court. *Pinholster*, 563 U.S. at 183-84. The court denies relief on Grounds 1B, 1C, 1F1, 4B, 6 and 9B, and, as is discussed above, determines that an evidentiary hearing is not warranted with respect to any of those claims. The Court grants relief relative to Ground 1G without need for an evidentiary hearing. The Court will, therefore, deny Nika's motion for an evidentiary hearing.

Certificate of Appealability

The standard for the issuance of a certificate of appealability requires a "substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c). The Supreme Court has interpreted 28 U.S.C. § 2253(c) as follows:

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where, as here, the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000); *see also James v. Giles*, 221 F.3d 1074, 1077-79 (9th Cir. 2000).

The Court finds that, with respect to the claims on which the Court denies Nika relief, applying the standard articulated in *Slack*, a certificate of appealability is warranted with respect to Grounds 1C, 3, 4A and 5. The Court will grant Nika a certificate of appealability with regard to those claims. With regard to the remainder of the claims on which the Court denies Nika relief, the Court will deny him a certificate of appealability.

Conclusion

IT IS THEREFORE ORDERED that the Petitioner's Second Amended Petition for Writ of Habeas Corpus (ECF No. 73) is **GRANTED IN PART AND DENIED IN PART**. Petitioner is granted relief relative to the penalty phase of his trial, as described below, with respect to his claims in Grounds 1G, 6 (the ineffective assistance of trial counsel claim in Ground 6, as to the penalty phase of his trial), and 7B. Petitioner is denied relief on all other claims in his second amended habeas petition.

IT IS FURTHER ORDERED that Respondents shall either (1) within 60 days from the date of this order, vacate Petitioner's death sentence and impose upon him a non-capital sentence, consistent with law, or (2) within 60 days from the date of this order, file a notice of the State's intent to grant Petitioner a new penalty-phase trial, and, within 180 days from the date of this order, commence jury selection in the new penalty-phase trial.

IT IS FURTHER ORDERED that Petitioner's Motion for Discovery (ECF No. 166) and Motion for Evidentiary Hearing (ECF No. 168) are **DENIED**.

IT IS FURTHER ORDERED that Petitioner is granted a certificate of appealability with respect to his claims in Grounds 1C, 3, 4A and 5 of his Second Amended Petition for Writ of Habeas Corpus (ECF No. 73). With respect to all other claims in Nika's second amended habeas petition on which the Court denies relief, the Court denies a certificate of appealability.

IT IS FURTHER ORDERED that the judgment in this action will be stayed pending the conclusion of any appellate or certiorari review in the Ninth Circuit Court of Appeals or the United States Supreme Court, or the expiration of the time for seeking such appellate or certiorari review, whichever occurs later.

IT IS FURTHER ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

IT IS FURTHER ORDERED that, pursuant to Federal Rule of Civil Procedure 25(d), the Clerk of the Court shall, on the docket for this case, substitute William Gittere for Timothy Filson, as the respondent warden, and Aaron Ford for Adam Laxalt, as the respondent Nevada Attorney General.

DATED June 12, 2019.

James C. Mahan

JAMES C. MAHAN,
UNITED STATES DISTRICT JUDGE

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2019-10-18 12:04:15 PM
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Transaction # 7546023

CASE NO. CR17-1055 **STATE OF NEVADA VS. JOEL RUVALCABA**

DATE, JUDGE OFFICERS OF COURT PRESENT	APPEARANCES-HEARING	CONT'D TO
10/17/19 HONORABLE ELLIOTT A. SATTLER DEPT. NO. 10 N. Delgado (Clerk) P. Hoogs (Reporter)	**458 REVIEW HEARING** Deputy District Attorney Nicholas Zicari was present on behalf of the State. Defendant was present with Deputy Public Defender Ana Swanson. Officer Alyssa Foster was present on behalf of the Division of Parole and Probation. **COURT** reviewed the procedural history of the case, noting that he has reviewed the Probation Review Report filed on October 16, 2019. Defense counsel advised the Court that the Defendant is doing well on probation, has been testing clean, and made a payment of $100 towards his supervision fees. State's counsel concurred with Defense counsel, but advised the Court that he is concerned about the Defendant's outstanding fee balance. Defense counsel advised that the Defendant is able to make a payment of $135 today in order to be paid in full with his probation fees. Officer Foster advised the Court that her notes reflect that he owes $165. **COURT ORDERED:** Defendant is to contact Officer Foster to determine the exact amount owed toward his probation supervision fees. **COURT FURTHER ORDERED:** Matter continued to October 22, 2019, at 9:00 a.m.; if the Defendant is paid in full with the Division of Parole and Probation, he does not need to be present for this hearing and the Court will enter an order setting aside his conviction and dismiss this case. Defendant remained out of custody.	**10/22/19 9:00 a.m. 458 Review Hearing**

EXHIBIT 2

EXHIBIT 2

AFFIDAVIT

STATE OF NEVADA)
ss.
COUNTY OF WASHOE)

I, Martha B. Mahaffey Ph.D., make the following declaration based on personal knowledge and under penalty of perjury:

1. I am a licensed psychologist in the state of Nevada, licensed to practice from 1988 to the present.
2. From 1996 to the present, I have had a private practice specializing in forensic psychology.
3. As part of my practice, I conduct forensic psychological examinations in death penalty cases where the *Atkins* issue was raised or was to potentially be raised. From 2003 to the present, I have been hired in the state of Nevada by defense counsel or prosecutor in 23 such cases.
4. In my 16 years of experience in *Atkins* cases, I have usually been hired as the sole psychologist for the defense or prosecution; however, as the legal and psychological communities gained experience with *Atkins* cases, it became more common for defense counsel to hire multiple psychologists to address the *Atkins* issue.
5. In 2019, I was hired by the Washoe County Public Defender's Office in the case of Wilber Martinez Guzman, in anticipation that the death penalty was to be filed. I was asked to conduct a preliminary evaluation to see if there were grounds for the defense to file an *Atkins* motion.
6. Upon preliminary evaluation, I provided feedback to the defense team and made three recommendations:

a. That a neuropsychologist be hired as part of a multi-evaluation team for the following reasons:

   i. Intelligence testing identified potential deficits in executive functioning and frontal lobe functioning which neuropsychological testing could further assess.

   ii. Neuropsychological testing can look at the components of intellectual/cognitive abilities and relate them to specific deficits in adaptive behavior functioning. [Salekin, K. L., Macvaugh, III, G. S., Derning, T. J. (2015). Relevance of other assessment instruments. In Edward A. Polloway (Ed), *The Death Penalty and Intellectual Disability*. Washington, D.C.: American Association of Intellectual and Developmental Disabilities.]

   iii. "The benefits of using neuropsychological measures should be considered whenever possible in *Atkins* cases because these types of tests are considered to be useful in identifying specific types of brain-based impairments that are thought to underlie certain types of adaptive behavior." (Salekin, et al., pg. 320).

b. That an MRI be obtained to assess for functional brain impairments that may further identify and explain impairment in intellectual and/or adaptive behavior functioning.

c. That a mitigation team be formed to travel to El Salvador to interview collateral individuals such as family, friends, neighbors, teachers, medical personnel, past employers, coworkers, and other relevant collateral individuals for the assessment of adaptive behavior functioning; and to gather relevant academic, medical, and/or mental health documents.

7. I advised the team that an evaluation for the purpose of an *Atkins* hearing must be exceedingly thorough and carefully documented, requiring expansive data collection and a level of investigation far more in depth than those typically conducted in a forensic case. [Blume, J. H., Salekin, K. L. (2015). Analysis of Atkins cases. In Edward A. Polloway (Ed), *The Death Penalty and Intellectual Disability*. Washington, D.C.: American Association of Intellectual and Developmental Disabilities.]

8. I advised the team that said evaluations typically take 10 months for individuals whose collateral contacts and documented information are readily available, and more time when collateral and documented information is in a foreign country, requiring travel(s) to a foreign country.

9. I also advised the team that if the prosecution's expert was to use the same intelligence test, she would need to administer such 12 months after the date of this expert's intelligence testing:

    a. When a person is retested on the same intelligence test in close proximity in time, there is likely to be a gain in the obtained IQs on the second administration, referred to as a practice effect. "For this reason, established clinical practice is to avoid administering the same intelligence test within the same year to the same individual because it will often lead to an overestimate of the examinee's true intelligence." [Schalock, R. L. (2010). Intellectual Disability: Definition, Classification, and Systems of Supports, 11th Ed. Washington, D. C.: American Association on Intellectual and Developmental Disabilities.]

I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND THAT IT IS MADE FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR PERJURY.

Dated this 18th day of October, 2019.

Martha B. Mahaffey, Ph.D.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on March 18, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

John Reese Petty
Chief Deputy Public Defender

I further certify I served a copy of this document by e-mailing a true and correct copy to:

Hon. Connie J. Steinheimer
Second Judicial District Court, Dept. 4

John Arrascada
Washoe County Public Defender

Katheryn Hickman
Chief Deputy Public Defender

Gianna Verness
Chief Deputy Public Defender

Joseph W. Goodnight
Chief Deputy Public Defender

/s/ Tatyana Kazantseva
TATYANA KAZANTSEVA