issue.

Ultimately, this set the defense up for failure on the whole issue of self-defense as the state was able to argue, unimpeded, that the defense was simply on a smear campaign and presented no evidence other than the "one day" a "long time ago" that Virginia was violent. Putting aside the issues of prosecutorial misconduct with regards to this tactic and the argument, the failure of defense counsel to introduce evidence which was not speculative, but known and available to them was not an informed strategic choice, but prejudicial ineffective assistance of counsel.

Emeline Eisenman was on the state's witness list and released from subpoena without notice to the defense. The defense was then given a bogus phone number and address and was unable to contact her and secure her attendance at trial. This despite the fact that the state had paid to transport her and her family from California as well as her lodging costs.

She was critical to the defense to further demonstrate the violent nature of Virginia, as well as her knowledge of the events of December of 2000, but more importantly her suborning perjury of her grandson, Francisco Sanchez.

3. Conclusion

When petitioner attempted to present his defense, the failure of his counsel to properly interview and secure witness testimony, and other evidence, prevented petitioner from both defending himself from the allegations of the state and providing support to the defense theory of the case. This prejudiced petitioner in that the state used the failed and faulty presentation to attack not only the defense theory of the case, but the credibility of petitioner. Since the presentation of the defense in this matter largely rested on the credibility of petitioner it cannot be said that the failure on this issue did not affect the outcome of the trial. Counsel's performance with respect to this issue was constitutionally deficient under the Strickland standard.

D. Experts notes

1. Factual and procedural background

The production of Dr. Eisel's notes by defense counsel constituted ineffective assistance of counsel.

Incorporate by reference as previously set forth herein.

2. Argument and legal authority

Incorporate by reference as previously set forth herein.

3. Conclusion

Incorporate by reference as previously set forth herein.

E. Witness statements

1. Factual and procedural background

Bloom turned over all of the witness statement that were obtained by the various private investigators hired to assist the defense under the mistaken belief that it was required under Nevada law. This is not the case. It is clear from both the reciprocal discovery statutes in Nevada, as well as the conduct of the prosecution (in not turning over their interviews and interview notes as "work product") that Bloom did not understand the law and this prejudiced his case.

a. Mike Edwards

One of the only witnesses to testify for petitioner, who knew and socialized with petitioner and Virginia both in San Diego and Las Vegas, was Mike Edwards, Jr. For reasons only known to Bloom, he turned over the transcripts and the notes of the defense investigator's interviews of Edwards and others, to the state. The interviews contained off the cuff remarks by Edwards which were not known to the state who was then able to utilize them (calling Virginia and her family "white trash" and that they "cleaned up nice") to not only discredit him and his testimony regarding petitioner's propensity for not being violent with petitioner, but to discredit petitioner by making it look like he endorsed the derogatory comments.

Mr. Edwards testified on April 12, 2004. His cross-examination by Peterson reveals why the interviews should not have been turned over:

Q. Sir, you said that Gina was trash, didn't you?
A. I said she came from trash, yes.
Q. You thought she was trash and her family was white trash. Didn't you say that?
A. I thought she was trashy and cleaned up well after she met Chip. And Chip like her, so did everyone else.

Q. I thought after Gina met Chip and she's shown around to the other attorneys in the office, you still thought she was trashy; isn't that right?
A. I thought that she came from trash and that she cleaned up pretty well, and Chip loved her so everyone else accepted her.
Q. And you that that I think you said her family was trailer trash; is that right?
A. That's what they appeared to be to me, yes.
Q. They appeared to be that to you? Why?
A. The way they conducted themselves, their mannerisms, their way of speech.

AA, Volume 5, 147, p. 138, line 8 to p. 139, line 2.

Q. Is there anything else to your answer?
A. . . . And, yes, it's my opinion that, clearly, in my opinion they came across as trashy, but they dressed up nice and flashed around a lot of money. It doesn't make them good people.

Id. 147, p. 138, lines 11-20.

Which allowed the state to argue in closing:

"[A]s his friends said 'the trailer trash, the white trash."

AA, Volume 5, 241, p. 131, lines 3-4.

b. Angelo Ciavarella

Angelo Ciavarella then testified on April 13, 2004. Again the production of the transcripts of his discussions with defense investigators provided Peterson more than enough to impeach his testimony so as to neutralize benefit to the defense, or in fact cause harm.

Peterson first noted that Ciavarella's testimony regarding knowledge of the December 1, 2000 domestic violence incident was not contained in his April 13 and September 3, 2001 statements. AA, Volume 5, 159, p. 41, line 22 to p. 43, line 11. That he had discussed with defendant getting his guns back. Id. at 159, p. 44, lines 8-22. And hearing about having a gun to his head. AA, Volume 5, 160, p. 45, lines 2-6.

2. Argument and legal authority

Counsel was deficient in a number of aspects with regards to defense witness statements, which were prejudicial to petitioner. As stated above, showing that adequate pretrial preparation and investigation would have produced a conviction of a lesser degree of homicide would suffice for a showing of prejudice from lack of competent representation by defense counsel. See, U.S.C.A. Const.Amend. 6.; Turner v. Duncan, 158 F.3d 449 (C.A.9 (Cal.) 1998).

a. Duty to investigate

Counsel has a duty to investigate the facts and evidence to be presented at trial before it is presented. Defense counsel has a duty, for the purpose of an ineffective assistance of counsel claim, to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary; a lawyer who fails adequately to investigate renders deficient performance. Reynoso v. Giurbino, 462 F.3d 1099, (C.A.9 (Cal.) 2006).

b. Turning the records over prior to trial

There was no need for counsel to have turned over to the prosecution defense witness statements to the state prior to trial. This was either the result of not understanding Nevada's reciprocal discovery statute or of having no trial strategy. See, Berryman v. Morton, 100 F.3d 1089, 1096, (C.A.3 N.J.) 1996) (defense counsel improvised as they went along, proceeding from blunder to blunder with disastrous consequences).

c. Failure to prepare

Counsel failed to review the statements prior to turning them over. This failure resulted in the state being able to impeach both Edwards ("white trash") and Ciavarella ("December 1") on key parts of their testimony. The failure to prepare for this issue resulted in the state being able to get the jury to minimize, if not outright disregard, these defense witnesses testimony which were critical to the presentation of self-defense.

d. Failure to respond

The state, on the other hand, refused to turn over, to the defense, transcripts of interviews with Virginia's co-workers and others. Detectives indicated that they had interviewed many witnesses who both refused to speak with the defense, at the bequest of the state, and whose transcripts were not provided informing the Court that if the state did not intend to introduce the transcripts as evidence at trial to impeach or refresh recollection they had no duty to provide them to the defense. The Court agreed with this erroneous position. The state was able to improperly use this "strategy" and knowledge of the law to prevent the defense from properly preparing for trial and learn helpful or harmful things about the state's witnesses. Brady material was improperly suppressed. Bloom's "open book" policy ultimately cost him and the defense

dearly.

3. Conclusion

When petitioner attempted to present his version of events, the failure of his counsel to understand Nevada's Reciprocal Discovery statute and to properly prepare, develop and present the facts and evidence properly, prevented the defense from providing support to the defense theory of the case. This prejudiced petitioner in that the state used the failed and faulty presentation to attack not only the defense theory of the case, but the credibility of petitioner, and his witnesses. Since the presentation of the defense in this matter largely rested on the credibility of petitioner it cannot be said that the failure on this issue did not affect the outcome of the trial. Counsel's performance with respect to this issue was constitutionally deficient under the Strickland standard.

F. Defense work product

1. Factual and procedural background

As described above, counsel improperly and erroneously turned over work-product to the district attorney's office in the form of the plastic surgery records, day care records, the criminal history of Virginia, protected expert reports and witness statements. Counsel also allowed the district attorney's office to retain the notes and photographs taken by petitioner's counsel the night of December 20, 2000, as further detailed in Ground Six, Section 10, above. The effect of turning over each of these items was to lessen the burden of prosecution. This clearly violated petitioner's constitutional rights guaranteed under the 5th and 6th Amendments to the Constitution of the United States.

2. Argument and legal authority

Counsel was deficient in a number of aspects with regards to work product, which was prejudicial to petitioner. As stated above, showing that adequate pretrial preparation and investigation would have produced a conviction of a lesser degree of homicide would suffice for a showing of prejudice from lack of competent representation by defense counsel. See, U.S.C.A. Const.Amend. 6.; Turner v. Duncan, 158 F.3d 449 (C.A.9 (Cal.) 1998).

/////

a. Duty to investigate

Counsel has a duty to investigate the facts and evidence to be presented at trial before it is presented. Defense counsel has a duty, for the purpose of an ineffective assistance of counsel claim, to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary; a lawyer who fails adequately to investigate renders deficient performance. Reynoso v. Giurbino, 462 F.3d 1099, (C.A.9 (Cal.) 2006). The failure to do so was both ineffective and prejudicial to petitioner and the presentation of the defense. It cannot be said that this did not effect the outcome of the trial because the failure allowed the state to minimize if not disregard this evidence.

b. Turning the records over prior to trial

There was no need for counsel to have turned over work-product to the state, or allow them to keep the illegally obtained work product from Mutch. This was either the result of not understanding Nevada's reciprocal discovery statute or of having no trial strategy. See, Berryman v. Morton, 100 F.3d 1089, 1096, (C.A.3 (N.J.) 1996)(Defense counsel improvised as they went along, proceeding from blunder to blunder with disastrous consequences). Here, providing the state with work-product lessened the burden of prosecution and undermined petitioner and the presentation of a defense at trial.

c. Failure to prepare

Counsel failed to review the work-product he did turn over, or the work-product that was illegally obtained from Much. The failure to prepare for this issue resulted in the state being able to get the jury to minimize, if not outright disregard, the evidence which was critical to the presentation of self-defense.

d. Failure to respond

For counsel to claim that this was "strategy," necessitates the existence of one. As to the issue of turning over work-product, this case lacked strategy. Instead, it was a 'useless charade.' U.S. v. Cronic, 466 U.S. 648, n. 19, 104 S.Ct. 2039 n. 19, 80 L.Ed.2d 657. (1984).

3. Conclusion

When petitioner attempted to present his version of events, the failure of his counsel to

understand Nevada's Reciprocal Discovery statute and to properly prepare, develop and present the facts and evidence properly, prevented petitioner from providing support to the defense theory of the case. This prejudiced petitioner in that the state used the failed and faulty presentation to attack not only the defense theory of the case, but the credibility of petitioner and his witnesses. Since the presentation of the defense in this matter largely rested on the credibility of petitioner, it cannot be said that the failure on this issue did not affect the outcome of the trial. Defense counsel's performance with respect to this issue was constitutionally deficient under the Strickland standard.

14. Defense counsel was ineffective in failing to understand, know and apply Nevada law and statutes in the preparation and trial of this matter.

A. Factual and procedural background.

1. Disqualification of Dan Albregts.

As discussed in Ground One, supra, and incorporated herein by this reference, defense counsel failed to properly handle the issues with regards to the disqualification of Dan Albregts, which resulted in the violation of petitioner's Fifth and Fourteenth Amendment Right to remain silent and Sixth Amendment Right to counsel. When the state finally acknowledged that Albregts was not going to be a defense counsel, Bloom should have made a motion to have Albregts reinstated as counsel of record as he was petitioner's attorney of choice. Counsel also failed to writ the issue to the Nevada Supreme Court as required to challenge the Court's decision under Nevada Law.

2. Canvassing of client on the issue of self-defense

As discussed in Ground One, supra, and incorporated herein by this reference, counsel failed to object to the canvassing of petitioner which resulted in the violation of petitioner's Fifth and Fourteenth Amendment Right to remain silent and Sixth Amendment Right to counsel. Counsel also failed to writ the issue to the Nevada Supreme Court as required to challenge the Court's decision under Nevada Law.

/ / / / /

3. Nevada's reciprocal discovery statute

As discussed in Ground Six, and incorporated herein by this reference, counsel turned over records, expert and investigative reports, witness statements, and photographs and notes protected by the attorney work-product privilege, due to his misunderstanding of Nevada's Reciprocal Discovery Statute and the statutes on attorney client and attorney work-product privilege, which improperly lessened the burden of the prosecution.

4. Nevada statute on self-defense

Bloom improperly advised petitioner that he had to testify in order for Bloom to present his case of self-defense and to be able to present evidence of Virginia's background and history of violence. This conflicted with both the Court's prior ruling of December 27, 2001 and Nevada law. At the December 27, 2001 hearing, Judge Gibbons ruled that in accordance with the Petty decision (Petty v. State, 116 Nev. 321, 997 P.2d 800 (2000), petitioner was allowed the present evidence of prior bad acts of the victim without the defendant testifying, pursuant to NRS 48.045.

> The Court advised the prior bad acts of the victim can be presented without that person testifying.
>
> AA, Volume 1, 024.

Therefore, the defense could have presented the defense of self-defense and supporting evidence without testimony from petitioner. There was nothing presented in petitioner's testimony that could not have come from other witnesses and evidence (Virginia's criminal history). In fact it was petitioner's testimony that was one of the most damaging aspects of the defense. Petitioner had advised defense counsel that he did not want to testify but was advised that he had to in order to present self-defense.

Bloom's options were presenting the evidence of self-defense and knowledge of violence through his experts and other percipient witnesses. The problem became he failed to properly investigate his experts opinions prior to presenting them and failed to secure the attendance of critical witnesses which perhaps fueled his desire to have petitioner testify. An evidentiary hearing should be held where Bloom is questioned on this matter.

Between the time of Petty, and the Court's ruling of December 27, 2001, the Nevada Supreme Court addressed the issue in Daniel v. State, 119 Nev. 498, 78 P.3d 890 (2003). In Daniel, the Nevada Supreme Court held that when a defendant claims self-defense and knew of relevant specific acts by a victim, evidence of the acts can be presented through a variety of methods, separate and apart from a defendant's testimony. All of these methods were available to Bloom: including cross-examination and extrinsic proof. However, not even this was necessary since a defendant is permitted to present evidence of the character of a crime victim, regardless of the defendant's knowledge of the victim's character, when it tends to prove the victim was the likely aggressor. See, Petty, supra, and NRS 48.055(1), proof of character may be established by testimony as to reputation or in the form of an opinion.

In pre-trial preparation, Bloom was faced with the fact that petitioner was having incredible difficulty recalling facts and details of events, not just of the incidents in question, but other events as well, which made him a poor witness. Experts were consulted and hired to evaluate petitioner's mental state (the catatonic state noted by the responding officer on December 20, 2000, supra) and problems, i.e. lack of memory, but they were not used at trial leaving this issue (which LVMP detectives admitted "preparing for trial") alone with no explanation for the jury when in fact one existed. Another expert was also consulted to assist petitioner in testifying and no reasonably competent attorney would have even dared put petitioner on the stand, but Bloom did.

Bloom had the option of putting on the evidence of Virginia's background without petitioner's testimony, supra. In fact, petitioner's testimony, especially on the issue of the plastic surgery, subjected him to impeachment, ridicule and a complete loss of credibility, as detailed above. Regarding the events of December 1, 2000, December 4 and 5, 2000 and December 20, 2000, petitioner's testimony only hurt and did not help the defense theory of the case, and this evidence could have been presented through other witnesses, documents and evidence. In light of petitioner's recollection problems and lack of pre-trial preparation, the decision to instruct his client to testify at all, let alone give the advice he "must" testify was objectively unreasonable.

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B. Argument and legal authority

In the case of Edwards v. Lamarque, 439 F.3d 504 (C.A.9 (Cal.)2005) the 9th Circuit set forth the applicable case law regarding the misunderstanding of the law and its relationship to tactical decisions. At issue in Edwards was the defendant's attorneys decision to waive the marital privilege in order to present certain testimony. In finding both ineffectiveness and prejudice, the 9th Circuit found the following:

> Meyers' responses to the prosecutor's objections and the trial judge's comments reveal that he fundamentally misunderstood the marital privilege, and thus lacked the legal understanding necessary for a competent tactical decision.
>
> Id. at 512.

The district court recognized the "wide latitude" given to counsel to determine trial strategy, and the importance of considering counsel's behavior from the perspective counsel himself had, rather than with hindsight. Nevertheless, it concluded that '[e]ven if it was a conscious strategy, Meyers's decision to waive petitioner's right to assert the marital privilege was so completely uninformed and misguided that a reasonably competent lawyer would not have done the same thing in like circumstances." We agree. Id. at 514.

Furthermore, the Court found that such a "tactical" decision requires a cost benefit analysis. The district court recognized that the Supreme Court and this circuit have applied a cost-benefit analysis to such tactical decisions. See, e.g., Darden v. Wainwright, 477 U.S. 168, 186, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) ("Any attempt to portray petitioner as a nonviolent man would have opened the door for the state to rebut with evidence of petitioner's prior convictions."); Mak v. Blodgett, 970 F.2d 614, 619 (9th Cir.1992) ("[N]o risk would have been incurred by presenting the proffered evidence."). Id. at 514.

In rejecting the tactic of waiving the privilege the Court addressed a number of issues which Bloom was also confronted, such as Bloom's alleged "strategy" in allowing petitioner to "waive" his Fifth Amendment Right to remain silent and not testifying and the "strong evidence" against petitioner.

> Given the extremely strong circumstantial evidence against Edwards, an attorney in Meyers' position would be forced to consider numerous different strategies, all of which

could be risky or prone to failure, in an effort to win an acquittal. However, nearly all of the supposed advantages of Gaines' testimony could be reaped without her testimony. Edwards could testify himself that he was cleaning up a dog's mess, and it is difficult to see how Meyers could hope to supplement that testimony with Gaines' perspective. It comes down to the difference between Edwards testifying that Thomas' cousin threatened his and his wife's life, and Edwards giving that testimony supplemented by Gaines' testimony that she was aware of the threat. When balanced against the near-certainty of Gaines' testifying as to Edwards' confession to the murder, the tactical decision to allow the privilege to be waived was objectively unreasonable.

The main reason offered is that there was "strong evidence" against Edwards--apparently suggesting that desperate straits call for desperate measures. However, for the adversary process to function effectively, there must be some limits on counsel's willingness to take enormous risks, and Meyers' decision falls outside those limits.

Id. at pp. 514-515.

Regardless of whether Meyers' acts are viewed as reflecting a tactical decision to waive the privilege or as a plain mistake, the California Court of Appeal's conclusion that his performance was adequate was an unreasonable application of clearly established Supreme Court precedent, or was based on an unreasonable determination of the facts in light of the evidence presented at trial.

Id. at 516.

Furthermore, putting his client in harm's way in compelling him to testify, exposed weaknesses in the defense. In the unusual case of Johnson v. Baldwin, 114 F.3d 835 (C.A.9 (Or.) 1997), the Ninth Circuit was faced with an attorney who, due to his failure to adequately investigate and confer with his client, presented the client as a liar to the jury. In finding both ineffectiveness and prejudice from essentially setting up his own client, as it appears in this case that defense counsel had done with petitioner, the Court held:

Albert's denial that he was at the scene of the alleged crime was incredibly lame. He did not state where he was, or elaborate in any other way. His denial was so ineffective that it stimulated no cross-examination on its merits. Most of his testimony, on direct and cross-examination, was concerned with his prior convictions. The jury obviously concluded that he was not telling the truth when he denied that he was present at the scene. Because of the precariousness of the prosecution's case, there is a "reasonable probability" that, if Albert had not taken the stand and lied, the outcome of the trial would have been different. See, Strickland, 466 U.S. at 690, 104 S.Ct. at 2065-66.

Id. at pp. 838-839.

In Blackburn v. Foltz, 828 F.2d 1177 (C.A.6 (Mich.) 1987) the Court held that if defendant's

attorney had correctly stated the well established law, the defendant would have had a meaningful opportunity to decide whether to testify. Id. at 1183. "Counsel's error takes on the added significance in view of the fact that as a practical matter no viable defense was presented on [Defendant's] behalf. Id.

Finally, in the case of Hyman v. Aiken, 824 F.2d 1405 (C.A.4 (S.C.) 1987) the Court set for the test for counsel's failure under the same or similar circumstances as presented themselves in petitioner's trial.

> Under the first half of the Strickland test, counsel enjoys the benefit of a strong presumption that the alleged errors were actually part of a sound trial strategy and that counsel's performance was within the limits of reasonable professional assistance. 466 U.S. at 689, 104 S.Ct. at 2065. But this presumption does not overcome the failure of Hyman's attorneys to do basic legal research, to review the testimony of key witnesses--including their own client--and to be familiar with readily available documents necessary to an understanding of their client's case. Counsel's lack of preparation and research cannot be considered the result of deliberate, informed trial strategy. Their performance was based on ignorance rather than on understanding of the facts and the law. We conclude counsel's performance to be below the objective standard of reasonable representation required by Strickland, 466 U.S. at 688, 104 S.Ct. at 2065.
>
> Id. at 1416.

C. Conclusion

Advising petitioner to testify was both the wrong advice under Nevada law and an objectively unreasonable tactical decision based upon all the facts, evidence and other factors well known to Counsel both before and during trial. This prejudiced petitioner in that the state used the failed and faulty presentation. In essence Bloom set his own client up for impeachment to attack not only the defense theory of the case, but the credibility of petitioner. Since the presentation of the defense in this matter largely rested on the credibility of petitioner it cannot be said that the failure on this issue did not affect the outcome of the trial. Counsel's performance with respect to this issue was constitutionally deficient under the Strickland standard.

15. Defense counsel was ineffective in failing to investigate defense experts' opinions prior to presentation of that evidence.

A. Factual and procedural background

The theory of the defense was that the shooting which occurred on December 20, 2000

was done in self-defense, and thus not a criminal act. In support of it's theory, the defense proposed to call experts in the areas of forensic pathology, ballistics, blood spatter, shootings and psychology. The interplay between the experts and their opinions was critical to the presentation. Simply put, the experts needed to be in concert on their opinions and been properly prepared for trial. Defense counsel had to make himself fully aware of their opinions and the basis for each in order to be assured that when he testified, at the request of the defense, that the testimony given would fit and strengthen the petitioner's theory of defense.

The evidence which was available before trial was there were seven shots, four to the torso and three to the head. At issue was how to explain to the jury forensically, both the physical and psychological aspects and events leading up to and including the shooting, as well after the shooting. The evidence that was available both before and during the trial was that petitioner could not remember the shooting and was observed by the responding officer and others after the shooting as being "catatonic."

Defendant retained attorney Bloom in September of 2001, after his counsel of choice Albregts was improperly and erroneously disqualified by the Court. The matter was first set for trial in October of 2001. Bloom commenced to hire a series of experts to assist for preparing for trial. Bloom was even allocated funds by the Court, in addition to fund provided by Defendant and his supporters, to hire whomever he wanted.

Bloom consulted with and retained experts in the areas of forensic pathology, ballistics, blood spatter, toxicology, psychology, among other proposed areas. Some of these experts were consulted with and hired to counter the state's proposed experts and some to assist in the preparation of the defense.

The trial was continued until January of 2002, partly to allow Bloom additional time to prepare and allow his experts, including his forensic pathologist, Dr. John Eisele, his ballistics expert, Dr. John Fox (subsequently replaced by Jimmy Trahin) and, Dr. Scott Frasier, forensic psychologist (and ostensibly his other experts) to complete their evaluations and prepare for trial. During this time, as will further be discussed below, Eisele authored a report and produced notes to Bloom which stated unequivocally **"it would be hard to present this as self-defense."** This

report was not shared with petitioner for reasons only known to defense counsel. There was no effort to hire another expert or to consult with the client as to how to best handle the situation, or how this may effect or impact the trial strategy or presentation of self-defense. It appears that Bloom failed to ever review Eisele's notes and opinion prior to trial or he incompetently allowed this information to be given to the jury through the state's cross-examination.

The matter proceeded to trial in March of 2004. In the interim the state was given copies of Eisele's 2001-2002 authored report and his notes. The foundation for improperly turning over the notes had been established as far back as 2001.

> THE COURT: Whatever it is, the underlying data that they relied upon is to be furnished and disclosed.
> MR. LAURENT: And their notes.
> THE COURT: And their notes.
>
> AA, Volume 1, 199, p. 239, lines 10-13.

Defense counsel Bloom told the jury in his opening statement that this would be a case of self defense. Part of the evidence that the jury could rely upon was the testimony of a forensic pathologist hired by the defense, Dr. Eisele, who would support the theory of self defense. Bloom turned over Eisele's report and notes to the prosecution, which undermined the entire theory of the defense. Eisele's notes contained the statement that, "it would be difficult to present this as self defense." This became the lynchpin in both the cross-examination of Eisele, as well as emphasis at trial and in closing. Eisele becomes a better witness for the state than the state's own forensic pathology expert, Dr. Larry Sims, on the issue of how the shooting may have occurred, which was critical to the defense.

The ineffectiveness arisen from the fact that counsel failed to review the files and consult with his expert prior to turning the expert materials over to the state. But for this failure, Bloom would have realized that his expert either needed to be replaced (as was done with the originally retained ballistics expert Richard Fox, since funding was not an issue) or that he needed to consult with his client with regards to the how to further proceed at trial. The prejudice was two fold: he proceeded to trial on a theory not supported by his own experts and/or failed to obtain experts to support the theory he was planning on proceeding with at trial. It is reasonably

probable that this failure undermined the confidence of the verdict reached in this case, as the outcome would have been different.

Bloom's handling of the experts did not end with the failure to prepare Eisele. Bloom also failed to consult with his other experts before trial (both before the presentation of the state's experts - to assist in both their testimony and to assist Bloom with cross examination), conduct any research, and requests copies of the studies relied upon by expert witnesses. This was clearly the case with the experts for ballistics, blood spatter and forensic pathology. Bloom's failure to even read, let alone review, the reports of the experts is reflected in their trial testimony and trial performance.

Had Bloom properly prepared his experts, as he represented pre-trial, and allowed them to share their opinions, reports and other evidence with each other, at least one of the experts, and perhaps Bloom himself, would have picked up upon Eisele's report undermining self-defense. In fact in both open court and in pleadings filed with the Court and provided to the state, Bloom indicated that all three of his experts would be consulting with each other (forensic pathologist, ballistics and blood spatter) to assist the defense in preparation of the case. This clearly did not occur.

On October 29, 2001 Bloom prepared and filed a document, entitled, "Defendant's Response to State's Motion Requesting the Defense Turn Over Expert Information." AA, Volume 1, 095-105. In this document, Bloom indicated the following:

> Three defense experts have commenced their evaluations. These persons are Dr. John Eisele, a medical examiner and pathologist; Richard Fox, a criminalist and ballistics expert; and Dr. Scott Frazer, a neuro-psychologist; have been consulted, none of whom have completed their respective evaluations.
>
> AA, Volume 1, 096, page 2, lines 21-25.

In the follow-up hearing which took place on December 21, 2001, Bloom stated to the Court, in response to requests for reports from his experts:

> Dr. Eisle is a pathologist. He has talked to Dr. Sims who is the coroner, who did the autopsy here.
> He had reviewed materials from Dr. Sims and materials that the people has given us with regard to that; and he has talked to me.

He has not written a report, because we haven't formulated -- I don't know if he's going to write a report. A formal report is not required under Nevada law . . . But nonetheless, he is going to testify about what I think their expert is going to testify about.

AA, Volume 1, 146, page 27, line 15 to page 28, line 4.

And so, Dr. Eisele is one expert and he had reviewed these materials and he is going to testify about the cause of death and the manner of death and the things that pathologist testify to as it relates to our particular case.

AA, Volume 1, 146, page 28, lines 15-20.

Mr. Fox [the then defense ballistics expert who *was replaced before trial*] has consulted with Dr. Eisele and he will testify with regards to a theory or a -- what -- what happens with experts is one side says it's -- the physical finding you have is consistent with this type of potential circumstance of him shooting her in this -- in this way and the people will ask those questions.
I expect to ask the same questions of their experts and of my experts.
From the physical findings you have seen, is it consistent with this theory or a sequence of events?
And that 's the way experts always testify and no expert that I'm going to present will say that this is the only way it could happen or something like that.
They will say the -- these physical facts are consistent with this scenario.

AA, Volume 1, page 146, page 29, lines 3-17.

The experts Bloom retained and called as witnesses did not do as he represented.

1. Opening statements by Bloom

The matter, at that time was set for January 2, 2001, but due a number of circumstances did not commence until March 17, 2004 [opening statements], a full three years, two months later. Bloom had three plus years to prepare for trial.

On March 17, 2004, Bloom gave an opening statement in which he represented the following to the jury:

You're not going to be alone, though, in deciding the events that happened during those three seconds and the few moments beforehand. Because you're going to have the assistance of a variety of experts. Doctor Sims is just one.

He's also going to say he can't rule out the fact that she was upright at the time of those shots. Now, the prosecution presenting evidence or will present evidence and talk to you about what evidence they are going to present of one theory of

how the shooting occurred to her body, and when she is on the ground, to the head shots.

AA, Volume 8, 055, page 176, lines 4-20.

Your going to hear from a number of experts from the defense . . . one of who is Doctor John Eisele. Dr. John Eisele is a forensic pathologist out of San Diego County and Northern California who has worked and been the chief pathologist for several different counties and he will tell you that Dr. Sims is right to say he can't rule out the fact that the shots were of the kind, of were administered in a pattern described by the prosecution, but its equally as possible from the evidence that, in fact, Gina was upright at the time of the shots.

AA, Volume 8, 055, page 176, line 24 to 056, page 177, line 8.

2. Dr. Larry Simms' testimony

Dr. Sims testified on April 6, 2004. At issue, as explained to the jury in opening statements, supra, and during the state's case-in-chief, was when the three shots to the head were fired, either while Virginia was still standing, supporting the defense theory of the case (self-defense), or while down on the ground, supporting the state's theory of the case (first degree murder).

Dr. Sims literally opened the door to the defense theory at various points in his testimony for the defense to present their theory. He testified that often pathologists disagree and this "doesn't mean one is right and one is wrong. Two reasonable interpretations can come out." [AA, Volume 4, 211, page 87, lines 2-18]. "I do respect any reasonable opinion, even if I disagree with what I had to say." [AA, Volume 4, 211, page 87, lines 20-21].

Bloom then got into the area of explaining the shots to the back and how they could be caused by a person who gets shot at turning from the shooter (defense theory) versus simply getting shot at in the back (state theory). [See, AA, Volume 4, 212, page 89, line 12, to page 92, line 16]. In fact Dr. Sims stated (in response to a question that the back injuries could be from turning from the shooter) ". . . [B]ut I do not exclude the possibility you just talked about [Explaining away the shots to the back], especially since you have some studies that back it up. [See, AA, Volume 4, 213, page 93, lines 11-13].

The next issue was how long would it take Virginia to fall after being shot.[AA, Volume 4, 213, page 94, line 2 to page 95 line 19] To this line of questioning, Dr. Sims, responded:

> I think I could probably be comfortable with anywhere from a half second to three seconds I think that would probably be my comfort level.

See, AA, Volume 4, 213, page 95, lines 20-22.

Then with regard to the possibility that during this up to three second range the three head shots occurred (while still standing) Dr. Sims stated:

> I'll be perfectly honest with you. They may not only have a reasonable opinion, but they could actually be right and I could actually be wrong.

See, AA, Volume 4, 214, page 99, lines 22-24.

The next inquiry regarded, again, the possibility that the shot to the eye (one of the three head shots) occurred while upright. [See, AA, volume 4, 215, page 102, lines 8-12], Dr. Sim's responded:

> I didn't do any analysis of all the blood spatter and all the scene stuff . . . I don't think I can answer that question with the knowledge I have right now.

Id. at 215, page 102, lines 13-18.

And finally, with regards to the possibility Virginia exhibited wounds that would be consistent with her being the aggressor, Dr. Sims testified:

> Yes. And just to go a little bit further too. If someone had martial arts training, I think they use elbows as weapons, that would certainly be another possibility, so I certainly cannot rule those out . . .[T]his would be consistent with stippling to the hand.

Id. at 215, page 103, lines 6-9; page 103, line 10.

Simply put, after Dr. Sims' testimony and cross-examination, he opened the door to Bloom to present his expert's testimony as being consistent with both the three head shots being fired while Virginia was still standing and her being the aggressor. After Dr. Sims testimony, the state rested their case. This further assisted Bloom as the very first witnesses he should have called should have been the experts he had hired and consulted with to support the self-defense theory while the issues were still fresh in the jury's mind.

At this point in the trial, prosecution expert Sims had established critical points in favor of the defense, including the plausibility of the defense theory that Virginia was upright as all of

the shots were fired, which would support the theory of self-defense. If Bloom had read or reviewed Eisele's notes or consulted with him prior to trial, he would have been aware of the inconsistencies in Eisele's opinion's relative to the defense theory of the case. Bloom would have been better off not calling him as a witness at all and making the argument of reasonable doubt to the jury on this issue.

3. Defense calls ballistics expert Jimmy Trahin

Bloom called as his first witness, Dr. John Eisele, Jimmy Trahin the ballistics expert, was second, who not only did not obviously listen to, understand, or comprehend either the defense strategy or Dr. Sims' testimony, but both confused the issues and made a better case for the state. This is discussed in more detail, below.

Bloom told the jury the following with regards to the testimony of Jimmy Trahin in his opening statement:

> Mr. Traheen (sic) will tell you that he can't rule out that as a possibility, but believes it is not indicative of most of the evidence that is there for two primary reasons:
> First, the angle of the shots into the body, there's one, into the head, one shot which goes straight in and there's two shots which are at an upright angle. If Gina was down on the ground receiving those shot's she's down here like this, the shot comes straight down, the shooter could have been over and fired that shot. We know that the gun is close to the body, but then in order to create the upward angle the person would have to shoot and they get down and change the angle of the gun. So it's no longer down. It's like this and like that.
> An improbable circumstance says Mr. Traheen (sic). Not how people usually shoot. Doesn't make sense one would do that and change the angle. We know the angles are the entries.
>
> AA, Volume 8, 057, p. 178, line 9 to 058, p. 179, line 2.

He goes on further to tell the jury that Trahin will testify that "evidence is consistent with her having come at home and being close to the muzzle" and "is more consistent . . . with a situation where Chip has the weapon and she is standing and ***coming at him*** and she is shot . . . " Id. at 058, p. 179; lines 8-9, and 21-23.

All of the same facts and arguments regarding the failure to prepare with regards to the testimony of Dr. Eisele, apply with equal force and effect to Bloom's handling of Jimmy Trahin, the defense ballistics "expert." Here, the state, and not the defense, was more familiar with the

proposed testimony of the defense experts than defense counsel. It is clear from the cross-examination that was conducted that the state had consulted with the defense experts before trial, learned their opinions, read their reports, and were prepared to question them.

The state's cross examination and closing argument demonstrate the ineffectiveness of counsel and the ensuing prejudicial effects it had on the defense of the case.

Cross Examination

Topic One: The rapid firing of the gun:

Trahin admitted the shooting was not as quickly as it could have been, undermining the defense theory of the case.

AA, Volume 4, 225, p. 142, line 13 to p. 144, line 20.

Topic Two: Shooter moving towards [as opposed to coming at him as Bloom stated in opening] and two separate shootings.

Q. And all the evidence is that she's moving away from west to east, yes.
A. Generally, the shooting appears to being going from west to east, yes.

AA, Volume 4, 227, p.149, lines 1-4.

Q. [W]e also known the shooter moved in this case, do we not?
A. Apparently yes.

AA, Volume 4, 227, p.11, lines 2-4.

Q. I remember when I talked to you I wrote down in a quote "Shooter not following after her."
Do you agree with that?
A. . . . [Y]es, I would say that either the defendant is pushing the victim to the right, or there's some reason the suspect is moving to the right.

AA, Volume 4, 227, p. 152, lines 19-21.

Topic Three: No evidence she attacked him.

Q. Would you agree with me, sir, that there is no physical evidence to show she was approaching him?
A. That's correct, true; physical evidence.

AA, Volume 4, p. 154, lines 1-3.

Q. And there is no physical evidence that Gina Centofanti attacked or came towards Chip Centofanti; isn't that correct?
A. I have no physical evidence that would depict that scenario, no.

AA, Volume 4, 228, p. 156, line 25 to p.157, line 4.

Topic Four: Bolstering state's expert's opinions regarding the proximity of the shots.

Q. . . . [Krylo][state's ballistics' expert] says 6 to 24 inches [regarding the stippling.
A. . . . 12 inches, plus or minutes three of four inches.

AA, Volume 4, 229, p. 157, lines 5-24.

Topic Five: Shots to the head.

Q. After that shot . . . the to head [temple], she's done?
A. Yes, not matter which [of the three] shots.

AA, Volume 4, 232, p. 172, lines 9-14.

This of course set up a devastating closing argument.

Closing Argument

There is no evidence she attacked him, none.
Even their own expert witnesses say that. Jimmy Trahin (phonetic), no evidence she attacked him.

AA, Volume 5, 215, p. 27, lines 8-11.

[W]hen I asked Jimmy Trahin about what he call the 21-foot Rule. That rule talks about how a trained officer with a sidearm cannot get that gun out and fire center body at a person who starts their attack closer than 21 feet.
There's another defense diagram that's got the dimensions on this case and they just can't make it work.
They just can't make it work.

AA, Volume 5, 215, p. 28, lines 7-15.

You heard Jimmy Trahin when I showed what I just acted out for you? He said "I can't say the evidence is consistent with that. The evidence is consistent -- the evidence at the scene is consistent with that.

AA, Volume 5, 216, p. 29, lines 14-17.

Remember how I asked Jimmy Trahin – I laid on the floor and said what if she was on the floor and her head was near the floor and her arm was raised, bullet comes through and into the temple?
He said "Yeah, the evidence is consistent with that. After that she's done."

AA, Volume 5, 216, p. 31, lines 7-12.

These injuries tell you what happened to her. The blood spatter, on the leg of the bike, tell you her head, when she suffered one of those injuries, was at or near the floor. Remember, their expert came in and said "Yeah, I can't rule that out. I think there's other mechanisms but I can't rule that out. They don't even disagree. Lateral blood flow, that head wasn't in an upright position when there was bloodletting.

AA, Volume 5, 216, p. 32, lines 7-16.

Is he spraying shots all over like cops do in self-defense cases? You heard [from Jimmy Trahin] the hit rate 15 to 20 percent, 15 to 75 percent, even in the best case scenario.

AA, Volume 5, 217, p. 36, lines 1-4.

In the rebuttal closing argument:

Jim Trahin said there's no evidence she was attacking him.

AA, Volume 5, 241, p. 129, lines 16-17.

4. Testimony of Dr. John Eisele

As to the defense expert, forensic pathologist Dr. Eisele, he testified the next day, on April 7, 2004. [It should be noted that Dr. Eisele was not present for Dr. Sims' testimony and allegedly was provided rough draft transcripts of his testimony and was briefed by Bloom. He was also not present for Trahin's testimony or provided a copy of the transcript of it as well. It also became clear that Eisele was not provided access to or did not request the reports of the other experts, such as defense blood spatter expert Stewart James.]

As a result of not being properly prepared to testify and Bloom providing the prosecution with Eisel's internal notes in conjunction with his report, Bloom turned Eisele into a better witness for the state than Dr. Sims was to refuting the defense theory of the head shots having been fired while Virginia was still standing and evidence of her being the aggressor. It should be noted here that the defense as far back as 2001 mentioned both Virginia's martial arts training

and their intention on calling a defense expert on martial arts, Michael Newman [See, AA, Volume 1, 149 at page 150]. Yet Newman was never called as a witness even after prosecution witness, Dr. Simms, testified that Virginia's wounds were consistent with someone with martial arts training. Not only that, but no questions were asked of any other witness, in particular Eisele on this topic, which supported the theory of self-defense.

First on the issue of the head shots, which defense counsel spent considerable time developing with Sims that they could have occurred while Virginia was upright, expert defense witness, Dr. Eisele, refutes Dr. Simms' testimony and instead testifies that "[A]ny one of these three shots would have caused immediate unconsciousness and collapse." AA, Volume 5, 013, page 45, line 1. He then goes on to further testify:

> Q. How long would it take for someone to collapse under such circumstances?
> A. . . . I don't remember the exact number.
> Q. Dr. Simms gave an opinion that he thought that the body, if shot standing upright, would have collapsed between a range of one-half to three seconds.
> Do you believe that is accurate?
> A. I think the three seconds is probably too long . . . body collapse are going to happen in a fraction of a second.

Id. at 013, page 45, lines 9-25.

But this came as no surprise considering the fact that Dr. Eisele admitted on the stand that he *did not review* (contrast with Bloom's 2001 statements on the record, supra, that all of the experts had consulted with each other and shared findings, reports, etc.) any of the other defense expert reports, consult with them, or in the case of the Dr. Sims and the one defense expert called before he testified, defense expert Trahin, review any testimony.

> Q. Any could you tell us the materials that you looked at in order to have the foundation for your testimony here today?
> A. [B]asically I looked at the coroner's report at the autopsy report, at police scene investigation reports, photographs of the scene and autopsy.

Id. at 005, p. 13, lines 13-22.

This fundamental failure to prepare and be prepared became obvious on the first set of questions posed to him by Bloom when instead of testifying about the seven (7)

known shots, Eisele testified as follows:

> Q. [H]ow many shots did she suffer and can you group them together in some fashion?
> A. I want to say there were eight. Let me just -- yeah, there were a total of -- actually nine -- probably eight shots.

Id. at 005, page 15, lines 1-5.

This of course caught everyone, the Court, the jury, the state and more importantly, Bloom completely off guard. Bloom was then forced to make multiple attempts to "rehabilitate" his own witness, with regards to the correct number of shots, since he made it greater than the actual number of seven. See, Id. at 009, p. 31, lines 19-25 [multiple times] and also at 011, p. 40, lines 23-24 [Q. There's not an eighth shot, not a ninth shot, or a tenth shot . . . [T]here's these seven . . .]

An additional failure was Bloom not even questioning, let alone developing, the area of the wounds being consistent with someone trained in martial arts, as was suggested by Sims and known to the defense through investigation and discovery. See, discussion by Bloom about the use of Michael Newman, as karate expert, during pre-trial hearings [AA, Volume 1, 149, p. 39, line 1, to 41, line 10]. Newman in particular would have assisted the defense with regards to defensive versus offensive wounds, particularly in light of Dr. Simms testimony regarding this very issue.

Bloom's efforts would be in vain as Bloom already gave the state more than enough to discredit all of Eisele's testimony: The state, unlike Bloom, had reviewed Eisele's notes, report and testimony and took the defense expert (and the theory of defense) apart piece by piece:

> Q. And regardless of the order of shots would you say in your review of all this that it's difficult to present this case as the victim threatening Defendant?
> A. Um, I don't know, I certainly -- the material I have is relatively limited compared to what's in Court. I think you can make a case for it. Um, it's reasonable, at least as far as some aggressive action.
> Q. Did you prepare notes in this case?
> A. Yes.
> Q. Did you give those to Mr. Bloom?
> A. Yes.

Q. Did you not write in your notes that it is difficult to present this as her threatening him?

. . .

A. Yeah, that apparently was my though at the time.

AA, Volume 5, 020, p. 75, line 20, to p. 76, line 16.

Q. You also indicated [in your notes] that due to the pattern of the casings these were separate shooting events and they could be separated by one to two seconds, but no continuous shooting.

A. Um, yeah.

AA, Volume 5, 020, p. 77, lines 5-9.

Q. It looks like in your notes that they are in chronological order from the earliest notes being on page one, to the final notes being on page nine and ten.

A. Yeah. I think so. That's the way I could keep them in the file.

Q. On the second to the last page you wrote, "It's difficult to present this as her threatening him," right?

A. That was on -- at the end of 2000 or 2001?

Q. 2001 --

A. 01, yes.

AA, Volume 5, 020, p.77, line 22, to p. 78, line 8.

Q. And so, on 12-10 when you made notes you made the note that it was difficult to present this as her threatening him and on 12-24-01 you had a telephone conversation with Mr. Bloom right?

A. Yes.

Q. Since that time you changed your opinion, right?

A. Um, I don't know that I have in terms of self-defense.

. . ..

Q. Would you agree with the statement then that its difficult to present this case as her threatening him?

A. With the information I have, um yes.

AA, Volume 5, 024, p.90, lines 8-25.

The DA went further on to note and have Eisele's admit that his work on the defense case was essentially done at the time he made the note on December 10, 2001 and by the time of the phone call to Bloom to December 24, 2001, further discrediting his testimony and his attempts to explain away the discrepancy between his notes and his opinion at trial. [See, AA, Volume 5, 024, p. 89, line 4, to p. 90, line 3. This of course set up a devastating closing by the prosecutor:

There is no evidence she attacked him, none, their own experts say that . . . You remember Ms. Goettsch's cross-examination of Dr. Eisele; do you remember the notes?
Hard to present this one as a case of her attacking him. Do you remember him trying to weasel out of that and change his opinion?

AA, Vol. 5, 215, p. 27, lines 8-16.

Everyone agrees that the casings were in two different places and that's an indication of a pause in the shooting which shows premeditation.

Id. at lines 10-12.

The knockout blow by the prosecution. At that point, by the time the defense called only it's second witness, the defense case and theory of self defense was over before it even started. This would of course lead to the erroneous advice to petitioner that he "had to testify" [This despite the fact that both Nevada law and Judge Gibbons had advised the defense that defendant did in fact not have to testify to go forward with a self-defense defense. See, supra.] This advice, covered elsewhere in this petition, was both ineffective and prejudicial and simply attempt to try to save a sinking ship that was already proverbially sunk.

Finally, what was the point in calling a ballistics expert who not only did not support the defense theory of the case, but actually contradicted the statements made by defense counsel to the jury in opening statements? This clearly was not the product of any reasonable strategy.

5. Testimony of blood spatter of expert Stewart James

The critical blood spatter evidence in this case concerned the questions of whether or not Virginia could have been upright during each of the seven shots, and more importantly, if the three shots to the head were sustained while she was standing or on the ground. As with the other defense experts, it became clear that only the state had actually consulted with them sufficiently before trial to ascertain their opinions relative to the state versus the defense theory of the case. See, AA, Volume 5, 037, p. 15, lines 20-21 [Peterson mentions speaking with James on the phone].

During cross-examination, the following occurred with regards to his opinions relative to whether or not Virginia could have been upright for all of the shots and if she was on the ground when she sustained the three shots to the head. James testified that he agreed with four of the

conclusions of the state's blood spatter expert, Randall McLaughlin. See, Id. at 039, p. 21, line 13 to p. 22, line 1. The only dispute is the blood stain on the leg of the bike, which the state contended was evidence of the shots to the head occurring while Virginia was on the ground (and therefore evidence of pre-meditation and first degree murder).

As to this stain, he testified as follows:

Q. Your not ruling this stain [on the bike leg] out as from a gunshot, are you.
A. The stain pattern, no.

AA, Volume 5, 037, p. 13, line 3, to p. 14, line 5.

Bloom, on re-direct attempted to "fix" this testimony on re-direct, but instead placed emphasis on it. See AA, Volume 5, 040, p. 26, lines 8-13.

As to why defense counsel would use the word "victim," when it is both conclusory and in violation of the order of the court the defense counsel obtained regarding same, is anyone's guess and perhaps best left to an evidentiary hearing on ineffective assistance, but as to James this line of questioning should have been worked out before trial and a determination made as to whether or not even to call James as a witness.

Because James, the world renowned blood spatter expert who "wrote the book" on the topic (literally and figuratively) that is used by the state's expert, testified that he cannot say if she was upright. Bloom then reasked this question and gets the same answer on further re-direct. Id, at 041, p. 29, lines 8-12.

6. Psychological experts

Both the facts and circumstances of this case, as well as defense counsel's representations both pre-trial and during trial, pointed to the fact that petitioner had a mental state defense. In that regard the defense ostensibly hired a Dr. Glen Lipson and Dr. Scott Frasier, both forensic psychologists to assist the defense in the presentation of this evidence. However, neither was utilized to assist the defense, and in fact, as with the other defense experts, their testimony actually assisted and aided the state and lessened the burden of prosecution.

a. Dr. Glen Lipson

Back during the 2001 pre-trial hearings, Bloom made the following representations with

regards to Dr. Lipson, which were relied upon by the state in filing the pre-trial writ to obtain a psychological examination of petitioner.

> Dr. Glen [Lipson]. He is a psychologist who has examined his -- begun the examination. Had one full day of examination of Mr. Centofanti, needs a second, and we'll do that.
>
> AA, Volume 1, 147, p. 30, lines 1-4.

Bloom further "pre-viewed" the testimony and claimed it would show:

> [T]hey'll think they shot once and, in reality, they shot seven times or unloaded the gun, fired the gun until its empty.
>
> Id. at p. 31, lines 3-5.

While the examinations took place, Lipson did not offer any testimony regarding his examination of the petitioner or how any of his testimony and opinions would assist the defense or petitioner in explaining the events as they occurred in December of 2000 (the domestic violence incidents of December 1 and December 5 as well as the incident on December 20). Lipson did not discuss or relate to the jury the evidence of petitioner's catatonia on December 20, 2000 and any other issues raised by the evidence in this case as to petitioner's mental state.

His testimony as to officer related shootings was also ineffective as it was not connected or related to any actions or inaction of the petitioner but instead focused on the phenomenon's in general associated with officer related shootings. So this had no force or effect with the jury as his testimony and opinions were easily discredited and dismissed in cross-examination and closing argument by the state.

b. Dr. Scott Frasier

Dr. Frasier was introduced to the jury as a professor in psychiatric law and behavioral sciences who also did consultant work in the same areas. As with Lipson, he spoke in generalities and did nothing to assist the defense theory of the case.

During cross-examination, the state brought forth the ineffectiveness of calling him as a witness:

> Q. Now, you're not in any position to tell us who might have been threatening who in this case; are you?

A. No. I cannot make that judgment. Only the jury can decide that.
Q. That's because you've ever interviewed the defendant, have you?
A. I did not.

AA, Volume 5, 128, p. 64, lines 11-17.

Q. When were you retained initially in this case?
A. I believe it was in October of 2001.

Id. at lines 21-23.

Q. Let me see if I'm understanding. Your talking about people and memory and feelings in general today; right?
A. That's correct.
Q. Your not coming in here telling this jury you've made some specific diagnosis of Chip Centofanti, is that true?
A. That is correct.

AA, Volume 5, 117, p. 18, lines 9-16.

Q. But you cannot tell us who the aggressor was in this case?
A. I cannot.

Id. at 129, p. 65, lines 4-6.

So, again, we are faced with the failure to prepare for trial, consult with experts and have the expert testimony support the defense theory of the case, and in fact, allow the state to argue the failure to prove any of these issues.

Furthermore, Bloom failed to utilize Dr. Frasier, as he had in other cases they worked on together, in an effort to discredit the questioning techniques of the state with regards to Quito, and Quito's testimony itself being the product of coaching and influence, and thus unreliable (See, Section 16, supra, re: Emeline Eisenman). In the case of Plascencia v. Alameida, 467 F.3d 1190, (C.A.9 (Cal.) 2006) Plascencia's attorney, Bloom, presented an expert witness, Dr. Scott Fraser, whose testimony was designed to undercut the child Jesse's eyewitness identification and to support a motion to exclude the identification as untrustworthy. Id. at 1204. In was ineffective not to use Frasier to assist the defense with this issue in this case.

7. Experts not called or used

There were a number of experts that Bloom failed to call or use in the presentation of the defense during the trial of this matter. As to each of these experts, the failure was both

unreasonable and prejudicial as demonstrated by the following:

a. Toxicology

Back in 2001, Bloom told the Court he was going to hire a "Van Berkable" (Dan Berkable) identified as a toxicologist [AA, Volume 1, 148, p. 37, line 14, to 149, p. 39, line 6]. Toxicology was an issue in this case as the state argued that no drugs or alcohol were found in Virginia's system. Not only did Bloom not call and toxicologist, but he lost the samples given to him of tissue and blood and thus the defense had no evidence or response to this issue. Had this issue been properly prepared, the defense may have been able to attack the testing, methodology and other aspects of the testing, as well as additional control tests of the hair to determine long term patterns of drug or other illegal substance use.

b. Karate/martial arts

Michael Newman, was a karate expert [AA, Volume 1, 149, p. 39, line 1, to 41, line 10]. Newman would have assisted the defense with regards to defensive versus offensive wounds, particularly in light of Dr. Simms testimony regarding this very issue, which supported a theory of self-defense, but was left undeveloped or responded to by the defense.

c. Self-defense

Back in 2001, Bloom told the Court he was going to hire a Dr. Demerits Heller, described as an expert who would testify as to the 'Psychological pattern of showing aggressiveness or combativeness." [AA, Volume 1, 149, p. 41, line 15, to p. 43, line 7]. This would again have assisted the defense in the presentation of self-defense, but again was not pursued by Bloom. Heller would have also testified as to the issue of battered spouse syndrome in relation to the events of December 1, 2000, December 5, 2000 and December 20, 2000.

d. Blood spatter

During Opening Statements Bloom told the jury the following:

> Though we don't have the benefit of looking at it in any preserved state; but the blood spatter people who will come in and explain to you, one by the name of Stewart James who is an internationally known blood spatter expert, and a person by the name of Lisa DeMeo who is a 20 year police officer criminalist and blood spatter expert out of San Diego California
>
> AA, Volume 8, 062, p. 183, lines 6-25.

While James was called as a witness, there was no attempt to call or explain to the jury why Ms. DeMeo was not a witness in the case for the defense.

e. Lt. Steve Franks

Petitioner incorporates the facts and arguments found in Ground 6, Section 16, Part 2, as though fully set forth herein as to Lt. Franks. In addition, the jury was told by Bloom in his opening statement that Franks would testify as to the shootings in relation to the observations of the petitioner, as well as the investigative techniques for a shooting. There was no other witness called to testify to these issues and not attempt to call or explain to the jury why Franks was not a witness in the case for the defense.

B. Argument and legal authority

In Wiggins v. Smith, 123 S.Ct. 2527, 539 U.S. 510, 156 L.Ed.2d 471, (U.S. 2003) the United States Supreme Court found it particularly unreasonable for counsel to limit the scope of their investigation given the preliminary reports, noting that "any reasonably competent attorney" would have pursued such leads in order to make an informed choice among possible defenses. Id. at 525, 123 S.Ct. 2527. "In assessing the reasonableness of an attorney's investigation . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Id. at 527. Using this standard, the Wiggins Court found that Wiggin's counsel had chosen to abandon their investigation at an unreasonable juncture, and thus had made a fully informed decision with respect to sentencing strategy "impossible." Id.

In the case of Combs v. Covie, 205 F.3d 269 (C.A.6 (Ohio) 2000) the Court held that defense counsel's failure to investigate an expert witness before presenting him amounted to ineffective assistance of counsel. Specifically, the Court held defense counsel's failure to investigate an expert prior to presenting his testimony constituted ineffective assistance of counsel in a murder prosecution. The expert was called to testify that defendant was too intoxicated at time of the murder to form the intent to kill, but stated on cross-examination that the defendant was capable of acting purposefully despite such intoxication.

Although Combs's counsel's decision to present Dr. Fisher's testimony may be

considered a strategic one, it was a decision made without undertaking a full investigation. Cf. Strickland, 466 U.S. at 691, 104 S.Ct. 2052 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."); Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir.1991) ("[O]ur case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them."),cert. denied, 503 U.S. 952, 112 S.Ct. 1516, 117 L.Ed.2d 652 (1992). At trial, Dr. Fisher did present several aspects of Combs's history that were psychologically relevant, such as Combs's state of despondency, his difficult past, his history of severe drug and alcohol abuse, and his stormy relationship with Peggy Schoonover. R. at 1176-78; J.A. at 2579-81 (Fisher Test.). Additionally, Fisher supported the contention that Combs was under the influence when he shot the victims. However, Stidham testified that defense counsel put Fisher on the stand in an effort "to establish that Combs could not act purposely and intentionally because of his diminished capacity," and Stidham admitted that he was "surprised" when Fisher testified to the opposite. J.A. at 2920 (Stidham Dep.). Fisher's opinion regarding whether Combs lacked the requisite intent to commit the crimes was crucial to the defense theory; defense counsel's failure to have questioned Fisher in this regard prior to trial is inexcusable. Defense counsel should have known Fisher's opinion on this ultimate issue and should have prepared accordingly. Regardless of whether Combs's counsel should have known or instead actually knew Fisher's opinion regarding Combs's intent, however, counsel's decision to put him on the stand was objectively unreasonable.

Id. at 205 F.3d 269, 288, Combs v. Coyle, (C.A.6 (Ohio) 2000)

In Bean v. Calderon, 163 F.3d 1073, (C.A.9 (Cal.) 1998) the Ninth Circuit held that counsel failed to adequately prepare expects for their testimony in finding ineffective assistance of counsel. The Court went on to note, "None of the conclusions reached by the experts testifying at the federal habeas hearing were unavailable to trial counsel." Id. at 1079. As Wiggins makes clear, without a reasonable investigation, a fully-informed decision with respect to trial strategy is "impossible." Wiggins, 539 U.S. at 527-28, 123 S.Ct. 2527. Because the failure to conduct a reasonable investigation lacked a strategic rationale, representation was ineffective. See Hendricks, 974 F.2d at 1109; Williams v. Taylor, 529 U.S. 362, 396, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (finding that counsel had an obligation to conduct a thorough investigation of the expert's background); see also Strickland, 466 U.S. at 691, 104 S.Ct. 2052 (finding that counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary").

The Ninth Circuit also explored the failure to prepare an expert in the case of Bloom v. Calderon, 132 F.3d 1267, 1277 (9th Cir. 1997) "The complete lack of Bloom's trial counsel to obtain an expert until days before the trial, combined with counsel's failure to adequately prepare his expert and then present him as a trial witness, was constitutionally deficient performance."; See, also Sanders, 21 F.3d at 1456 (holding that trial counsel was deficient during guilt phase for "fail[ing] to conduct even the minimal investigation that would have enabled him to come to an informed decision about what defense to offer," and that "[d]escribing [counsel]'s conduct as 'strategic' strips that term of all substance"). This is particularly true where the defense that was presented at trial was weak or meritless. See, e.g., Jennings, 290 F.3d at 1016 ("[A] possible conflict between a diminished capacity and an alibi defense would not excuse counsel's failure initially to investigate the potential strengths of a 'mental defense' vis-à-vis an uncorroborated alibi defense.") (quoting People v. Mozingo, 34 Cal.3d 926, 196 Cal.Rptr. 212, 671 P.2d 363, 367 (1983)). This is particularly true where the defense that was presented at trial was weak or meritless. Daniels v. Woodford, 428 F.3d 1181, 1206 (C.A.9 (Cal.) 2005).

See, also, Wiggins, 539 U.S. at 522-23, 123 S.Ct. 2527 (internal citation omitted). Counsel's decision not to expand their investigation beyond the preliminary reports they had access to fell below professional standards. Id. at 524-25, 123 S.Ct. 2527. The Court found it particularly unreasonable for counsel to limit the scope of their investigation given the preliminary reports, noting that "any reasonably competent attorney" would have pursued such leads in order to make an informed choice among possible defenses. Id. at 525, 123 S.Ct. 2527. "In assessing the reasonableness of an attorney's investigation ... a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Id. at 527, 123 S.Ct. 2527. Using this standard, the Wiggins Court found that Wiggins's counsel had chosen to abandon their investigation at an unreasonable juncture, and thus had made a fully informed decision with respect to sentencing strategy "impossible." Id.

Further support is found in the case of Rogers v. Israel, 746 F.2d 1288 (C.A. 7 (Wis.) 1984) in which the Court recognized the importance of having an expert to rebut the state's

expert testimony. Here, it can be argued that Bloom's failure to investigate his expert's opinions and reports prior to presenting their testimony resulted in having, in essence, no expert. In Rogers, the Court noted that "defense counsel owed a duty to petitioner to ask a qualified expert [to rebut the state's expert]. We find that under the particular factual circumstances of this case as known to the defense counsel at the time of trial, the failure to make such inquiry would have been unreasonable and could not have been based on sound trial strategy." Id. at 1295.

In Richey v. Mitchell, 395 F.3d 660, the attorney failed to "screen, supervise, or engage" his own expert witness to the extent that his witness ultimately ended up testifying for the government. The attorney also neglected to find another expert to contradict the state's testimony. In finding infectiveness, the Sixth Circuit found this important because the expert testimony was a major component of the case. Id. at 685.

As to the failure to call the witnesses mentioned in opening statements this has also been held to be an independent basis to find counsel ineffective. When counsel failed to produce the witnesses to support this version, the jury likely concluded that counsel could not live up the claims made in the opening. See, Anderson v. Butler, 858 F.2d 16, 29 (1st Cir.1988) (failure to produce expert witnesses in support of defense theory introduced in opening statement is a "speaking silence" that is prejudicial as a matter of law).

C. Conclusion

Failing to prepare for his expert's testimony in advance of trial and failing to call expert witnesses, both needed for the presentation of the defense, and that were mentioned in opening statements was an objectively unreasonable tactical decision based upon all the facts, evidence and other factors well known to Counsel both before and during trial. This prejudiced petitioner in that the state used the failed and faulty presentation to attack not only the defense theory of the case, but the credibility of petitioner. Since the presentation of the defense in this matter largely rested on the credibility of petitioner it cannot be said that the failure on this issue did not affect the outcome of the trial. Counsel's performance with respect to this issue was constitutionally deficient under the Strickland standard. Petitioner is therefore entitled to a new trial due to his counsel's ineffectiveness regarding this issue, or in the alternative, petitioner is entitled to a full evidentiary hearing to

determine all the relevant facts and circumstances for proper consideration by this Court.

16. Defense counsel was ineffective for failing to secure the attendance of all necessary witnesses at trial.

A. Factual and procedural background

Counsel failed to secure the attendance of all of the following witnesses necessary for the defense to put on their case at trial:

1. Emeline Eisenman

Emeline Eisenman is the mother of Virginia. The issue of the importance Emeline's testimony was evident throughout the trial in addition to the issues surrounding the multiple interviews of Quito while she was present (AA, Volume 1, 094, pp. 218-220). Defense counsel failed to subpoena her to trial, despite the fact that he spent considerable time both pre-trial and during presentation to the jury discussing the importance of her testimony. The failure to subpoena is itself an independent basis for ineffectiveness (See, Goodman v. Bertrand, 467 F.3d 1022, 1029 (C.A.7 (Wis.) 2006) "Goodman's lawyer failed to subpoena Retzlaff because he (erroneously) believed the government would call her as a witness; much to his lawyer's dismay and Goodman's peril, this did not occur.")

Emeline Eisenman was listed during jury selection as a witness for both the state and the defense. She, and other members of her family were flown out to Las Vegas and put up in a hotel at the state's expense. Ultimately the state did not call Emeline as a witness and released her from her trial subpoena. Bloom never subpoenaed the state's witnesses, as is custom and practice, and therefore did not have her under the power of subpoena to testify.

a. Importance of witness pre-trial

Why she was an important witness for the defense is beyond dispute and known by defense counsel from the beginning of the case. The issue of her testimony finally arose during the Petrocelli hearing which occurred back in December of 2001. At that time it became clear that she tried to influence the outcome of the investigation and trial as reflected in the testimony of Francisco Sanchez (Quito), Virginia's oldest son. She pressured him to lie and he initially did so.

The state improperly introduced his false testimony at the Petrocelli hearing, as evidenced by the following:

Q. Did you ever see a gun that day [December 5, 2000] in anyone's hand?
A. No -- yes.
Q. Okay, okay. When you say yes, who -- who did you see a gun -- where did you see the gun in Chip's [petitioner] hand?
A. When I was on the bed.
Q. When you were on the bed?
A. [nods head affirmatively]
Q. Can you describe the gun you saw in Chip's hand?
A. It was black.
Q. It was black.
Have you ever told the police or myself this before, that you saw a gun in Chip's hand while he was on the bed?
A. Yes.

AA, Volume 1, 177, p. 151, line 10, to p. 152, line 5.

However, on cross examination, the following was revealed:

Q. What did she [Emeline] say?
A. She said to get Chip [petitioner] in jail.
Q. To get Chip in jail?
A. Yes.

AA, Volume 1, 182, p.172, lines 17-20.

A. She -- she didn't like him; doesn't like him.
Q. Anything else.
A. No.
Q. What did she say about jail?
A. Um, she doesn't want him to die yet. She wants him to suffer.

AA, Volume 1, 183, p.174, line 20, to p. 175, line 2.

Q. Did you ever see either your mom or Chip have that pistol in their hand that day?
A. Yes.

AA, Volume 1, 183, p. 177, lines 11-13.

Q. If you say today that you saw a gun on Burger King day on December 5, is that a lie -- a lie or the truth?
A. Lie.

Q. It's a lie?
A. (Nods head affirmatively)

AA, Volume 1, 184, p.180, lines 1-6.

Q. What's the truth here, seeing a gun or not seeing a gun?
A. Not seeing a gun.
Q. Say it again.
A. Not seeing a gun.
Q. So you didn't see Chip with a gun on Burger King day, did you?
A. No, cause I was hiding under the bed.
Q. But your grandma [Emeline] told you that he had a gun, right?
A. Yes.
Q. So because grandma [Emeline] told you, even though you didn't see it, that's why you said he had a gun that day?
A. Yes.
Q. Is that right?
A. Yes.

AA, Volume 1, 184, p.180, line 12, to p.181, line 7.

Q. Do you remember that after your grandma helped you remember some things?
A. Yes.

AA, Volume 1, 186, p.186, lines 8-10.

Q. How do you know he was trying to shoot your mom with it?
A. That's what my grandma told me.

AA, Volume 1, 190, p.202, lines 20-22.

THE COURT: [I] think the defense did develop that perhaps his [Quito's] Aunt [Lisa Eisenman] and grandma [Emeline Eisenman] put this in his mind that [petitioner] is trying to shoot his mother [Virginia] on this day, you know like that.

AA, Volume 1, 192, p. 213, lines 21-24.

THE COURT: It doesn't appear to me that he came to his own conclusions on that, so I have some -- I have some concerns about that.

AA, Volume 1, 193, p.214, lines 1-3.

On March 11, 2004, Bloom filed a Memorandum of Points and Authorities in response to a request by the Prosecution to limit the introduction of Virginia's prior violence and drug use. See, AA, Volume 2, 056. In this Memorandum Bloom wrote:

"[A]nd her own mother can be questioned on the specific acts of violence perpetrated upon them by Virginia, and known to defendant.

AA, Volume 2, 063, p. 8, lines 6-10.

The defendant knew, through the confirmed statements of Virginia and her mother, that she when she used drugs she was very violent, even to the point of attacking her mother.

AA, Volume 2, 064, p.9, lines 2-4.

Bloom also indicated that information regarding both the issues of violence and drug use could be obtained from "Virginia's family members, in particular her mother Emeline (whom Virginia even beat up while using meth) . . . " AA, Volume 2, 061, p. 6, lines 20-21.

The defendant knew - though the confirmed statements of Virginia and her mother - that when she used drugs she was very violent, even to the point of attacking her mother.

Id. at 064, p. 9, lines 1-3.

b. Bloom's opening statement

Her mother [Emeline] sits down with Camille and big Chip, his father, during the time they are having the rehearsal dinner. It's like she's not quite trying to break it up, but for whatever the reason, she's saying "Do you know the history of Gina. Did she tell you about the story that she tried to kill somebody . . .

AA, Volume 8, 042, p. 163, lines 20-25.

Bloom told the jury they would specifically hear from Emeline regarding Virginia's history of violence, drug and alcohol abuse as well as her lack of credibility, which was critical to the presentation of the defense. Bloom also told the jury that Emeline told the petitioner "You know her history", AA, Volume 8, 041, line 23, and that Emeline sat down with petitioner's parents and told them "Do you know the history of Gina. Did she tell you about the story that she tried to kill someone when she was young and used drugs?" AA, Volume 8, 042, line 20, to 043, line 1. Yet he never subpoenaed her.

c. State's opening statement

The state mentions Emeline at least four times in their opening statement [AA, Volume 8, 005, line 25, "She was raised by her mother"; AA, Volume 8, 014, lines 6-7 "She called her mother [from jail] . . . in San Diego"; AA, Volume 8, 016, lines 16-17 "She sent Quito to San Diego with

her mother until the holidays"; AA, Volume 8, 017, line 2 "She called her family (mother)"] and

d. State's case-in-chief

During trial, the state's second witness, Tricia Miller, made a number of statements regarding her conversations with Emeline, including claiming she called Emeline in San Diego while Virginia was still in jail on December 5, 2000. [AA, Volume 2, 088, p. 93, lines 13-20 and p.94, lines 13-16.] Without Emeline's testimony there was no way the defense could try to impeach her testimony regarding the conversations themselves or if they even occurred. There was also testimony received regarding Emeline setting Virginia up in her own apartment in Henderson, due to credit issues and not out of fear of petitioner. See, supra.

The testimony of Quito was also allowed by the Court and introduced by the state, and as had occurred in December of 2001, the issue arose as to the statements made by Emeline to Quito to influence his testimony. See, AA, Volume 3, 160, p.35, line 24, to p.36, line 9).

Q. And when you went back to San Diego your grandma and Lisa told you some things they wanted you to say when you were going to talk to the police?
A. Yeah.
Q. But these things that you hadn't really seen yourself, but they wanted you to say them?
A. Yeah.
Q. For example, the thing about the gun, you never, ever saw a gun right?
A. No.

AA, Volume 3, 160, lines 18-20.

Q. Well you went back to San Diego and it was grandma [Emeline] who told you to say that?
A. Yeah.

AA, Volume 3, 161, lines 11-13.

When Lisa Eisenman testified she also brought up a number of topics regarding Virginia's history and background that would have been best covered by Emeline, an adult at the time, then Lisa, who was five years younger than Virginia. Bloom allowed, without objection, the state to inquire of events regarding Virginia which took place when Virginia was in Seventh Grade and Lisa was in Second Grade. [See, AA, Volume 4, 121, p. 148, lines 19-24]. She also mentioned that it

was Emeline, and not Virginia who raised Quito. Id.

Lisa went on to testify going to juvenile hall with her mother [Emeline] [AA, Volume 4, 133, p.31, line 21, to p. 32, line 12] when Virginia got into trouble, but even she admitted "considering I was 12 [actually 10 when you subtract 5 from Virginia's age of 15] I do not know." AA, Volume 4, 133, p.32, lines 21-24. What Bloom did not anticipate or prepare for was the state taking the position that Virginia only got into trouble based only upon one day's events.

Q. And the whole juvenile thing where she had to go to Court that you've discussed, was that based on one day's events?
A. Yes.

AA, Volume 4, 140, p.58, lines 18-21.

Q. The juvenile problems involving Gina and the van and the fight with the crossing guard occurred in one day's time?
A. Yes.

AA, Volume 4, 140, p.59, lines 3-6.

This was not only misleading and false, but could have been impeached by Emeline's testimony, as the defense was in possession of evidence which directly contradicted this position. However, Bloom, did not seek to impeach Lisa Eisenman with it [assuming it was proper impeachment] but he waited for the testimony of Emeline, which never occurred.

More testimony was received from Lisa Eisenman regarding the fight which occurred in juvenile hall, in which Virginia beat another girl with the cast on her arm which was from when the officer broke it while she resisted arrest. As a result of that incident (which in and of itself belies the "one day" theory of the state) Emeline sent her to live with her grandmother in San Francisco. AA, Volume 4, 140, p.59, lines 22-23. Virginia was eventually "sent back" for causing the grandmother trouble, something Lisa could not testify to, but Emeline clearly could have (or the grandmother). Id. at 134, p. 34, line 6, to p.35 line 14.

Lisa Eisenman also testified regarding her knowledge of the events of December 5, 2000 and those leading up to December 20, 2000. Throughout her testimony she mentions the fact that Emeline, during this time, was speaking with both Virginia and petitioner regarding the events of December 5, 2000 and bailing her out. AA, Volume 4, 128, p.9, lines 1-18. She also mentioned that

Emeline set up shop at the Rio Hotel and Casino after December 5, 2000 with Virginia and Quito. Id. at p.10, lines 10-12.

e. Close of state's case

What occurred was at the close of the state's case on April 6, 2007, they informed the defense of their intention not to call Emeline Eisenman as a witness. They also informed the defense that she had been released from her subpoena. Bloom seemed befuddled. He requested and was given what the state represented was the address and phone number the state had for Emeline. Subsequent investigation revealed that both the address and the phone number were "no longer good" and Emeline was unable to be reached.

The state claimed they did not know her whereabouts, despite the fact that she was present at the courtroom and during the trial, as were her daughters and other members of the family and friends. She quite literally disappeared. It should be noted that Emeline re-materialized after the close of the trial for closing arguments.

Instead of requesting a continuance of the trial to attempt to secure her attendance or to investigate the matter further, Bloom choose to just "let it go."

f. Defense case-in-chief

When Ricardo Dominguez testified during the defense case, he also extensively mentioned Emeline's involvement in the incident where Ricardo and petitioner drove to Emeline's house looking for Virginia. AA, Volume 5, 105, p.156, to 106, p.157. This event was also mentioned specifically by Lisa Eisenman during her testimony. AA, Volume 4, 014, at p. 63. Testimony about this event from Emeline would have highlighted petitioner's non-violent method of resolving family disputes.

During the defendant's testimony, there were various references to Emeline related to him about the very things concerning about Virginia's past which the defense sought to prove to the jury in support of the defense of self-defense. Emeline had told defendant' s parents certain information around the time of the wedding, AA, Volume 5, 049, p. 61, line 15 to p. 64 line 22. She had related information to defendant and his parents that clearly indicated Emeline's knowledge about all of her violence and drug use and that this did not occur on only one day. Id.

Petitioner also testified to discussions with Emeline on December 5, 2000, Id. at 062, p. 116 line 4 to 117, line 1. These discussions bolstered petitioner's testimony regarding the events which took place that day as well as the accounts related to Emeline by both Virginia and the defendant.

It is clear from the above cited references to the transcripts and other evidence that Emeline Eisenman and her testimony was critical to the defense presentation in a number of areas which were not allowed to be presented to the jury due to Bloom's failure to secure her attendance at trial, compounded by his failure to request a continuance or some other method to deal with this issue.

Emeline was the only witness who could have provided testimony regarding conversations she had with various witnesses regarding her knowledge of Virginia's extensive history of violence (thus would have prevented the state from presented the "one day of violence" rebuttal), including the time spent in San Francisco with her grandmother where there were further incidents of violence. (As to the propriety of calling the grandmother, it was believed she was too ill to travel to attend and testify at trial).

Emeline was also the only witness who could testify as to the conversations she had with petitioner throughout the relationship of Virginia and petitioner which would support the defense theory of self-defense. Specifically, Emeline spoke with petitioner the day of the incident with Ricardo Dominguez, and on various times throughout December of 2000, including December 5, 2000, the day of the domestic violence incident, and the dates leading up to December 20, 2000.

Emeline's testimony is not merely cumulative or impeaching but was essential to the presentation of the defense theory of the case. Emeline also had other evidence regarding Virginia's character, including evidence of her stealing money from her and her green house business, both in San Diego and Las Vegas. Further Emeline would have testified to further instances of untruthfulness by Virginia, including telling Emeline she needed money after the baby was born because she was going to take time off from work, and after receiving the money returned to work and kept the money.

2. Lt. Stephen Franks

LVMPD Lt. Stephen Franks was an expert witness who Bloom represented to petitioner

was retained by the defense. Yet defense counsel failed to secure the attendance of Franks at trial, despite the fact that he spent considerable time both pre-trial and during the presentation to the jury discussing the importance of his testimony.

During a December 21, 2001 Pre-Trial hearing, the issue of the use of Lt. Franks was first discussed on the record, after Bloom made representations that he was going to use him as an expert witness:

> I scheduled today to meet a Lt. Steve Franks of the Las Vegas Metro Police Department . . . Lt. Franks has been an officer who has investigated officer involved shootings.
> And in response to the people's argument about seven shots show premeditation and real focus sort of your evil intent, I believe Lt. Franks will be in a position to say he has seen where the number of shots doesn't at all indicate sort of evil intent and so forth.
> So he would be testifying as -- again, counter the people's argument that seven shots equal this premeditation . . . the adrenalin will flow, the emotion will flow, and they will shoot a number of times, load and reload their gun and shoot more and not even know they did it.
> Afterwards when they are interviewed, they say, of course, I fired twice, when they really fired none times or something like that.. . . [the jury's] not going to have the benefit of having done many investigations of police shootings like Lt. Franks.
>
> AA, Volume 1, 150, p.43, line 9, to p.44, line 3.

> BLOOM: With regards to Lt. Franks . . .but finding a police officer related shooting expert, who was in the area and would not charge an enormous amount from far away was a difficult process.
> THE COURT: Well I don't know if somebody who is an active office could even charge.
> LAURENT: And Metro may decide they're not going to let him testify since he's not a percipient witness.
>
> AA, Volume 1, 151, p. 48, lines 9-19.

A lunch break was taken at the hearing and the following exchange occurred when Court reconvened:

> [I] did meet with Lt. Steve Franks of the Las Vegas Metro Police Department and do expect to call him and will subpoena him . . . I will subpoena him to testify on the issue of psychology -- I guess I'll call it the psychology of shooting, but the question of whether or not seven shots equal premeditation or if there are

other explanations.
And I will present that to -- to the Court; and he informs me that if he was under subpoena, that he will testify to that.

AA, Volume 1, 173, p. 135, lines 3-13.

And again, aren't threatened to take steps to prevent this testimony:

And again Judge, since he's not a percipient witness, Metro may not allow him to be called in this case . . . I have not talked to their attorney yet . . . if they're calling him as an expert witness . . . . you can't call another side's expert. He's employed by the LVMP I'm imbued with knowing everything they're supposed to know.

AA, Volume 1, 173, p.135, line 17, to p.137, line 5.

The Court reserved the right to entertain a motion regarding Lt. Franks' testifying, but no such motion was ever filed and Lt. Franks never did testify at trial.

In Opening Statements on March 17, 2004, Bloom informed the jury:

You'll hear the testimony of Lt. Steve Franks of Las Vegas Metro. Lt. Franks is a very, very, experienced officer with regards to shooting.
He's the person who for years went to every officer involved shooting that Metro had in Las Vegas. He will tell you that his experience is that people just don't have any idea how many times they shoot or how quickly they shoot. They shoot until someone stops being a threat.
He will tell you officers many, many times will write out their statements when they are doing the post shooting event, write out their statements and today will say, "I fired one time."
"How do you explain your gun is empty."
They don't even know they fired that many times. Seven shots caused a hush in everyone as those charges were read, Lt. Franks will talk to you about the firing power of that weapon, how quickly it can be fired and how even trained police officers trained to shoot in bursts of three will empty their gun or fire some indeterminate amount and not know, not realize they even did it. Your talking about a very, very short period of time.

AA, Volume 8, 059, p. 180, line 6 to p.181, line 5.

Lt. Franks was never called as a witness by the defense. No other expert witness had the experience, the expertise, to testify in this area, or would have had the impact on the jury of being an active member of the very same organization who investigated the crime for which the petitioner was charged and for which he was on trial. This was not a question of merely

cumulative testimony or an area that could be covered by another expert, it was a critical area for the defense, the issue of premeditation, and it was not presented in any form to the jury.

When it came time for him to testify, on or about April 13, 2004, Bloom, as he had done with Emeline Eisenman, supra, simply, "let it go."

> THE COURT: If we end your witnesses today, this could be the end of your case. Is that fair to say?
> MR. BLOOM: If I can't get Lt. Franks at the very least, rather than get a warrant for his arrest, I'm going to call Jim Thomas, my investigator, to say his efforts to try to get him . . . other than that and [Emeline]Eisenman, that's it.

AA, Volume 5, 170, p.85, line 21, to p. 86, line 8.

Jim Thomas was never called to the stand to explain why Lt. Franks did not testify. No effort was made to secure his attendance, request a continuance or allow another expert to be retained and called in his place, which is allowed under the applicable rules at the Court's discretion. This was particularly damaging to the defense. Three of the defense experts, the forensic pathologist, the ballistics expert and the blood spatter expert had testified that the evidence did not support either self-defense or the defense version of events. Petitioner had also testified as to his inability to recall the specifics of the events leading up to the shooting and the shooting itself. The only expert that could have explained all that to the jury in a plausible fashion was Franks.

Lieutenant Franks was prepared to explain this all to the jury as the only expert, either from the state or defense, to investigate shootings. It is not speculation to surmise that his opinions regarding investigating shootings, particularly first time shooters and first time shootings, could have illuminated all the inconsistencies in not only the defense experts' testimony and that of petitioner, but the other witnesses such as petitioner's parents and the Wrights. Simply stated, the lack of this testimony prevented the petitioner from receiving the benefit of the jury having a very large piece of the puzzle of the defense theory of the case.

Also without his criticism of how the police and state had investigated the shooting and processed the crime scene, the defense was left without a way to effectively challenge these issues. This was highly prejudicial.

Further damage was done by the state in the closing argument, albeit improper, it was still

given to the jury by the state:

> If this was anything less than first degree premeditated murder, you would have expected there to be more dispute on the experts you heard.
>
> AA, Volume 5, 240, p. 128, lines 23-25.
>
> If this was anything less than first degree premeditated murder we'd expect witnesses.
>
> AA, Volume 5, 241, p. 128, lines 20-21.

This in the face of Bloom's representations to the Court all the way back in December of 2001, that Lt. Franks would be called to testify regarding this very thing, premeditation. Combined with Bloom's failure to develop the psychiatric evidence, Bloom's performance fell below reasonableness and prejudiced petitioner's ability to put forth a viable defense.

Franks would have been the only witness to be called by the defense who would have been able to testify as to the facts and circumstances of the shooting from the perspective of someone whose actual job is to investigate such shootings and tie together all of the elements of the defense case to a defense of self defense. Without his testimony the defense was not viable at trial.

Franks' testimony is not merely cumulative or impeaching but was essential to the presentation of the defense theory of the case and it was promised to the jury by Bloom but was not delivered.

3. Ricardo Dominguez's grandmother

Defense investigators in San Diego had located Ricardo Dominguez and spoke with his grandmother who provided them with additional information regarding Virginia. Apparently after the incident which was presented at trial regarding petitioner, Virginia and Ricardo in 1998, Virginia went looking for Ricardo at his grandmother's house where he lived. Virginia threatened the grandmother when she would not let Virginia in. She described Virginia as "a very violent person." This witness was not subpoenaed or called to testify at trial although Bloom obviously knew about her. Without her testimony, the defense was not able to provide a response to the state's use of the "one day of violence" presentation to the jury, and to show that various incidents had occurred in the 1999 and 2000 time frame (which were specifically raised

by the state in their closing as a failure by the defense).

The grandmother's testimony is not cumulative or impeaching but was essential to the presentation of the defense theory of the case.

4. Michael Stephenson

Michael Stephenson was a co-worker of petitioner's at Eva Cisneros' law firm (in house counsel for Travelers' Insurance). Unlike the other co-worker's called as witnesses during trial (Sarah Smith, Adrienne Atwood, Eva Cisneros and Judy Estrada) Michael and petitioner knew each other for years, having been classmates in law school. Michael and petitioner socialized outside of work and their families (each were married and had step-children) also got together on a number of occasions. Michael was also the one who got petitioner his job interview at Travelers.

Michael had given a statement to the police which was turned over to the defense. In his statement he clearly implicated questionable police interview techniques or tactics. At one point in the transcript, Michael states that he already answered that question (apparently asked either before the statement was taken or in an earlier version) and was not willing to change it. This could have been used by the defense to attack the credibility of the state's investigative methods and Michael was the only witness who could have offered this testimony.

Michael also could have testified as to his observations of petitioner's demeanor and the conversations he had with petitioner in the December 2000 time frame. Michael could also have prevented the state from making the argument that the only witnesses petitioner called on his behalf were from out of state (See, state's closing argument regarding Angelo Ciavarella and Lisa Johnson). Michael's testimony would not have been cumulative or merely impeaching but was essential to the presentation of the defense theory of the case.

5. Petitioner's neighbor Herb

Herb was identified both pre-trial and at trial as a neighbor of petitioner in December of 2000, and the one who's house the Centofanti's (Alfred Jr. and Camille) were taken and interviewed by the police. An issue that was raised both before and during trial was when an alleged phone call was made to Eva Cisneros by Alfred and Camille on the night of December

20, 2000. Eva alleged she was contacted at 7:00 p.m. This time became important because the state argued to the jury "lawyers are called, rather than ambulances" by the Centofantis. There were also questions raised in the guise of credibility by the state as to the demeanor of the Centofantis at this time. Defense counsel did not try to obtain the phone records of petitioner's neighbors, Herb or Eva Cisneros, to verify when this call was made. Defense counsel also did not attempt to contact Herb to determine if he could provide useful information and testimony regarding his observations of December 20, 2000, including any phone calls made from his residence (as contended by the defense, which would place the phone call to Eva well after 7:00 p.m.).

Herb's testimony would not have been cumulative or merely impeaching but was essential to the presentation of the defense theory of the case.

6. Dr. Calixco and Nurse Kruger

Petitioner testified that on December 4, 2000 he took Nicholas to the Pueblo Medical Center after picking him up from La Petite Academy (day care) due to Nicholas being sick. Petitioner gave further testimony regarding the fact that Virginia was not with him and certain conversations were had with Nicholas' doctor and nurse which would support petitioner's version of events. This would also have resulted in testimony regarding the seriousness of Nicholas' condition that night, and in general, as well as the demeanor of the petitioner. The state argued that this whole incident was "made up" by petitioner and was used to attack his credibility at trial. These witnesses would have conclusively proven petitioner's version as defense counsel obtained statements of these witnesses, both of whom were able and willing to testify at trial. The testimony of these witnesses could also have been corroborated by medical and pharmacy records and receipts from that date.

Calixico and Kruger's testimony would not have been cumulative or merely impeaching but was essential to the presentation of the defense theory of the case.

7. Lisa DeMeo.

Lisa DeMeo was an expert witness retained by the defense. Counsel failed to secure the attendance of DeMeo at trial, despite the fact that he told the jury in opening statements that she

record.

B. Argument and legal authority

Petitioner contends that the erroneous disqualification of Daniel J. Albregts violated his Fifth Amendment right to remain silent (as to the improper canvass) and his Sixth Amendment right to counsel. See, Ground One, supra. The violation of petitioner's Fifth Amendment Right with regards to the canvass provides an independent basis (from the Sixth Amendment right to counsel of choice) to reverse his conviction and grant him his request for a new trial. When the violation of petitioner's Sixth Amendment right to counsel of his choice is erroneous, no additional showing of prejudice is required to make the violation complete and the entitled him to a reversal of his conviction as "structural error" not subject for review as harmless error.

In addition to the Argument and Legal Authority contained in Ground One, supra, and incorporated herein by this reference, petitioner's counsel were ineffective for not knowing the appropriate procedure for challenging an erroneous disqualification under Nevada law, which was a petition for writ of mandamus. Mandamus is used properly to challenge orders disqualifying attorneys from representing parties in actions that are pending in the district courts. See Collier v. Legakes, 98 Nev. 307, 646 P.2d 1219 (1982). Cronin v. Eighth Judicial Dist. Court, In and For County of Clark, 105 Nev. 635, 781 P.2d 1150, 1155, note 4 (1989).

Counsel was also ineffective for failing to hold the court to the standards set forth in DiMartino v. Eighth Judicial Dist. Court ex rel. County of Clark, 119 Nev. 119, 66 P.3d 945 (2003). In DiMartino the Nevada Supreme Court overturned a disqualification as:

> [T]he district court's oral ruling and written decision do not balance the parties' interests or address the hardship Singer's disqualification may have on DiMartino. SCR 178(1)(a) requires consideration of this factor. The district court also did not determine whether Singer was likely to be a necessary witness.
>
> Id. at 947.

There was no attempt to determine whether Albregts "was likely to be necessary witness" as evidenced by the failure to hold a full hearing on the matter of the real estate transaction. A hearing would revealed that not only was Albregts not a witness, but even, arguendo if he was, there were other options for the state and the Court in the form of the testimony of the real estate

agent, buyer and financial agents as to the issues presented by the state which precluded Albreghts from being disqualified.

C. Conclusion

Petitioner's attorneys' failure to address the significant and obvious issue of the improper canvass of petitioner at the hearing on the motion to revoke bail, failure to file a petition for writ of mandamus to challenge the erroneous disqualification, failure to obtain a ruling on the motion in limine on the issue of the San Diego real estate transaction, and failure to make a record at the close of trial regarding the bad faith actions of the state, fell below the standards of reasonableness and were prejudicial as all of these failures resulted in his being denied his Sixth Amendment Right to counsel of his choice. Counsel's performance with respect to this issue was constitutionally deficient under the Strickland standard.

2. Defense counsel was ineffective in failing to object to the canvass of petitioner before trial with regards to consent to defense.

A. Factual and procedural background

Petitioner incorporates the factual and procedural history of Ground Two, supra as though fully set forth herein. The following additional facts as to the ineffective assistance of counsel, are as follows:

The issue of the canvass came before the court in December of 2001 (Judge Gibbons) and March of 2004 (Judge Mosley). When the issue was raised in 2001, Judge Gibbons denied the state's motion, without prejudice to have the petitioner canvassed with regards whether he consented to the defense of self-defense outside the presence of the state, supra. The apparent purpose of the state's request in 2001 was to preserve the issue of petitioner's consent to prevent the petitioner from waiting until the direct appeal to claim he did not consent and have a "built in" or "automatic" grounds for a new trial.

By the time of trial in March of 2004, the request for the canvass somehow "evolved' into requesting the petitioner to consent to the fact that he was the shooter, and for this "canvass" to be conducted in open court with the state allowed to be present and use this "statement" to lessen the burden of prosecution in it's case-in-chief.

When the issue was re-raised in March of 2004, the Court instructed petitioner's counsel that petitioner must answer whether or not he was the shooter before the trial would commence. A break was taken in the proceedings and petitioner was allowed to consult with his attorneys. An objection was placed on the record by Bloom and the canvass proceeded. In response to the canvass, petitioner answered "On the advise of counsel, yes."

The ineffectiveness of petitioner's attorneys was the failure to:

1. Properly advise petitioner as the issue of the canvass

Defense counsel should have instructed petitioner not to answer the canvass as there was no authority for the request for the canvass and should have properly advised him to litigate the matter and not allow the Fifth, Fourteenth and Sixth Amendment Right violations to occur.

2. Failure to properly object to the canvass before the trial of the matter.

The acquiescence of defense counsel to the canvass was prejudicial ineffective assistance of counsel. Counsel failed (in 2004) to create an adequate record as to have the matter reviewed on direct appeal. There was no attempt to request from the state or the Court the authority for which the canvass could be requested or conducted, and thus no record.

3. Failure to have the issue decided by the Nevada Supreme Court before the trial commenced.

The proper procedure for challenging such a prejudicial ruling of the Court was by filing a writ of certiorari and/or prohibition as it was clear that the Court was exceeding it's authority in compelling the petitioner to lessen the burden of prosecution. This was also something not unknown to petitioner's counsel as the state had filed a similar writ on the Court's ruling in January of 2002 denying the state's request for a psychological examination of petitioner.

The failure of counsel to adequately address the canvass was prejudicial ineffective assistance of counsel. One need look no further than the closing argument to see the effect this had on lessening the burden on prosecution:

> The first thing the State of Nevada has to do in any case is prove the identify of the criminal, and in TV, the movies, we all grew up with books, we had a lot of who dun nit's? It's a mystery who was the person who committed the crime? This isn't one of

those cases. The shooter in this case is Chip Centofanti and no one else. We don't have to worry about that. The identity of the Defendant is established.

AA, Volume 5, 110, p.4, lines 15-23.

Simply put, by conceding one of the necessary elements of the state's case, the defense lessened the burden of prosecution and did not allow the defense to present other defenses available to them or to at least not share with the state their trial strategy in advance of the trial.

B. Argument and legal authority

Petitioner contends that the improper canvass of petitioner regarding his consent to the use of self-defense improperly minimized the state's burden of proof. See, Ground Two, supra. The canvass was a violation of the petitioner's right to remain silent under the Fifth and Fourteenth Amendments and his Sixth Amendment Right to counsel and a fair trial.

In addition to the Argument and Legal Authority contained in Ground Two, supra, and incorporated herein by this reference, petitioner's counsel were ineffective for not knowing the appropriate procedure for challenging the improper canvass under Nevada law, a petition for writ of mandamus or prohibition.

A writ of certiorari is appropriate to remedy jurisdictional excesses committed by an inferior tribunal, board, or officer, exercising judicial functions. Bayside Inc. v. Dist. Ct., 119 Nev. 404, 406-07, 75 P.3d 384, 386 (2003); NRS 34.020(2).

Similarly, writs of prohibition are available to arrest the proceedings of any tribunal or board when such proceedings are without or in excess of the tribunal's or board's jurisdiction. State of Nevada v. Dist. Ct. (Insulin), 118 Nev. 140, 146-47, 42 P.3d 233, 237 (2002); NRS 34.320. The writs of mandamus and prohibition were appropriate in this instance since petitioner had no plain, speedy, and adequate remedy in the ordinary course of law to the Court's Order regarding the conducting of the canvass. See, NRS 34.020(2); NRS 34.330.

C. Conclusion

Petitioner's attorneys' failure to address the significant and obvious issue of the improper canvass of petitioner. In failing to properly advise petitioner as the issue of the canvass, failure to properly object to the canvass before the trial of the matter, and failure to have the issue decided by the Nevada Supreme Court before the trial commenced, fell below the standards of

reasonableness and were prejudicial as all of these failures resulted in his being denied his Fifth and Fourteenth Amendment Rights to due process, to remain silent and his Sixth Amendment Right to counsel of his choice. Counsel's performance with respect to this issue was constitutionally deficient under the Strickland standard.

3. Defense counsel was ineffective in failing to properly handle the evidentiary issues pertaining to the December 1, 2000 domestic violence incident.

A. Factual and procedural background

On Friday, December 1, 2000, petitioner and Virginia had plans to go to dinner with the children, Quito and Nicholas, at Chevy's Mexican Restaurant. Virginia called petitioner in the afternoon on his cellular telephone and asked if petitioner could pick both Quito and Nicholas up from day care and meet her at the house.

Petitioner picked up Quito first from Safekey and then took him to sign up for indoor soccer. He and Quito then went to the grocery store, where petitioner picked up, among other things, a dozen of roses for Virginia, and some Corona beer. Petitioner then picked up Nicholas from La Petite Academy and drove home (to the residence on 8720 Wintry Garden Avenue).

When petitioner returned home, he called Virginia to see where she was. She told him she was still at work, was running late, but still wanted to go to dinner. Petitioner waited approximately one hour and called again, and, got the same response. Petitioner waited another hour, called again, but this time was told that she was actually out with Tricia Miller and didn't know when she would be home. Petitioner then spoke with Miller on Virginia's phone. Petitioner told Miller not to let Virginia drive home if she had been drinking.

Petitioner then called and spoke to both his father (who was back in Massachusetts) and Angelo Ciavarella (who was back in New York) about what was transpiring. Both advised petitioner to stay calm and not to over react when, and if, Virginia returned home.

Petitioner went to sleep and was awakened by the sound of Virginia coming through the front door and simultaneously and by the security alarm going off (and being shut off by Virginia). Virginia came into the house and yelled at petitioner for putting the alarm on. A physical confrontation then erupted over an intoxicated Virginia having access to the children. Petitioner and the kids slept in one room and Virginia in the other. In the morning, petitioner

observed Virginia's car parked up over the sidewalk.

The next day petitioner spoke with both his father and Ciavarella and told them what had occurred. That evening petitioner went next door, as he, Virginia and the kids were invited to a birthday party, and brought with him the beer he bought on Friday. At some point over the weekend, petitioner contacted his boss, Eva Cisneros and told her about the trouble he was having in his marriage. Virginia also was on the phone extensively with friends, family and perhaps co-workers and others believed to be discussing what had occurred the night before. It is believed one of the individuals she spoke with was Diane Brandt from Security Link, who did testify at trial.

When police responded to a second domestic violence incident on December 5, 2000, petitioner mentioned the events of December 1, 2000 to them.

B. Argument and legal authority

Showing that adequate pretrial preparation and investigation would have produced a conviction of a lesser degree of homicide would suffice for a showing of prejudice from lack of competent representation by defense counsel. See, U.S.C.A. Const. Amend. 6.; Turner v. Duncan, 158 F.3d 449 (C.A.9 (Cal.) 1998).

What counsel failed to do was to properly prepare, develop, and present the facts and evidence of the events surrounding December 1, 2000, so as to support the defense theory of the case. Petitioner did provide counsel with the documents in his possession that supported his version of events on December 1, 2000. This included the sign up sheet and receipt for payment for signing Quito up for soccer. It also included the store register receipts for the items purchased on December 1, 2000, which included, a time/date stamp. There were also the telephone records to substantiate the (long distance) calls made December 1, 2001 (and in the following days) to New York and Massachusetts numbers that could be identified as Ciavarella's and petitioner's parents.

Counsel should have used these documents and the others available (records from Safe Key, La Petite, phone and atm) to create a time line that would have been essential at trial. Counsel then could have utilized witness testimony (in conjunction with the time line) to both

prove and give credibility to petitioner's version of events. This could have also been asserted by the testimony of Alfred Centofanti, Jr. (and his phone records), Angelo Ciavarella (and his phone records), Eva Cisneros (and her phone records), Tricia Miller (during her direct testimony and through her phone and atm records) the officers who responded on December 5, 2000 and more importantly through Quito (Francisco Sanchez).

Petitioner was therefore deprived of the ability to establish the December 1, 2000, incident as a recent, relevant incident of violence committed by Virginia against petitioner. As a result of this failure, the state was able to present the argument to the jury that petitioner spoke to Miller on December 4, 2000 and not December 1, 2000. The state was also able to argue that it was Virginia and not petitioner who picked up Nicholas on December 1, 2000, and thus call into question the whole event (which they argue was fabricated) and attack the defense theory of defense and petitioner.

C. Conclusion

When petitioner attempted to present his version of the December 1, 2000 events, the failure of his counsel to properly prepare, develop and present the facts and evidence properly, prevented it from providing support to the defense theory of the case. This prejudiced petitioner in that the state used the failed and faulty presentation to attack not only the defense theory of the case, but the credibility of petitioner. Since the presentation of the defense in this matter largely rested on the credibility of petitioner it cannot be said that the failure on this issue did not affect the outcome of the trial. Counsel's performance with respect to this issue was constitutionally deficient under the Strickland standard.

4. Defense counsel was ineffective in failing to properly handle the evidentiary issues pertaining to the December 5, 2000 domestic violence incident.

A. Factual and procedural background

1. December 4, 2000.

As with December 1, 2000, petitioner received a phone call from Virginia, from her cell phone, asking petitioner to pick up Nicholas from La Petite as she had received a call from them stating that Nicholas was sick. Petitioner left work, picked up Quito first from Safe Key, then

picked up Nicholas from La Petite. Petitioner called Virginia and told her that he was taking Nicholas to the doctor's office. She told him she was on her way.

Petitioner then took Nicholas to the Pueblo Medical Center where he was seen by his pediatrician Dr. Calixco and the attending Nurse (Kruger). They both asked petitioner where Nicholas' mom was (Virginia) since she had not arrived. Petitioner tried calling her but she did not answer her phone. She never arrived at the center. The nurse asked petitioner if everything was alright and petitioner related that they were having problems. The nurse suggested it may be post-partum depression and gave petitioner a questionnaire to bring home with him.

Petitioner took Nicholas and Quito with him to the pharmacy where he picked up a number of prescription medicines for Nicholas. He then stopped off at a Burger King drive thru, located in the parking lot of the shopping center of the pharmacy, bought some food and drove home. Petitioner gave the medication to Nicholas and helped Quito with his homework. He tried (unsuccessfully) to contact Virginia by phone and went to bed.

2. December 5, 2000 domestic violence incident

As on December 1, 2000, Virginia returned home the morning of December 5, 2000, intoxicated. The police were eventually summoned to the residence in response to a phone call received from a Mark Smith, a licensed social worker from New York who had spoken with both petitioner and Virginia on the phone.

Police investigated the incident and as a result, Virginia was taken into custody and charged with domestic violence as a result of her admitting she hit petitioner over the head with a picture frame as a result of a struggle over her cellular phone.

The only evidence the police took into custody was petitioner's ripped t-shirt (which Virginia had torn from petitioner's body). The police also noted certain injuries on petitioner's body consistent with him being attacked during the incident. Police also located a loaded hand gun in the glove box of Virginia's car (which was parked on the sidewalk as on December 1, 2000) and beer bottles in the back seat. They also took other firearms from the residence.

Petitioner kept the broken picture frame (and shattered glass) and also had photos taken with a digital camera of his injuries (taken the next day when the injuries were much more

prominent and noticeable). The computer disc with the photographs was believed to be the computer disc the police seized on December 20, 2000, as listed in the return of the search warrant of the residence conducted that night. The disc has never been located.

3. Additional December 5, 2000 events.

Petitioner was taken to the family court to obtain a temporary protective order against Virginia. That night petitioner's co-worker Janeen Mutch and her (now husband) Troy Issacson came over to the residence and helped petitioner with the children. That night petitioner received multiple calls from the jail from Virginia requesting that he bail her out and/or contact her mother, Emeline Eisenman, or sister Lisa Eisenman. Petitioner spoke with both Emeline and Lisa that night regarding both what had occurred that day as well as the issue of bail.

B. Argument and legal authority

Showing that adequate pretrial preparation and investigation would have produced a conviction of a lesser degree of homicide would suffice for a showing of prejudice from lack of competent representation by defense counsel. See, U.S.C.A. Const. Amend. 6.; Turner v. Duncan, 158 F.3d 449 (C.A.9 (Cal.) 1998).

What defense counsel failed to do was to properly prepare, develop, and present the facts and evidence of the events occurring on December 5, 2000, so as to support the defense theory of the case and the petitioner. Petitioner did provide counsel with the documents in his possession that supported his version of events of December 4 and December 5, 2000. This included the documents from the Pueblo Medical Center (regarding Nicholas and the questionnaire given to petitioner by the nurse), the pharmacy, Burger King, as well as Quito's homework dated December 4, 2000. It also included the store register receipts for the items purchased on December 4, 2000, from the pharmacy and Burger King, which included, a time/date stamp.

Counsel should have used these documents and the other available (records from Safe Key, La Petite, phone and atm) to create a time line that would have been essential at trial. Counsel then could have utilized witness testimony (in conjunction with the time line) to both prove and bolster petitioner's version of events. This could have been accomplished through the testimony of Dr. Calixco, his nurse, La Petite employees (and their records), Tricia Miller (during

her direct testimony and through her phone and atm records) and employees of Eagle Sentry who were with Virginia the night/morning of December 4/5, 2000, as well as the officers who responded on December 5, 2000, and more importantly through Quito. Records could have also been used to show that Virginia did not have a permit to carry the weapon that was found in her vehicle that morning.

What occurred was counsel did not effectively use any of the facts and evidence available to him (the only records he tried to use were Quito's home work and he made an unprepared attempt to question Miller and Eagle Sentry employees without any records or documentation). Petitioner was therefore deprived of the ability to establish the December 5, 2000, incident as a recent, relevant incident of violence committed by Virginia against petitioner.

Furthermore, counsel failed to interview, investigate or develop the issue regarding Janeen Mutch, Troy Issacson, as well as try to obtain the phone records from the jail (showing the calls from Virginia to petitioner), Lisa Eisenman and Emeline Eisenman which would have corroborated petitioner's version of events and created a time line for counsel's use in the presentation of the defense case and theory of the case at trial.

As a result of this failure, the state was able to present the argument to the jury that petitioner "made up" or exaggerated Nicholas' medical condition, and that petitioner spoke to Miller on December 4, 2000 and not December 1, 2000. The state was also able to argue that it was Virginia and not petitioner who picked up Nicholas on December 4, 2000, and thus call into question the whole event (which they argue was fabricated) and attack the defense theory and petitioner's credibility.

C. Conclusion

When petitioner attempted to present his version of the December 4/5, 2000 events the failure of his counsel to properly prepare, develop and present the facts and evidence properly, prevented it from providing support to the defense theory of the case. This prejudiced petitioner in that the state used the failed and faulty presentation to attack not only the defense theory of the case, but the credibility of petitioner. Since the presentation of the defense in this matter largely rested on the credibility of petitioner it cannot be said that the failure on this issue did not affect

the outcome of the trial. Counsel's performance with respect to this issue was constitutionally deficient under the Strickland standard.

5. Defense counsel was ineffective in failing to properly handle the evidentiary issues pertaining to the December 20, 2000 incident.

A. Factual and procedural background

1. Pretrial

On December 20, 2000, the Las Vegas Metropolitan Police Department, along with members of the Crime Scene Investigation unit were responsible for securing and processing the scene at 8720 Wintry Garden Avenue. This included, among other responsibilities, the inventory and taking into evidence certain items. What became an issue was the failure of the LVMPD and CSI to inventory and take into evidence Virginia's purse, it's contents (including her palm pilot), her keys, her vehicle and it's contents.

These items became the subject of a pre-trial motion as the purse, and it's contents, keys, palm pilot and cell phone that were seized in the 8720 Wintry Garden residence on December 20, 2000 as well as her vehicle which was seized outside the residence that night, were not inventoried or in some cases photographed (the vehicle) and instead, they were immediately turned over to Virginia's family members. Additionally raised in the motion was the failure to provide the defense with the opportunity to see the items seized from Virginia's apartment, including her computer among the other items which were prematurely returned her family.

Not raised in the motion were the lost messages and data (stored numbers) on the cell phone, lost data from the palm pilot (scheduling information, phone numbers, diary notes, etc.), as well as her work and home answering machines and computers.

This failure of the state to take into evidence Virginia's property seized by the state and turned over to the family before it could be properly examined for evidence, photographed, inventoried or examined, was prejudicial to the defense, as further explained below.

a. Attorney Harvey Gruber

Attorney Gruber appeared on petitioner's behalf during his first court appearance and visited him at jail immediately following his arrest. At that time, Gruber was asked to secure the

above mentioned items. No effort was made by Gruber to secure these items.

b. Attorney Steve Wolfson

Defendant next hired Steve Wolfson to represent him. During all of the discussions with Mr. Wolfson, petitioner repeated his request that Virginia's purse, it's contents, the palm pilot, the keys, the phone and the auto all be secured. In particular, petitioner had a conversation with Wolfson regarding finding out how long the battery life is for a palm pilot so that the information stored therein would not be lost. Wolfson made petitioner assurances he was "looking into it" but never did anything further. Petitioner was still in custody.

c. Attorney Peter Christianson

Petitioner next hired Peter Christianson as his attorney while he was still in custody and requested he secure the items in question, as well as to begin interviewing a number of witnesses he felt were "acting weird" on the phone with him. Petitioner was released and further pursued these issues with Christianson. As to the palm pilot, he was told that Christianson would prefer they not obtain it on the outside chance it may contain incriminating and potentially harmful evidence regarding petitioner. As to the other items, he was told he would look into it.

d. Attorney Dan Albregts

Petitioner next hired Dan Albregts as his attorney and again repeated his request to locate and secure the items which had been discussed with Gruber, Wolfson and Christiansen. This time petitioner was told that the items were gone.

e. Attorney Allen Bloom

When attorney Allen Bloom was hired by petitioner he filed a motion regarding the destruction of the items (A Motion to Dismiss). In the state's Opposition to the defense Motion to Dismiss, even the state admitted "Defendant's Motion would be more aptly based on a theory of failure to collect evidence." AA, Volume 2, 009, p. 2, lines 12-13.

Not only did Bloom fail to bring the motion on the proper grounds but also failed to request and obtain an evidentiary hearing on the issues prior to trial.

2. Trial.

During trial, the issue of the destroyed evidence came up during the testimony of a number

of witnesses, and during an in-trial hearing held on the pre-trial motion filed by Bloom.

a. CSI Robbie Dahn.

Robbie Dahn was one of the members of the LVMPD CSI who were assigned to the Wintry Garden Residence on December 20, 2000. On March 26, 2004, she testified as follows:

> Q. Did you notice any items of evidentiary value on top of the table?
> . . .
> Q. Show you [Exhibit] 49.
> Is that also a close-up of the purse?
> A. Yes.
> Q. And do you also notice near the purse -- did you actually go through the purse?
> A. I think the detective had gone through it prior to my getting there.
> Q. Did you also notice that there -- what is -- was lying next to the purse that's shown here?
> A. Keys and cell phone.
> Q. Were you able to determine who the keys and cell phone belonged?
> A. I wasn't -- like I said, the detectives, I think they were handling that end of it.

AA, Volume 3, 185, p. 135, line 13 to p. 136, line 21.

During the continuation of her testimony, Dahn testified as follows:

> Q. Now the purse and the keys and the cell phone that were in [Exhibit 49] that we were talking about, did you impound any of those items?
> A. No, I didn't.
> Q. Was there a reason you did not impound the cell phone or the keys or the purse?
> A. No.
> Q. Did it appear to have any evidentiary value at the time?
> A. The keys and the cell phone, no.
> Q. Did you actually go through the purse?
> A. The purse was gone through by detectives prior to my returning from jail.

Id. at 194, p. 23, lines 3-15.

On re-cross she then changed her testimony regarding the keys:

> Q. Does that cause you concern [the keys]?
> A. Yes. They should have been inventoried.

Id. at 213, p. 99, line 24 to p. 100, line 2.

b. Motion Hearing held on March 29, 2004

Despite the fact that Bloom filed a pre-trial Motion to Dismiss based on the destruction of evidence issues back in 2001, he did not seek a ruling by the Court until the trial was already in

progress, during which the following discussion was held on the record, outside of the presence of the jury. Bloom admitted that he failed to re-new the motion or request a ruling BEFORE trial commenced and therefore was precluded from having this issue reviewed pre-trial by writ or review for direct appeal.

> MR. BLOOM: Yes, your honor. The keys of Gina Centofanti are photographed in several pictures that we've already talked about at the scene, and the keys were taken into police custody.
>
> But prior to them being inventoried and determined if there was a key to the house at 8720 Wintry Garden, the keys were released to the family of Gina Centofanti. And it was done before the Defense had any opportunity to confirm that the key -- that Ms. Centofanti had the key to the house.
>
> It's important to the Defense to establish that, in fact, Ms. Centofanti entered the house without being admitted by anyone. And we believe that the presence of a key ring would have been able to go a long way towards establishing that, if not establishing it in and of itself.
>
> The Defense position was that she entered without anyone letting her in, and she came in on her own. So kind of a middle ground that the Court and counsel has settled on. But let me back up one second. This is pursuant to a motion that was filed in 2001 when Judge Gibbons was still on the case, and it had to do under the category of destruction of evidence, or loss of evidence to the Defense.
>
> The issue, I believe, was raised to my recollection. I don't think it was ever resolved. We didn't get to that stage because of the interruption in the proceedings for the writ, the way the case went to the Supreme Court on an entirely different matter short-stopped that.
>
> We never got a resolution to this particular issue. That's my recollection. I think Ms. Goettsch's recollection is pretty much the same. We never resolved it.
>
> AA, Volume 3, 190, p. 7 line 9 to p. 8 line 18.
>
> MR. BLOOM: I think it's inappropriate for them [the keys] to have been released. I think it was wrong for the police to have released them. I think it was wrong to release them without an inventory.
>
> I can bring some of that out through questioning. But the issue is, the defense has now lost the opportunity to make that confirmation. The police had this exclusively within their control. We have lost the opportunity to have any confirmation because of it.
>
> Id. at 191, p. 10, lines 12-20.

In the state's counter-argument you can see that a pre-trial evidentiary hearing would

have been the best way to address the keys [not mentioning for the moment Bloom's failure to renew the objection to the other items originally delineated in the 2001 Motion, the contents of the purse, the vehicle and it's contents, as well as the contents of the apartment].

> MR. PETERSON: I guess my position is, it should just be done through the witness. You don't know today whether or not there was a key to that front door on there? No we don't know that.
>
> I don't think the state as a party should be forced. Because what Mr. Bloom is trying to do is make it look like the state has prejudiced his client, and that's nonsense.

Id. at 191, p. 11, lines 15-23.

The state therefore claimed that the keys have and had no evidentiary value and that they and the police are blameless. This despite the admission by CSI Robbie Dahn that they keys should have been inventoried, and his own admission regarding the presence of the evidence.

> Her purse is inside the house. Her cell phone is inside the house next to her keys, essentially on the table. Her body is there.

Id. at 192, p. 16, lines 12-15.

Nevertheless, no attempt was made by Bloom, the state, or the Court to address any of the other items, in particular the contents of the purse, the palm pilot, the vehicle, it's contents, and the apartment and it's contents.

The Court only ruled on the issue of the keys, and denied petitioner's motion:

> Now, whether the investigating officers should have seized upon this at the time and realized that now this key to the door might be an issue . . . [However] I am not finding negligence. I'm going to let you resolve this through questioning, and if it doesn't get fully resolved, I do reserve the right to step in some fashion.

Id. at 193, p. 19, lines 3-15.

c. Testimony of Detective Thomas Townsen

Detective Townsen testified on direct on April 5, 2004 regarding this issue:

> Q. Did you find personal effects related to Ms. Gina Centofanti?
> A. Yes.
> Q. I'm showing you state's 49. Do you recognize what's in state's 49?
> A. Yes, I do.
> Q. Is that accurate -- is it accurate to say that it's the purse, cell phone and keys of Gina Centofanti sitting together in a group on the small wooden table found inside

the residence?

A. Yes, and just next to the cell phone would be the stack of bills in Ms. Centofanti's name.

Q. Those bills are in Ms. Centofanti's name?

A. That's correct.

AA, Volume 4, 179, p. 105 line 2 to line 15.

Q. Sir, did you identify the purse and contents and cell phone as belonging to Gina Centofanti, the one we have in that photo I showed you earlier?

A. Yes.

Id. at 182, p. 117, lines 22-25.

d. Rebuttal closing argument

Even in Rebuttal Closing Argument on April 15, 2004, the state argued:

She came in, went to the table, put down her purse, her cell phone and her keys in this nice area there.

AA, Volume 5, 238, p. 117, lines 19-20.

B. Argument and legal authority

Showing that adequate pretrial preparation and investigation would have produced a conviction of a lesser degree of homicide would suffice for a showing of prejudice from lack of competent representation by defense counsel. See, U.S.C.A. Const.Amend. 6.; Turner v. Duncan, 158 F.3d 449 (C.A.9 (Cal.) 1998).

An evidentiary hearing should have been held pre-trial. Short of that, an evidentiary hearing should and could have been held during trial before testimony was received on these issues. As a last and final attempt at preserving the issue and defendant's rights regarding it, an instruction should have been requested and or read to the jury on the issue of the state's destruction or loss of evidence and the presumptions (against the state) that that would entail, and if the instruction was refused then object and properly preserve the issue for review.

A permissible inference that missing evidence would be adversely applied when evidence was negligently lost or destroyed by a party who possessed the evidence, while a rebuttable presumption applied for willful destruction of evidence. See, Bass-Davis v. Davis, 122 Nev. 442, 134 P.3d 103 (2006), overruling Reingold v. Wet'n Wild Nevada, Inc., 113 Nev. 967, 944 P.2d 800 (1997), and Bohlmann v. Printz, 120 Nev. 543, 96 P.3d 1155 (2004). West's NRSA

47.250(3).

If the defendant shows that evidence the state failed to gather was "material," i.e., that there is a reasonable probability that the result of the proceedings would have been different if the evidence had been available, the court must determine whether the failure to gather it resulted from negligence, gross negligence, or bad faith; in case of mere negligence, no sanctions are imposed, but the defendant can examine the state's witnesses about the investigative deficiencies, in the case of gross negligence, the defense is entitled to a presumption that the evidence would have been unfavorable to the state, and in the case of bad faith, depending on the case as a whole, dismissal of the charges may be warranted. See, Gordon v. State, 121 Nev. 504, 117 P.3d 214 (2005).

Here counsel was deficient in two areas, one he failed to show the evidence was material and, two, failed to show the actions of the state were not merely negligence. There was no attempt to question seasoned homicide detectives as to why Virginia's cell phone and the messages left on it, and a handheld computer, and the data stored on it, would not be material to a murder investigation when such items were found with the alleged victim at the scene.

The same questions were not asked as to her home and work computers and her home and work answering machine messages. She was a salesperson. It cannot be said that data from the lost and or destroyed items was not material to her whereabouts on December 1, 2000, December 4, 2000, December 5, 2000 and December 20, 2000, the critical dates at trial.

The fact the detectives and crime scene analysts told counsel that returning property to the victim's family was routine, this is not a valid reason to deny petitioner relief on this issue.

In the case of United States v. Riley, 189 F.3d 802 (9th Cir.1999), the Ninth Circuit held that it was bad faith for federal officers to destroy notes of their interviews whether or not it was "routine" to do so. Id. at 806.

> Rather, the government contends that the sanctions imposed were within the court's discretion because the case against Riley was strong, the witness "statement" in this case consisted of the agent's rough notes (not a writing by the witness), and it is hard to see how Riley was harmed. Although close, we do not agree. While the district court rested its decision on the correct factors, we cannot say the Jencks error was harmless given the fact that the

> statement was intentionally destroyed, there was no substitute for it except the recollections of the key witnesses themselves, Dufriend was the principal witness whose testimony was critical to Riley's entrapment defense, and the district court found prejudice.
>
> Id. at 806.

Inside both her purse, in the form of a palm pilot, and her cell phone was information that was critical in establishing time lines and information for events surrounding events in November and December of 2000. For the police and the state to claim that the evidentiary value of these items was not known to experienced homicide detectives, crime scene analysts and deputy district attorney's is incredulous and should have been explored pre-trial in a hearing and subsequent evidentiary hearing on the 2001 defense motion.

Testimony should have been received at that time from the parties involved and not merely through self-serving statements made by the state over three years later (see Townsen's testimony regarding his alleged observations of defendant in the police car the night of December 20, 2000 to see how the state's position evolves with the passage of time - perhaps no one asked him any questions regarding evidence specified in the warrant issued that night until the time of trial.).

Now during cross-examination by Bloom, he does not ask any questions regarding the purse and it's contents. What should have occurred (pre-trial) was a hearing on this matter. Short of that (since it was not requested) the officer should have been examined extensively on these issues. Questions such as what was done with the items since they were not placed in evidence? They were not turned over to the family that night so what happened to them? Were they taken by him or another member of the police for safekeeping? There was evidence the phone was used by someone to call the towing company to tow Virginia's vehicle? Was a dump done of the cell phone? Were messages retrieved? Numbers stored retrieved? Same with the palm pilot, etc?

Instead none of these or any questions were asked by Bloom (See, AA, Volume 4, 182, p. 118, line 7 to 184, p. 125, line 5 (cross) and Id. at 184, p. 126, line 12 to 128, line 12 (re-cross) of not only police and their representatives but of the sole member of Virginia's family who did testify, Lisa Eisenman. What were the circumstances by which items of Virginia's were turned over to the family? What was the family told to do with the items? What did the family in fact do with the items? It should be noted that on the website the family did make a posting about items found in

Virginia's car (disregarded fast food wrappers and other items) which was not raised at trial.

C. Conclusion

When petitioner attempted to present his version of the December 20, 2000 events the failure of his counsel to properly prepare, develop and present the facts and evidence properly, prevented it from providing support to the defense theory of the case. This prejudiced petitioner in that the state used the failed and faulty presentation to attack not only the defense theory of the case, but the credibility of petitioner. Since the presentation of the defense in this matter largely rested on the credibility of petitioner it cannot be said that the failure on this issue did not affect the outcome of the trial. Counsel's performance with respect to this issue was constitutionally deficient under the Strickland standard.

6. Defense counsel was ineffective in failing to properly handle the evidentiary issues pertaining to the state failing to take into evidence the bloody exercise bike.

A. Factual and procedural background

As stated above, on December 20, 2000, the Las Vegas Metropolitan Police Department, along with members of the Crime Scene Investigation unit were responsible for securing and processing the scene at 8720 Wintry Garden Avenue. This included, among other responsibilities, the inventory and taking into evidence certain items. What became an issue was the failure of the LVMPD and CSI to inventory and take into evidence an exercise bike.

The exercise bike became a critical piece of evidence in the attempt by the experts (from both sides) to determine if the alleged three shots to the head were made while Virginia was still standing or while she was on the ground. The bike and the blood spatter on it became the focal point of the expert analysis and presentation to the jury as to how the shooting occurred. The sequence and timing of the shots and the location of the blood spatter (on the bike) were key issues in the trial.

1. Opening statements

In Clark Peterson's opening statements for the state he addressed the issue of the exercise bike as follows:

> He (state's expert) will tell you that there is no evidence that Gina Centofanti was upright when the shots to the head occurred. He will tell you this spatter right in here by the bike indicates that her head was very close to that bike when she sustained the gunshot wounds

that she did.

AA, Volume 8, 025, p. 146, lines 20-25.

In Allen Bloom's opening statements for the defense he told the jury:

You'll see some more physical evidence, because the statement that on this exercise bike over here; the statement this exercise bike over here has blood on it is correct. The government did not take that exercise bike into evidence.

Though we don't have the benefit of looking at it in any preserved state; but the blood spatter people who will come in and explain to you, one by the name of Stewart James who is an internationally known blood spatter expert, and a person by the name of Lisa DeMeo who is a 20 year police officer criminalist and blood spatter expert out of San Diego California

. . .

Mr. James . . . will tell you that the blood which is on the exercise machine is not at all limited to just her being shot on the ground, but there are several different ways, mechanisms . . .

AA, Volume 8, 062, p. 183, lines 6-25.

2. CSI Robbie Dahn

Crime Scene Analyst Robbie Dahn was the one who processed the exercise bike and testified extensively about her observations, notes and photographs.

Q. Now we talked about the exercise bike.
Did you happen to notice if there was any apparent blood on the exercise bike?
A. That night, it was talked about, and I did notice it at first. It was pointed out to me and yes, I did see it.
Q. ... state's Exhibit 37 . . . depicts the blood transfer that you saw on the exercise bike that night?
A. Yes.

Id. at 197, p. 36, lines 10-21.

Q. If you could explain to the jury so they kind of know what we're looking at here, what was on the bike?
A. Well, we noticed just on the seat of the bike on our lower left-handed side, it appeared like there was some blood, some type of transfer mark.

Id. at 198, p. 37, lines 1-6.

Q. [T]here's a picture inside there of some blood spatter that was found on the exercise bike right next to Gina Centofanti's head, right?
A. I believe there was some blood on the bike that I saw in the photographs.
Q. But the exercise bike was never received or put into evidence, was it?

A. No.

Id. at 211, p. 90, lines 6-13.

3. Defense expert Stewart James

The state called as it's blood spatter expert Randall McLaughlin. McLaughlin's theory about how the shooting took place was that Virginia was on the ground when she received the gunshot wounds to the head. This was supported by the alleged blood spatter on lower portion of the exercise bike.

Stewart James was called by the defense as it's blood spatter expert. James testified on April 7, 2004 and April 8, 2004. During his testimony the failure to preserve the exercise bike became evident.

Q. Other kind of things, basically what you're summarizing and saying is that other types of forces could have caused what you observed on that exercise bike other than gunshot?

A. Yes, you know, other blood stains events or bloodshed events can produce stains in that size range. We're estimating size range, because again, the item [the exercise bike] was not collected. It was not -- photographs were not taken with a measuring device so we're working only to what extent we can with the available documentation photographically.

AA, Volume 5, 030, p. 114, lines 12-22.

Q. Did you go take a look at this bike yourself, at the exercise bike?

A. Yes, I did. . . .

Q. Was there anything left of value in terms of your analysis of it by the time you saw it in March 2004? Was there anything that --

A. No, there wasn't.
It wasn't collected as evidence and secondly, it was stored when I saw it. It was being stored outside on a patio and it wasn't covered.
It didn't surprise me at all there was not blood on it. I wanted to take a look at it because it was purported to me it was covered which gave an opportunity for there to be something on it, but it wasn't covered and you know, there was nothing to really see.
I took a few photographs of it and that was about it.

Id. at 031, p. 117, line 24 to p. 118, line 18.

The impact of the failure came across during cross-examination:

Q. . . . You agree, do you not, that from the photos of the crime scene we see no evidence of bloodletting that tells us definitively she's upright when the shots are received.

Do you agree with that?

A. Yes, in the sense that I believe he's referring to the flow pattern when he's saying that . . .

AA, Volume 5, 038, p. 19, line 19 to p. 20, line 1.

Q. No evidence to suggest the victim was upright when the gunshot wounds to the head were sustained?

A. You can't tell that just from the flow pattern, because I don't know when those gunshots occurred. It all relates to when the blood flow started.

Id. at 040, p. 26, lines 8-13.

4. Closing arguments

The exercise bike became a critical part of the Closing Arguments for both the state and the defense. On April 15, 2004, the state explained it's theory of the case with regards to the exercise bike as follows:

> Then she crashes into this bike on her way to the floor. After she's shot in the back, she crashes into the bike on the way to the floor and she transfers blood, because she's obviously already bleeding -- and remember what Dr. Simms showed you, that autopsy photo, the abrasion she has on her chest.
>
> She obviously crashes right into this bike, transfers blood and get the abrasion from some portion of the bike, because she's crashing into it this way.

AA, Volume 5, 216, p. 29, line 18, to p.30, line 1.

Bloom acknowledged that the state's theory relied upon the evidence of the exercise bike:

> Mr. McLaughlin's theory about this being on the ground, the support of Gina being on the ground in part starts with the idea that there was blood spatter on this area right here on the exercise bike.

AA, Volume 5, 224, p. 62, lines 18-21.

5. Rebuttal closing argument

In rebuttal, the true impact of the failure to preserve the bike is demonstrated by the following:

> BY MS. GOETTSCH: We need to actually look at how the body was and how this murder took place. We have blood spatter, high-impact blood spatter on the leg of that bike. Mr. Bloom wanted to take issue with that, that his expert in blood spatter said that's not a gunshot wound, but that's not accurate. His blood spatter person, Stewart James, does not disagree with our blood spatter person, Randy McLaughlin, that this could be

from a gunshot wound to the head. Certainly considering this is the leg of the bike -- it's way down here -- where do you think her head was when she sustained this shots to the head?
On the floor, by the bike rail . . .

AA, Volume 5, 240, p. 125, lines 9-21.

Then we have the bike . . . She goes down. She leans into the bike. We have a nice little blood smear that tells us where she was.
. . .
Take a look at the pictures of that bike. There's this big metal chunk right by that bloody seat that causes an abrasion here . . .

AA, Volume 5, 241, p. 132, lines 10-17.

B. Argument and legal authority

Defense counsel had a plethora of options with regards to the issue of the exercise bike. Despite the fact that this was a destruction of evidence issue, it was not included in the Motion to Dismiss which was filed with regards to Virginia's personnel effects. For the sake of argument, unlike some of the other items not collected, lost or destroyed by the state, the bike clearly had obvious evidentiary value and should have been taken into evidence on December 20, 2000.

Furthermore, defense counsel made no attempt to secure the bike when he was retained or even after he retained the services of a blood spatter expert to assist in the analysis of the bike (not to mention his other experts in the areas of police investigations). Finally no effort was made at trial to develop the failure of the state to preserve the exercise bike since no argument was made to the jury about it in closing (as it was in opening) or a curative instruction requested from the Court regarding the loss and or destruction of evidence under the Nevada Supreme Court case of Gordon v. State, 121 Nev. 504, 117 P.3d 214 (2005).

An evidentiary hearing should have been requested and held on the issue of the exercise bike pre-trial. Short of that, an evidentiary hearing should and could have been held during trial before testimony was received on the issues affected by the loss of evidence. As a last and final attempt at preserving the issue and defendant's rights regarding it, an instruction should have been requested and or read to the jury on the issue of the state's destruction or loss of evidence and the presumptions (against the state) that that would entail, and if the instruction was refused then object and properly preserve the issue for review.

As stated, supra, if a defendant shows that evidence that the state failed to gather was "material," i.e., that there is a reasonable probability that the result of the proceedings would have been different if the evidence had been available, the court must determine whether the failure to gather it resulted from negligence, gross negligence, or bad faith; in case of mere negligence, no sanctions are imposed, but the defendant can examine the state's witnesses about the investigative deficiencies, in the case of gross negligence, the defense is entitled to a presumption that the evidence would have been unfavorable to the state, and in the case of bad faith, depending on the case as a whole, dismissal of the charges may be warranted. See, Gordon v. State, 121 Nev. 504, 117 P.3d 214 (2005). This was not pursued at all by defense counsel and the issue not preserved for the record.

Finally, there was no strategic reason not to have the bike issue litigated pre-trial and perhaps be excluded from evidence. Without the evidence from the bike the state would have been prevented from making the arguments that there was physical evidence in the form of blood spatter on the leg of the bike to support their theory that the shots to the head were administered while she was on the floor. There was also no strategic reason to have not taken the bike into evidence in 2001, when the defense first hired an expert in blood spatter and instead he waited until 2004 to have the bike looked at after it had been stored outside and the evidence lost.

C. Conclusion

When petitioner's counsel attempted to present to the jury his expert's testimony of how the shooting occurred on the December 20, 2000 the failure of his counsel to properly prepare, develop and present the facts and evidence of the exercise bike properly, prevented it from providing support to the defense theory of the case. This prejudiced petitioner in that the state used the failed and faulty presentation to attack not only the defense theory of the case, but the credibility of petitioner and his experts. Since the presentation of the defense in this matter largely rested on the credibility of petitioner it cannot be said that the failure on this issue did not affect the outcome of the trial. Defense counsel's performance with respect to this issue was constitutionally deficient under the Strickland standard.

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7. Defense counsel was ineffective for failing to properly handle and process the missing shell casings

A. Factual and procedural background

On the night of December 20, 2000, the Las Vegas Metropolitan Police Department, along with members of it's Crime Scene Investigation Unit, were present and responsible for securing, investigating, and processing the alleged crime scene at 8720 Wintry Garden Avenue. Five (5) shell casings were recovered from the scene and taken into evidence. These shell casings were purported to be from the alleged murder weapon, a 9 millimeter Ruger.

In March of 2001, two (2) additional shell casings were discovered during the move-out by petitioner from the Wintry Garden residence. Attempts to have petitioner's attorney of record at the time, Peter Christiansen, and/or Christiansen's investigator, "Archie", come to the scene to properly document the facts and circumstances surrounding the discovery and location of the casings were unsuccessful. On the advice of defense counsel, the two (2) casings were placed in an envelope. Petitioner was instructed to deliver the envelope to Christiansen's office. Petitioner then sought the advise of other counsel.

As a result of this incident, petitioner then sought and obtained other counsel, Daniel Albregts. One of the first issues discussed with Albregts was what to do about the shell casings issue. Nothing was done about the shell casings by Albregts, who eventually was involuntarily replaced by attorney Allen Bloom. Bloom similarly did nothing regarding this issue until the casings were picked up from petitioner by defense investigator Jim Thomas and turned over to members of the Las Vegas Metropolitan Police Department in December of 2001, nine months after they were discovered.

The issue of the shell casings was raised pre-trial, as evidenced by the following placed on the record:

> "Shell casings that defendant found in his home . . . and under the advice of counsel has not been turned over to anybody."
>
> AA, Volume 1, 144, p. 20 line 18, to p.21, line 4.

> [T]here were seven shots; five casings found at the scene. The police missed those two.

They were questioned about the missing shell casings throughout their investigation. Even at the grand jury, they were asked by a grand juror how come there are only five casings when there were seven shots and so forth.

AA, Volume 1, p. 145, line 7, to line 23.

Clearly, the grand jury testimony demonstrates the shell casings were material to the presentation of the case at trial.

At trial, during the examination of crime scene analyst Randall McLaughlin, on April 5, 2004, the issue was raised as follows:

Q. The results showed she suffered seven wounds?
A. Yes.
Q. Only five casings were found?
A. That's correct.
Q. Anybody ever go back to look for the missing casings?
A. Not to my knowledge. It was never relayed to me the number of injuries they found at the autopsy.
. . .
Q. Were the police officers at the autopsy to get the results?
A. Yes.
Q. They never told you "We're missing two casings."?
A. No.

AA, Volume 4, 175, p. 90, line 24 to p. 91, line 18.

No further effort or examination was put forth by counsel as to the failure to locate the additional two casings and how this may have reflected on how the alleged crime scene was investigated and processed by the police and their representatives.

B. Argument and legal authority

Defense counsel failed to adequately handle the whole issue of the missing shell casings. The first failure, was the failure to properly investigate, document and process the missing shell casings when they were found. What should have occurred was petitioner should have been advised not to handle or otherwise move or disturb the shell casings and the police contacted so that their discovery and location could be properly documented and persevered for use at trial. Not doing this prejudiced petitioner's ability to use the failure of the police to properly document, process and collect evidence at trial. The second failure, was the overall failure to properly develop, both before and during trial, the improper processing of the crime scene, which would have assisted the defense. Here, the number and location of shell casings was used by both state

and defense experts in their presentation of how many shots were fired, and how and where the shooting occurred, which were critical issues in the case.

As stated, supra, if a the defendant shows that evidence the state failed to gather was "material," i.e., that there is a reasonable probability that the result of the proceedings would have been different if the evidence had been available, the court must determine whether the failure to gather it resulted from negligence, gross negligence, or bad faith; in case of mere negligence, no sanctions are imposed, but the defendant can examine the state's witnesses about the investigative deficiencies, in the case of gross negligence, the defense is entitled to a presumption that the evidence would have been unfavorable to the state, and in the case of bad faith, depending on the case as a whole, dismissal of the charges may be warranted. See, Gordon v. State, 121 Nev. 504, 117 P.3d 214 (2005).

As with the issues pertaining to the bike, this was not preserved for the record. Furthermore, counsel failed to utilize the experts and other witnesses (state and defense) to discuss the importance of the failure to discover the shell casings and how this might reflect on the processing of the crime scene as a whole. This could and should have been used to create reasonable doubt in the minds of the jurors as to the investigation and presentation of evidence by the state.

C. Conclusion

The failure by counsel to properly handle the issues surrounding the finding of the additional shell casings prejudiced petitioner's ability to present all available defenses, including the improper handling of the alleged crime scene and challenge the state's theory of how the shooting occurred. The location of the ejected shell casings was important to establish where the gun was located at the time of the shooting. Since the presentation of the defense in this matter largely rested on the credibility of petitioner it cannot be said that the failure on this issue did not affect the outcome of the trial. Defense counsel's performance with respect to this issue was constitutionally deficient under the Strickland standard.

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8. Defense counsel was ineffective for failing to preserve and present the issue of the cremation order.

A. Factual and procedural background

When Petitioner was in the Clark County Detention Center following his arrest, he was taken out of his cell by someone who identified himself as a Lieutenant in the Metropolitan Police Department and presented what was represented to him as being a "cremation order." Petitioner was told that his signature was needed in order for the body to either be released to Virginia's family or cremated because "he was the husband." Petitioner requested that he be allowed to speak with his attorney before he would sign anything and then was told "in no uncertain terms" that he "was going to sign the order" "or else." Therefore, under the threat of harm or duress the petitioner signed "the document" and then was allowed to return to his cell.

Petitioner told his succession of counsel about this "incident" at the jail. There was no effort to pursue this matter further despite the fact that it may have provided a basis for the petitioner to argue destruction of evidence, since once Virginia's body was cremated it could not be examined or tested by the defense or defense experts at all to challenge the theory of the state with regards to either how the shooting took place or whether or not the blood, tissue, organs or hair contained any evidence of alcohol or drug use not only on December 20, 2000, but perhaps earlier, to give credence to the petitioner's observations that Virginia had been acting erratic in November and December leading up to the December events which were the subject of the trial. Furthermore, with the destruction of the body, the defense was precluded from conducting it's own autopsy to challenge the autopsy conducted by the state.

B. Argument and legal authority

A criminal defendant must be warned that he has the right to remain silent and to the assistance of counsel before he can be subjected to custodial interrogation. "Custody" is defined as formal arrest or a restraint on the freedom of movement to a degree associated with formal arrest. See, Avery v. State, 122 Nev. Adv. Rep. 24, 129 P.3d 664, 668 (2006) [Citations omitted]. Though informed of his Miranda rights, unless the defendant knowingly and voluntarily waived them, statements made during custodial interrogation are inadmissible. The state must

prove by a preponderance of the evidence that the waiver was knowing and intelligent. Floyd v. State, 118 Nev. 156, 42 P.3d 249, 259 (2002) [Citations omitted].

In Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16 (2004), the Nevada Supreme Court held:

> The Fifth Amendment of the Federal Constitution states, "No person ... shall be compelled in any criminal case to be a witness against himself." The Fourteenth Amendment makes this privilege against self-incrimination binding upon the States. In Miranda, the United States Supreme Court established a prophylactic right to have counsel present during custodial interrogations. In Edwards v. Arizona, the Court established a rule for this Miranda right to counsel. Pursuant to Edwards, once a suspect has "expressed his desire to deal with the police only through counsel," not only must the current interrogation cease, but he may not be approached for further interrogation "until counsel has been made available to him." If police later initiate an encounter in the absence of counsel and there has been no break in custody, "the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards." The Edwards rule is not offense specific and bars police-initiated interrogations related to any offense once a suspect has invoked the Miranda right to counsel regarding one offense. However, suppression under Edwards "requires a court to 'determine whether the accused actually invoked his right to counsel.' "
>
> Id. at 26.

Counsel was ineffective in failing to raise this issue pre-trial so a hearing could have been held to determine whether or not the state allowing the body to be cremated through coercing petitioner to sign a cremation order was a violation of petitioner's Fifth and Fourteenth Amendment right to remain silent, his Sixth Amendment right to counsel, such that any evidence obtained from Virginia's body by the state be suppressed or a destruction of evidence instruction read to the jury, supra. This conduct by the state was intentional and did affect both petitioner's rights as well as his ability to prepare for trial. It cannot be said that petitioner's experts were not prejudiced by the state not allowing the defense to preserve the body for autopsy and other investigation and, instead, having to rely upon the photographs and notes of the state's experts.

The proper way to challenge this issue was to file a motion for suppression prior to trial See, United States v. Matos, 905 F.2d 30 (2nd Cir.1990), (Trial counsel's failure to file suppression motion and preserve issue for review may constitute ineffective assistance of counsel

and requires a remand). In Nevada when ineffective assistance of counsel claim is based upon counsel's failure to file motion to suppress confession or motion to suppress evidence allegedly obtained in violation of Fourth Amendment, the prejudice prong must be established by showing that claim was meritorious and that there was reasonable likelihood that exclusion of the evidence would have changed result of trial. See, U.S.C.A. Const.Amends. 4, 6; Doyle v. State, 116 Nev. 148, 995 P.2d 465 (2000).

There was also no effort was made at trial to develop the failure of the state to preserve the body, or purposely assisting in the cremation, since no argument was made to the jury about it in closing (as it was in opening) or a curative instruction requested from the Court regarding the loss and or destruction of evidence under the Nevada Supreme Court case of Gordon v. State, 121 Nev. 504, 117 P.3d 214 (2005). Furthermore, there was no attempt to raise this issue at trial, thus further prejudicing petitioner as it was not made part of the record, and not preserved for review.

C. Conclusion

Petitioner's attorneys failure to address the significant and obvious issue of the improper consent obtained for the cremation order, the violation of petitioner's Fifth and Fourteenth Amendment right to remain silent, Sixth Amendment right to counsel, and the destruction of evidence fell below the standards of reasonableness and were prejudicial as all of these failures resulted in the lessening of the burden of prosecution and the preclusion of petitioner in presenting all of the issues and defenses available to him, and failing to preserve the issue for appellate review. Defense counsel's performance with respect to this issue was constitutionally deficient under the Strickland standard.

9. Defense counsel was ineffective for failing to preserve and present the issue of the invalid search warrant

A. Factual background

In October of 2001, the Defense filed a "Request for an Order to Produce Cassette Tape." At issue was the fact that on December 20, 2000 the police had requested and obtained a search warrant telephonically, yet a signed copy of the search warrant and/or the cassette tape used to record the conversation between the police and the judge was not provided to counsel on request or located

in the file.

While the signed warrant and the tape, which must be furnished upon request by the defense, was never located, let alone turned over, a blank was located in the justice court file. This was raised pre-trial in 2001, as reflected by the following discussion with the Court:

> It is unsigned Your Honor; There is no signature.
>
> AA, Volume 1, 201, p. 246, lines 21-22.

The Court allowed further argument on the record. See, Id. to 202, p. 250, line 20.

In the minutes of the Court, the following is reflected with regards to the cassette tape:

> Defendant's objection is overruled and the motion denied. Mr. Laurent advised he will make a copy of the document and provide it to the defense.
>
> AA, Volume 1, 025.

It should be noted that neither the documentation (signed warrant) or cassette tape were provided by Laurent or anyone else from the District Attorney's Office or the Court to the defense. Furthermore, this issue was never re-raised by defense counsel or resolved.

B. Legal argument and authority

NRS 179.045 Pertaining to the Issuance and Contents of Search Warrants, provides, in pertinent part:

> 4. After a magistrate has issued a search warrant, whether it is based on an affidavit or an oral statement given under oath, he may orally authorize a peace officer to sign the name of the magistrate on a duplicate original warrant. A duplicate original search warrant shall be deemed to be a search warrant. It must be returned to the magistrate who authorized the signing of his name on it. The magistrate shall endorse his name and enter the date on the warrant when it is returned to him. Any failure of the magistrate to make such an endorsement and entry does not in itself invalidate the warrant.

The fact that the issue was not re-raised does not preclude it's review. The manner in which search warrant was executed is reviewable on appeal even though no motion to suppress evidence was made before or during trial. See, N.R.S. 174.125, 179.045, subd. 3, 179.075, subd. 1. Smithart v. State, 86 Nev. 925, 478 P.2d 576 (1970).

The proper way to challenge the warrant was to file a motion for suppression prior to trial See, United States v. Matos, 905 F.2d 30 (2nd Cir.1990), (Trial counsel's failure to file

suppression motion and preserve the issue for review may constitute ineffective assistance of counsel and requires a remand). In Nevada when ineffective assistance of counsel claim is based upon counsel's failure to file motion to suppress confession or motion to suppress evidence allegedly obtained in violation of Fourth Amendment, the prejudice prong must be established by showing that the claim was meritorious and that there was reasonable likelihood that exclusion of the evidence would have changed result of trial. See, U.S.C.A. Const.Amends. 4, 6; Doyle v. State, 116 Nev. 148, 995 P.2d 465 (2000).

Here the claim was both meritorious, and if the evidence obtained from the warrant on December 20, 2000, including the weapon, Virginia's body (which consisted allegedly of both how the shooting occurred, cause of death as well as whether or not she had ingested drugs or alcohol) and all the physical evidence regarding the alleged shooting was excluded, it cannot be said that there is not a reasonable likelihood that the exclusion of this evidence would not have changed the result of the trial.

C. Conclusion.

The issue of whether or not the warrant was properly issued on December 20, 2000 was not pursued or resolved by defense counsel prior to or during trial. This issue, if resolved in favor of petitioner, could have allowed the defense to seek to exclude all of the evidence obtained by the police at 8720 Wintry Garden on December 20, 2000, and used by the state at trial, and therefore was both ineffective and prejudicial to petitioner. Defense counsel's performance with respect to this issue was constitutionally deficient under the Strickland standard.

10. Defense counsel was ineffective for failing to preserve and present the issue of the improper production of the photographs and notes of Janeen Mutch/Harvey Gruber.

A. Factual and procedural background

On February 20, 2004, the Court conducted what was called an "Ex Parte Hearing Outside the Presence of the State." This hearing was held by the Court to determine if the attorney client/ attorney work-product privilege existed as to the testimony and actions of attorney Janeen Mutch (Mutch). Mutch was a co-worker of petitioner at Eva Cisneros's law firm (in-house counsel for Traveler's Insurance).

Mutch was represented at the hearing by attorney John Moran. Moran was allowed to take the lead at the hearing and examine Mutch. What was revealed at the hearing, and subsequently during discovery, and at trial, was that at some point criminal attorney Harvey Gruber was contacted the night of December 20, 2000. Gruber had been contacted previously by petitioner with regards to the events of December 5, 2000.

Gruber apparently contacted Mutch to assist him in the investigation of the matter. Mutch was instructed by Gruber, acting as de-facto counsel for petitioner, to take photographs and notes at the scene on December 20, 2000. She did so. What was also revealed during examination was that prior to any determination by the Court regarding the existence of privilege to these materials, Mutch turned them over to Moran who then turned them over to the state.

> Q. When you were interviewing people at the scene on December 20th, you did so with Mr. Gruber, or at Mr. Gruber's direction?
> A. Exactly. I did what he told me to do.
> Q. You took some photographs?
> A. They were turned over to Mr. Moran along with any notes?
> Q. The original notes and photographs, yes.
> MR. MORAN: Those were provided to all sides in this matter, counsel.
> THE WITNESS: For the record, I did not develop them. I turned over the undeveloped camera and any original notes or information I had.
> MR. MORAN: Those were provided. I had them developed and provided to all sides, the state and you. If you'd like after these proceedings I can go through that and show you the copy.
> MR. BLOOM: It's another matter of where the Prosecution would get them at that stage, but they're there. As the Court knows, I came in after Mr. Albregts was on the case for a long time, and he may have received these materials.
>
> AA, Volume 2, 051, p. 14, line 11, to 052, p.15, line 12.

No objection was made or pursued, by defense counsel, regarding these materials, nor was any objection made to the filing of this transcript in open court (on March 12, 2004, five days before trial) after the examination, despite the fact that Mutch's testimony was ruled by the Court to be covered by the privilege.

Bloom did not determine or distinguish the notes and photographs that were improperly turned over and used by the state and did not file an appropriate motion to have the materials removed or stricken or the subject of some type of motion in limine, motion to suppress, or other ruling the Court deem appropriate under the facts and circumstances of the case. The issue of

sanctions as to the improper actions of Moran was also not pursued.

B. Argument and legal authority

It is believed that the defense work-product photographs and notes were used improperly by the state during the presentation of their case and this lessened the burden of prosecution. Specifically, it is believed that the photographs taken by Mutch were taken after the scene had been processed by the Metropolitan Police Department and it's crime scene investigation members. One of the improperly obtained photographs was used by Deputy District Attorney Clark Peterson to argue to the jury the following:

> You can almost see the depression where she's seated where she's reading her bill. For goodness sakes, she's sitting down there on the couch looking at her mail, looking at her mail.
>
> AA, Volume 5, 214, p. 21, lines 17-20.

Mutch, and other representatives of the petitioner were not allowed to enter the alleged crime scene at 8720 Wintry Garden until it was "cleared." It is believed that during or after the investigation members of the LVMPD and others (coroner's office, CSI, etc.) had sat on the couch before the photograph was taken. Thus, it was not only improper to utilize the photograph as a violation of attorney work-product privilege but was false evidence presented to the jury as to alleged scenario proposed by the state.

Materials obtained by the state in violation of the attorney client/attorney work-product privilege cannot be used by the state unless the privilege is waived by the person who holds the privilege. While the attorney may claim attorney-client privilege on the client's behalf, only the client has the ability to waive it. N.R.S. 49.095. Manley v. State, 115 Nev. 114, 979 P.2d 703 (1999). Here, counsel failed to request that the district attorney's office return the materials to the defense and to further explore, what, if any, improper discovery and other information was learned from what could only be called the "poisonous tree" of the privileged materials. This was clearly ineffective assistance of counsel as it prejudiced petitioner by lessening the burden of prosecution, as the prosecution was able to use the information provided by the defense to impeach the credibility of the petitioner and the defense.

Furthermore, it was prosecutorial misconduct for the state to accept materials that were

clearly privileged. Here, the state cannot argue that it did not know since Mutch's attorney made the representation that the materials were purported to be photographs and notes taken on behalf of petitioner's counsel, Harvey Gruber. This conduct is considered prejudicial error in Nevada. Where the prosecutor in criminal proceeding sought to rebut defendant's testimony that defendant's wife was unavailable to testify on behalf of defendant and the attorney for defendant's wife was a prosecution witness and could have been asked about defense efforts to locate defendant's wife, it was prejudicial error for prosecutor to call defendant's attorney to testify about availability of defendant's wife to testify. Const. Art. 1, § 8; U.S.C.A.Const. Amends. 6, 14. Kaeser v. State, 96 Nev. 955, 620 P.2d 872 (1980).

The proper way to challenge this issue was to file a motion for suppression prior to trial See, United States v. Matos, 905 F.2d 30 (2nd Cir.1990), (Trial counsel's failure to file suppression motion and preserve issue for review may constitute ineffective assistance of counsel and requires a remand). In Nevada, when ineffective assistance of counsel claim is based upon counsel's failure to file a motion to suppress a confession or a motion to suppress evidence allegedly obtained in violation of Fourth Amendment, the prejudice prong must be established by showing that claim was meritorious and that there was reasonable likelihood that exclusion of the evidence would have changed result of trial. See, U.S.C.A. Const.Amends. 4, 6; Doyle v. State, 116 Nev. 148, 995 P.2d 465 (2000).

Here the claim was both meritorious, and if the evidence obtained in violation of the attorney-client/attorney work-product privilege (which consisted of notes taken at the scene of witness interviews and photographs) was excluded, it cannot be said that there is not a reasonable likelihood that the exclusion of this evidence would not have changed the result of the trial since counsel failed to make a proper record at any point that the materials that were turned over and how they were used.

C. Conclusion.

Counsel for Janeen Mutch, John Moran improperly provided the state with the photographs and notes taken by Janeen Mutch on the night of December 20, 2000, in violation of Petitioner's attorney-client/attorney work- product privilege. The state had the duty to not accept

these materials as only petitioner and not they can waive the privilege. What should have occurred was the state should have not accepted the items.

Once Bloom was made aware during the February 20, 2004 hearing that petitioner's attorney-client/attorney work product privileges were violated, a motion for sanctions and or to suppress or return the materials should have been filed immediately and a hearing held in the Court to determine how best to address the situation. Instead, Bloom let the matter go and the photographs and notes were used by the state and lessened the burden of prosecution and prejudiced petitioner. Counsel's performance with respect to this issue was constitutionally deficient under the Strickland standard.

11. Defense counsel was ineffective for failing to interview and secure crucial defense witness testimony.

A. Factual and procedural background

Petitioner was taken into custody on the night of December 20, 2000. During the time he was incarcerated at the Clark County Detention Center, until his release on bail on January 17, 2001, petitioner kept in contact with his employer, Eva Cisneros (in-house counsel for Travelers Insurance), as well as a number of his co-workers, including Janeen Mutch and Sarah Smith, by telephone and during visits.

During his incarceration the matter became a high profile matter with the Las Vegas media. Details of the alleged incident and petitioner's photo were plastered all over the television news and print media. All of petitioner's court appearances and movements (once released on bail) were reported for a time.

Despite all that going on, while incarcerated, petitioner was told that his job was being held for him. Petitioner called and spoke to various co-workers at work (they were accepting his collect calls from the jail) and at home. Petitioner was also told that his co-workers were establishing a defense fund for him, and a separate fund for his son Nicholas. Some of his co-workers even got together with petitioner's parents and gave them Christmas presents for Nicholas.

When petitioner was released, he was told that he had, in fact, while incarcerated, been let

go from his employment with Travelers (and all his personal property boxed up and delivered to his parents). There was no "defense fund" set up and petitioner was provided evasive and vague responses regarding the one for Nicholas. Furthermore, Cisneros, Mutch and Smith all stopped taking petitioner's calls. Petitioner related his concerns regarding this turn of events to his attorney at the time, Peter Christiansen. Petitioner suggested that defense investigators interview these three witnesses to secure their testimony, as well as that of certain other employees of Travelers. Christiansen told petitioner "not to worry about it" since "they were on our side" and "we don't need to interview friendly witnesses." Christiansen further assured petitioner that he had seen Smith in Court (he related how flamboyantly she was dressed) and that recognizing him as petitioner's attorney, she asked "how petitioner was doing."

As with the issue of trying to secure Virginia's items, discussed supra, this issue was bounced from attorney to attorney during the three years this case took to get to trial and no effort was made to interview any of the above three witnesses until right before trial in 2004. There were also no efforts made to contact a number of other individuals whose identity was provided to defense counsel as being witnesses who could assist the defense. At that time, both Cisneros and Mutch were refusing to speak with the defense (despite claiming to the state they would not speak to them due to attorney-client privilege - the propriety of claiming privilege and then refusing to communicate with your "client" similarly was not raised) as was Sarah Smith, who apparently was now in constant contact with the state. In the meantime a number of events known to petitioner and related to counsel, occurred to prevent petitioner from being able to call witnesses favorable to him and the defense of his case.

1. Actions by Virginia's family, friends and co-workers

Virginia's family, friends and co-workers conducted what would best be described as a "smear campaign" of petitioner. A foundation and web site were set up in memory of Virginia which openly attacked petitioner and discussed facts and other details of both the criminal and guardianship case. This including posting pictures of Nicholas and identifying who had custody of him. Knowing petitioner had unsuccessfully attempted to obtain Virginia's personal items, postings were made regarding the family finding "fast food wrappers" and other items. The web

site entries were believed to have been entered by Lisa Eisenman and/or others.

Former co-workers and friends of Virginia, such as Bridget Masis, who also assisted with the attempt to have petitioner's bail revoked, made efforts to locate friends, colleagues and former co-workers of petitioner on the internet. Long and rambling e-mails were sent to these people comparing petitioner to the terrorist of 9/11. (Masis sent such an e-mail to Thomas Byron, a former employer of petitioner) petitioner found out about all of this as he was contacted by people who were sent and offended by the e-mails, and, in turn, forwarded them to petitioner. Masis's efforts were particularly stepped up when petitioner's bail was not revoked back in 2001. Petitioner provided all of this information to his attorneys.

Virginia's family was also behind at least one newspaper article that was published in 2003 which blamed petitioner for "manipulating the legal system" by virtue of his being an attorney and for delaying the trial, among other things.

2. Actions by the district attorney's office

In 2003 the local Las Vegas NBC affiliate produced a story about petitioner. The gist of the piece (which was run both on the news and posted on the news stations website) was the outrage that someone facing murder charges was still allowed to practice law. The story was done by investigative reporter Glen Meeks. Meeks did an on camera interview with the then Deputy District Attorney assigned to petitioner's case Christopher Laurent. Laurent spoke in an on camera interview as to his opinions, during which crime scene photos and other details of the alleged incident were shown to the viewer. These photos and details were not available to the public. Additionally, Tricia Miller was interviewed and gave her opinion that "in no way" could this be "self defense" because of the number of times Virginia was allegedly shot. There were other aspects of the case discussed and the story aired on various days and times, and was available 24/7 on the internet. Against the direct wishes of petitioner, Bloom issued a statement in response. As a result of this story, a number of newspaper articles were also generated regarding the case.

3. Actions by petitioner's former co-workers.

Unknown to petitioner, at the time of his release, was that Eva Cisneros had given a

statement to the police in January of 2001. Soon after Cisneros gave this statement to police she stopped accepting petitioner's calls, as did many of petitioner's co-workers. petitioner did not understand why this was occurring.

An explanation did not present itself until 2003. Despite being assured by Travelers' that all of his personal property was returned to him when his employment was terminated, this was not the case. Apparently person or persons who were provided access to petitioner's office in his absence took it upon themselves to take one of petitioner's computer discs. This disc was held by Sara Smith who believed that the disc contained information that petitioner had planned on writing a book about what had occurred on December 20, 2000, before it happened.

This information was then disseminated by Sarah throughout the Las Vegas legal community and it got back to petitioner that this was all Sara would talk about. Eventually this disc was provided to the district attorney's office who finally shared it with the defense in January of 2003. The issue was eventually resolved in petitioner's favor as the allegations were proved to be factually impossible by a forensic computer expert. However, the damage had already been done to petitioner.

Furthermore, counsel did not seek to contact Eva Cisneros or Janeen Mutch until right before trial. This despite the fact that counsel was made aware that Eva Cisneros had given a statement to police in January of 2001, and that Janeen Mutch's counsel had provided photographs and notes that were protected by attorney-client/attorney work- product privilege to the state.

4. Actions by the guardian ad litem

As further explained below, Dara Goldsmith was appointed as Guardian Ad Litem in the Guardianship case involving Nicholas. Goldsmith indicated she had evidence of people who knew petitioner and that he had a reputation for being non-violent. Goldsmith refused to turn over this information. Goldsmith then engaged in a smear campaign against petitioner, under the guise of conducting an investigation as Guardian Ad Litem, and sent disparaging e-mails and other communications regarding petitioner and his criminal case with other family court attorneys, employees and staff. Evidence of this was revealed and shared with counsel when the

Court ruled that the files of the Guardian Ad Litem were discoverable and were turned over to petitioner.

By the time counsel chose to interview witnesses in 2004, a number of what were considered "friendly witnesses" now were refusing to speak with petitioner or his counsel or his investigator at all (Smith and other former co-workers of petitioner, such as Mike Stevenson) or only through counsel (Cisneros and Mutch). This was due in no small part to the efforts as described in grounds a through d above. This prejudiced petitioner as the facts, information and other investigative leads and tasks were not completed prior to trial and thus counsel was not prepared at trial to respond. (The statements Smith gave to police were not provided to defense counsel until the day of her testimony.)

B. Argument and legal authority

In Turner v. Duncan, supra, the Ninth Circuit examined the issue of an attorney's failure to prepare for trial by not investigating the state's case.

> Smyth did not make any effort to investigate the state's case. This, again, falls below minimum standards of competent representation. See Kimmelman, 477 U.S. at 385, 106 S.Ct. 2574 ("Respondent's lawyer neither investigated, nor made a reasonable decision not to investigate, the state's case through discovery. Such a complete lack of pretrial preparation puts at risk both the defendant's right to an ample opportunity to meet the case of the prosecution and the reliability of the adversarial testing process.") (citations and internal quotation marks omitted). Smyth also failed to interview any of the witnesses that the government planned to call to testify, and therefore could not have known how they would testify and what information he should try to elicit on cross-examination or would otherwise need to present in response. See United States v. Tucker, 716 F.2d 576, 583 (9th Cir.1983) (counsel cannot make "informed assessment" of case without ascertaining how government witnesses will testify).
>
> Id. at 456.

The failure to timely marshal and gather evidence, especially witness testimony, is critical, even more so in a high profile case such as petitioner's. The combined efforts of Virginia's family, friends, co-workers and others, the District Attorney's Office and Sara Smith all conspired to essentially "taint" the pool of available witnesses for the defense. In the case of Troedel v. Wainwright, 667 F. Supp. 1456 (S.D.Fla. 1986) the Court stated "A

criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation." Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir.1986). See Strickland, 466 U.S. at 691, 104 S.Ct. at 2066. Although the scope of the required investigation depends upon the number of issues and their complexity, the strength of the government's case and the overall strategy of trial counsel, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. Nealy v. Cabana, 764 F.2d 1173, 1177 (5th Cir.1985); Martin v. Maggio, 711 F.2d 1273, 1280 (5th Cir.1983).

One need look no further than the state's closing argument to see that the failure to timely interview and secure witness testimony was both ineffective and prejudicial. In "highlighting" the state's proper tactic of "locking" witnesses testimony down, Clark Peterson told the jury (referencing the testimony of Alfred Centofanti, Jr. and Camille Centofanti):

> That outbreak of amnesia stretches during this 15 minute time where lawyers are called, rather than ambulances.
>
> Luckily, however, Detective LaRochelle and others arrive on the scene, even though the lawyers get there before homicide. They are able to lock these stories down, so now, three years later, they can't change their story.
>
> AA, Volume 5, 218, p. 37, lines 2-9.

The failure to timely locate, interview and secure witness testimony was not a reasonable strategy and prejudiced petitioner. Furthermore, defense counsel failed to utilize the available evidence at trial to impeach the state's witnesses and refute it's case.

1. Actions by Virginia's family, friends and co-workers

Evidence, of a smear campaign by the family, friends and co-workers of Virginia, could and should have been used to attack the credibility of the state's witnesses and theory of the case at trial. If the state was so sure of their case against petitioner why did they resort to the tactics they did and were they proper? The state had indicated (in the trial testimony of the homicide detectives) that they interviewed Bridget Masis, the author and sender of the e-mail. Yet no effort was made by the defense to contact her or call her as a witness at the trial to show the extent to which they sought to besmirch petitioner.

2. Actions by the district attorney's office

Evidence of the news story should have been gathered and utilized by counsel to attack the credibility of Tricia Miller and the state's case. Again, why did the state release evidence to the media and comment on camera about pending litigation in violation of the NRS Rules of Professional Conduct and then use Tricia Miller to make further comments about the viability of the proposed defense, when the state could not? The outtakes, notes and other raw material used by Glen Meeks could have been used at trial to impeach Miller (who's story seemed to change and evolve over time) and perhaps prove further misconduct by the District Attorney's Office. Furthermore, the release of information to the media would give the defense an argument that the state could not claim "work-product" privilege as to their files (which they did during a subsequent Brady hearing) that were released to the media and others. However, counsel failed to make a record or conduct an investigation as to these materials and when the time came for the Brady hearing did not even raise the issue.

3. Actions by petitioner's former co-workers.

Sara Smith provided the District Attorney's Office with the computer disc at some point. Allegedly Smith did not give a statement to the police until 2003. The disc was not raised as an issue until January of 2004. Smith's statement was not provided until the day she testified at trial. Counsel made no effort to impeach Smith with the issue of the disc, nor raise the issue with Cisneros or Travelers' as to how the disc was taken from petitioner's property in 2000 and held by who knows who and for how long. Defense counsel also did not develop the issue of Smith's smear campaign based on the disc to attack her credibility.

Counsel also failed to inform the Court that both Cisneros and Mutch, while asserting attorney-client privilege refused to speak with petitioner and the defense and could have been subjected to sanctions, contempt or a motion to compel. Furthermore, no effort was made to pursue the issue of the photographs and notes improperly turned over to the state.

4. Actions by the guardian ad litem

As further detailed below, the actions of the Guardian Ad Litem were left unchallenged by counsel, despite the fact that Brady material was withheld from the defense.

C. Conclusion

When petitioner attempted to present his defense, the failure of his counsel to properly interview and secure witness testimony, and other evidence, prevented petitioner from both defending himself from the allegations of the state and providing support to the defense theory of the case. This prejudiced petitioner in that the state used the failed and faulty presentation to attack not only the defense theory of the case, but the credibility of petitioner. Since the presentation of the defense in this matter largely rested on the credibility of petitioner it cannot be said that the failure on this issue did not affect the outcome of the trial. Defense counsel's performance with respect to this issue was constitutionally deficient under the Strickland standard.

12. Defense counsel was ineffective in failing to properly handle the issues pertaining to the Guardianship proceedings.

A. Factual and procedural background

Per the terms of the divorce of December 12, 2000, petitioner was given primary custody of his and Virginia's child, Nicholas. After petitioner was taken into custody on December 20, 2000, Guardianship proceedings were initiated with regards to Nicholas (and separate proceedings for Francisco). When petitioner was released from custody on bail on January 17, 2001, he returned to the Wintry Garden residence and continued to care for Nicholas. About a week later, the relatives of Virginia (and Nicholas) went to Court to have custody of Nicholas taken from petitioner. As a result of these proceedings custody was taken away from petitioner and given to petitioner's parents.

The Court appointed Dara Goldsmith as Nicholas' Guardian Ad Litem and ordered no contact between petitioner and Nicholas pending the recommendation of Goldsmith. A status hearing was set by the Court. Petitioner wanted visitation with his son. He and his attorney at the time, Peter Christiansen, met with Ms. Goldsmith to discuss the issue. Petitioner was told that visitation should not be a problem. Petitioner hired attorney Elyse Tyrell to represent him.

During the interim, on at least two occasions, officials (LVMP and DFS) were called to the Wintry Garden Residence to investigate "reports" that Nicholas was there with petitioner in

violation of a no-contact order or that petitioner was in the possession of weapons (a violation of both his bail and house arrest). Each allegation was investigated and it was determined false and without merit. Petitioner was subsequently informed that the "reports" were made by Virginia's mother, Emeline Eisenman, who was a party to the guardianship proceedings.

At the status check on the Guardianship proceedings, Goldsmith told the Court that she had conducted some investigation and had spoke with a number of individuals who knew petitioner and who were "surprised and shocked" at the allegations against him and it went against what they knew of him. Petitioner requested that Tyrell obtain this information, in open court and on the record, as this information would be useful to him in the defense of his criminal case. She refused to do so. At the same hearing, Goldsmith told the Court she could not recommend any contact unless or until petitioner submitted himself to a psychological evaluation.

Discovery commenced in the Guardianship proceeding. Petitioner received a deposition subpoena from Jeffrey Shaner, the attorney for proposed Guardians Lisa Eisenman, Virginia's sister, and Emeline Eisenman, Virginia's mother. Subpoenas were issued for records and an evidentiary hearing held where petitioner was called to testify as to the events of December 20, 2000. Petitioner's efforts to have his criminal attorney's (Christiansen, Albregts and Bloom) to utilize the discovery procedures available to assist in the preparation of the criminal case were to no avail.

Petitioner repeatedly requested that his attorneys consider taking the deposition of the Eisenman family members, since they would not speak to defense investigators, as all of the same issues at trial, the events surrounding the events of December 2000, were the very same issues in the Guardianship case.

Petitioner refused to consent to a psychological evaluation as it could be used against him by the state in the criminal matter. This issue was heavily litigated over the next three plus years it took to take the criminal matter to trial. During this time, Goldsmith removed herself from the case, claiming a conflict of interest and was replaced by Brian Tanko. Petitioner also represented himself as well as being represented by John Graves and Matthew Manning.

In litigating the issues, petitioner filed and won a motion to compel production of the guardian ad litem's files. Goldsmith refused to turn over her files despite the court order and informed petitioner's counsel (Albregts) that if they persisted in seeking the files she would go to the District Attorney's Office and have petitioner's bail revoked (at that time Goldsmith was in a law partnership with Marjorie Guyman, whose husband Gary Guyman was a Deputy District Attorney).

The only files turned over were those of Brian Tanko, the replacement Guardian Ad Litem. In his files were contained the e-mails and other communications, some derogatory and demeaning, between the homicide detectives, the District Attorney's Office, Dara Goldsmith and the family court regarding petitioner. Police provided Goldsmith with photos of petitioner, his vehicle and other information on his whereabouts and employment. These clearly evidenced Goldsmith having a conflict of interest as they demonstrated she was not objective in her recommendation of no contact between petitioner and his son. Any notes or memos regarding who she interviewed and who gave favorable testimony regarding petitioner were gone.

There were also e-mails and other communications sent to Goldsmith from Virginia's family members, friends and co-workers which provided information and evidence otherwise not available to the defense. No effort was made to follow up on any of this information by counsel, or use it to impeach the state's case at trial.

In January of 2002, the state filed a pre-trial writ challenging Judge Gibbons decision not to allow a psychological examination of petitioner. The redacted portions of Goldsmith's file which, were made part of Tanko's file, were used as an exhibit to the petitioner's opposition to the writ, which was successful.

Goldsmith ultimately went to the family court in 2002 to have her fees paid out of the proceeds of the San Diego real estate transaction which were to go to Nicholas. A majority of her fees were generated by opposing the motion to compel the production of her files, which she opposed (Guardian Ad Litem's files are not privileged and not protected from disclosure under Nevada law) and lost.

/////

B. Argument and legal authority

In Correll v. Ryan, 465 F.3d 1006 (9th Cir.2006) the Ninth Circuit discussed the failure to make a reasonable investigation. Even though in the context of penalty phase evidence, it is illustrative that not all strategic choices are immune from being ineffective.

> However, to be considered a constitutionally adequate strategic choice, the decision must have been made after counsel has conducted "reasonable investigations or [made] a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691, 104 S.Ct. 2052. In addition, "[e]ven if [a] decision could be considered one of strategy, that does not render it immune from attack--it must be a reasonable strategy." Jones v. Wood, 114 F.3d 1002, 1010 (9th Cir.1997) (emphasis in original). Defense counsel both failed to investigate potential mitigation evidence sufficiently to make an informed strategic decision and, when considered objectively, his strategy cannot be considered reasonable.
>
> Id. at 1015.

Here, it is was not reasonable to fail to obtain and use discovery in the guardianship proceedings, and that failure was prejudicial to petitioner. As stated above, showing that adequate pretrial preparation and investigation would have produced a conviction of a lesser degree of homicide, would suffice for a showing of prejudice from lack of competent representation by defense counsel. See, U.S.C.A. Const.Amend. 6.; Turner v. Duncan, 158 F.3d 449 (C.A.9 (Cal.) 1998).

1. Failure to demand and/or obtain Brady material from Goldsmith.

Counsel failed to take the appropriate steps to attempt to seek what can best be characterized as Brady material from the Guardian Ad Litem. Petitioner, on his own, litigated the matter, while representing himself, and did obtain an Order from the Court, compelling her to turn over her files to obtain this information. When threatened with incarceration, petitioner's attorney's did not pursue the matter and did not obtain the information.

2. Failure to utilize the discovery process in the guardianship case or request a stay to protect petitioner.

Counsel for petitioner had two options with regards to the guardianship proceedings. One

would be to utilize the discovery process or file a motion to stay the discovery. Counsel did neither.

a. Failure to utilize the discovery process.

While the criminal case was still pending, both counsel for the Eisenman's (Emeline, Virginia's mother and Lisa, Virginia's sister) and the Guardian Ad Litem (first Dara Goldsmith and then Brian Tanko) conducted discovery in connection with the guardianship proceedings. Therefore, they were both entitled to and subjected all the discovery tools available under the Nevada Rules of Civil Procedure, including Depositions (Rule 30), Interrogatories (Rule 33), Request for Admissions (Rule 36), Request for Production of Documents (Rule 34), as well as subpoenas and other discovery tools available under Rule 26.

The failure to utilize this discovery prejudiced petitioner in that both Emeline Eisenman and Lisa Eisenman were parties to the Guardianship and not cooperative with the defense or defense investigators. All of the discovery tools listed above were available to defense counsel, not just depositions, but written discovery as well. This could have been used to request the items turned over by the state to them (the purse, the keys, the palm pilot, the vehicle, the contents of the apartment and other items) be produced (request for production of documents) or explained (if destroyed cover with a request for admissions). This would be proper since the Court was allowing the parties to litigate all of the matters of December of 2000 to determine who should be the guardians of Nicholas and if petitioner could have visitation and contact.

Further, Emeline was not subpoenaed by the defense and ultimately was not used as a witness at trial (she was "missing" the day she was to be called as a witness then re-appeared for closing arguments). This would have allowed counsel to question them, on the record, and under oath, in advance of trial, and thus lock in their testimony and prevent them from conforming their stories at trial to suit the state's case. The state recognized the importance and vitalness of this strategy as the state told the jury:

> Luckily . . . [Detectives] . . . are able to lock these stories down, so now, three years later, they can't change their story.
>
> AA, Volume 5, 218, p. 37, lines 2-9.

Defense counsel may have been able to utilize Emeline's testimony under oath in the Guardianship proceedings in the criminal case once she became "unavailable." This was prejudicial to the defense as she was the only witness who could have provided evidence to rebut the state's contention that Virginia was violent only "one day" or her life, which was used by the state to impeach the defense theory of self defense.

Furthermore, defense counsel had the unique ability to use the discovery procedures to assist in the preparation of the criminal case. Counsel could have called most, if not all, of the state's witnesses, while not parties to the guardianship, would still be subject to discovery, in the form of deposition and deposition subpoenas (in which they could be asked to bring with them documents and evidence) as witnesses. There can be no greater way to prepare for trial then to test the state's case before trial.

The defense failed to do this to the detriment of petitioner as a number of uncooperative state witnesses (Tricia Miller, employees of Eagle Sentry, Virginia's family members) were allowed to testify without defense counsel prepared to cross-examine them. Further, defense counsel could have used the limited discovery provided by the Guardian Ad Litem to question the members of the district attorney's office and the LVMPD who were assisting the Guardian Ad Litem in the investigation of petitioner in the guardianship proceedings. This could have shown the lack of objectivity and bias and prejudice that was evident in the documents found in the Guardian Ad Litem file.

b. Failure to request a stay

Attempts were made to take petitioner's deposition and he was ultimately forced to testify in the guardianship proceedings without having his criminal counsel present. This could and should have been avoided by his criminal attorney's taking the necessary steps to protect petitioner from the discovery process by filing a stay of the proceedings as they pertained to him, which is routinely done in wrongful death suits and not done here. To what extent the facts and evidence gathered in the guardianship proceedings were provided to the state (either the LVMPD or the District Attorney's Office) and used against petitioner is not known. Only an evidentiary hearing will disclose the answer to this issue.

C. Conclusion

When petitioner attempted to present his defense, the failure of his counsel to properly interview and secure witness testimony, facts and other evidence, through the guardianship case and by other available means, prevented petitioner from both defending himself from the allegations of the state and providing support to the defense theory of the case. Defense counsel also failed to demand or obtain Brady material from the Guardian Ad Litem. Furthermore, the value of being able to test the state's case before trial and having Brady material and impeachment evidence was prejudicial would have been invaluable and being deprived of it through the ineffective assistance of counsel was highly prejudicial.

This prejudiced petitioner in that the state used the failed and faulty presentation of defense counsel to attack not only the defense theory of the case, but the credibility of petitioner. Since the presentation of the defense in this matter largely rested on the credibility of petitioner it cannot be said that the failure on this issue did not affect the outcome of the trial. Defense counsel's performance with respect to this issue was constitutionally deficient under the Strickland standard.

13. Defense counsel was ineffective in failing to prepare for trial and lessening the burden of prosecution.

A. Plastic Surgery Records

1. Factual and procedural background

Defense counsel Bloom turned over to the prosecution a number of items that he was not required to pursuant to the discovery rules. He did not investigate (read, understand, prepare) prior to turning them over to the state. He failed to recognize the prejudicial impact of his actions and the consequences of doing so. This provided evidence which allowed the state to use them to impeach his witnesses and his client. Bloom's failure to prepare caused him to provide the state with evidence which undermined the defense theory of the case as follows:

One of the issues that Bloom developed extensively prior to and during trial was the issue of the plastic surgery that was performed on Virginia in San Diego in 1999. Bloom contended both before and during trial that the damage to Virginia's nose was caused by extensive use of

illegal drugs. At issue with the records was whether or not during the performance of a rhinoplasty (nose job) that the doctor or doctor(s) performing the surgery (there were two, a Dr. Scott Sessions and a Dr. Richard Escajeda) informed petitioner that a hole was discovered in the septum that was most likely the result of illegal drug use. This was tied in to the defense theory of the case that the decedent's drug use was linked to the defense of self defense.

Bloom subpoenaed, and was provided with, the plastic surgery records as early as 2002, a full two years before trial commenced. Defense counsel never hired or consulted with any one qualified to read and interpret these records and in fact appeared not to have read the records himself, as the records directly contradicted a focal point of the defense presentation of Virginia's drug use.

Prior to turning the records over, not only did Bloom not read, review or understand what was contained in the records, Bloom also never tried to contact, directly or indirectly, through the investigators working on the case (both in Nevada and California), the two doctors who performed the surgery to discuss the surgery and the records with them, as well as to verify what, if any discussions were had with petitioner. He certainly should have done so before offering the testimony about the decedent's drug use and hole in the nose information supposedly based upon the decedent's plastic surgery. But the state did contact Dr. Sessions.

Having done none of the necessary factual and evidentiary investigation, Bloom presents the following without reviewing the records and without speaking to the doctors:

a. Pre-trial pleadings

Bloom "previewed" this issue in his March 11, 2004 response to the state's Motion to Limit Evidence of Virginia's Prior Violence and Drug Use. In fact, Bloom wrote the following:

> He [Defendant] knew of these matters [prior violence and drug use] because of explanations about her gang tattoos, when the plastic surgeon told the defendant that a considerable complication with Virginia's nose job involves holes in the nasal septum created by extensive and chronic nasal ingestion of crystal, etc.
>
> AA, Volume 2, 062, p. 7, lines 6-9.

b. Discovery

Bloom provided the records to the state, despite the fact that he was under no obligation

to do so. Unlike Bloom, the state in fact contacts at least one of the doctors, Dr. Sessions, who performed the surgery, and asks him to interpret the records for the state and provide a response and opinion regarding the alleged drug use being the cause of the hole in the nasal septum.

As to when Dr. Sessions was consulted by the state is unknown at this time and should be investigated during an evidentiary hearing, but he was provided at some point the sum and substance of the defense opening statement and petitioner's trial testimony regarding the surgery and discussions that allegedly took place. Armed with this knowledge, the state was able to undermine both petitioner, Bloom and the petitioner's case and credibility on this issue. It enabled the prosecutor to argue that all of petitioner's testimony was not to be believed.

c. Opening Statements

The issue of the hole in the nose became a focal point of both pretrial preparation, supra, and of petitioner's proposed and anticipated testimony (although the issue could have been raised by several other witnesses including the doctor's themselves). It also became a focal point of Bloom's opening statement in support of the defense theory and evidence supporting self defense. How could he state the following without having the surgical records reviewed or without speaking with the plastic surgeons?

> One thing Chip finds out is a very extensive drug use and this history of crystal methamphetamine on Gina. One of the occasions, she wants to have a nose job to become more attractive. She goes to the plastic surgeon to get the procedure and the surgeon comes out and talks to Chip. He says "We also have a problem here. She has her septum which is so deteriorated, that it has holes in it because of all the drug use. We have to do that as well.."
>
> AA, Volume 8, 042, p. 163, lines 7-15.

d. Direct examination of petitioner

During direct examination, the following testimony was elicited by Bloom from petitioner:

> A. . . . During that surgery in the waiting room, the doctor came out and give me some information that I hadn't heard before.
> Q. Which was?
> A. He came out and explained to me that the bump, underneath the bump was a hole, and there was a hole in the nose. I don't know, the septa, or something like that. And they needed to do this, not an emergency procedure, but some procedure where

they took cartilage from somewhere else to repair the hole.
And I said: Why would you have a hole? And he said: Well, I don't know how to tell you this, but that's from drug use. That's the hole you would get if you're ingesting drugs through the nostrils. That's the type of hole you get that way.
I hadn't heard any of the drug stuff before. And then after she - after the surgery and stuff, then we sat down and, basically, talked about that.

AA, Volume 5, 046, p. 50, lines 3 to 20.

e. Cross-examination of petitioner

This led to the following on cross-examination:

Q. What you have, though, according to what you told us on direct, is Dr. Scott Sessions or Dr. Sessions or a doctor who told you that she had damage to her nose from extensive drug use; is that right?
A. Yes, that's correct.
Q. This doctor pulled you aside and said "Gina had damage to her nose from drugs," right?
A. Yes.
Q. You weren't -- you weren't this doctor's patient, but he pulled you aside and told you this information; is that true?
A. Yes, he told me that information.
Q. You remember that pretty vividly on the witness stand; didn't you?
A. Yes.
Q. I mean, you told us on direct how he pulled you aside, the words he told you. You even kind of mimicked sort of the concern in his voice. "Hey, I got something to tell you. There's all this drug use." You did that on direct; is that right?
A. I explained to you what I recall him telling me, yes.
Q. You're sure that happened?
A. Yes, I'm sure that happened.
Q. You're as sure that happened as you are of your innocence in this case?
A. I'm sure that happened and Gina told me afterwards that what he told me was true about the drug use.
Q. Are you sure that happened as you are of your innocence in this case?

MR. BLOOM: I'm not quite sure what that question means, Your Honor, in terms of his innocence.
THE COURT: Let's rephrase.

Q. There is not doubt in your mind that that happened, is there?
A. That they had to repair the hole in her nose?
Q. No, no, no, no, no. I'm talking about there's no doubt in your mind that Dr. Sessions made those statements to you, is there?
A. No, there is no doubt in my mind.
Q. And you wouldn't be making this stuff up to sort of smear Gina's

character to help yourself out at trial, would you?
A. No, I wouldn't.
Q. And one of the reasons why you're so sure of this is, as you told us on direct, Dr. Sessions' comments to you were what led you to question Gina about drugs, right?
A. Yes.
Q. So if Dr. Sessions never told you that you would never have questioned Gina about drugs; isn't that true?
A. No. I don't believe that would be true.
Q. Okay. That doctor's full name is Scott Sessions; is it not?
A. I don't know the doctor's full name.
Q. The guy who did her nose and eventually some other cosmetic surgery, is that true?

MR. BLOOM: Is what true? Objection. Vague.
THE COURT: Vague?
BY MR. PETERSON:
Q. Though you don't know the doctor's full name, it's Dr. Sessions; is it not?
A. Actually there was another doctor as well.
Q. All right. Well, I think Mr. Bloom said Dr. Sessions, you said Dr. Sessions. That is who we're talking about.
A. There was also a Dr. Scaheda (phonetic) because Dr. Sessions didn't have --
Q. Was that question confusing?
The doctor who told you those words to you is Dr. Sessions, is that true.
A. Yes, Dr. Sessions.
Q. Okay. Do you know where Dr. Sessions is right now?
A. I have no idea at all.
Q. He's on vacation. Want to know what he's going to do when he get's back?

MR. BLOOM: This is really cute. Mr. Peterson always talks about experienced counsel. Experienced counsel, Mr. Peterson, knows that's an improper form. That's an argumentative question. If you want to call him and talk about how can remember things from a long time ago, he can do it. Objection. Argumentative.
THE COURT: Sustained.
BY MR. PETERSON:
Q. Would it surprise you to learn that Dr. Sessions is going to get on a plane next week and tell this jury, unequivocally, a hundred percent, he never diagnosed Gina Centofanti with drug damage to her nose, one hundred percent, unequivocally, never said those words to you, 100 percent unequivocally, would not share that information with you when she's the patient, and 100 percent, unequivocally, is offended that you would say that, and that he attended your wife, he thought she was an angel of a girl and though you two had a bright future together, which turns out he was wrong about? Are you aware of that?
MR. BLOOM: Objection. Compound. Argumentative. Improper. And Mr. Peterson knows that. It's a nice play for the jury.
THE COURT: All right. Sustained. Next question.

AA, Volume 5, 072, p. 23, line 19 to 073, p. 28, line 2.

No attempt to object before the question was finished. You can't "unring" the bell once it was rung for the jury. No request for a mistrial. Bloom just "let it go" despite the fact that such questioning is completely improper.

f. Testimony of Dr. Scott Sessions

Dr. Sessions was called as a witness on April 14, 2004.

Q. Sir, I want to read you a quote from some testimony from the defendant and ask you a question about that. This is from the transcript of proceedings earlier in this case.
Quote: "So we went ahead and she went ahead to get that surgery," talking about the nose job.
[DDA Peterson went on to quote defendant's testimony regarding the plastic surgery and the drug use, supra.]
Sir, did you ever diagnose Gina Centofanti with having a hole in her nose from drug use?
A. Absolutely not.

AA, Volume 5, 197, p. 47, line 23 to AA, Volume 5, 197, p. 48, line 23.

Q. When you actually performed the rhinoplasty, did you discover such damage to that nose?
A. No.
Q. Did you ever speak those words that I just quoted from the defendant to Chip Centofanti?
A. No, I not.

Id. at 198, p. 49, lines 5-10.

Q. Did you believe that the Gina Centofanti you knew in 1999 to be a scary gang member?
A. Absolutely not.
Q. What did you think of Gina?
A. She was just the opposite.

MR. BLOOM: Objection, Your Honor. I thought the Court was not going to allow this cheerleading or this vouching and so forth. I think we're moving into that area. The Court has restricted us from going into it. Now we're not talking anything about his expertise, just as a person he observed.
And that way, Your Honor, I don't believe it's appropriate.
THE COURT: Before your respond, I don't want to get into the item. What we're doing here is, I understand it's the nature of rebuttal, but we're opening up a whole new segment of vouching for people.
. . .

I don't want to open the door about afraid. I don't want to open it so I'll disallow it. Next question please.

AA, Volume 5, 198, p. 50, line 13 to p. 51, line 18.

Q. Did you ever observe the Gina Centofanti you knew in 1999, did you ever get the impression that she was affiliated with gangs-

THE COURT: Disallowed. Next question.

AA, Volume 5, 198, p. 51, lines 22-25.

Then Dr. Sessions testified to the following:

Q. By the way, did you do the surgery of Gina alone?
A. Well, there's myself, a nurse, and my scrub tech.
Q. So the three of you do the surgery?
A. Uh-huh.
Q. I don't mean they do it, but they're there to --
A. To help me.

AA, Volume 5, 199, p. 54, lines 12-22.

g. State's closing argument

After a brutal cross-examination of petitioner and testimony from Dr. Scott Sessions, Peterson argued the following to the jury in Closing Argument on April 15, 2004.

[B]ecause really, this comes down to credibility and reasonableness. Credibility and reasonableness.

AA, Volume 5, 211, lines 23-25.

And perhaps the cherry on top, if you will, is Dr. Sessions. There's an instruction I want you to look at, number 29.

The credibility or believability of a witness should be determined by his manner on the stand, fears, motives, et cetera, the reasonableness of is statements and the strengths and weaknesses of his ability to recall. Let's got (sic) to this most important part.
If you believe that a witness has lied about any material fact in the case, you may disregard their entire testimony, and in terms of this instruction, instruction 29, I submit to you that when you ask yourself whether or not a witness -- and by a witness I mean Chip Centofanti, from the instruction "lied about any material fact in the case", I believe and I submit to you that the evidence supports a determination, by you, that when Dr. Sessions came in here he revealed the Defendant.

Do you remember what Chip Centofanti said on direct examination about his knowledge of drug use?
Answer by the Defendant --
THE COURT: A little SLOWER, counsel.
MR. PETERSON: Answer by the Defendant "yep, that's correct."
QUESTION: The doctor pulled you Aside and said Gina had damage to her nose from drugs, right?"
ANSWER: That's the last think I remember.
QUESTION: Let's talk about this for a minute.
I asked him about drug use and he admitted he never saw any drug use by her or any paraphernalia he could link to her for drugs.

Then I asked him about whether he was aware that the toxicology screen in this case came back clean and that he confirmed it by their own private doctor and he said yes, he was aware of that.

I asked him -- let me get this straight. You weren't the doctor's patient, but he pulled you aside and told you this information?
Chip's answer, again, yes, he told me that information.
QUESTION: You remember that pretty vividly on the way to the stand, didn't you?
ANSWER: Yes.
QUESTION: I mean, you told us on direct how he pulled you aside, the words he told you. You even kind of mimicked the concern in his voice. I've got something to tell you, things about drug use.
ANSWER: I explained to you what I recalled him telling me, yes.
QUESTION: You're sure that happened?
ANSWER: Yes, I'm sure.
QUESTION: You're as sure that happened as you are of your innocence in this case?
ANSWER: I'm sure that happened.
QUESTION: There's no doubt in your mind that happened?
ANSWER: There's no doubt in my mind.
QUESTION: You wouldn't be making this stuff up to smear Gina's character to help yourself out at trial, would you?
ANSWER: No, I wouldn't.
QUESTION: And one of the reasons why you're so sure of this, as you told us on direct, is because Dr. Sessions' comments to you were what led you [to] question Gina about drugs?
ANSWER: Yes."
Dr. Sessions took that witness stand and told you that all of that was absolutely, 100 percent not what Dr. Sessions diagnosed and hot what he ever said to Chip Centofanti. He said he would never say those things, even were they true, but most importantly, they were not correct.
They were not correct.

AA, Volume 5, 212, p.14, line 5 to 213, line 7.

...

If you find -- and I'm going back to instruction 29 -- if you believe that a witness has lied about any material fact, you may disregard his entire testimony.
The law allows you to throw out every word that man said on the witness stand and I submit to you would be correct in doing that. You would be correct in doing that.
Because is this a material fact? Yes.
Why?
He said "I was so afraid of these changes in her, because I believed she was using drugs again. That let to why I reacted the way I reacted."
When he links it up like that that makes it a material fact. That makes it a material fact.
I'm sure we're going to hear allegations about Gina, but let's recall -- did Gina take that witness stand, raiser her hand to tell the truth, swear an oath and then tell what he told?"
No. Absolutely not, absolutely not.
Once you find this, you can throw out his testimony. So I submit to you that already he didn't have actual fear, because, if he did, what the heck was he doing downstairs that night?
Actually you can throw out his testimony because of instruction 29. On top of all that, his story isn't even reasonable. The judge gives you an instruction and it's instruction, I believe 14, let me double check -- I'm sorry it's 13 -- a bare fear of death is not sufficient to justify a killing.
You don't get to get out and say I've got a fear of death. Bare means unsupported by anything. You don't get to just throw it out and have the jury believe it.

AA, Volume 5, 213, p. 18, line 17 to p. 20, line 1.

2. Argument and legal authority

Counsel was constitutionally deficient in a number of aspects with regards to the plastic surgery records, which were prejudicial to petitioner. As stated above, showing that adequate pretrial preparation and investigation would have produced a conviction of a lesser degree of homicide would suffice for a showing of prejudice from lack of competent representation by defense counsel. See, U.S.C.A. Const.Amend. 6.; Turner v. Duncan, 158 F.3d 449 (C.A.9 (Cal.) 1998).

a. Duty to investigate

Counsel has a duty to investigate the facts and evidence to be presented at trial before it is presented. Defense counsel has a duty, for the purpose of an ineffective assistance of counsel claim, to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary; a lawyer who fails adequately to investigate renders deficient

performance. Reynoso v. Giurbino, 462 F.3d 1099, (C.A.9 (Cal.) 2006)

The failure to do so was both ineffective and prejudicial to petitioner and the presentation of the defense. It cannot be said that this did not effect the outcome of the trial because the failure allowed the state to argue to the jury to disregard all of petitioner's testimony.

b. Turning the records over prior to trial

There was no need for counsel to have turned the plastic surgery records over to the state prior to trial. This was either the result of not understanding Nevada's reciprocal discovery statute of having no trial strategy. See, Berryman v. Morton, 100 F.3d 1089, 1096, (C.A.3 (N.J.) 1996) (defense counsel improvised as they went along, proceeding from blunder to blunder with disastrous consequences).

It should be noted that Peterson remarked at trial that had Bloom not provided the records to the District Attorney's Office, they would not have been able to cross-examine on the issue of the nose surgery/drug use, or would have been able to locate Dr. Sessions.

c. Failure to prepare

It is clear that Bloom never reviewed, read, understood or investigated the records. If he had he would have either decided not to present/turn over the evidence to the state (no obligation existed) or investigated further (or in this case at all) such as interviewing the doctor and or his partner. At the very least Bloom, would have discussed this matter with his client in terms of not presenting the evidence or presenting it in a different manner. If defense counsel had reviewed the medical records and interviewed the plastic surgeons before trial, there is no way he could have or would have presented this evidence as it was not beneficial to the defense case. Instead, Bloom spent critical preparation time with his client during pre-trial preparation and on the stand presenting evidence and testimony that was subject to fatal impeachment because of his negligence in not reviewing the records or interviewing the surgeons.

In light of Nevada's jury instruction regarding credibility (in this case it was Jury Instruction No. 29), allowing himself and his client to be impeached on an issue that should have been investigated pre-trial is clearly ineffective assistance of counsel. The state would not have been able to have this evidence admitted without this defense blunder.

d. Failure to respond

Once the "cat was out of the bag" with regards to the issue of the records, there was no attempt to respond to the allegations that the testimony of Sessions was not true. Had defense counsel performed an investigation (he had access to investigators both in Nevada and California) he would have discovered the "other doctor" (Escajeda) disputed Sessions testimony.

3. Conclusion

When petitioner attempted to present his defense, the failure of his counsel to properly interview and secure witness testimony, and other evidence, prevented petitioner from both defending himself from the allegations of the state and providing support to the defense theory of the case. This prejudiced petitioner in that the state used the failed and faulty presentation to attack not only the defense theory of the case, but the credibility of petitioner. Since the presentation of the defense in this matter largely rested on the credibility of petitioner it cannot be said that the failure on this issue did not affect the outcome of the trial. Counsel's performance with respect to this issue was constitutionally deficient under the Strickland standard.

B. La Petite Academy

1. Factual and procedural background

One of the other issues that Bloom developed extensively prior to and during trial was the issue of Virginia being a "bad mother." There certainly is another issue whether this was a viable proper tactic to use. As part of the evidence, Bloom intended to introduce at trial was that on a number of occasions petitioner had to pick Nicholas up from daycare at La Petite Academy, when Virginia never returned home from work. Specifically at issue, and critical to petitioner's credibility and his defense, was whether or not he picked Nicolas up on December 1, 2000, a Friday, and Monday, December 4, 2000. Why these dates were critical is that these were the dates petitioner (and his counsel) asserted precipitated other events (mainly the defense versions of incidents which occurred on December 2, 2000 and December 5, 2000 respectively).

Petitioner testified at trial that on December 1, 2000, Virginia never came home from "work" and that he had to pick up both Quito (who was in a safe-key program) and Nicholas. This incident was alleged to have led to a domestic violence incident on December 2, 2000, when

Virginia came home drunk and belligerent. The second instance was when Virginia did not come home from "work" on December 4, 2000, which led to a second domestic violence incident for which she was arrested on December 5, 2000. These two instances were tied in to the defense theory of the case in that these domestic violence incidents helped establish the defense of self-defense.

Bloom subpoenaed, and was provided with, the records of La Petite Academy as early as 2002, a full two years before trial commenced. Bloom never hired or consulted with any one qualified to read and interpret these records or in fact appeared to have read the records himself, as the records again appeared to contradict a focal point of the defense presentation of the events of December 1, 2000 and December 4, 2000, as the records did not indicate that petitioner had picked up Nicholas from daycare.

Prior to turning the records over, not only did Bloom not read, review or understand what was contained in the records, Bloom also never tried to contact, directly or indirectly, any employees or record keepers of La Petite to discuss the records with them, nor did he attempt to verify what, if any interaction or discussions were had with petitioner, or with Virginia.

a. Trial testimony

Having done none of the necessary factual and evidentiary investigation, Bloom had petitioner testify that he was the one who picked Nicholas up from La Petite on December 1, 2000, and December 4, 2000. This led to the following testimony on cross-examination by Peterson:

Q. La Petite is the day care?
A. Yes, that was Nicolas's day care.
Q. You said you picked him up sometimes?
A. Yes, I did.
Q. Is there a process for checking a baby out of daycare?
A. Yes, La Petite had a system for checking in and out.
Q. Tell me about it.
A. There was a card that you had to slide to open the door and put in a four digit code.
Q. Did you have your own card?
A. No.
Q. Whose card -- what are you talking about?
A. We had one card for the family, but Gina had -- Gina was the one

who had originally registered Nicholas. No matter who picked Nicholas up, by using that code, that would register it as being Gina.

Q. Then you had to punch in a code too, right?
A. Yeah, I said it was a four digit code.
Q. It's only four digits?
A. Or how many digits it was.
Q. What does the code consist of?
A. Made up of some password and you slide it in the door. You put the code and that allowed you to come into the facility.
Q. It's not your first initial, your last initial and the last four digits of your phone number?
A. After all this time, I don't remember exactly what it was, Mr. Peterson.

AA, Volume 5, 084, p. 71, line 7.

Peterson, in rebuttal, called two La Petite employees to testify regarding this issue. Carla Smith was called and testified that she is the Director and brought the records with her which show that it was Virginia and not petitioner who checked Nicholas "out" on December 1, 2000 and December 4, 2000. She also contradicted petitioner's testimony regarding how many cards were issued, how the card was used, to whom it was issued, and what was the pass code. [AA, Volume 5, 188, p. 9, line 11, to p. 12, line 2.]

Next the state called La Petite employee Margaret Foisel who testified she could not recall seeing petitioner pick up Nicholas and also downplayed Nicholas's RSV medical condition. See, AA, Volume 5.

The failure by Bloom to prepare this issue set up the following closing argument for the state:

> When you look at the attendance records in day care for December 1, who picked him [Nicholas] up, who picked Nicholas up on December 1st?
>
> AA, Volume 5, 236, p. 111, lines 6-9.
>
> The person who picked him up on 12-1 was Gina.
>
> AA, Volume 5, 236, p. 111, line 25 to p. 112, line 1.
>
> This is pretty reliable evidence here that the person who picked him up on 12.1 was Gina, which is indicative of -- that this whole 12.1 thing is a created story once he got on the witness stand to bolster his fear.

AA, Volume 5, 236, p. 111, line 25 to p. 112, line 3.

b. Bloom's failure to use the evidence known and available to him.

In addition to the failure to properly prepare the issues regarding La Petite, Bloom also failed to utilize the evidence that was available to him to counter the state's presentation that petitioner lied about picking Nicholas up on December 1, 2000 and December 4, 2000. Petitioner had informed counsel pre-trial and during his testimony that he had contact by phone with Virginia on December 1, 2000, after he had already picked up both children (and in fact had received a phone call from Virginia the afternoon of December 1, 2000 requesting he pick up both children). On this day, petitioner picked up Quito from Safe-Key and took him and signed him up for indoor soccer (the documentation supporting this was provided to counsel). This simple fact could have been verified in a variety of ways by Bloom.

When Miller was on the stand (and this issue was well known) he could have asked her about her whereabouts on December 1, 2000 or verified or impeached her with phone, atm or other records and evidence. When it was established that it was a factual impossibility for anyone other than the petitioner to have picked up the children on that date, the state would not have been able to impeach on this issue at a later point in trial, mainly during cross-examination and in rebuttal.

Petitioner's cell phone records would have also showed calls to him during the time when Nicholas was picked up (and ostensibly show where the calls were coming from geographically as well - a restaurant bar across town). Bloom also had the ability to cross-examine the various employees of Eagle Sentry that testified that they were with Virginia after work. They would have verified that she did not leave the bar, after drinking, drive all the way to Summerlin, pick up Nicholas, drop him off and drive all the way across town back to the bar.

Instead the state put forth just that (improper and false, yet unchallenged) theory that on December 1, 2000, Virginia somehow left the bar or restaurant she was at, unnoticed by Tricia Miller or any of her co-workers, and traveled all the way to Summerlin, after drinking for hours (again, failure to conduct adequate pre-trial investigation of phone records, credit card receipts,

witnesses, etc) to drop Nicholas off at the family residence in Summerlin, and return to the bar or restaurant in Henderson. This never happened. Besides being an incredulous version of events, it was not supported by any evidence but nevertheless was not challenged by the defense.

At issue on December 4, 2000, was whether or not petitioner was the one who picked up Nicholas from day care and whether or not petitioner feigned Nicholas being sick as a way to try to manipulate Virginia into leaving the bar to come home.

Petitioner received multiple calls and made calls to and from work this day with regards to calls from La Petite Academy that Nicholas was sick. Petitioner left work (at Associated Court Reporters) and proceeded to pick up both Quito (from Safe-Key) and Nicholas (from La Petite). Nicholas was immediately brought across the street to Pueblo Medical Center Urgent Care. Nicholas was seen by his pediatrician (Dr. Calixico) and attending nurse (Kruger) and was prescribed medicine which was called in to the pharmacy located in a nearby shopping center. The medication was picked up by petitioner and he and the children returned home.

Petitioner testified to this but was impeached by the state which claimed that petitioner never picked up Nicholas and they again told the same incredible story that Virginia traversed the distance from Henderson to Summerlin, after drinking, picked up Nicholas, dropped him off to petitioner and returned to the bar. Despite the obvious fact that this never occurred, Bloom took absolutely no steps to rehabilitate his client on the stand or prove his version of events through witnesses, documents or other evidence.

There was a plethora of evidence not utilized by Bloom despite it being readily available. First, Nicholas's pediatrician (Calixico) and the attending nurse (Kruger) were interviewed and available to testify regarding the events of that night, which would have completely supported petitioner's version of events. Furthermore, Calixico also was familiar with Virginia's family and was prepared to offer testimony regarding the true nature of Nicholas' RSV condition (which was downplayed by the state and it's witnesses as being exaggerated by petitioner).

Second, the medical records from the hospital would have verified both (1) the illness and (2) who was present. Third, petitioner picked up the medication from the pharmacy which, through records and receipts that were provided to Bloom would show (1) the prescriptions were

both prescribed and picked up; (2) the time and location; and (3) who paid for it and how. Finally, Bloom had access to the phone and atm records of Virginia which would have contradicted the testimony of Miller regarding her whereabouts and actions that night.

Evidence was available to show that Virginia was with co-workers (and others, Miller for one) all the way across town and did not leave the bar at any time and return. However, this was the version of events that was allowed to go unchallengeable by Bloom, despite the fact that there was some testimony introduced that Virginia told co-worker's she thought petitioner was "making up the fact that Nicholas needed medical care" to get her to come home.

2. Argument and legal authority

Counsel was deficient in a number of aspects with regards to the day care records, which were prejudicial to petitioner. As stated above, showing that adequate pretrial preparation and investigation would have produced a conviction of a lesser degree of homicide would suffice for a showing of prejudice from lack of competent representation by defense counsel. See, U.S.C.A. Const.Amend. 6.; Turner v. Duncan, 158 F.3d 449 (C.A.9 (Cal.) 1998).

a. Duty to investigate

Defense counsel has a duty to investigate the facts and evidence to be presented at trial before it is presented. Defense counsel has a duty, for the purpose of an ineffective assistance of counsel claim, to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary; a lawyer who fails adequately to investigate renders deficient performance. Reynoso v. Giurbino, 462 F.3d 1099, (C.A.9 (Cal.) 2006).

The failure to do so was both ineffective and prejudicial to petitioner and the presentation of the defense. It cannot be said that this did not effect the outcome of the trial because the failure allowed the state to argue to the jury to disregard all of petitioner's testimony.

b. Turning the records over prior to trial

There was no need for counsel to have turned the day care records over to the state prior to trial. This was either the result of not understanding Nevada's reciprocal discovery statute of having no trial strategy. See, Berryman v. Morton, 100 F.3d 1089, 1096, (C.A.3 (N.J.) 1996)(Defense counsel improvised as they went along, proceeding from blunder to blunder with

disastrous consequences).

c. Failure to prepare

Bloom was told that petitioner had picked up Nicholas on a number of occasions when he was ill. A fact that could be verified by petitioner's employer, co-worker's, Nicholas' pediatrician, Nicholas' medical records and others. Petitioner specifically recalled being told by staff at La Petite that one of the other children in the day care had died over the weekend of what was believed to be SIDS (but later found out to be an accidental suffocation) and that they were being overly cautious with children who appeared ill, like Nicholas. Instead, Bloom allowed the state to run with the false "security code" theory to discredit petitioner.

d. Failure to respond

The prosecution claimed (incorrectly) that petitioner never picked up Nicholas from day care based upon the fact that the records of LaPetite that apparently show that petitioner never signed in or had his own pass code which allowed him to pick Nicholas up. Besides this being false evidence (another issue), this could have been cleared up and prepared for by sufficient pre-trial investigation. Petitioner failed to remember the pass code used while on the stand, however this pass code (6191) was the code for the parties security code for home security systems in San Diego and Las Vegas, banking and other pass code protected items. Therefore, clearly petitioner knew and had access to the password and thus access to the day care center.

Furthermore, Bloom allowed the state to down play the seriousness of RSV to play into the state's theory that petitioner was over-exaggerating Nicholas' condition as a way to try to manipulate Virginia to come home. Nicholas' condition was serious and again, his pediatrician and medical records would have been the best supporting evidence of this but was not presented to the jury.

The state, which had done pre-trial investigation (or perhaps post opening statement investigation) regarding La Petite, provided false and misleading testimony regarding petitioner picking Nicholas up from La Petite on other occasions as well as the nature of his illness, RSV.

Once again Bloom allowed the state to attack both him, his theory of defense, his witnesses and evidence and client on an issue that could have been prevented with the proper

pre-trial preparation. Here, Bloom did not object to the impeachment on the issue of the use of the key card since petitioner claimed he did not remember. Aside from that, there was no effort to obtain the records pre-trial and prepare this issue. However, even if all of that was not done, Bloom did have the records from the Pueblo Medical Care Center and the witness statements of the Doctor (Calixco) and Nurse (Kruger) who could have testified as to the events of December 4, 2000 and the fact that it was petitioner who brought Quito and Nicholas into the hospital, alone, and the seriousness of his condition and other facts and evidence to contradict the state's evidence that petitioner was "making this up" to try to get "Gina to come home."

Additionally, Bloom failed to obtain the records from safe-key (Quito's day care) which would have shown petitioner picking up Quito on the two critical dates in question. This gets to another issue. How was it that all of the witnesses that were with her December 4, 2000, not a one testified (or was cross-examined by Bloom) that Virginia left the bar or bars they were at, after drinking all day, and drove all the way to Summerlin from Henderson to pick up Nicholas and return. No effort was made to put a time on all these events by Bloom. It should be noted that the phone records, the hospital records and the pharmacy records all supported petitioner's version of these events but were never used by Bloom. This was not reasonable trial strategy but was constitutionally defective and deficient.

3. Conclusion

When petitioner attempted to present his defense, the failure of his counsel to properly interview and secure witness testimony, and other evidence, prevented petitioner from both defending himself from the allegations of the state and providing support to the defense theory of the case. This prejudiced petitioner in that the state used the failed and faulty presentation to attack not only the defense theory of the case, but the credibility of petitioner. Since the presentation of the defense in this matter largely rested on the credibility of petitioner it cannot be said that the failure on this issue did not affect the outcome of the trial. Counsel's performance with respect to this issue was constitutionally deficient under the Strickland standard.

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C. Virginia's criminal history

1. Factual and procedural background

One of the issues that Bloom developed extensively prior to and during trial was the issue of Virginia's criminal history. Bloom contended both before and during trial that petitioner's knowledge of Virginia's criminal history explained the events of December 20, 2000. At issue with the records was Virginia being arrested for a series of events involving running someone over with her vehicle (with Quito in the vehicle), throwing a chair at a crossing guard, and having her arm broken during arrest. This was tied in to the defense theory of the case that her past history of having a propensity for violence was linked to the defense of self-defense.

Bloom obtained a Court order in Nevada to obtain these (juvenile) records in California. These records were provided to him as early as 2002, a full two years before trial commenced. Bloom contacted a number of the witnesses involved and was able to have them interviewed and subpoenaed for trial. However, as with the plastic surgery and daycare records, these were turned over to the state, despite no requirement that they be provided. Again, as with the plastic surgery and day care records, it appears only the state took the time to analyze the records and prepare them for trial. And as with the plastic surgery and daycare records, the criminal records undermined a focal point of the defense presentation of Virginia's criminal history.

Having done none of the necessary factual and evidentiary investigation, Bloom presented the evidence of Virginia's criminal records in opening statements and during the defense case-in-chief. What he did not anticipate or prepare for, was the state was already laying the ground work in their case-in-chief to neutralize this evidence.

When Lisa Eisenman testified during the state's case-in-chief, she brought up a number of topics regarding Virginia's history and background. The state asked her about events regarding Virginia which took place when Virginia was in Seventh Grade and Lisa was in Second Grade. [See, AA, Volume 4, 121, p. 148, lines 19-24].

Lisa testified that she went to juvenile hall with her mother [Emeline] [AA, Volume 4, 133, p.31, line 21, to p. 32, line 12] when Virginia got into trouble, but even she admitted "considering I was 12 [actually 10 when you subtract 5 from Virginia's age of 15] I do not know." AA, Volume

4, 133, p.32, lines 21-24. What Bloom did not anticipate or prepare for was the state taking the position that Virginia only got into trouble based upon one day's events.

> Q. And the whole juvenile thing where she had to go to Court that you've discussed, was that based on one day's events?
> A. Yes.

AA, Volume 4, 140, p.58, lines 18-21.

> Q. The juvenile problems involving Gina and the van and the fight with the crossing guard occurred in one day's time?
> A. Yes.

AA, Volume 4, 140, p.59, lines 3-6.

By the time of closing arguments the state was able to effectively neutralize the evidence and the witnesses called by the defense as to her history of violence to the following:

> Let's talk about this violent past.
> We heard a lot from Mr. Bloom about the violent past of Gina Centofanti. When the rubber hit the road and the witnesses took the witness stand, what did it turn out to be? One day, 9.23.92, almost 12 years earlier than today's date. I'm not trying to say Gina did the right thing on that day. Of course she didn't, but her violent past boils down to one day, one day, one day.

AA, Volume 5, 211, p. 11, lines 2-11.

2. Argument and legal authority

Defense counsel was deficient in a number of aspects with regards to the criminal history records, which were prejudicial to petitioner. As stated above, showing that adequate pretrial preparation and investigation would have produced a conviction of a lesser degree of homicide would suffice for a showing of prejudice from lack of competent representation by defense counsel. See, U.S.C.A. Const.Amend. 6.; Turner v. Duncan, 158 F.3d 449 (C.A.9 (Cal.) 1998).

a. Duty to investigate

Counsel has a duty to investigate the facts and evidence to be presented at trial before it is presented. Defense counsel has a duty, for the purpose of an ineffective assistance of counsel claim, to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary; a lawyer who fails adequately to investigate renders deficient

performance. Reynoso v. Giurbino, 462 F.3d 1099, (C.A.9 (Cal.) 2006). The failure to do so was both ineffective and prejudicial to petitioner and the presentation of the defense. It cannot be said that this did not effect the outcome of the trial because the failure allowed the state to minimize if not disregard this evidence.

b. Turning the records over prior to trial

There was no need for counsel to have turned the criminal history records over to the state prior to trial. This was either the result of not understanding Nevada's reciprocal discovery statute or of having no trial strategy. See, Berryman v. Morton, 100 F.3d 1089, 1096, (C.A.3 (N.J.) 1996) (defense counsel improvised as they went along, proceeding from blunder to blunder with disastrous consequences). Here, the records should have been used to impeach state witnesses who testified to knowing Virginia (one went as so far as to call her an 'Angel' (without objection)) yet were unaware of her criminal background, thus their credibility would be challenged in front of the jury.

c. Failure to prepare

Counsel failed to review the records it obtained with regard to Virginia's criminal history. This failure resulted in the state being able to argue to the jury that the best the defense could come up with was one day's worth of events in her life. The failure to prepare for this issue resulted in the state being able to get the jury to minimize, if not outright disregard, this evidence which was critical to the presentation of self-defense.

d. Failure to respond

One of the points emphasized both during the trial and especially at closing was that Virginia was only violent in her past on one occasions, and even going as far as to saying it only happened on one day. The defense had in their possession evidence which directly contradicted the state's position on this matter, which was used to undermine the defense of self-defense. Specifically, defense investigator's had conducted an interview with Ricardo Dominguez's grandmother, who Ricardo was living with during the incident referred to a trial which involved Virginia and the petitioner. During this interview the grandmother indicated that Virginia was a "very violent person" who "threatened to kill her" if she did not let her into the grandmother's

residence to see Dominguez.

Once the state brought forth the position that Virginia was "an Angel" and only had one violent outburst in her whole life, it was both ineffective and prejudicial for defense counsel to not bring forth known, available evidence to contradict it as a way of bolstering their contention she was violent. Additionally, the defense was also in the possession of information regarding the nature and extent of Virginia's addition to methamphetamine and alcoholism and it's effects on her demeanor and capability for violence that were less remote in time than the one incident brought forth by the defense and was emasculated by the prosecution at trial.

Virginia on a number of occasions had beat up her mother Emeline as well as other family members. She was in an out of jail more than just one time and the defense had in its possession records which showed she was released on one occasions because she was pregnant while in custody. This was after the birth of Francisco. The defense also knew that Virginia had been sent, as a measure of desperation, to live with her grandmother Stella, in San Francisco, and that she had been involved in a number of incidents, many of them violent, which resulted in her being sent back to San Diego.

None of this evidence was presented at trial, despite the fact the state had attacked petitioner, his counsel and their defense as a result of the presentation of only the "one day" of violence. The state then did not call Emeline Eisenman, who would have undermined the state's position on this matter, and instead called Virginia's youngest sibling, Lisa Eisenman (despite the fact that her two older sisters, Caroline and Lynn, and well as Emeline were flown in for the trial and housed at the state's expense) as a way to obfuscate and mislead the Court and the Jury.

When it came to time for the state to rest it's case, they did not call Emeline (Virginia's mother) and without notifying the Court or the defense released her from her subpoena. When the defense sought to call Emeline to the stand, they were told she was nowhere to be found and were given a cell phone number and address by the state that were not current. Furthermore, since the defense failed to subpoena her themselves, they were put into a situation of being at the mercy of the Court with regards to requesting a continuance of the trial, however they, the defense, did not request a continuance of the trial and did not present any further evidence on this

CONSTITUTION OF THE UNITED STATES.

VII. WHETHER IT WAS REVERSIBLE ERROR FOR THE DISTRICT COURT TO NOT GRANT APPELLANT'S MOTION TO EXCLUDE EVIDENCE AND DISMISS CHARGES AGAINST APPELLANT.

VIII. WHETHER THE CUMULATIVE EFFECT OF THE PREVIOUSLY CITED ERRORS DENIED APPELLANT HIS RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW AS UNDER THE CONSTITUTION OF THE UNITED STATES AND UNDER STATE LAW.

On January 23, 2006, the state filed its Answering Brief, a copy of which is filed under separate cover as Exhibit 2.

On February 17, 2006, petitioner filed his Reply Brief, a copy of which is filed under separate cover as Exhibit 3.

On December 27, 2006, the Nevada Supreme Court issued it's Order of Affirmance, a copy of which is filed under separate cover as Exhibit 4.

On January 18, 2007, petitioner filed a Petition for Rehearing, a copy of which is filed under separate cover as Exhibit 5.

On February 27, 2007, the Nevada Supreme Court issued its Order Denying Rehearing, a copy of which is filed under separate cover as Exhibit 6.

On March 27, 2007, the Nevada Supreme Court issued it's Remittitur, a copy of which is filed under separate cover as Exhibit 7.

III.

STATEMENT OF RELEVANT FACTS

Petitioner incorporates the facts as stated in Appellant's Opening Brief as though fully set forth herein, and offers the following relevant and additional facts in support of his Petition for Writ of Habeas Corpus (Post Conviction). Petitioner will also utilize the eight volume Appellant's Appendix prepared and filed with the Nevada Supreme Court to refer to exhibits and other documents primarily by their bate stamp number for ease of reference. A copy of the Appellant's Appendix is filed under separate cover as Exhibit 12, Volumes 1-8, and hereinafter

referred to as AA, Volumes 1-8.

A. December 5, 2000 incident

On December 5, 2000, the LVMP were summoned to petitioner's residence located at 8720 Wintry Garden to investigate a domestic violence incident. As a result of the investigation, Virginia Centofanti (Virginia) was arrested for domestic battery. During the course of the investigation, police discovered that petitioner had been hit over the head with a picture frame, a struggle then ensued in which petitioner had the shirt ripped off his back and received a number of injuries. The LVMP took into evidence the ripped shirt and other items.

Petitioner at first, did not choose to speak to representatives of the LVMP, but then gave a voluntary statement. After taking Virginia into custody, LVMP performed a search of Virginia's car and discovered empty beer bottles and other items, including a loaded gun in the glove box, which she was not permitted to carry. Subsequent to the incident, petitioner had photographs taken on a digital camera to document the injuries he received as a result of the struggle. Petitioner consulted with attorney Harvey Gruber (Gruber) with regards to this incident.

B. December 20, 2000 incident

On December 20, 2000, the LVMP were again summoned to 8720 Wintry Garden Avenue (the residence) to investigate reports of a shooting. Petitioner was taken into custody at 8716 Wintry Garden, the home of Mark and Marilee Wright, as was the weapon allegedly used in the shooting. After securing the scene, LVMP purportedly obtained a warrant to search the alleged crime scene, which included the residence at 8720 Wintry Garden Ave, as well as petitioner's and Virginia's vehicles. Petitioner was taken into custody, searched, handcuffed, ostensibly read his rights, and placed in a LVMP vehicle parked on the street. LVMP, and others, were allowed access to the residence.

During the search of the 8720 Wintry Garden residence, petitioner's co-workers, who like petitioner were attorneys, were contacted. Petitioner's co-workers arrived at the scene while petitioner was still present in custody in the back of a LVMP vehicle in front of the residence. Photographs were taken and interviews conducted on behalf of petitioner by Attorney Harvey Gruber's Office. Also present were various members of the LVMP and the media, as well as

others not known to the petitioner.

The LVMP recovered, among other items, Virginia's purse and it's contents, her keys, a palm pilot and her phone, as well as her vehicle and it's contents. The towing company was called by police from her cellular telephone. LVMP subsequently searched, at a later date, Virginia's apartment, and her work, and took into custody a number of items. All of the items seized by LVMP of Virginia's were turned over to Virginia's family, or others, and not provided to the defense.

As to the residence at Wintry Garden, LVMP took into evidence, among other things, a handgun, believed to be the alleged murder weapon, as well as what is listed as a "computer disc." They also recovered approximately (5) five of (7) seven shell casings. It is not clear who was allowed access to the residence at Wintry Garden during the night of December 20, 2000.

Petitioner was transported to the Clark County Detention Center (CCC), processed, booked and placed on suicide watch (which apparently was the protocol in alleged incidents of this type). Petitioner was visited at CCC by members of the LVMP (and ostensibly others) re-read his rights and remained silent. While at the CCC and represented by counsel, petitioner was taken from his jail cell and was presented with an order for cremation for Virginia and was told to sign it. Petitioner protested and requested counsel and was told "he was going to sign it" and under threat of duress and coercion, signed the order.

C. Pre-trial representation

Attorney Gruber, and others working with him or on his behalf, were summoned to 8720 Wintry Garden Avenue and conducted interviews and took photographs. Gruber, and others, also visited petitioner at the CCC. Petitioner requested that attorney Gruber secure Virginia's purse, in particular the keys and the palm pilot, as well as the vehicle and its contents. Nothing was done to secure the requested items. Attorney Gruber then appeared on behalf of petitioner at petitioner's first appearance in Court in December of 2000, at the bequest of petitioner's family and friends, and not petitioner.

Petitioner subsequently hired attorney Steve Wolfson (Wolfson) to represent him. Attorney Wolfson represented petitioner at the January 2001 hearing to determine bail.

Defendant was granted bail by the Court. Petitioner repeated his request to secure Virginia's items from the LVMP, especially the palm pilot, due to the fact that not only would contain valuable information, but that any information may be lost if the battery in the palm pilot were to run out. Nothing was done to secure the requested items.

Prior to his release on January 17, 2001, petitioner hired Peter Christianson, Jr. (Christianson) as his attorney. Petitioner repeated his request, both prior to and after his release, that Virginia's items be located and secured. In addition, petitioner requested from his attorney that certain witnesses, in particular Eva Caseros, his boss whom he spoke with by phone during the December 5, 2000 domestic violence incident, Janeen Munch, who came to his residence the night of December 5, 2000, as well as Sarah Smith, be located and interviewed. Petitioner was told "not to worry" about these witnesses as "they were on our side" and that he would "look into" the purse, keys, palm pilot and vehicle. But, as with attorney Gruber and Wolfson, Christianson made no effort to locate and secure Virginia's property which had been of Virginia's seized by the police.

Petitioner was released from custody on January 17, 2001. When petitioner was released he was placed on house arrest and was transported to the residence at Wintry Garden by two house arrest officers. Petitioner was told by the house arrest officers the terms and conditions of his house arrest, which included, among other things, that no weapons were allowed in the residence. When asked by house arrest if there were any weapons, petitioner stated he did not know if there were or were not. Apparently while executing the search warrant on December 20, 2000, LVMP did not discover a .38 caliber revolver and a shotgun. These were turned over to attorney Christianson's office for safekeeping and petitioner was allowed to return and reside at the Wintry Garden residence.

By March of 2001, petitioner was advised, for a variety of reasons, to move out of the residence at Wintry Garden. While in the process of moving out of the residence, petitioner discovered additional shell casings, and other evidence, which apparently had been left behind and not found by the LVMP or its representatives (crime scene analysts and/or crime scene investigators) during their search on December 20, 2000. Petitioner contacted attorney

Christianson regarding this issue, and due to a conflict of interest which developed regarding Christianson's advice, petitioner sought other counsel.

Petitioner subsequently hired attorney Daniel J. Albregts [Albregts] in March of 2001 as his attorney. Petitioner turned the issue of the shell casings over to attorney Albregts as well as repeated his request to secure Virginia's items. At this point, petitioner was advised that the items in question, the purse, the keys, the palm pilot (and the date stored on it), the phone (and the messages stored on it), her vehicle and it's contents, as well as her items at work, had been turned over to Virginia's family and were no longer available (destroyed).

D. Family court proceedings

When petitioner was released from custody, he was allowed to return to the 8720 Wintry Garden Residence and lived with his parents as well as his biological son with Virginia, Nicholas. As a result of the alleged incidents of December 20, 2000, guardianship proceedings were initiated in the family court case regarding the custody of both Nicholas, and Francisco Sanchez ("Quito"), Virginia's son from a previous relationship, who was already in the custody of and living with the Eisenman family in California. Petitioner's parents were awarded temporary guardianship of Nicholas. This was opposed by Emeline and Lisa Eisenman (Virginia's mother and sister).

Petitioner hired separate counsel to assist him in the proceedings, which were held in front of Judge Hardcastle. Nicholas was taken from petitioner and placed into the custody of petitioner's parents, who petitioned the Court for Guardianship of Nicholas. Petitioner was advised not to oppose the guardianship proceedings as to Quito, and the Eisenman's (Lisa, Virginia's sister, and Emeline, Virginia's mother) were appointed his guardians. The Court also issued a no-contact order for petitioner not to have visitation with Nicholas (this was later modified so that he could have phone contact).

The Court appointed Dara Goldsmith (Goldsmith) as Guardian Ad Litem for Nicholas. In the course of her duties, Goldsmith met with petitioner, and his then counsel Christianson, in connection with petitioner's attempts to obtain visitation with Nicholas. At that time, Goldsmith indicated she had met and/or spoke with a number of individuals who knew petitioner and they

expressed to her disbelief as to his involvement in the events of December 20, 2000. Goldsmith indicated to petitioner and his counsel that she did not see a problem with petitioner having visitation with Nicholas.

During this time frame, from January to March of 2001, petitioner was subject to a number of "false reports" regarding his violation of the contact order and the conditions of his bail. In both instances the authorities were called out to investigate (Child Protective Services (CPS) and House Arrest) and the allegations were found to be unsubstantiated. Petitioner's investigator (Tom Dillard) told petitioner that it was Virginia's mother Emeline who was "creating trouble" for petitioner with the CPS and house arrest.

At the subsequent hearings to resolve the issue of visitation, Goldsmith changed her stance. Goldsmith demanded that petitioner submit to a psychological evaluation as a condition of his visiting his son, something the petitioner could not and would not agree to as it would require him to waive his Fifth and Fourteenth Amendment Right to remain silent as to the allegations of the criminal case. This then became an issue in December of 2001, as the District Attorney's Office requested a pre-trial psychological examination of petitioner, which was the subject of a writ which delayed the criminal trial of the matter over a year.

The guardianship matter stayed open while the trial was pending per the order and wishes of Judge Hardcastle. Petitioner went a period of time when he was unemployed and unable to continue to afford counsel for both the criminal and guardianship proceedings and was forced to represent himself in the guardianship case. This resulted in petitioner having to fend for himself with regards to the attempts at discovery that were initiated by opposing counsel (Jeffrey Shaner) as well as the Court. This included petitioner being called to testify regarding the events of December 20, 2000. Petitioner spoke with attorney Albregts about being at these hearings, but he refused. Petitioner also requested that attorney Albregts consider examining potential witnesses in the criminal action in the family court case, but, he also refused. The guardianship case remained open until after the trial in 2004.

Petitioner continued to suggest to his criminal attorneys that they utilize the guardianship proceedings as a way to conduct discovery, in light of the fact that many of the state's witnesses

refused to cooperate with defense counsel and defense investigators. This would have allowed petitioner's attorneys to conduct both written discovery and depositions as to the parties to the guardianship proceedings, Emeline Eisenman, Lisa Eisenman, and Francisco Sanchez. Discovery could also have been obtained from other state witnesses in the criminal case, including the representatives of the police and district attorney's office without them claiming work-product privilege since they had provided information, documents and evidence, as well as access to their files to the Guardian Ad Litem and others. Guardian Ad Litem's files and investigation are not protected by privilege under Nevada Law. While petitioner was told by his criminal attorneys not to initiate any such discovery proceedings himself, no efforts were made by his criminal counsel, and the opportunity to test the state's case before trial was lost.

E. San Diego real estate issue

Prior to the marriage, petitioner and Virginia had purchased property in San Diego, California, where they resided, with Francisco Sanchez, prior to moving to Las Vegas, Nevada in the fall of 1999. When they left California, they rented the property to Lisa Eisenman, Virginia's sister, and Mark Beaty, her then boyfriend, who appeared on the lease. When the December 20, 2000 incident occurred, rent stopped being paid by the tenants. When petitioner was released from custody, he was let go from his employment at Traveler's Insurance, and had to rely upon his savings and the help of others to cover the mounting bill and legal expenses associated with both the criminal and family law matters, as well as the expenses of both the California and Nevada properties.

Petitioner began receiving foreclosure notices with regards to the property in San Diego. Efforts to collect rent were unsuccessful, therefore the property was sold. Petitioner consulted with Albreghts regarding the sale of the property and was given the okay ("No one is going to fault you for raising money to fight your criminal case.") This involved petitioner sending Albreghts copies of all the paperwork to review before it was submitted in connection with the sale of the property. While not seeking Albreghts' advice, petitioner did rely upon the review of the paperwork in determining whether or not to conduct the transaction. The sale went forward.

F. State's motion to revoke bail and disqualify petitioner's counsel

The Eisenmans found out about the sale of the property and attempted to extort all of the proceeds from petitioner. When petitioner refused to turn over all of the proceeds, and his efforts at putting all the money in trust for Francisco and Nicholas were rejected, the Eisenmans' attorney, Jeffrey Shaner, turned over all the documentation to the District Attorney's Office. Proceedings were then initiated to revoke petitioner's bail in connection with the real estate transaction.

Hearings on the bail revocation were held over a week's period of time in June of 2001. During the hearings, the District Attorney's Office moved to disqualify Attorney Albregts, who ultimately was indeed disqualified, as further detailed below, and replaced by both the Special Public Defender's Office, attorney Gloria Navarro, and California attorney Allen Bloom.

G. Pre-trial proceedings

1. Petrocelli hearings

The trial of the matter was continued and various pre-trial motions and hearings commenced. One of the hearings was on whether or not Francisco Sanchez ("Quito"), Virginia's son, would be allowed to testify, as he was only nine (9) years old in December of 2000. Judge Gibbons held a hearing to determine if he was competent to testify. During the hearing, Deputy District Attorney Laurent provided a number of transcriptions of interviews taken by both the District Attorney's Office and LVMP. Judge Gibbons also allowed Francisco to have an advocate with him while he testified. During this hearing, Francisco admitted to lying with regards to his testimony, and identified Emeline Eisenman and others as those who told him to lie.

Despite this admission under oath, Judge Gibbons ruled he could still testify. Nothing was done by the District Attorney's Office or, more importantly, by the defense counsel, to follow up on the suborning of perjury. Furthermore, nothing was done by the defense to obtain any of the tapes of the transcribed interviews or to pursue the matter further. In the irony of all ironies, the one who conducted the interviews in which the perjured testimony was the subject, was Deputy District Attorney Laurent, the same person who sought to disqualify attorney Albregts

for being a "witness." A motion in limine to preclude Quito from testifying should have been done.

The Court ultimately made a number of rulings as a result of the hearings, including that one of the responding officers, David Winslow, would be allowed to testify as to his observations but not his "opinions" regarding the December 5, 2000 incident, and would not be allowed to testify as to any discussions he had with Virginia regarding December 6, 2000. The Court also ruled that the state would not be allowed to bring in any evidence the petitioner went on a "smear campaign" about Virginia without first holding an evidentiary hearing. The Court also rejected the state's request to have petitioner canvassed regarding his consent to the use of self-defense as a defense at trial.

2. Pre-trial writ regarding state's request for psychological exam of petitioner

The matter was set for trial on January 2, 2002 in front of Judge Gibbons. Deputy District Attorney Laurent made a motion that petitioner be subjected to a psychological examination by the state. Judge Gibbons denied the motion and, instead, proposed a hybrid solution to the issue of a psychological examination. The state filed a writ and requested a stay of the matter. The stay was granted and the trial delayed. The writ was set for oral argument in front of the Nevada Supreme Court, en banc, in June of 2002. The Court came back with their decision, denying the state's writ in December of 2002. During that time Judge Gibbons had successfully run and won a seat on the Nevada Supreme Court and could no longer hear the trial of this matter.

H. Assignment to Judge Donald Mosley

Petitioner's co-counsel Gloria Navarro believed she had an agreement with the state to have the matter heard by Judge Cherry. At the hearing of the matter, the state, without explanation, stated there was no agreement. Attorney Navarro attempted to introduce evidence of the agreement through e-mails between petitioner's counsel and the state, but the Court did not allow them into the record and ruled the matter would be subject to random assignment. The matter was next assigned to Judge Mosley. Judge Mosley set the matter is due course, setting a

trial date for July of 2003, second on the stack and November of 2003, first on the stack.

1. Hearing regarding computer disc

In January of 2003, the state claimed to have come into possession of a computer disc which may be material to the trial of the case. The disc was provided to them by Sarah Smith, a former co-worker of petitioner who claimed the disc contained a story petitioner wrote which appeared to be a foreshadowing of the events of December 20, 2000. She had stolen the disc.

This matter was investigated and a forensic computer expert hired by the Court determined that what Ms. Smith had alleged was not true. The subject of the disc and the alleged story was then determined not to be material, but only after a number of hearings were held and considerable effort spent by the state, the defense and the Court dealing with this issue.

The July 2003 trial date was continued at the request of petitioner's counsel due to scheduling conflicts, as well as the misunderstanding that the matter would proceed in November. The Court granted the continuance.

2. Pre-Trial publicity

During the summer of 2003, Glen Meeks of the local Las Vegas NBC affiliate did a story about petitioner. The focus of the story was the supposed community outrage at the fact that petitioner was still allowed to practice law on a limited basis while he remained on bail. In the course of the story, Meeks interviewed both Deputy District Attorney Laurent as well as Tricia Miller, purported to be a close friend of Virginia. Laurent made a number of statements regarding his opinions of petitioner's guilt or innocence, as did Ms. Miller, who on camera cast disparaging comments regarding this being a case of "self-defense." The story also utilized crime scene photos, and information that could only have come from the district attorney's office and/or the district attorney's office files. It is not clear if the photos or information used in the story were ever made available to petitioner's counsel. No effort was made by defense counsel to determine if the district attorney's office did anything improper in providing access to it's files (or in using Miller as a mouthpiece to say things they could not). Meeks contacted attorney Bloom before the story aired and requested a statement. Over petitioner's objections, Bloom issued a written statement which was read on the air as part of the story regarding the use of self-defense.

I. Trial

The matter was set to proceed to trial in March of 2004. In connection with trial a number of pre-trial matters were heard and decided by Judge Mosley. One of the matters brought to Judge Mosley was the canvassing of petitioner with regards to the issue of self-defense. Specifically, Deputy District Attorney Clark Peterson (Peterson), who had replaced Laurent, requested that the petitioner be canvassed on whether he would admit to being the shooter. The Court allowed this to be brought up, despite the fact that Judge Gibbons denied the motion in 2001 (as further detailed below) and there being no authority for it whatsoever. The defense, after an off the record out-of-the-court room consultation with petitioner, instructed petitioner to answer this question.

J. Verdict

After the guilty verdict, petitioner had a brief conversation with attorneys Navarro and Bloom in the jury room regarding whether or not to have the jury or judge sentence petitioner. Petitioner was then taken into custody and taken to the CCC and put in what is referred to as "the hole." Petitioner learned that "there may be a problem with the jury." All his efforts to contact Bloom regarding this, and other post trial issues, were in vain as Bloom's office indicated he was "out of the county." When Bloom finally did respond to petitioner in May of 2004, the seven (7) day period in which to file a motion for a new trial had lapsed.

K. Post trial proceedings

Petitioner hired attorney, Carmine Colucci, to represent him in May of 2004. Attorney Colucci was able to secure a continuance of the sentencing and filed a motion for new trial on the basis of juror misconduct and other issues. One of the main issues was the concealment of a felony conviction by juror Barrs. A hearing was held in which the Court refused to hear any evidence regarding any of the issues raised in the motion outside what was contained in the pleadings and argument of counsel. At that hearing, Peterson presented evidence and made arguments regarding Barrs felony status that were false. This included presenting an affidavit from Barrs which contained false information. Ultimately the Court ruled against the motion on jurisdictional grounds.

GROUNDS FOR RELIEF

GROUND ONE

THE DISTRICT COURT'S ERRONEOUS DISQUALIFICATION OF PETITIONER'S COUNSEL OF CHOICE DANIEL J. Albregts, BASED UPON THE BAD FAITH ACTIONS OF THE STATE, IN VIOLATION OF PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO REMAIN SILENT AND SIXTH AMENDMENT RIGHT TO COUNSEL OF CHOICE AND THE U.S. SUPREME COURT'S RULING IN U.S. VS. GONZALES-LOPEZ, IS STRUCTURAL ERROR, NOT PROCEDURALLY BARRED, AND REQUIRES AUTOMATIC REVERSAL OF PETITIONER'S CONVICTION.

A. Factual and procedural background

On or about June 5, 2001, the Court held a hearing on the State's Motion to Revoke Bail with regards to allegations of malfeasance by petitioner in connection with the sale of property owned by petitioner and Virginia in San Diego, California. The motion was filed by the state on the Friday before a hearing was to be held on petitioner's (First) Request for a Continuance, and not provided in a timely manner to petitioner's counsel, ostensibly to gain some sort of tactical advantage in seeking to have petitioner immediately remanded into custody.

This motion would be the vehicle which the prosecutor would use, in bad faith, to obtain a prejudicial (and improper) ruling from the Court erroneously disqualifying petitioner's counsel of choice, Daniel Albregts. Albregts filed a response to the motion under seal to protect any privileged information contained therein. At the subsequent hearing on June 14, 2001, a number of irregularities occurred which resulted in the denial of petitioner's Fifth and Fourteenth Amendment Right to remain silent and Sixth Amendment right to counsel.

1. Improper canvass of petitioner

The state improperly requested, and the Court improperly conducted, a canvass of petitioner in order to obtain an erroneous disqualification of Albregts at the evidentiary hearing held on June 14, 2001. At the start of the hearing the following exchange took place:

> THE COURT: Mr. Laurent, I have read the motion and response by Mr. Albregts.
> MR. LAURENT: Couple of matters first, Judge. First of all, I believe the Court needs to canvass the defendant to make sure that he's authorized his attorney to file the documents that are contained in the sealed motion.
> THE COURT: Is that correct, Mr. Centofanti, did you authorize Mr. Albregts to file

those documents in a sealed motion?
THE DEFENDANT: If that's what Mr. Laurent just said. I didn't hear him.
THE COURT: He wanted to know if you have authorized Mr. Albregts to file the particular pleadings under seal?
THE DEFENDANT: Correct.
THE COURT: And that has your authorization?
THE DEFENDANT: Yes, sir he does.
THE COURT: Very well.

See, Transcript of June 14, 2001 hearing, filed under separate cover as Exhibit 8, at page 4, line 7, to page 5 line 2.

The state had no authority to request a canvass of the petitioner in open court while petitioner was represented by counsel and without the permission of the Court, this was clearly misconduct, the extent of which became apparent later in the proceedings. The state offered no authority to authorize a canvass of petitioner, and the Court did not require any in allowing the questioning to continue, not by the state, but now by the Court. Petitioner's counsel did not object, clearly ineffective assistance of counsel (as will be further discussed in Ground 6, below), and the improper and unconstitutional actions of the state and the Court (is allowed the improper canvass to be requested and then conducting it at the hearing) were prejudicial to petitioner as they were used as the basis (the waiver of the attorney-client privilege) for the erroneous disqualification.

MR. LAURENT: For that purpose, Judge, because of those three -- at least three instances where the attorney/client privilege has been waived since the defendant has authorized his attorney to make those, we need to have a hearing to the extent so I can discuss that. Additionally, since the attorney/client privilege is waived, that makes Mr. Albregts a potential witness in this case, a witness in this case here. It makes him a witness in the trial because of motive, it makes him a witness in the penalty phase, and he is going to have [to have] new counsel.

See, Transcript of June 14, 2001 hearing, filed under separate cover as Exhibit 8, page 6, lines 7 to 18.

It is clear from the manner in which the hearing was conducted, from a review of the transcripts (and the pleadings filed by the state), that Laurent improperly set this matter up to accomplish the disqualification of petitioner's counsel. This was not done in good faith, as the canvass was unauthorized and without the canvass the whole matter of the disqualification would

have been denied by the Court and the issue resolved.

However, having mislead the Court and petitioner to "waive" privilege (which petitioner does not concede occurred but had the effect with the Court) the erroneous disqualification was obtained. It should be noted for the record that at no time was Albregts ever called as a witness by the state at any point at trial or sentencing. None of this occurs without the improper and unconstitutional canvass and response.

It should also be noted that Albregts steadfastly maintained he was not a witness, and in an offer of proof to the Court, actually "dared" the state to call him as a witness, although he never did concede, nor did petitioner, that he was indeed a witness, let alone a necessary witness as required under Nevada law. Since there was a buyer, real estate agent, and various financial persons involved in the transaction who all could have been called by the state at trial (if necessary) to testify as to the alleged offending conduct, there was no need to call Albregts as a witness. Furthermore, there was no attempt by the state, the Court, or for that matter defense counsel to simply concede the issue. All of these steps would have preserved petitioner having his counsel of choice.

2. Material misrepresentations to the Court by the state

In order to obtain the erroneous disqualification of Albregts, the state made a number of representations to the Court that they knew, or should have known, were false at the hearing of the disqualification. First and foremost, it was improper to request a canvass of petitioner in violation of petitioner's Fifth and Sixth Amendment Rights, as he was represented by counsel and there was no authority for the request or the canvass. Secondly, the state then attempted to mislead the Court with a number of improper and false arguments regarding petitioner as a way to persuade them to order the disqualification.

> Judge, this person has defrauded not only the bail bondsman, but the entire property system in the State of California and the reason he did that, the reason he filed that sealing is so no one can find it on a title search, so no

/////

one can find out, hey, maybe we are going to look a little deeper. Nobody can find the divorce decree.

Id. at page 15, lines 2-7.

This statement is particularly troubling in light of when it takes place, on June 14, 2001, a full six (6) months after the divorce was final. At this point, the divorce decree was available to the state from a variety of sources: Virginia's family, their estate attorney, the Guardian Ad Litem in the guardianship proceedings (whose records show was actively assisting and in contact with the prosecution) and, and this is the most obvious, the petitioner and his counsel.

So the statement "Nobody can find the divorce decree" is at best disingenuous. It should be noted that at this point in the litigation, the District Attorney's Office, the Guardian Ad Litem, Dara Goldsmith, and the Eisenman's estate/family law attorney, Jeffrey Shaner, were all in constant communication over the issues of the divorce, yet they can't find the divorce decree? The divorce was sealed by petitioner's divorce attorney on his own. He offered to come to Court and testify to this fact, which was neither hidden or unknown at the time of the statements to the Court at the hearing(s) to revoke bail.

The false impugning of petitioner, to gain an advantage at the hearing, was improper. It should also be noted that the state subsequently obtained the divorce decree with an improper ex-parte order to the family court. [See, AA, Volume 1, 154, p. 59, line 7 to p. 58, line 23, wherein the state informs the Court that they went ex-parte to the family court and unsealed the divorce filed in order to obtain copies of the divorce documents.] Why this becomes material to the proceedings is the extent of which the state ties these "facts" to the motion to revoke bail and represents the same to the Court.

As to the issue of the sealing, as stated above, it was done by petitioner's Attorney Ed Kainen, on his own and not at the direction of the petitioner, his family or any of his representatives. This information too was available, and as stated above, this fact perhaps was even known by the state by the time of the hearing. Petitioner also offered to have his bail bondsmen testify at the hearing that petitioner misled no one with regards to the ownership of the property when he applied for bail. Again this information was available and should have been

known to by the state, if not already known, at the time of the hearing.

It is clear that the state was motivated not by the desire to see that justice was done, but by their desire to have petitioner returned to custody at any cost. This should be considered by this Court in light of whether or not the disqualification was done in good faith. Petitioner also believes that the state was behind having CPS and the House Arrest Officers "investigate" petitioner so as to have additional "false allegations" regarding petitioner to present to the Court as "cause" to revoke his bail.

Therefore, as is clearly demonstrated above, the state orchestrated the whole canvassing of petitioner as a way of obtaining a fraudulent, or misleading, at best, waiver of the attorney/client privilege as a way to disqualify petitioner's counsel of choice Albregts, which apparently was the goal all along. This should be considered per se misconduct and at least a bad faith effort to deny petitioner the assistance of his counsel.

3. The Court improperly allows the evidentiary hearing to proceed despite no evidence that Albregts would be a witness in the case, a fact the State subsequently conceded.

a. June 14, 2001 hearing

The proceedings should have been suspended or terminated and the issue of the alleged waiver of attorney/client privilege disqualification dealt with immediately, so as to not prejudice petitioner, by denying him the active and full participation of his counsel, who instead was forced to defend on two fronts, the bail revocation and the disqualification. Instead, the hearing proceeded in which argument and evidence were received from Albregts and DDA Laurent. Finally, the state "suggested" substitute counsel:

> MR. LAURENT: Judge, with that in mind, since the area we are going into on the waiver, might it be prudent to also have the public defender present at that time?
>
> Transcript of June 14, 2001 hearing, page 16, lines 17-20.

> THE COURT: Okay, what the Court will do, the Court will ask the Special Public Defender to have someone present here on Monday just in case there's an issue with Mr. Albregts. I'm just going to basically for Mr. Albregts' benefit as well.
>
> Transcript of June 14, 2001 hearing, page 17, lines 14-18.

Attorney Albregts made it clear in his proffer to the Court that he would not be a witness in the case, period.

> [I]t wasn't the advice of counsel.
> In terms of my role as counsel, I briefly looked over some of the documents that he had and said I didn't see anything, you know, wrong with the documents that he was signing. That was the extent of my involvement.
>
> Id. at page 20, lines 12-16.

At this point what should have happened was since (whether properly or not) Albregts indicated that his client would not be able to (and implicitly was not going to) assert advice of counsel as a defense to any alleged misdeeds, the state was attempting to bring forth, his role as both an advocate and a witness was clear. If advice of counsel was not going to be asserted as a defense, the issue of disqualification was no longer an issue.

The Court in this instance had the ability, and perhaps the duty, to resolve this issue before the hearing on the bail revocation proceeded forward. The Court also could have requested or allowed petitioner to be heard on the issue of the disqualification, only in camera, in order to determine whether there could be a wavier or if a conflict or interest existed with regards to Albregts, and should have allowed petitioner to proceed at trial with his counsel of choice. Instead the Court allowed the District Attorney's Office and the Eisenmans' attorney, Jeffrey Shaner, to join to deprive petitioner of his counsel of choice.

b. June 19, 2001 hearing

The hearing was next continued until June 19, 2001. Again, without first deciding the issue of the waiver or disqualification, the Court allowed the hearing to proceed. During that hearing, Albregts states for the record the state's attempt to interfere with petitioner's right to counsel:

> MR. Albregts: They're [The State] trying to make a situation where I'm a witness to get me off the case and violate his Sixth Amendment Right . . . and you don't need to go there, Judge, when you balance the Sixth Amendment right of Mr. Centofanti with what's going on here.
>
> Transcript of June 19, 2001 hearing, page 30, lines 6-15.

If the Court has any doubts about the bad faith actions and tactics of the state, it need look

no further than DDA Laurent's closing arguments on the matter which occurred at the continuation of the hearing on June 19, 2001, wherein he conceded that **petitioner was not given advice by Albregts and thus no disqualification was warranted**:

> LAURENT: Now, he can't claim that he was given advice of counsel, or there has been no evidence that he's been given poor advice of counsel on this.
>
> Transcript of June 19, 2001 hearing, page 30, lines 13-15.

At this point the issue of the disqualification of Albregts becomes erroneous. When the state admits that he will not be a witness, there is no basis for the Court to proceed with the disqualification. However, the Court allowed the state to continue to "waffle" on it's position on Albregts' role to the detriment of petitioner and his right to counsel of choice. As to the matter at hand, the bail revocation, the Court imposed a number of conditions on petitioner regarding the sale of the San Diego property and the proceeds, which are not relevant to this discussion, and continued the matter for a status check and ruling to June 26, 2001.

c. June 26, 2001 hearing

The matter was continued until June 26, 2001. At that time the Court denied the Motion to Revoke Bail, but did not rule on the issue of disqualification. The matter was continued until September 14, 2001.

d. August 31, 2001 hearing

As stated above, the Court had set the Motion for Disqualification for September 14, 2001, but the state, ex-parte attempted to move "up" the request to August 31, 2001, a date they should have known that Albregts was not available. Albregts was eventually located and showed up for the hearing. At that time Albregts argued to the Court that "The state clearly indicated he [Albregts] was a potential witness. The Court continued the hearing until the original date of September 14, 2001.

4. The Court erroneously disqualifies Albregts

On September 14, 2001 the Court held the hearing on the issue of disqualification. Per the Court's Order, the Special Public Defender's Office was present, along with Allen Bloom (Bloom), proposed replacement/co-counsel and argued against the disqualification for petitioner.

Bloom argued to the Court about the prejudice the disqualification would cause petitioner:

> Mr. Bloom advised he has made the argument that it would be a substantial hardship to the defense to disqualify Mr. Albregts.
>
> AA, Volume 1, 011, p.011.

Bloom also argued that the matter could be resolved, without disqualification, if the Court would rule on the defense proposed Motion in Limine regarding whether or not the entire issue of the San Diego real estate transaction would be allowed into evidence at all. These arguments were denied and not considered by the Court. The Court also refused to conduct a full evidentiary hearing on the matter, despite the ramifications of the issue, to hear from all sides of the dispute, including the tenants, the real estate agents involved and the buyer, among others, which would have cleared up first the issue of any "malfeasance" by petitioner and second the issue of Albregts as a witness.

After hearing further argument only from both sides, the Court Ordered the Motion to Disqualify Counsel granted with the following conditions:

> Mr. Albregts will be allowed to help Mr. Bloom in preparation of the case and Mr. Albregts will be allowed to testify in the guilt phase and the penalty phase, if there is one; Mr. Albregts will be not be allowed in the courtroom and will not be allowed to sit at counsel table during trial.
>
> AA, Volume 1, 011, p. 011.

What further compounded this problem was that he advised the parties that the issue of Albregts being a witness "must be resolved prior to trial." Bloom also made it clear that he will need to know "how crucial a witness Mr. Albregts will be and what the state intends to present." Id. at 012.

The Court, therefore, did not balance the parties' interests, but instead sided with the state. Furthermore, the Court did not address the hardship of Albregts' disqualification on petitioner. Finally, and most importantly, the Court did not determine whether Albregts was likely to be a necessary witness.

Counsel for petitioner should have filed a Writ of Mandamus to have this issue determined before any further proceedings should have been allowed to take place. This ineffective assistance of counsel is discussed, further, in Ground 6, below.

5. Post hearing bad faith actions by state on the disqualification

On December 26, 2001, a mere seven (7) days before the scheduled trial of this matter which was scheduled for January 2, 2002, the state informs defense counsel that not only will the state not present the San Diego real estate transaction as an issue, but that the state will not call Albregts as a witness.

This position was placed on the record by petitioner in the pleading entitled, "Defense Response to the Prosecutions Request that Defendant Be "Canvassed" By the Court to Approve of Presentation of Self Defense Evidence" that was filed on December 26, 2001 (See, AA, Volume 2, at 001-007).

> This is not the first time in this case that the prosecutor has played "fast and loose" with the law. For, example, for over two months, and over the course of five hearings, the prosecutor made allegations against defendant and Mr. Dan Albregts, prior counsel, alleging some sort of fraud was perpetrated regarding defendant's sale of his San Diego Real Estate Property.
>
> We need not review the entire sequence of that incident, but suffice to say, the prosecutor made repeated and vehement claims to this court that Mr. Albregts should be relived as counsel from the case because of his role in the San Diego Real Estate transaction. Hours were spent before this court on the subject. More hours were spent in preparation of the matter. All of which based upon dramatic and unequivocal statements by the prosecution that they would present evidence in their case in chief regarding the San Diego transaction and that Mr. Albregts would be a witness in this matter. Thereafter, after new counsel was retained, and after considerable effort expended, the prosecutor made a complete about face and quietly told the court it was not going to present the San Diego Real Estate issue in the case in chief and would not call Mr. Albregts to the stand.
>
> Id. at 005, lines 9-22.

B. Argument and legal authority

1. Improper canvass

During the issue of the bail revocation, the state made representations to the Court, on the record, that they were considering filing additional charges against petitioner related to the San

Diego real estate transaction. Therefore, the successful attempt to canvass petitioner at the hearings to obtain a waiver of attorney-client privilege and violate his Fifth and Fourteenth Amendment Right to remain silent and Sixth Amendment Right to counsel were improper.

As the case of Gilmore v. Taylor, 113 S.Ct. 2112, 508 U.S. 333, explains:

> The Fifth and Fourteenth Amendments to the Constitution guarantee every criminal defendant the right to remain silent. Our precedents have explained that this right precludes the state from calling the defendant as a witness for the prosecution. See, e.g., South Dakota v. Neville, 459 U.S. 553, 563, 103 S.Ct. 916, 922, 74 L.Ed.2d 748 (1983) **(the "classic Fifth Amendment violation"[508 U.S. 363] consists of requiring the defendant to testify at his own criminal trial)**; Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964) (the Fourteenth Amendment Due Process Clause incorporates the Fifth Amendment right to remain silent against the states). The state must provide all evidence necessary to a conviction if the defendant chooses not to testify.
>
> Id. at 2128-2129. **(Emphasis added)**

Therefore, the questioning by the state (accomplished through the Court) regarding the San Diego real estate transaction, as incorporated in the Opposition to the Motion to Revoke Bail, violated petitioner's Fifth and Fourteenth Amendment Rights to remain silent and his Sixth Amendment right to counsel. As stated above, the information sought from petitioner through the ruse of "waiver" of attorney-client privilege, was available from a number of witnesses (the buyer, the real estate agent, the financial agents) which did not require the violation of any privilege or the calling of counsel as a witness. Unfortunately, while the Court was not willing to allow the state to proffer false evidence and allegations regarding the sealing of the divorce and application for bail, it did allow the state to go forward with the attorney as witness arguments.

2. Erroneous disqualification

The erroneous disqualification of Dan Albregts as petitioner's counsel of choice, accomplished with the improper canvass of petitioner, was plain error, and violates petitioner's Sixth Amendment Right to Counsel and Fifth Amendment right to remain silent. Automatic reversal is required only when a constitutional error can be characterized as a "structural defect." "Structural defects" defy harmless error analysis because they undermine the framework of the

trial process itself, their effect cannot be ascertained without resort to speculation, or the question of harmlessness is irrelevant based on the nature of the right involved. See, United States v. Gonzales-Lopez, 548 U.S.140, 126 S.Ct 2557, 2564, 165 L.Ed.2d 409 (2006)(denial of right to counsel of choice).

In Nevada, Rule 3.7. of the Rules of Profession Conduct, entitled "Lawyer as Witness" governs the situation which presented itself with regards to Attorney Albregts. Rule 3.7 provides, in pertinent part, as follows:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
> (1) The testimony relates to an uncontested issue;
> (2) The testimony relates to the nature and value of legal services rendered in the case; or
> (3) Disqualification of the lawyer would work substantial hardship on the client.

In the case of DiMartino v. Eighth Judicial Dist. Court ex rel. County of Clark, 119 Nev. 119, 66 P.3d 945, the Nevada Supreme Court ruled that when determining whether to disqualify an attorney, under the rule precluding an attorney who is likely to be a necessary witness from acting as a trial advocate, the court must balance the parties' interests and address the hardship the attorney's disqualification may have on the client.

In granting a Petition for Mandamus reversing the disqualification, the Nevada Supreme Court ruled as follows:

> [T]he district court's oral ruling and written decision do not balance the parties' interests or address the hardship Singer's disqualification may have on DiMartino. SCR 178(1)(a) requires consideration of this factor. The district court also did not determine whether Singer was likely to be a necessary witness.
>
> Id. at 947.

At the time the Court made its ruling, SCR 178 was still in effect (it has since been repealed - effective May 1, 2006). Judge Gibbons did not attempt to balance the parties' interest or address the hardship that Albregts disqualification would have on petitioner. More importantly, he did not determine whether or not Albregts was likely to be a necessary witness as required in DiMartino. As stated above, there were a number of witnesses who could have been

called regarding the documents that were filled out with regards to the real estate transaction and whether or not petitioner committed any "further crimes" in the way he conducted the real estate action. Petitioner contends this failure made the disqualification erroneous on it's face and the violation of his Sixth Amendment Right to counsel complete.

Furthermore, Judge Gibbons did also not consider the defense's proposed Motion in Limine, which would have resolved the issue, as stated, supra. Again, reaching a favorable decision on the Motion in Limine, eliminates Albregts as a "necessary witness" and thus his disqualification was not required. The primary concern seems to have been the keeping of a trial date and he failed to determine whether Albregts was likely to be a necessary witness, and in fact left the matter open and to be submitted before trial.

The Nevada Supreme Court set forth the factors to be determined in attorney disqualification in more detail in the case of Brown v. Eighth Judicial District Court, 14 P.3d 1269 (Nev. 2000). In Brown, the Court held:

> District courts are responsible for controlling the conduct of attorneys practicing before them, and have broad discretion in determining whether disqualification is required in a particular case. See Robbins v. Gillock, 109 Nev. 1015, 1018, 862 P.2d 1195, 1197 (1993); Cronin v. District Court, 105 Nev. 635, 640, 781 P.2d 1150, 1153 (1989).
>
> Courts deciding attorney disqualification motions are faced with the delicate and sometimes difficult task of balancing competing interests: the individual right to be represented by counsel of one's choice, each party's right to be free from the risk of even inadvertent disclosure of confidential information, and the public's interest in the scrupulous administration of justice. See Hull v. Celanese Corp., 513 F.2d 568, 570 (2d Cir.1975). While doubts should generally be resolved in favor of disqualification, see Cronin at 640, 781 P.2d at 1153; Hull, 513 F.2d at 571, parties should not be allowed to misuse motions for disqualification as instruments of harassment or delay. See Flo-Con Systems, Inc. v. Servsteel, Inc., 759 F.Supp. 456, 458 (N.D.Ind.1990).
>
> When considering whether to disqualify counsel, the district court must balance the prejudices that will inure to the parties as a result of its decision. Cronin, 105 Nev. at 640, 781 P.2d at 1153. To prevail on a motion to disqualify opposing counsel, the moving party must first establish "at least a reasonable possibility that some specifically identifiable impropriety did in fact occur," and then must also establish that "the likelihood of public suspicion or obloquy outweighs the social interests which will be

served by a lawyer's continued participation in a particular case." Id. at 641, 781 P.2d at 1153 (quoting Shelton v. Hess, 599 F.Supp. 905, 909 (S.D.Tex.1984)). 14 P.3d 1266, 116 Nev. 1200.

Id at 1269-1270.

Here, there was no effort by the Court to balance the prejudices as a result of the decision. Instead, it allowed the disqualification to occur, despite the fact that it had not even determined whether or not Albregts would be a necessary witness. Furthermore the Court did not require the state to establish that "some specifically identifiable impropriety did in fact occur" as evidenced by the fact that despite the low threshold to revoke bail, bail in fact was not revoked. Finally, the state was never required to show how Albregts continued participation in the case would create any "public suspicion" required by the Nevada Supreme Court in Brown, Id. There was also no attempt to determine if the state was merely seeking to misuse the motion to disqualify as an instrument of "harassment or delay," which is specifically precluded by Brown.

Since the time that Dimartino and Brown were decided, the United States Supreme Court issued it's seminal decision in the case of United States v. Gonzales-Lopez, 548 U.S.140, 126 S.Ct 2557, 2564, 165 L.Ed.2d 409 (2006)(denial of right to counsel of choice). In Gonzales-Lopez the Court was asked to look at a situation where a defendant's paid attorney was erroneously disqualified by the trial judge from being his counsel. The Supreme Court held the following:

> [W]here defendant's Sixth Amendment right to counsel of his choice was violated because the disqualification of his chosen counsel was erroneous, no additional showing of prejudice was required to make the violation complete, and (2) trial court's erroneous deprivation of defendant's Sixth Amendment right to choice of counsel entitled him to reversal of his conviction, as error qualified as a "structural error" not subject to review for harmlessness.

The Court went on to state:

> The right to select counsel of one's choice, by contrast, has never been derived from the Sixth Amendment's purpose of ensuring a fair trial. It has been regarded as the root meaning of the constitutional guarantee. See Wheat, 486 U.S., at 159, 108 S.Ct.1692; Andersen v. Treat, 172 U.S. 24, 19 S.Ct. 67, 43 L.Ed. 351 (1898). See generally W. Beaney, The Right to Counsel in American Courts 18-24, 27-33 (1955). Cf. Powell, supra, at 53, 53 S.Ct. 55. Where the right to be assisted by counsel of one's choice is wrongly denied, therefore, it is unnecessary to conduct an

ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice--which is the right to a particular lawyer regardless of comparative effectiveness--with the right to effective counsel--which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.

Id. at 2563.

Finally, the Court held:

> We have little trouble concluding that erroneous deprivation of the right to counsel of choice, "with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.' " Id., at 282, 113 S.Ct. 2078. Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the "framework within which the trial proceeds," Fulminante, supra, at 310, 111 S.Ct. 1246 --or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.

Id. at 2565.

By denying petitioner the right to have Albregts be his trial counsel, the Court, and by it's involvement in the disqualification, the state, in the ruse to make petitioner "waive" attorney-client privilege at the June 14, 2001 hearing with the assistance of the Court, committed the very same error of the Court as in United States v. Gonzales-Lopez which caused the very same harm of "different attorneys" who "will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument." Id. The "hybrid" solution offered by the Court does not "cure" the structural error which was occasioned by the Court and the state on petitioner. Therefore, petitioner's conviction should be reversed and the matter

remanded for a new trial.

Unlike in United States v. Gonzales-Lopez, in which it was held that the attorney disqualification was "erroneous" (which is defined as "Containing or derived from error; mistaken" [American Heritage Dictionary of the English Language, Third Edition (1992)]) here it was done in both "bad faith" and "intentionally" as orchestrated by the state. Seven days before trial, the "prosecutor made a complete about face and quietly told the Court it was not going to present the San Diego Real Estate issue in the case in chief and would not call Mr. Albregts to the stand" admits both the bad faith and intentions of the state. This position was placed on the record by petitioner in the pleading entitled, "Defense Response to the Prosecutions Request that Defendant Be "Canvassed" By the Court to Approve of Presentation of Self Defense Evidence" that was filed on December 26, 2001 (See, AA, Volume 2, at 001-007).

This clearly establishes that the state, in bad faith, sought and obtained the erroneous disqualification of Dan Albregts in this matter.

3. Issue is not procedurally barred

Petitioner anticipates the state will attempt to argue that this claim is procedurally barred as it was not brought up in the first instance in the direct appeal. However, the Court should note the following:

1. The Gonzales-Lopez decision was not issued until June 26, 2006, until after the briefing was done in this case [a day short of 8 months after petitioner filed his Opening Brief and four months after the Reply was filed];

2. There was no way petitioner could anticipate the U.S. Supreme Court's ruling would provide petitioner with an additional ground for relief; and

3. The Gonzalez-Lopez decision was decided before the Remittitur was issued by the Nevada Supreme Court and is the binding law of the case.

Furthermore, since petitioner can, and has shown good cause, for the failure to raise this issue on direct appeal, and the prejudice which resulted in the erroneous disqualification of counsel, which constituted a plain and structural error it can, and should be considered, on the merits by this Court. See, N.R.S. 34.810.

C. Conclusion

Therefore, petitioner is entitled to a new trial due to the erroneous disqualification of his counsel of choice, Daniel Albregts, accomplished by the bad faith actions of the state, or in the alternative, petitioner is entitled to a full evidentiary hearing to determine all the relevant facts and circumstances for proper consideration by this Court.

GROUND TWO

THE DISTRICT COURT'S IMPROPER AND UNCONSTITUTIONAL CANVASS OF THE PETITIONER REGARDING HIS CONSENT TO THE USE OF SELF DEFENSE, IS PLAIN ERROR, AND IMPROPERLY MINIMIZED THE STATE'S BURDEN OF PROOF THEREBY VIOLATING PETITIONER'S DUE PROCESS RIGHTS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SHOULD MANDATE THE RECUSAL OF JUDGE DONALD MOSLEY FROM ANY FURTHER PROCEEDINGS IN THIS CASE.

A. Factual and procedural background

The issue of conducting a canvass of petitioner as to his consent to the defense of self-defense was first raised, pre-trial in December of 2001 in front of Judge Gibbons. The issue was not raised by the state in a formal motion, but was requested orally during Petrocelli hearings. The Court allowed the defense to respond in writing and ultimately denied the request, which was re-raised and granted by Judge Mosley in March 2004.

1. December 21, 2001 - initial request

During a break in the Petrocelli proceedings that was conducted on December 21, 2001, Deputy District Attorney Christopher Laurent addressed the Court on the issue of canvassing petitioner.

> MR. LAURENT: Judge, there is -- there is one matter I would like to throw out. On a number of these arguments Mr. Bloom has been making, he keeps saying its not an issue of who shot Jeena (Sic) ; it's just not an issue. The issue is going to be mens rea.
>
> In the past what has happened -- because we had a case in front of Judge Thompson at the time where Dave Gibson got up there and basically admitted to second degree murder; says: Yeah, this is murder; we're not going to tell you this wasn't murder.

And the Supreme Court reversed that.

What I'm asking, Judge, is that you canvass the defendant, outside the presence of the state, as to whether Mr. Bloom is authorized to argue that, so that we don't end up starting a trial, having that error introduced, and just so we have a record that's authorized ahead of time.

THE COURT: Okay.

AA, Vol. 1, 202, p. 251, line 12, to p. 252, line 5.

a. The state made material misrepresentations to the Court regarding the authority to both request and conduct a canvass of petitioner.

When asked to give the Court the authority for the canvass, Laurent vaguely referred to the "Beets" case. In prior proceedings, Laurent had also referenced another, unnamed case, believed to be "Johnson". It is now believed the "Beets" case is Beets v. State, 110 Nev. 339, 341, 871 P.2d 357, 358 (1994). It is now believed that the other case that Laurent was "relying" on was the case of Johnson v. State, 17 P.3d 1008, 117 Nev. 153, (Nev. 2001).

The Beets case did not give the Court the authority to canvass the petitioner with regards to his consent to self-defense. In fact, the Beets decision had nothing to do with the issue whatsoever, and it is a mystery as to why the state represented this to the Court.

Similarly, the Johnson case did not give the Court the authority to canvass the petitioner with regards to his consent to self-defense. In Johnson, the Nevada Supreme Court held that a defendant had the absolute right to prohibit defense counsel from interposing an insanity defense. Id. at 1015. At no point in the decision did the Nevada Supreme Court expand it's ruling to all, or for that matter, any other defense, and did not even address the issue of canvassing a defendant.

Furthermore, since the Johnson decision in 2001, the Nevada Supreme Court has not expanded its ruling to allow canvassing of defendants prior to trial with regards to consent a particular to defense, but limited the ruling to the interposing of the insanity defense. Petitioner is unaware of any jurisdiction, state or federal, which allows the Court or the state to canvass a defendant to determine if he is going to assert self-defense, because, quite simply it is not allowed. There was no objection made by Bloom at the hearing, at that time, and no action taken

by the Court.

2. The defense objects to bad faith requests by state and lack of cognizable authority.

On December 26, 2001, the defense filed an opposition to this request entitled "Defense response to the Prosecution's Request that Defendant Be "Canvassed" By the Court to Approve of Presentation of Self Defense Evidence" that was filed on December 26, 2001. (See, AA, Volume 2, at 001-007). Petitioner now incorporates this document, as though fully set forth herein and hereby highlights the following:

a. The state acted in bad faith in making the request to the Court.

DDA Laurent told the Court that "Nevada law requires that the court must 'canvass' the defendant and ask the defendant to make a statement to the court that he admits he fired the shots and agrees with the tactic" Id. at page 2, lines 7-9. There was no such requirement then (in 2001) under Nevada law, nor is there now, or has there ever been. As Bloom pointed out in his brief, "[t]he defense has requested the prosecutor provide him the case authority for this matter. To date, the prosecutor has not provided any authority for this proposition." Id. at 002, lines 14-17.

Bloom went on to further note, "As disturbing in this whole matter is the cavalier manner that the prosecutor used in making this request. The prosecutor didn't come to the court with a noticed memorandum or request in writing . . . [W]hat the prosecutor did, is motion by ambush." Id. at 003, line 24, to 004, line 2. "Without citing any law, and with a statement to the court that a canvassing should be done in a tone and using words which was so "matter of fact", with the clear implication that the law is clear that a canvassing must take place . . . " Id. at 004, lines 2-7.

b. Canvassing is a clear violation of petitioner's constitutional rights.

Bloom clearly identified to the Court that canvassing would be a constitutional violation:

> [T]he implications of the prosecutor's request are monumental. We all are aware of the United States Constitutional protection under the 5th Amendment to remain

silent. This right has been held to be one of the true cornerstones of our judicial system.

What the prosecutor was asking the court to do is to require that the defendant give up that right and make a statement regarding the facts of the case to the court.

Id. at 002, lines 18-25.

[A] canvassing is not required under the law and would actually violate the defendant's U.S. Constitution right to remain silent under the 5th and 14th amendments.

Id. at 003, lines 20-23.

c. The Court becomes a witness to the proceedings requiring recusal.

As Bloom informed the Court on this issue:

If the defense did not request a continuance to research the matter and if the court did not consent to that continuance, the court could have become part of a error of constitutional proportions in requiring defendant to give up his 5th amendment right to remain silent . . . [t]he result could have been that the court might have had to recuse itself from any further proceedings on the case.

Id. at 004, lines 7-14.

3. Second request - December 27, 2001

The matter was next raised on December 27, 2001, prior to the trial of this matter, the state, through Laurent, made an oral motion to then trial and Chief Judge Mark Gibbons, to have petitioner "canvassed" with regard to the issue of his consent to the defense of self-defense.

4. The Court denies the motion

The Court's Minutes reflect the following:

As to the canvass of Defendant, Mr. Laurent advised that he never said it was required, however, he believes it is prudent under the Beets case and advised it is a cautionary measure to make sure the record is clean. Mr. Laurent advised he wants to make sure defense counsel is authorized to do what he does. COURT ORDERED, motion DENIED WITHOUT PREJUDICE. Court advised he will see how things develop.

5. Third request - March 12, 2004

Peterson, for reasons not known, raised the issue of conducting a canvass again, and as

his predecessor Laurent had done, orally and not as the result of a Notice Motion, on the eve of the trial set to commence in March of 2004, Peterson made an oral motion to Judge Donald Mosley (Mosley) on March 12, 2004, as reflected in the Court's Minutes:

> Mr. Peterson requested Defendant authorize Mr. Bloom to admit he was the shooter; that they are using a self-defense theory and that is one of the elements. Following discussion with counsel, Defendant so authorized.

The transcript of this hearing, which is not part of the appellate record, reveals that in response to the Court's inquiry, an objection was made by Bloom but he allowed the canvass to proceed. In response to the Court's canvass, the petitioner responded, "On the advise of counsel, yes." A copy of the transcript of the March 12, 2004 hearing is filed under separate cover as Exhibit 9 and incorporated herein by this reference. The question then becomes for the Court threefold: (1) Did petitioner actually consent to the canvass and/or defense; (2) Does the ineffective assistance of counsel ("On the advise of counsel") vitiate the alleged consent; and (3) How does the effect of an affirmative determination to questions one and/or two affect petitioner's rights?

The only way for the Court to adequately address all of the issues raised by the conducting of the improper canvass, is to conduct an evidentiary hearing in which all the parties involved, including Judge Mosley (as contemplated and placed on the record by the defense in 2001), are questioned about the facts and circumstances of the request and conducting of the canvass, under oath, and how and why the Court and Bloom allowed the canvass to proceed. While this was clearly ineffective assistance of counsel on behalf of petitioner's trial attorneys, as will be further addressed below in Ground Six, it was both prosecutorial misconduct to request the canvass take place and plain error by the Court to allow this improper canvass to be conducted.

This course of prosecutorial misconduct, as outlined in even more detail, in Ground Six, unfortunately infected most, if not all, of the pre-trial proceedings, including not only the issue of canvassing, but the bad faith disqualification of Dan Albregts, as stated above in Ground One, the failure to provide discovery, and other acts of prosecutorial misconduct.

B. Argument and legal authority

1. There is no law authorizing a canvass for consent to self-defense.

Simply put, and as stated above, supra, and briefed to the Court in December of 2001, there is no authority for a consent to self-defense canvass in Nevada and therefore, one should not have been conducted. The state's attempt to bootstrap some authority for the canvass was improper and should have been objected to at each instance, and even without objection, not allowed by the Court. Apparently Judge Gibbons recognized this. Judge Mosley did not.

If the state, or the Court, by endorsing and carrying out the state's improper request wanted to conduct the canvass in 2004, there should have been the opportunity for the defense to brief the issue and present argument at a recorded hearing so as to have the matter properly litigated.

The only case even remotely on point, and not cited to by the state, the defense or the Court was Jones v. State, 110 Nev. 730, 877 P.2d 1052 (1994). This case does not provide the authority for the state to request the canvass and the Court to conduct it. What it does provide is that it is ineffective assistance of counsel in a capital case where "counsel undermined his client's testimonial disavowal of guilt" which occurred "during the guilt phase of the trial" and "in spite of the client's earlier plea of not guilty and without the defendant's consent." Id. at 1057.

The Court was clear that it was limiting it's decision "to the situation present" in Jones and further did not "address or decide the issue of the propriety or effect of defense counsel's unauthorized concession of his or her client's guilt during the penalty phase of trial," Id. at 1057, and also did not at all address the issue of a pre-trial canvass

Furthermore, even if the state, in it's Opposition were to argue Jones does provide some limited authority in support of their request, the canvass conducted in 2004, (1) it wasn't cited to or relied upon by the state or the Court in requesting and obtaining the improper canvass; and (2) the canvass in 2004 exceeded the scope and purpose of the initial request made in 2001, which was denied without prejudice, to have the canvass conducted "outside the presence of the state".

By allowing the state to have the Court conduct a canvass to compel the petitioner to "concede" a necessary element of the state's case, the state and the Court lessened the burden of

prosecution and violated petitioner's Constitutional Fifth and Fourteenth Amendment Right to Remain Silent and his Sixth Amendment Right to Counsel.

2. The actions by the state and the Court were plain/structural error subject to automatic reversal.

The first hurdle the petitioner anticipates having to overcome would be the state asserting that the error was not properly objected to by the defense and hence waived on appeal. The prosecutorial misconduct of requesting and obtaining the improper canvass of petitioner by the Court is plain error subject to appellate review. In the case of Anderson v. State, 121 Nev. 511, 118 P.3d 184 (Nev. 2005), the Nevada Supreme Court stated:

> [F]ailure to object precludes appellate review of the matter unless it rises to the level of plain error. "In conducting plain error review, we must examine whether there was 'error,' whether the error was 'plain' or clear, and whether the error affected the defendant's substantial rights." Thus, "the burden is on the defendant to show actual prejudice or a miscarriage of justice."
>
> Id. at 187.
>
> "[W]e conclude that the jury verdict is valid because the jury was unanimous as to two theories of culpability that are supported by substantial evidence. However, the prosecutorial misconduct committed in this case warrants plain error review because it affected Anderson's substantial rights. Accordingly, we reverse the judgment of conviction and remand this matter to the district court for a new trial."
>
> Id. at 187.

As to what type of error the improper canvass would be properly characterized as, the Nevada Supreme Court has addressed this issue in the case of Manley v. State, 115 Nev. 114, 979 P.2d 703 (1999) and set forth tests for assigning error as follows:

> "Trial error", is any constitutional error "which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether it's admission was harmless beyond a reasonable doubt." Id. at [115 Nev. 123] 307-08, 111 S.Ct. 1246. "[B]efore a federal constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman, 386 U.S. at 24, 87 S.Ct. 824.
> In Arizona v. Fulimante, 499 U.S. 279, 306-312, 111 S.Ct. 1246, 113 L.Ed.2d 302

(1991), Chief Justice Rehnquist, speaking for a majority of the court, distinguished between "trial error" and "structural error" in determining whether a federal constitutional violation could be analyzed under the Chapman test or required automatic reversal. The Court explained that "structural error" is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Id. at 310, 111 S.Ct. 1246. Examples of structural error include total deprivation of the right to counsel at trial, a judge who is not impartial, the unlawful exclusion of members of the defendant's race from a grand jury, deprivation of the right to self-representation at trial, and deprivation of the right to public trial. Id. at 309-10, 111 S.Ct. 1246. Because the entire conduct of the trial is affected, structural error defies analysis by "harmless-error" standards. Id.

Id. at 708.

As stated above, since there are no statutes or cases which require a defendant in a case of self-defense (as suggested by the state) or in any case, to admit or concede, pre-trial and in the presence of the state, essential elements of the state's case, the actions of the state and the Court had the intended effect of lessening the burden of prosecution as well as violating the petitioner's Constitutional Rights. This practice has been condemned by the United States Supreme Court.

Furthermore, before the petitioner was asked if he would essentially waive an element of the state's case, the Court was obligated to inform him of his right to have the issue of who the shooter is or was litigated by the jury. See, United States v. Broce, 488 U.S. 563, 569, 109 S.Ct. 757, 762 (1989). The record must disclose that a guilty plea was "intelligent and voluntary." Boykin v. Alabama, 395 U.S. 238, 242-43, 89 S.Ct. 1709, 1711-1712 (1969). "The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses open to the defendant." Parke v. Raley, 506 U.S. 20, 29, 113 S.Ct. 517, 523, (1992)(quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160 (1970)). "That is so because a guilty plea constitutes a waiver of three constitutional rights: the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination." Id.

In Walter v. Arizona, 110 S.Ct. 3047 (U.S. Ariz. 1990) the Supreme Court, in explaining the difference between the constitutional and unconstitutional state statutes and practices, stated the following:

"The basic of these cases controls the result in this case. So long as a state's method of allocating the burdens of proof does not lessen the state's burden to

prove every element of the offense charged . . . , a defendant's constitutional rights are not violated . . . "

Id. at 3055.

One need look no further than the closing argument to see the effect this had on lessening the burden on prosecution:

> The first thing the State of Nevada has to do in any case is prove the identify of the criminal, and in TV, the movies, we all grew up with books, we had a lot of who dun nit's? It's a mystery who was the person who committed the crime? This isn't one of those cases. The shooter in this case is Chip Centofanti and no one else. We don't have to worry about that. The identity of the Defendant is established.
>
> AA, Volume 5, 110, p.4, lines 15-23.

Therefore, since the effect of the state request and Court conducting the canvassing lessened the burden of prosecution in violation of Walter, petitioner is entitled to a new trial.

3. Petitioner should be allowed to withdraw his consent to defense elicited during the canvass by the Court.

The Nevada Supreme Court has addressed the issue of canvassing in the context of a plea agreement in a number of decisions, which are illustrative of how the petitioner should be allowed to withdraw this improper canvass and granted a new trial. Here, however, there was no written canvass agreement so the only thing the Court has to review is the record.

In Crawford v. State, 117 Nev. 718, 30 P. 3d 1123 (2001) the Nevada Supreme Court stressed the importance of having a record of the proceedings to review.

> "Our review of the record convinces us that under the totality of the circumstances, Crawford's plea was not knowing, voluntary and intelligent. The court's canvass of Crawford was insufficient . . . . The canvass conducted orally by the court was inadequate to demonstrate that Crawford's plea was voluntary.

Id. at 1127.

Based upon the above, the decision of the district court in Crawford to not allow the withdrawal of the plea, was reversed and the case remanded to the district court with instructions to allow Crawford to withdraw his guilty plea.

As to the absence of an adequate record, the Nevada Supreme Court in Palmer v. State,

118 Nev. 823, 59 P.3d 1192 (2002), held:

> "The record before us is silent with respect to whether Palmer knew, in pleading guilty . . . that he would be subject to lifetime supervision; an evidentiary hearing on this issue is therefore necessary. Should the totality of the circumstances indicate that Palmer was unaware of the direct consequences of lifetime supervision, the district court must allow him to withdraw his guilty plea. Accordingly, we reverse the order of the district court and remand the matter for an evidentiary hearing."

Therefore, the Court should conduct an evidentiary hearing if there are any doubts about the facts and circumstances surrounding the request and the conducting of the canvass by the Court.

In Meyer v. State, 95 Nev. 885, 603 P.2d 1066 (1979), the Nevada Supreme Court held that the failure to adequately inform Meyer of the consequences of his plea created a manifest injustice that may be corrected by setting aside the conviction and allowing Meyer to withdraw his guilty plea. See, NRS 176.165. The order denying the withdrawal of the plea was found to be an abuse of discretion. Consequently, the order was reversed and the case was remanded to the district court to permit Meyer to plead anew.

The record in this case indicates the reluctance of petitioner to consent and in fact reveals that he was relying upon (the faulty) "advice of counsel" in consenting to the canvass. In Smith v. State, 110 Nev. 1009, 879 P.2d 60 (1994) the Supreme Court dealt with the issue of coercion in a canvass situation. In Smith, Smith plead guilty to first degree murder and signed a formal written pleading prepared by the district attorney's office, called a "Guilty Plea Memorandum," in exchange for the state's dismissal of the robbery and sexual assault charges and for the state's promise not to seek the death penalty. The Court held, as follows:

> "The transcript of the guilty plea canvass clearly reveals that Smith's plea is the result of coercion rather than being an informed and voluntary decision. See, NRS 174.035(1); Hanley v. State, 97 Nev. 130, 624 P.2d 1387 (1981). The plea canvass pretty much speaks for itself. The Guilty Plea Memorandum does not validate Smith's guilty plea to premeditated, first-degree murder."

Id. at 61.

Finally, the Court noted:

"[J]udicial involvement in plea negotiation inevitably carries with it the high and unacceptable risk of coercing a defendant to accept the proposed agreement and plead guilty." United States v. Bruce, 976 F.2d 552, 556 (9th Cir.1992). Id. at 63.

Here, the canvass was conducted only after the Court took a break in the proceedings after petitioner wished to consult with his counsel, off the record, regarding the request. When the proceedings were resumed, petitioner was canvassed by the Court and stated in response to whether or not he had consented to the defense of self-defense responded "On the advise of counsel" which is hardly an unequivocal "yes."

The Nevada Supreme Court further addressed a defendant's misunderstanding of the consequences of acquiescence to the improper actions of the Court in Douglas v. State, 99 Nev. 22, 656 P.2d 853 (1983). In Douglas, the Court held that where defendant's plea of guilty to a crime of giving away a controlled substance was based upon his misunderstanding that the maximum sentence was 20 years instead of life and his misunderstanding was not adequately clarified or contradicted on the record, sentence imposed on defendant would be modified from suspended life sentence with five years' worth of probation to suspended 20-year sentence with five years' probation.

In Henderson v. Morgan, 426 U.S. 637 (1976), the United States Supreme Court held that where neither defense counsel nor the trial court explained to the petitioner that an intent to cause death of his victim was an element of the offense of second degree murder and the petitioner made no factual statement or admission necessarily implying that he had such intent, the petitioner's plea of guilty to a charge of second degree murder was involuntary and that error was not harmless. Here, no one explained to petitioner that the request for canvass and the canvass itself was not required in order to proceed with trial (and in fact petitioner was informed, incorrectly, just the opposite). Also, no one explained to petitioner that the identity of him as the shooter was a necessary element of the crime of murder and that by consenting to the canvass, he was waiving his right to have the state prove it at trial.

Therefore, under the mandates of Crawford, Meyer, Douglas, Smith, and Palmer, and Henderson, the Court should allow petitioner to withdraw the answers given in response to the

improper request/improper canvass which occurred and which forced the petitioner to give up his Fifth and Fourteenth Amendment Right to remain silent as well as lessened the burden of prosecution. At the very least there should be an evidentiary hearing conducted to determine if petitioner acquiescence to the canvass was not the product of coercion by the state, the Court and even his own counsel (as addressed by the Nevada Supreme Court in Smith, supra, "Smith's plea was the result of extended "coaching" by all concerned, including the district court." Id. at 63.).

4. Forcing petitioner to testify is reversible error

As demonstrated above, the state, the Court and petitioner's own counsel compelled defendant to give up his Fifth and Fourteenth Amendment Right to remain silent which resulted in lessening the burden of prosecution. It should also be noted that even back in 2001, Laurent requested that the canvass take place "outside the presence of the state." It appears, in retrospect that the state wished to ensure that there was not an automatic "out" for petitioner with regards to this issue, but even in their improper zeal to undermine petitioner's constitutional rights, they realized that there had to be some limits, those being a record made outside of their presence, and ostensibly the knowledge of the state as to petitioner's consent.

This then apparently evolved by March of 2004 to include having the state present during the canvassing, which was requested and, over objection, obtained in the presence of the state. At that point, the violation of petitioner's Fifth and Fourteenth Amendment rights to remain silent were complete due to the improper actions of the state and the Court. Petitioner's conviction should be reversed on this ground alone, as Nevada has routinely reversed convictions based upon Fifth Amendment Rights violations. See, Flanagan v. State, 104 Nev. 105, 754 P.2d 836, 839, (1988) ["We conclude that the prosecutor's remarks were a violation of Flanagan's fifth amendment right to remain silent and constitute reversible error."]; Byford v. State, 116 Nev. 215, 994 P.2d 700, 704 (Nev. 2000) [In 1994, Byford and Williams were found guilty by a jury and sentenced to death, but this court reversed their convictions and remanded for retrial due to violation of their Fifth Amendment right to remain silent.] See, also, Murray v. State, 113 Nev. 11, 930 P.2d 121 (1997).

As previously cited to in Ground Two, supra, the United States Supreme Court has

addressed the issue of violation of a defendant's right to remain silent in Gilmore v. Taylor, 113 S.Ct. 2112, 508 U.S. 333, which is reversible error. In Gilmore the Court held:

> The Fifth and Fourteenth Amendments to the Constitution guarantee every criminal defendant the right to remain silent. Our precedents have explained that this right precludes the state from calling the defendant as a witness for the prosecution. See, e.g., South Dakota v. Neville, 459 U.S. 553, 563, 103 S.Ct. 916, 922, 74 L.Ed.2d 748 (1983) (the "classic Fifth Amendment violation"[508 U.S. 363] consists of requiring the defendant to testify at his own criminal trial); Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964) (the Fourteenth Amendment Due Process Clause incorporates the Fifth Amendment right to remain silent against the states). The state must provide all evidence necessary to a conviction if the defendant chooses not to testify.
>
> Id. at 2128-2129.
>
> When a defendant intentionally pleads guilty to an offense, he has a constitutional right to be informed about the consequences of his plea. See Mabry v. Johnson, 467 U.S. 504, 509, 104 S.Ct. 2543, 2547, 81 L.Ed.2d 437 (1984); Marshall v. Lonberger, 459 U.S. 422, 436, 103 S.Ct. 843, 852, 74 L.Ed.2d 646 (1983). Taylor, however, was never apprised of the consequences of his testimony. [508 U.S. 364] Instead, he was affirmatively misled into unknowingly confessing to a crime of which he claimed he was innocent. The judge's erroneous instructions thereby vitiated Taylor's right to a fair trial, guaranteed him by the Sixth and Fourteenth Amendments.
>
> Id. at 2129.

Here, the Court should have advised petitioner of his right to remain silent and to not answer the canvass requested by the state and conducted by the Court without being advised of his constitutional rights and obtaining a valid waiver thereto. This failure to apprise petitioner of the consequences of his testimony and the lessening of the burden of prosecution, was no less erroneous than it was in Taylor and no less a violation of his right to due process and a fair trial under the Fifth, Sixth and Fourteenth Amendments.

5. The Court should recuse itself from further proceedings

As originally brought to the Court's attention in December of 2001, the allowing of the canvass should not have been conducted by the Court because it would make the Court a participant and witness to the violation of the petitioner's constitutional rights as mentioned above.

The Court's active participation in the violation of petitioner's rights creates a conflict of interest for the Court and the appearance of impropriety which can only be addressed by the Court recusing itself from any further proceedings regarding this case.

Therefore, since the Court is both a witness and participant in the proceedings, the Court should recuse itself from hearing and deciding this matter as the petitioner may be required to call Judge Mosley as a witness in any hearing on this petition.

C. Conclusion

Therefore, petitioner is entitled to a new trial due to the improper canvass requested by the state and performed by the Court, or in the alternative, petitioner is entitled to a full evidentiary hearing to determine all the relevant facts and circumstances regarding this issue and the Court allowing it to occur at all, let alone the presence of the state, which exceeded the original request which was to preserve the consent for appeal and not to lessen the burden of the state. Finally, Judge Mosely should not be allowed to hear this matter as he has a conflict of interest and should recuse himself from this case.

GROUND THREE

PETITIONER IS ENTITLED TO RECONSIDERATION OF HIS MOTION FOR NEW TRIAL DUE TO PREJUDICIAL PROSECUTORIAL MISCONDUCT IN VIOLATION OF THE U.S. SUPREME COURT'S HOLDINGS IN BRADY, NAPUE, AND GIGLIO, WHICH ROSE TO THE LEVEL OF PLAIN ERROR.

A. Factual and procedural background

On June 28, 2004, petitioner filed a Motion for a New Trial. See, AA, Volume 8, 065-105. The Motion raised various grounds of juror misconduct, including Juror Caren Barrs not being qualified for juror service due to a felony conviction and juror misconduct by Barrs for not disclosing same. Other instances of juror misconduct were also raised, including a juror wearing an objectionable T-Shirt, jurors sleeping, and a juror conducting a fire-arm experiment. Id.

On August 10, 2004, the state filed it's Opposition to Defendant's Motion for New Trial. AA, Volume 8, 110-135.

On August 4, 2004, petitioner filed his Reply. AA, Volume 8, 141-181.

On August 26, 2004, the Court held a hearing on the Motion for New Trial. AA, Volume

8, 185-225. The state also made a Motion, entitled, "To Compel Audio Taped Interview." Id.

The Court did not conduct an evidentiary hearing, but instead heard argument from petitioner's counsel, Carmine Colucci, and for the state Deputy District Attorney Clark Peterson. Peterson presented false testimony, evidence and argument which were improper and materially prejudiced petitioner. These instances of prosecutorial misconduct constitute plain error and should be reviewed and considered by this Court in full.

1. Presenting false argument, facts, evidence and testimony in support of the state's opposition.

a. State's opposition (in writing)

In it's Opposition, the state falsely claimed that Caren Barrs' civil rights were restored and made the following assertions and arguments in it's brief:

> The Defendant is not entitled to a new trial based on a prior felony conviction of Caren Barrs because her civil rights have been restored entitling her to serve on a jury and she did not commit misconduct during voir dire.
>
> Caren Barrs is qualified to sit on a jury because her civil rights have been restored.
>
> Caren Barrs' Judgment of Conviction was filed on July 10, 1989, and she was sentenced to four (4) years probation. Her civil rights, therefore, automatically restored sometime in 1984. Consequently, she was qualified to serve on the jury.
>
> AA, Volume 8, 115, p. 6, lines 9-11.

These arguments were false and not based upon any facts, evidence or law that Peterson could prove in Court. They were also facts that could not and should not have been relied upon because they were false.

2. Presenting false argument, facts, evidence and testimony at the August 26, 2004 hearing.

During the hearing on the Motion for New Trial conducted on August 26, 2004, Peterson made a number of false representations to the Court on material issues germane to the motion and the hearing itself. The record itself proves that Peterson's representations were false.

a. Caren Barrs affidavit

Peterson argued extensively from the affidavit of Caren Barrs. The problem was he did

not do any investigation of the assertions and facts that were contained in the affidavit, which were conclusively proven to be false by the defense, at the hearing, and subsequently recognized as false by the Nevada Supreme Court in the Order of Affirmance. "From the record, it appears that Juror Barrs intentionally concealed her felony status." See, December 27, 2006, Order of Affirmance, filed under separate cover as Exhibit 4, at page 6.

> In the attached affidavit, Caren Barrs explained that when she believed she did disclose her felony conviction. She entered the appropriate data via telephone and in person and was told to appear for jury duty. She also wrote the information down on the Jury Commissioner information sheet.
>
> AA, Volume 8, 115, p. 6, line 26, to 116, p. 7, line 1.

This assertion by Barrs, as endorsed and presented the prosecutor was false, as further detailed in Section c, below.

b. Civil rights restoration

The defense provided the conclusive facts, evidence and law indicating that Caren Barrs' civil rights were not restored by the State of Florida. This information was provided to the state in advance of the hearing, and the state had a duty to investigate this evidence before attempting to mislead the Court and unduly influence the conduct of the proceedings by making the following false and improper assertions and argument:

1. False assertion by the state

> [I]t's an out and out incorrect assertion to say she did not have her civil rights restored.
>
> AA, Volume 8, 196, p. 12, lines 15-16.

2. False assertion by the state

> By operation of Florida law passed in 1975 when a person completes their probationary sentence, their civil rights, other than possessing a gun, shall be automatically reinstated. Automatically reinstated.
>
> Id. at lines 20-23.

3. False assertion by the state

> [B]ecause she's automatically reinstated. She votes. She has a nursing license.
>
> Id. at 197, p. 13, lines 2-3.

4. False assertion by the state

> THE COURT: I thought it was automatic.
> MR. PETERSON: It is automatic. She doesn't have to apply after 1975, upon completion of your probationary period you automatically have your civil rights restored, other than your right to own a firearm. That would be regulated and apply. Ms. Barrs' conviction was in 1980. By executive clemency rules in Florida, her civil rights are restored. She is not a felon.
>
> Id. at 201, p. 17, lines 3-15.

5. False assertion by the state

> There are no documents of restoration because they are automatic. She doesn't have to apply.
>
> Id. at 203, p. 19, lines 2-20.

Caren Barrs' civil rights were not restored. Exhibit A of Defendant's Reply to the Opposition to the Motion for a New Trial was a certificate signed from Jeanette Cools, the coordinator of the Office of Clemency in the State of Florida clearly stating that Barrs' civil rights were not restored in the State of Florida, so there is documentation of her rights not being restored, because she needed to apply to have her rights restored and she never did. It's not automatic. See AA, Volume 8, at 153-154.

Exhibit B to the Reply was the applicable directions to have her civil rights restored which clearly showed that she did not comply with the process and her civil rights were not restored. See, AA, Volume 8, at 155-157.

Finally, when Caren Barrs applied to be a nurse in the State of Nevada she disclosed that she did indeed have a felony conviction in the State of Florida. See, AA, Volume 8, 215, p. 31, line 10 to 216, p. 32, line 3. This militates against her and Peterson's assertion that "she thought she didn't have a problem as a result of what happened 20 years ago in Florida for a bad check" (See, AA, Volume 8, p. 216, p.32, lines 22-23) and/or that her rights were automatically restored? If so, why is she disclosing the felony conviction?

c. Disclosure to jury commissioner's office

The defense provided an affidavit from the jury commissioner as well as all the documents and other evidence regarding Caren Barrs' jury service. This evidence conclusively

proved that she did not disclose her felony conviction to the jury commissioner's office, yet, the state continued to argue that she did.

1. False representation number one

> [S]he indicated to me that she called in to the jury commissioner and spoke with a person on the phone. She indicated to them she had something, that it was 20 years old. They said: Was it in Nevada? She said: No. And they said: Come on down and report for service.
>
> Id. at 208, p. 24, lines 5-10.

2. False representation number two

> THE COURT: Well, did she say she told them?
> MR. PETERSON: She says on the Centofanti matter she informed them. Because apparently, you have to push a button when you phone in on the phone - in system. And they asked her: Is it in Nevada? No. Did you go to prison for it? No. Have you heard anything else? And she said no.
>
> Id. at 212, p. 28, lines 11-20.

Neither the jury commissioner [or the registrar of voters - another assertion by Peterson to support his claims] checks to see if someone is a felon, they simply rely upon the person's representations. The defense provided an affidavit from the Jury Commissioner as Exhibit C, AA, Volume 8, 158-162, and four separate documents from the Jury Commissioner, Exhibit C-1, AA, Volume 8, 162-166, that conclusively show that Ms. Barrs' did not indicate by phone at any time during the four times she contacted them that she was a felon, and did not speak with anyone from that office about her having a felony. The defense also provided the documentation from the registrar of voters as well. See, AA, Volume 8, 170-171. All this evidence and documentation belies the state's improper and false assertions made during the hearing and make their misrepresentations intentional and in bad faith.

d. Nursing license

The final issue was the issue of Caren Barrs' nursing license. As stated above, she did indicate to the licensing board that she did have a felony, and hence she would seem to be collaterally estopped from then arguing she thought she didn't have a felony conviction and that her rights were automatically restored, and therefore she didn't need to disclose it at voir dire.

MR. PETERSON: [I]told the licensing board about that. It didn't become a problem. I was able to get my nursing license.

Id. at 216, p. 32, lines 18-20.

[I]t was a great shock to her to hear these allegations made. She's a registered nurse. She's voted for some time.

Id. at 208, p. 24, lines 1-3.

As previously stated the arguments regarding the nursing license board are without merit, as is the "throw in" argument that she is allowed to vote. She was not "allowed" to vote, she just unlawfully did so.

While the Court ultimately ruled that in it's opinion the defense was "fly-specking" [AA, Volume 8, 222, p. 38, line 25] the state (Peterson) here was clearly "grasping at straws" in an attempt to bolster a juror who clearly lied about her felony status both before being called to serve, while serving and thereafter.

As to this issue the Court stated:

THE COURT: I'm not particularly taken aback by the fact that she was consistent in her denial of her criminal record. If she firmly believed it was absolved, that she had no duty to divulge it, it would be consistent.

AA, Volume 8, 213, p. 29, lines 20-23.

This assertion by the Court was also belied by the record, as demonstrated above, as Barrs disclosed her felony conviction to the Nevada State Nursing Licensing Board (if she thought she did not have a conviction than why would she disclose it).

e. False representation by the state

After the discussion concluded regarding the issue of Caren Barrs, Colucci requested the Court's findings on the three other issues raised in the Motion for New Trial, those being, the T-Shirt, sleeping jurors and the juror gun experiment.

1. T-Shirt issue

Both the state and the Court were mistaken as to the facts surrounding the "T-Shirt" issue as evidenced by the following exchange:

MR. COLUCCI: [T]he fact that somebody comes in and wears a T-Shirt in the courtroom that says, "What does a murderer look like," and is sitting as a juror is not a small matter. That's not fly-specking.
THE COURT: I don't think anybody saw that.
MR. PETERSON: No one saw it. It's a T-Shirt, it's a name of a song of a local band. This kid was wearing the band's T-Shirt, it said on the back near the belt. Apparently some other juror saw it and said: You know what Chris, that's a silly thing to wear given the trial we're in, cover it up. No one noticed it.

Id. at 223, p. 39, line 15 to 224, p. 40, line 6.

If this was the case, then why did the other jurors call it to the attention of the bailiff who instructed the juror in question to turn the shirt inside out? This then calls into question whether or not the bailiff is not only a witness to these events but may have committed misconduct by failing to report the incident to counsel or the Courts so that a record could have been made of this incident. See, Daniel v. State, 78 P.3d 890, 119 Nev. 498 (Nev. 2003) [defendant's right to an impartial jury was violated when the trial court refused to question a juror about the juror's comment to the bailiff, asking why the defendant was not in shackles].

2. Juror sleeping

The state was heard on this matter and told the court that he did not see anyone sleeping, nor did it appear that anyone else did. Id. at 234, p. 40, lines 7-15.

In response to these two issues the Court stated, without having an evidentiary hearing, "here's a guy that dozes off a little bit" [Id. at 223, p. 39, line 5] and "inattentive a total of two minutes in five weeks [Id. at lines 11-12] and "whatever we're talking about, it's not a major thing." [Id. at 12-13].

3. Firearms experiment

The Court also failed to address this issue despite the fact that juror Josh Wheeler went shooting during the trial with his dad and had a discussion with him regarding issues that came up during the trial, including how fast to empty a gun, to which they both said "let's try it." He indicated they were told it would take 2.3 seconds but it took him and his dad a total of five (5) seconds. See, Exhibit G, AA, Volume 8, 179-181.

There is case law directly on point on this very issue that petitioner was not able to bring

forward due to the Court's refusal to hold a hearing. The Ninth Circuit has indicated that just such an experiment, as was conducted by Wheeler is prejudicial. [See, Marino v. Vasquez, 812 F.2d 499, (C.A.9 (Cal.) 1987) Juror's out-of-court experiment with a handgun, with a third person, prejudiced defendant as the defense could neither confront nor cross-examine the non-juror who participated in the out-of-court experiment, as it could examine jurors who witnessed an unauthorized experiment performed in jury room at the behest of parties in court, and subject related to issues material to guilt or innocence of defendant.]

f. The Court prejudiced petitioner by failing to hold a full evidentiary hearing.

The Court ultimately decided not to hold a hearing on any of the juror misconduct issues. This despite the fact that the Court appeared to have some misgivings as to whether or not Barrs was being truthful. The Court refused to allow the defense to call any witnesses at the hearing:

> THE COURT: Now, there is, I think, something to be said about an indication at one point that she told these people that she had a problem 20 years ago, and perhaps a record showing an absence of such.
>
> Id. at 213, p. 29, lines 15-19.

> THE COURT: Now if there's some argument that she did divulge and then somebody said she didn't, then that goes to veracity.
>
> Id. at 214, p. 30, lines 10-12.

The Court did not conduct an evidentiary hearing or give the defense an opportunity to make a record on this issue. Id. at 222, p. 38, lines 18-20. Without this record, petitioner was prevented from having the necessary evidence to present to the Nevada Supreme Court on Appeal. The Nevada Supreme Court opined that petitioner had not shown any prejudice to him during this hearing. That was because the District Court would not allow him to do so. It appears that the District Court's reluctance to have these matters heard had nothing to do with the merits:

> [T]hen all that goes on, the weeks, maybe months that goes on in trial can all be set aside, and many thousands and thousands of dollars of tax-payers money is

just pooped away because there is this omission [By Barrs].

AA, Volume 8, 219, p. 35, lines 21-25.

To the extent that the state's (Peterson's) false and material misrepresentations to the Court resulted in the Court deeming a hearing unnecessary, it prejudiced petitioner as he was not able to examine Barrs' under oath and therefore was prevented and unable to show prejudice and bias, thus this issue was denied on appeal. Furthermore, the statements of Peterson, as a matter of law of the case, are false. Nevertheless, the Nevada Supreme Court held "from the record it appears that Juror Barrs intentionally concealed her felony status." See, December 27, 2006 Order of Affirmance, filed under separate cover as Exhibit 4, at page 6.

The prejudice by failing to hold a hearing is evident in the Supreme Court's Affirmance in which the Court stated:

> T-Shirt and sleeping juror issue
>
> Centofanti also argues that he is entitled to a new trial because a juror wore a tee shirt that read, "Do you know what a murderer looks like" and because two jurors were sleeping during trial. Centofanti failed to object to both instances of the alleged misconduct, we conclude neither instance amounted to plain error.
>
> Affirmance, p. 5, note 11.
>
> Failure to disclose felony status
>
> When deciding whether a juror's misconduct was prejudicial, we look to whether there was actual or implied bias. "Actual bias exists when a juror fails to answer a material question accurately because he is biased," and the defendant must prove actual bias "through admission or factual proof." . . . Accordingly, because Centofanti has demonstrated no implied bias or prejudice, he is not entitled to a new trial.
>
> Id. at pp. 6-7.
>
> Firearms experiment
>
> Centofanti has failed to demonstrate that misconduct actually occurred or, if it did, that the misconduct was prejudicial.
>
> Id. at p. 8.

With respect to the issues raised above, petitioner could not "demonstrate implied bias or

prejudice" or that the misconduct was prejudicial because he was not given an opportunity to have an evidentiary hearing by the district court. Barrs committed fraud both before, during (jury selection) and after (post trial proceedings) trial. This fraud, in the form or false and inaccurate affidavits provided to the state in support of their Opposition, demonstrated both bias and prejudice in favor of the state. Furthermore, the state used this fraud to deprive the petitioner of his due process right to a fair hearing and a full opportunity to be heard on this issue, as well as the other issues of juror misconduct on the issue of the T-Shirt, sleeping and the firearms experiment.

All of the cases cited by petitioner to the Nevada Supreme Court, on the issues of juror misconduct, had one thing in common, that defendants were allowed to have a full evidentiary hearing to develop all of the facts and evidence necessary to create an adequate record. How can the petitioner in this case be expected to establish prejudice if there is no hearing allowed to examine witnesses and make a record? The false statements of Caren Barrs, endorsed and set forth by the state, were relied upon by the District Court to deprive petitioner of this opportunity.

B. Argument and legal authority

The state should be held accountable for the improper and prejudicial actions in the Opposition filed with the Court and at the hearing on the Motion for New Trial. The state should not be allowed to present false argument, evidence, testimony and authority to the Court which prejudiced petitioner's ability to create a record to the Nevada Supreme Court on the issue of the bias and prejudice of juror Caren Barrs' intentional concealment of her felony conviction, which denied petitioner his request for a new trial and the opportunity to have a full evidentiary hearing on this issue, as well as the other issues of juror misconduct on the issue of the T-Shirt, sleeping and the firearms experiment.

A number of the Nevada Rules of Professional Conduct prohibit the very conduct Peterson engaged in by the submission of false evidence in support of his Opposition and the false facts, evidence, and argument at the hearing on the Motion for a New Trial.

Nevada Rules of Professional Conduct Rule 8.4. Misconduct, provides, in pertinent part, as follows:

It is professional misconduct for a lawyer to:

...

(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

...

Nevada Rules of Professional Conduct Rule 3.3., Candor Towards the Tribunal, provides, in pertinent part, as follows:

> (a) A lawyer shall not knowingly:
> (1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
> (2) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
> (3) Offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
> (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
> (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Nevada Rules of Professional Conduct Rule 3.4, Fairness to Opposing Party and Counsel, provides, in pertinent part, as follows:

> A lawyer shall not:
> (a) Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
> (b) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.

Nevada Rules of Professional Conduct Rule 4.1 Truthfulness in Statements to Others.

> In the course of representing a client a lawyer shall not knowingly:
> (a) Make a false statement of material fact or law to a third person; or
> (b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Petitioner has clearly established the state's knowing failure to correct the false testimony (by affidavit) of Barrs and that the testimony was material to the Court's decision not to hold a

hearing and allow petitioner to examine Barrs under oath to try to establish her bias and prejudice which would entitle petitioner to a new trial.

The Nevada Supreme Court has held:

> When deciding whether a juror's misconduct was prejudicial, we look to whether there was actual or implied bias. "Actual bias exists when a juror fails to answer [A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." ' Remarks by a prosecutor must be read in context and, if improper, will constitute harmless error when there is overwhelming evidence of guilt and this court can determine that no prejudice resulted to the defendant. Prejudice follows from a prosecutor's remarks when they have "so infected the proceedings with unfairness as to make the results a denial of due process." Johnson v. State, 148 P.3d 767, 775, (Nev. 2006).

Here, we are not speaking of prosecutorial misconduct leading to a conviction, but the denial of the right to a new trial. It is clear that the multiple misrepresentations by the state "so infected the proceedings" on the Motion for New Trial as to prejudice petitioner, the question is what is the remedy available to a defendant in this situation as a result of this misconduct.

In Riley v. State, 93 Nev. 461, 567 P.2d 475, 567 (1977) the Court held:

> "It is established that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942); Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957); Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); Miller v. Pate, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690(1967); Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).].

There are no Nevada Cases regarding prosecutorial misconduct which resulted in the context of a denial of a Motion for New Trial. However, it can be analogized to be a species of Brady error, which occurs when "the undisclosed evidence demonstrates that the prosecution's case included perjured testimony and that the prosecution knew, or should have known, of the perjury." United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)). In order to prevail under Giglio, one must establish that: (1) the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony; and (2) such use was material--i.e., that there is "any reasonable likelihood" that the false testimony "could ... have affected the judgment." Giglio, 405 U.S. at 154, 92 S.Ct. 763.

Since the time of the hearing there have been a number of prosecutorial misconduct cases both here in Nevada as well on a national level [The Duke Lacrosse case]. There is a dearth of Nevada cases dealing with prosecutorial misconduct in the context of a motion for a new trial. However, in the case of Hays v. Farwell, 482 F.Supp.2d 1180 (D.Nev. 2007), the Nevada U.S. District Court was asked to review a denied Motion for a New Trial raised in a federal petition for habeas corpus. Hay's Motion for a New Trial had been denied by Judge Mosely. In determining that the denial of the Motion for New Trial was improper the Court found:

> "Her [the alleged victim's] affidavits, which were presented to the trial court with Hays's motions for new trial, raised serious questions about the validity and veracity of her testimony. The affidavits also cast doubt upon the integrity of the prosecution in the matter."

Id. at 1189.

Peterson made the argument that Ms. Barrs was not a convicted felon and that her record in the State of Florida had been restored. This representation to the Court was false, misleading and clearly prosecutorial misconduct. Counsel for petitioner raised this issue at the hearing, but the Court, in denying the petitioner an evidentiary hearing and the ability to call Ms. Barrs for examination under oath, denied the petitioner due process and failed to receive evidence which would have conclusively established grounds for a new trial, as well as sanctions, if not worse, against Peterson for his unethical actions relating to the hearing.

How could petitioner be expected to prove actual bias "through admission or factual proof" when petitioner was not allowed to examine Caren Barrs under oath? Further, how could petitioner anticipate the ruling to the Nevada Supreme Court as to include this issue in the direct appeal? Petitioner could not be expected to anticipate the Court's ruling on Barrs' intentional misconduct and therefore this issue cannot be procedurally barred because petitioner was not made aware of the error until the Supreme Court's December 27, 2006 ruling.

It would be up to the Court to hold the necessary hearing to determine the breath and extent of the District Attorney's Office in presenting the false testimony, argument, evidence and authority to the Court in connection with the misconduct in the motion and hearing for a new trial. Once this is done, the Court should then look to U.S. Supreme Court decisions for

guidance on how to best remedy this situation.

Due process is violated when the prosecution suppresses evidence, irrespective of good or bad faith, that is favorable to the defense and material to the defendant's guilt or punishment. Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The state's knowing failure to correct false testimony also violates due process if the false testimony was material. Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). The disclosure requirement of Brady applies with equal force to evidence that affects only the credibility of witnesses. Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); Napue, 360 U.S. at 269, 79 S.Ct. 1173.

The state's presentation of misleading and outright false facts, argument, evidence and law in support of it's Opposition to the Motion for a New Trial and at the hearing is clearly violative of the spirit if not the letter of Brady, Giglio, and Napue, as the state knew or should have known through proper investigation that the affidavit and information provided by Caren Barrs was false. Further the state had both a duty and an obligation to investigate the facts and circumstances as to all of the instances of juror misconduct before presenting it as fact to the Court.

As in Hays, Barrs' statements (and other jurors) raised serious doubts as to the veracity and credibility of her testimony. Defense counsel provided the Court and the state in it's motion and reply all the relevant facts, information and evidence to show that Barrs was still a convicted felon, had not applied for or received clemency, and did not inform the jury commissioner of her felony conviction. Furthermore, the defense conclusively disproved the position that Barrs somehow "forgot" about her conviction when records showed she requested a copy of her criminal record from the State of Florida as recently as 1998 and disclosed this to the Nevada nursing licensing board that she still had a conviction.

This type of misconduct was considered by the Court in United States v. Alexander, 748 F.2d 185 (4th Cir.1984). In Alexander, the Fourth Circuit found "the Government's equivocation in making critical factual representations to defense counsel and the district court . . . compromised the integrity of the proceedings on the new trial motion." Id. at 191. Accordingly,

they remanded to the District Court, directing it to reconsider Alexander's motion for new trial. Id.

In the case of Earp v. Ornoski, 431 F.3d 1158 (C.A. 9 (Cal.) 2005) the Ninth Circuit faced the problem of prosecutorial misconduct in the context of a Motion for a New Trial. In Earp the Court determined that Earp made out "at least a colorable claim" that he was "prejudiced by the prosecutor's misconduct" of based upon the allegations that the prosecutor "precluded him from presenting a witness in support of his Motion for a New Trial." [Citing to Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct.1038, 35 L.Ed.2d 297 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense."]. Id. at 1171.

The Ninth Circuit further looked at the failure of the trial judge to hold a hearing on the issue of the above mentioned alleged prosecutorial misconduct, and determined that "Earp does not need to prove that the prosecutor committed misconduct or that his due process rights were violated; he only needs to allege a colorable claim for relief." See Phillips, 267 F.3d at 973. This is a low bar, and Earp has surmounted it." Id. at 1170.

Applied to the facts at bar, it is clear that the actions and conduct of the prosecutor at the Motion for New Trial Hearing (and in the Opposition that was submitted) were designed to preclude the petitioner from presenting the necessary facts and evidence to the Court regarding the misconduct of Caren Barrs' such that petitioner was prevented from establishing a record of the bias and prejudice which the Nevada Supreme Court deemed necessary to grant petitioner his request on appeal for a new trial.

Finally, the argument and reasoning of both the state and the Court was suspect with regards to characterizing (or more accurately minimizing) a 20 year old conviction for a bad check was improper. Under Nevada and Federal Law, crimes involving dishonesty or falsity, such as her bad check conviction, can be used to impeach. See, NRS 50.085(3) [Permits impeaching a witness on cross-examination with questions about specific acts as long as the impeachment pertains to truthfulness or untruthfulness.] Butler v. State, 120 Nev. 879, 102 P.3d 71 (2004); Federal Rules of Evidence, Rule 609(a)(2); 28 U.S.C.A.; U.S. v. Cuozzo, 962 F.2d 945, certiorari denied 113 S.Ct. 475, 506 U.S. 978, 121 L.Ed.2d 381 (1992). Therefore, both the

state and the Court unduly disregarded Barrs' conviction by not allowing her to be examined regarding it under oath in order to demonstrate bias and prejudice, to the detriment of petitioner.

C. Conclusion

Petitioner is and was entitled to an evidentiary hearing on his prosecutorial misconduct claim involving Caren Barrs, and perhaps other jurors whose misconduct was alleged, because he has alleged facts which, if proven true, would entitle him to relief on this claim.

Petitioner is also entitled to a reconsideration of his Motion for a New Trial and an evidentiary hearing on the issue of the intentional concealment of the felony conviction of Caren Barrs by both Barrs and the District Attorney's Office, in order to allow petitioner the right to examine Barrs as to the bias and prejudice needed to be established to obtain appellate relief for a new trial or in the alternative, petitioner is entitled to a full evidentiary hearing to determine all the relevant facts and circumstances for proper consideration by this Court.

This would also necessitate the recusal of Judge Mosley from the hearing of this issue, as it appears from the facts and circumstances, that his bailiff and perhaps other key court personnel may be called as witnesses as to some of the alleged instances of juror misconduct. In particular, on the issues of juror sleeping and the t-shirt (bailiff told the "offending" juror to turn the t-shirt inside out because of the language on the t-shirt), if the bailiff failed to bring to the attention of the Court and the parties the instances of juror sleeping or the juror t-shirt issue, this may provide the petitioner with an additional grounds for relief which should not be heard by Judge Mosley to avoid the appearance of impropriety (the Judge ruling on whether or not his staff's actions were proper or not) and in the interest of justice.

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GROUND FOUR

THE DISTRICT COURT'S INSTRUCTIONS ON REASONABLE DOUBT AND PREMEDITATION IMPROPERLY MINIMIZED THE STATE'S BURDEN OF PROOF THEREBY VIOLATING PETITIONER'S DUE PROCESS RIGHTS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

1. Unconstitutional reasonable doubt instruction

A. Factual and procedural background

On April 15, 2004, the District Court instructed the jury on reasonable doubt as follows:

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

Instruction No. 26. A copy of Jury Instruction Number 26 is filed under separate cover as Exhibit 10, and incorporated herein by this reference.

On December 19, 2001 defense counsel (Bloom) filed a Motion entitled "Reasonable Doubt Instruction Memorandum of Points and Authorities in Support of Adding the Necessary Level of Certitude to the Reasonable Doubt Instruction to Prevent Undermining Defendant's Due Process and Sixth Amendment Right to a Jury Decision Based Upon Sufficient Evidence of Evidentiary Certainty." AA, Volume 1, at 126-131.

This request sought not to change the language of the statutory instruction given in Nevada, but to add language to make it constitutional. As Bloom pointed out, [N]othing forbids it. The statutory language obviously does not mandate that no additional words can be given." Id. at 130, lines 20-21. Judge Gibbons denied the defense request for the additional language to

be added to the reasonable doubt instruction. AA, Volume 1, 025.

B. Argument and legal authority

The instruction read by the district court is codified in NRS 175.211 and has been upheld by the Nevada Supreme Court. The reasonable doubt instruction at issue in the present case, defined reasonable doubt as "actual" which clearly evidences a greater degree of doubt than the Constitution dictates. Further, by equating reasonable doubt as a "doubt that would govern or control a person in the more weighty affairs of life," the instruction suggests a lower burden of proof, for the state, than due process requires.

Moreover, the principals of criminal justice and the constitutional right to a jury trial require that the government prove each element of criminal conduct beyond a reasonable doubt. First, the "govern and control" language of the instruction actually defines "proof beyond a reasonable doubt," rather than the standard for doubt itself. That is, the amount of proof necessary for the government to prove it's case must meet the "govern and control" language. Contrarily, the amount of doubt required to acquit would be considerably less stringent. This instruction, however, imposes the proof standard onto the definition of doubt. The result is an instruction that requires a higher standard for reasonable doubt than for proof beyond a reasonable doubt, in complete contradiction of Constitutional principals regarding burden of proof.

Secondly, given the "govern and control" language of the instruction given by the trial court impermissibly decreases the burden of proof. The "doubt as would govern or control a person in the more weighty affairs of life" standard calls for a balancing test, more akin to a preponderance of the evidence standard than the beyond a reasonable doubt standard. In states other than Nevada, courts have found this language inappropriately trivializes the standard of proof.

A constitutionally insufficient reasonable doubt instruction violates due process as guaranteed by the Sixth and Fourteenth Amendments and is never harmless error. See, Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078 (1993)(defective reasonable-doubt provision). In Sullivan the Supreme Court held a defective reasonable doubt instruction demanded automatic

reversal because it "vitiates all of the jury's findings." Id.

C. Conclusion

The reasonable doubt instruction given in this case violated petitioner's Fifth and Fourteenth Amendment right to due process and entitles him to a new trial.

2. Unconstitutional premeditation instruction

A. Factual and procedural background

On April 15, 2004, the District Court instructed the jury on premeditation as follows:

> Premeditation is a design, a determination to kill, distinctly formed in the mind by the timing 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 act follows the premeditation, it is premeditated.
>
> The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.
>
> The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree.

Instruction No. 9. A copy of Jury Instruction Number 9 is filed under separate cover as Exhibit 11 and incorporated herein by this reference.

The state (Peterson) argued to the jury during Closing Arguments:

> Premeditation need not be for a day, an hour or even a minute . . . It may be an instantaneous as *successive thoughts of the mind.* Successive thoughts of the mind. That's how quickly you can premeditate.
>
> AA, Volume 5, 219, p. 42, lines 14-21.
>
> The last one is premeditation. Premeditation is a design, a determination to kill distinctly formed in the mind at the time of the killing.
>
> Id.

B. Argument and legal authority

In the case of Polk v. Sandaval, No. 06-15735, the Ninth Circuit Court of Appeals held that Polk's federal constitutional right to due process was violated because the instructions given at his trial permitted the jury to convict him of first degree murder without a finding of the essential element of deliberation. The error was not harmless. And the matter was reversed and remanded. Id. at 12228.

> Instruction No. 14 defined premeditation 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 instantaneous as successive thoughts of the mind. For *if a jury believes* from the evidence *that the act constituting the killing 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*.
>
> Instruction No. 14 (emphasis added).

Defense counsel objected to this instruction, known as the Kazalyn instruction, on the ground that it defined willful, deliberate, and premeditation as "the same thing," violating Polk's Sixth Amendment Right to a fair trial and his Fifth Amendment Right to due process. Id. at 12230.

In closing, the prosecutor emphasized that "[p]remeditation can be formed at the time of the killings as instantaneous as successive thoughts of the mind," and argued that both premeditation and deliberation had been proven . . . and [t]hat first degree murder requires only "successive thoughts of the mind." Id. at 12230-12231.

The Ninth Circuit held that "[t]his instruction is clearly defective because it relieved the state of the burden of proof on whether the killing was deliberate as well as premeditated. [Citations omitted]. Id. at 12239. Considering the instructions as a whole, we conclude that there is reasonable likelihood that the jury applied the instruction in a way that violated Polk's right to due process. Citing to Estelle, 502 U.S. 72. Instruction No. 14 then defined away "willful" and "deliberate" by equating them with "premeditated" and Instruction 15 reinforced this error by using the terms "premeditated" and "deliberation" interchangeably." Id. at 12240.

The question of whether there is a reasonable likelihood that the jury applied an instruction in an unconstitutional manner is a "federal constitutional question" [See, Francis, 471 U.S. 316] and not "purely a matter of state law." Id. at 12240. The state court failed to analyze its own observations from Byford under the proper lens of Sandstrom, Franklin, and Winship, and thus ignored the law in the Supreme Court clearly established in those decisions - that an instruction omitting an element of the crime and relieving the state of its burden of proof violates the Constitution of the United States. [Citations omitted]. [I]ts decision was contrary to clearly established federal law, as determined by the Supreme Court. [Citations omitted] Id. at 12240.

In determining that the error was not harmless, the Ninth Circuit determined that the evidence against Polk was not so great as to preclude a verdict of second-degree murder. The state's evidence on deliberation was determined to be weak as the state could only point to three pieces of evidence, threats and fighting with the victim about two months before the murder, a loud argument at the scene of the murder shortly before gunshots were heard and a threat which the witness who testified to it stated "she didn't think it was serious." Id. at 12242. The Court dismissed all of this evidence and stated, "[T]he prosecutor told the jurors, "It doesn't matter if he had the vest or not. That's just one fine nuance that we have, because it only takes successive thoughts of the mind. All it takes is pointing the weapon and pulling the trigger." Id. at 12243.

C. Conclusion

The premeditation instruction given in this case violated petitioner's Fifth and Fourteenth Amendment right to due process and entitles him to a new trial.

GROUND FIVE

IT WAS PLAIN ERROR FOR THE STATE TO IMPERMISSIBLY SHIFT THE BURDEN OF PROOF TO PETITIONER DURING CLOSING ARGUMENT IN VIOLATION OF PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHT TO REMAIN SILENT AND SIXTH AMENDMENT RIGHT TO A FAIR TRIAL.

A. Factual and procedural background

Closing Arguments were heard by the jury on April 15, 2004.

Deputy District Attorney Clark Peterson gave the Closing Argument for the state. AA, Volume 5, 209, p.2 to 220, p.46.

Deputy District Attorney Becky Goettsch gave the Rebuttal Closing Argument for the state. AA, Volume 5, 235, p. 107, to 242, p. 133.

During the Closing and the Rebuttal Closing Arguments there were at least (4) four instances in which the state impermissibly shifted the burden of proof to petitioner by making references to petitioner failing to call witnesses and present evidence in violation of petitioner's Fifth and Fourteenth Amendment Right to Remain Silent and Sixth Amendment Right to a Fair Trial. This was another instance of intentional prosecutorial misconduct.

1. Closing argument

During Closing Argument Peterson commented twice on the failure of petitioner to present and call witnesses and evidence, which while not objected to (which is the subject to a separate ground of ineffective assistance of counsel, see Ground Six, below), were improper and constitute plain error subject to review.

a. First instance of shifting the burden of proof

No persons came up here and talked about violence in her life up to 1999 and 2000.

AA, Volume 5, 211, p. 12, lines 5-7.

This comment would appear to be a continuation of the (improper) presentation by the state that all of Virginia's violence acts in her entire life boiled down to "one day." This was not a permissible comment on the evidence, but a clear indication to the jury that petitioner and his counsel failed to present evidence of any other violence by Virginia during the trial, and was improper.

b. Second instance of shifting the burden of proof

No one said that on the witness stand. No expert came in here and said "Yes, catatonia, afterwards, shows he must have been acting in self defense." Nobody said that.

AA, Volume 5, 218, p. 38, lines 1-4.

This comment was a clear indication to the jury that the defense failed to called expert witnesses on this issue. Again, there was no objection by defense counsel or a request made for a mistrial or a curative instruction.

2. Rebuttal closing argument

During the Rebuttal Closing Argument, Goettsch, commented twice on the failure of petitioner to present and call witnesses and evidence, which were objected to by defense counsel Bloom, and a record made.

a. Third instance of shifting the burden of proof

> If this was anything less than First Degree Premeditated Murder, you would have expected there to be more dispute on the experts you heard.
>
> AA, Volume 5, 240, page 128, lines 23-25.

b. Fourth instance of shifting the burden of proof

> If this was anything less than First Degree Premeditated Murder we'd expect witnesses.
>
> AA, Volume 5, 241, lines 20-21.

3. Record made by counsel and ruling of the Court

While here was no objection or record made to the two instances of misconduct by Peterson during closing, there was an objection and record made regarding the two instances of misconduct by Goettsch. During these instances, the comments were objected to by Bloom. In response the following exchange took place, outside the presence of the jury, after the conclusion of the trial.

> MR. BLOOM: One other matter. During Ms. Goettsch's closing statement I entered an objection. We approached the bench and I put my objection on the record. On two occasions Ms. Goettsch made reference to the fact that highlighting the defense's failure to call witnesses or present evidence commenting on the Defendant's failure to call witnesses or produce evidence.
> I believe that this is improper, resulting in an improper shift of the Burden of Proof, violative of the United States Constitution and U.S. Supreme Court Decisions as well as Nevada Supreme Court Decisions. I entered that objection. I feel it was inappropriate and the Court sustained the objection. Ms. Goettsch, at that initial point of going into the second time of it, agreed to refrain and not pick it up further.
> I think it should be on the record, though with regard to the defense objection.
> MS. GOETTSCH: My response to that is that I specifically said it was -- not commenting on witnesses that were not called, but on witnesses that they did choose to call.
> That's how it was couched.
> MR. BLOOM: That's improper as well.

THE COURT: As I recall, you were indicating should the facts, as the defense alleges exist we would expect to hear witnesses testify thus and so, which I think is dangerously close.
MS. GOETTSCH: Those are the witnesses we did hear from.
THE COURT: You said? As I understood you were telling the jury "We would expect to hear this testimony," implying we haven't heard it I [obliterated in the copy] that what the gravamen of that was?
MR. BLOOM: That's exactly what it was.
MS. GOETTSCH: The first time I was talking about the experts. We would expect differences or more differences in the experts that were called, our experts versus their experts.
On the second time I was referring to his witnesses, his out-of-state witnesses, and that's when I said I would drop that. I know on the first time with the experts it was in reference to the experts that were called.
MR. BLOOM: Doesn't matter if the experts were called or not.
MS. GOETTSCH: I'm entitled to comment on the experts that were called and what their testimony was.
THE COURT: And what they didn't say as experts. That's fair enough. Your explanation is one construction of it.
I think Mr. Bloom is perfectly within his rights to have another construction of it.
I don't believe there was anything prejudicial about it. You, Mr. Bloom, were proper in bringing it to my attention. You did so.
I did sustain, in essence, your second -- the second time you heard it, the time you approached the bench and she retreated from that line of questioning.
I don't think it's of any big real moment. It's a point well taken.

Transcript of April 16, 2004, page 136, line 18 to page 139, line 3.

Bloom did not request that the Court declare a mistrial, at least to preserve the issue for appellate review. Bloom also did not request a curative instruction be given to the jury, again, to preserve the issue for appellate review. These failures are raised separately in Ground Six, below, as instances of ineffective assistance of counsel.

B. Argument and legal authority

As to the comments of Peterson, defense counsel neither objected to the prosecutor's statements nor asked for a bench conference and a curative instruction to the jury. The prosecutor's comments on the failure to call witnesses shifted the burden of proof and may have misled the jury into believing that petitioner had a burden to prove his innocence. Counsel was ineffective for failing to object to these comments. Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984), cert. denied, 471 U.S. 1004, 105 S.Ct. 1865, 85 L.Ed.2d 159 (1985).

As a general rule, the failure to object or request an instruction will preclude review by

this court. Mercado v. State, 100 Nev. 535, 538, 688 P.2d 305, 307 (1984); Garner v. State, 78 Nev. 366, 372-73, 374 P.2d 525, 529 (1962).

However, there is an exception to the general rule in instances where "the errors are patently prejudicial and require the court to intervene sua sponte to protect the defendant's right to a fair trial." Downey v. State, 103 Nev. 4, 7, 731 P.2d 350, 352 (1987). Although the Court did not intervene sua sponte, the two instances by Peterson should be reviewed along with those by Goettsch which were properly objected to, as the prosecutors' comments and the other instances of prosecutorial misconduct, ultimately deprived petitioner of a fundamentally fair trial. Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144, rehearing denied, 478 U.S. 1036, 107 S.Ct. 24, 92 L.Ed.2d 774 (1986).

"It is generally improper for a prosecutor to comment on a defendant's failure to call a witness. Such comment can be viewed as impermissibly shifting the burden of proof to the defense." Rippo v. State, 113 Nev. 1239, 1253, 946 P.2d 1017, 1026 (1997) (citation omitted), cert. denied, 525 U.S. 841, 119 S.Ct. 104, 142 L.Ed.2d 83 (1998); Whitney v. State, 112 Nev. 499, 502, 915 P.2d 881, 882 (1996). Such comment can be viewed as impermissibly shifting the burden of proof to the defense. Id.; Barron v. State, 105 Nev. 767, 778, 783 P.2d 444, 451 (1989).

In Ross v. State, 106 Nev. 924, 926, 803 P.2d 1104, 1105 (1990), the prosecutor directed the jury's attention to the fact that a person whose testimony would have supported the defense theory did not testify and called on defense counsel to "explain why [this person] didn't come forward." The Nevada Supreme Court stated that such a comment could be viewed as impermissibly shifting the burden of proof to the defense. Such shifting is improper because it suggests to the jury that the defendant has the burden to produce proof by explaining the absence of witnesses or evidence. Id. at 927, 803 P.2d at 1105-06.

The Nevada Supreme Court concluded that the impact of the prosecutor's above-mentioned comment, along with the other statements by the prosecutors, including that the main defense witness was a liar, had the practical effect of shifting the burden of proof to the defendant. Id. at 927-28, 803 P.2d at 1106. The judgment was reversed on the ground that the

errors were not harmless and deprived the defendant of a fair trial. Id. at 928-29, 803 P.2d at 1106-07.

In Flanagan v. State, 104 Nev. 105, 754 P.2d 836 (1988), the Nevada Supreme Court set forth the test to determine if the comments by a prosecutor impermissibly shifted the burden. They stated as follows:

> The established test for determining whether prosecutorial comment constitutes a prohibited direct reference to a defendant's failure to testify is whether the language used was "manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to respond." Deutscher v. State, 95 Nev. 669, 682, 601 P.2d 407, 416 (1979). Here, the prosecutor first made reference to Scott Sloane's testimony under oath and then argued that "these fellows [the defendants] for the most part, by the way, didn't even do that." Our close examination of this language indicates that this remark is a direct comment on Flanagan's failure to testify. Next, the prosecutor stated that "[t]hey [the defendants] could or could not take the stand, whatever they wanted." While we note that this comment is not so direct that the jury would necessarily take it to be a comment on Flanagan's failure to respond, we find that, when taken in context, this comment as well, is an impermissible reference to Flanagan's silence. We conclude that the prosecutor's remarks were a violation of Flanagan's fifth amendment right to remain silent and constitute reversible error.
>
> Id. at 839-840

As in Rippo, Ross and Flanagan, the state, by commenting four times during closing on the failure to produce witnesses and evidence, and the prosecutor's statements that petitioner was a liar, had the practical effect of shifting the burden of proof to petitioner. As in Flanagan the prosecutor's remarks were a violation of petitioner's Fifth Amendment right to remain silent and constitute reversible error.

Such shifting is improper because "[i]t suggests to the jury that it was the defendant's burden to produce proof by explaining the absence of witnesses or evidence. This implication is clearly inaccurate." Id. Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)). Mullaney considered (and held "impermissible") the shifting of a burden of proof "with respect to a fact which the state deems so important that it must be either proved or presumed." 432 U.S., at 215, 97 S.Ct., at 2329.

An error is structural and not harmless when it "affect[s] the framework within which the

trial proceeds, rather than simply an error in the trial process itself." Arizona v. Fulminate, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). No aspect of an attorney's advocacy "could be more important than the opportunity finally to marshal the evidence for each side before submission to judgment." Herring, 422 U.S. at 862, 95 S.Ct. 2550. Only then can we have any reasonable assurance "the guilty [will] be convicted and the innocent [will] go free." Id.

Here the state, intentionally violated the petitioner's Fifth and Fourteenth Amendment Right to Remain Silent, which extends to whether or not to present evidence at trial. The Supreme Court of Nevada has addressed this issue. "Structural error" is a defect in constitution of trial mechanism, which defies analysis by harmless error standards. Riley v. Deeds, 1995, 56 F.3d 1117; "Structural error," which affects the entire conduct of the trial, defies analysis by "harmless-error" standards. Manley v. State, 115 Nev. 114, 979 P.2d 703 (1999). Here, the impermissible shift should not be considered "harmless" due to the importance a closing argument has on the trial of a matter.

In Herring v. New York, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975), when discussing the importance of a closing argument, the Court said:

> The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a fact-finding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment.
>
> Id.

While Herring discussed limiting closing argument, the point is not lost on the effect the improper closing argument would have when the jury is not given a curative instruction or the defense the opportunity to respond. As the Nevada Supreme Court said in Ross:

> In their totality, the prosecutor's remarks unfairly undermined the defense theory by improperly impugning a critical defense witness. It can be inferred that these remarks were fresh in the jurors' minds as they entered the jury room and commenced their deliberations. In addition, the imprimatur of the prosecutor's office added force and legitimacy to the prosecutor's argument to the jury:
>
> Id. at 1106.

Therefore, the last thing the jury heard in this case was the state commenting on the failure of petitioner to call witnesses and evidence. While objected to, when combined with the other instances of prosecutorial misconduct, improperly shifted the burden of proof and prejudiced petitioner, since no curative instruction was requested by defense counsel or sua sponte provided by the Court.

C. Conclusion

Petitioner is entitled to a new trial as the prosecution impermissibly shifted the burden of proof to petitioner in violation of petitioner's right to remain silent under the Fifth and Fourteenth Amendments and deprived petitioner of a fair trial under the Sixth Amendment, or in the alternative, petitioner is entitled to a full evidentiary hearing to determine all the relevant facts and circumstances for proper consideration by this Court.

GROUND SIX

PETITIONER IS IN CUSTODY IN VIOLATION OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Introduction

Petitioner has a constitutional right to be represented by competent counsel. It is proper to claim ineffective assistance of counsel for the first time in a first post-conviction habeas petition, because such claims are generally not appropriate for review on direct appeal. See State v. Powell, 122 Nev. Adv. Op. 65 (2006). Defense counsel's lack of effective representation substantially and injuriously affected the process to such an extent as to render petitioner's conviction and sentence fundamentally unfair and unconstitutional. No strategic or tactical reason existed for counsel's failure to address or investigate these significant and obvious issues during petitioner's proceedings. Counsel's failure to address these significant issues in this case fell below objective standards of reasonableness and thereby deprived petitioner of effective representation guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution. See, Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052. In Strickland, the United States Supreme Court set the standard used to determine when the assistance of counsel

has been so deficient that it violates the guaranties set forth in the Sixth Amendment of the Constitution of the United States, by setting forth the following two prong test:

> First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.
>
> Id. at 2064.

This requires proving that there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been more favorable to the defendant. Id. at 690-691, 104 S.Ct. 2052. A reasonable probability is one "sufficient to undermine confidence in the outcome." Wiggins v. Smith, 539 U.S. 510, 534, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). When evaluating the probability the result would have been different, a court views the alleged error in light of the totality of all the evidence before the jury to gauge the effect of the error. Kimmelman v. Morrison, 477 U.S. 365, 381, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

When a defendant raises multiple claims of ineffective assistance, each claim of ineffective assistance must be examined independently rather than collectively. Hall v. Lubbers, 296 F.3d 685, 692-693 (8th Cir. 2002); Griffin v. Delo, 33 F.3d 895, 903-904 (8th Cir. 1994). Further, ineffective assistance claims present mixed questions of law and fact. See Ennis v. State, 122 Nev. Adv. Op. 60 (2006). Therefore, an evidentiary hearing is required in order to resolve the specific factual allegations set forth in the petition and these supporting points and authorities, which, if true, would warrant relief.

The ineffectiveness of petitioner's counsel undoubtedly undermined the confidence in the fairness of the jury's verdict. Petitioner was severely prejudiced by his lawyer's performance. A reasonable likelihood exists that but for his lawyer's deficient performance, petitioner would have had a more favorable outcome in his case. The state accordingly, cannot show, beyond a reasonable doubt, that these failures did not affect the disposition, conviction or the sentence in

this case. Counsel's representation of petitioner fell below the minimum standard of reasonably competent counsel on the basis of the following interrelated grounds, which are organized by pretrial, trial and post trial ineffectiveness:

I.

Pretrial Ineffectiveness

1. Defense counsel was ineffective in failing to properly address the issues surrounding the improper disqualification of attorney Daniel J. Albregts.

A. Factual and procedural background

Petitioner incorporates the factual and procedural history of Ground One, supra as though fully set forth herein. The additional facts as to the ineffective assistance of counsel, relate to four things petitioner's attorneys failed to address in connection with of the erroneous disqualification of Daniel J. Albregts as petitioner's counsel:

1. Albregts' failed to object to the canvass of petitioner at the hearing of the motion to revoke bail.

As stated in Ground One, supra, the state requested, and the Court conducted (without requesting or obtaining any statute or case law authorizing same), an improper canvass of petitioner as to whether he authorized Albregts to file the opposition to the state's motion to revoke bail.

Albregts was ineffective in failing to object, and preserve for review on direct appeal, the issue of the improper canvass conducted at the hearing on the motion to revoke bail. This failure prejudiced petitioner as the canvass was allowed and petitioner's required verbal answer:

(a) violated petitioner's Fifth and Fourteenth Amendment right to remain silent (as the hearing not only sought to revoke bail, but potentially exposed petitioner to additional criminal charges (fraud) based upon the allegations being presented by the state to the Court);

(b) resulted in the erroneous disqualification of counsel as both the state and the Court took petitioner's "authorization" to constitute a waiver of the attorney-client/attorney work-product privilege, which was used by the state and the Court as "evidence" that Albregts "now became" a witness to the proceedings.

(c) was the product of prejudicial prosecutorial misconduct, as the prosecution knew or should have known that such a canvass was both unauthorized and should have not been requested or granted as violative of petitioner's Fifth Amendment right to remain silent.

(d) was prejudicial error by the Court as the Court allowed the state to question the petitioner directly and through the request for the canvassing conducted by the Court. This canvass was conducted with the Court failing to request authority for the canvass to take place, which was done in violation of petitioner's Fifth and Fourteenth Amendment right to remain silent and Sixth Amendment right to counsel.

2. Albregts and/or Bloom failed to file a writ of mandamus to the Nevada Supreme Court to challenge the Court's ruling.

Albregts and/or Bloom should have filed a Writ of Mandamus when the Court erroneously disqualified Dan Albregts as petitioner's attorney of record. This was the proper procedure under Nevada Law.

3. Albregts and/or Bloom failed to obtain a ruling on the motion in limine to exclude the evidence of the San Diego real estate action from being allowed into evidence at trial.

Albregts and/or Bloom failed to object or make a record regarding the Court's failure to rule on the proposed defense motion in limine regarding the introduction of any evidence of the San Diego real estate transaction in the first place. Here, had the Court issued a ruling saying that the real estate transaction would not come into evidence, then there would have been no need for disqualification. If the Court ruled that it did come in, then the issue could have been the subject of a pre-trial writ (along with the then anticipated disqualification and the canvass issue) and petitioner's Sixth Amendment Right's would not have been violated.

4. Bloom failed to create a record at the close of trial.

At the close of the trial, when the state neither called Albregts as a witness, nor raised the issue of the San Diego real estate transaction, Bloom should have made a record regarding this, preserving this instance of prosecutorial misconduct and bad faith for review on direct appeal. He also should have moved to have Albregts reinstated as petitioner's attorney of

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED P. CENTOFANTI III,

Appellant,

vs.

E.K. McDANIEL, WARDEN,
ELY STATE PRISON

Respondent.

DOCKET NUMBER: 58562

APPELLANT'S APPENDIX, VOLUME X

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NEVADA STATE PRISON

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CARMINE J. COLUCCI CHTD.
Nevada Bar #000881
629 South Sixth Street
Las Vegas, Nevada 89101
(702) 384-1274
Attorney for Petitioner
ALFRED P. CENTOFANTI III

DISTRICT COURT

CLARK COUNTY, NEVADA

ALFRED CENTOFANTI III,	) CASE NO. C172534
	) DEPT NO. VII
Petitioner,	)
vs.	)
E.K. McDANIEL, WARDEN, ELY STATE PRISON	) Date of hearing: 4-15-08
	) Time of hearing: 8:30
Respondent.	)

PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)
(POST CONVICTION)

93

The Petition of ALFRED P. CENTOFANTI III, by and through, CARMINE J. COLUCCI, ESQ., of the law firm of CARMINE J. COLUCCI CHTD., attorney for the above-captioned individual, respectfully shows:

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: I am presently imprisoned at the Ely State Prison, White Pine County, Ely, Nevada.

2. Name and location of court which entered the judgment of conviction

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CLERK OF THE COURT

under attack: Eighth Judicial District Court in the County of Clark, State of Nevada, Department XIV, 200 Lewis Avenue, Las Vegas, Nevada 89155.

3. Date of judgment of conviction: March 11, 2005.

4. Case number: C172534

5. (a) Length of sentence: The district court sentenced defendant to a term of life without the possibility of parole plus an equal and consecutive life sentence without the possibility of parole for use of a deadly weapon.

(b) If sentence is death, state any date upon which execution is scheduled: N/A.

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? No.

7. Nature of offense involved in conviction being challenged: Murder with Use of a Deadly Weapon (NRS 200.010, 200.030, 193.165).

8. What was your plea? Not Guilty.

9. If you entered a guilty plea to one count of an indictment or information, and a not guilty plea to another count of an indictment or information, or if a guilty plea was negotiated, give details. N/A

10. If you were found guilty after a plea of not guilty, was the finding made by: (a) Jury X

(b) Judge without Jury _____

11. Did you testify at the trial? Yes.

12. Did you appeal from the judgment of conviction? Yes.

13. If you did appeal, answer the following:

(a) Name of court: Nevada Supreme Court

(b) Case number or citation: No. 44984

(c) Result: The Nevada Supreme Court affirmed the judgment of the district court.

(d) Date of Result: Order of Affirmance filed December 27, 2006; Petition for Rehearing filed January 18, 2007; Order Denying Rehearing filed February 27, 2007; Remittitur dated March 27, 2007

14. If you did not appeal, explain briefly why you did not. N/A

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state of federal? No.

16. If your answer to No. 15 was "yes," give the following information: N/A

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? Yes.

(a) Which of the grounds is the same:

Ground 3 - Petitioner is entitled to reconsideration of his motion for new trial due to prejudicial prosecutorial misconduct in violation of the U.S. Supreme Court's holdings in Brady, Napue, and Giglio, which rose to the level of plain error.

(b) The proceedings in which these grounds were raised: Motion for a

New Trial and on direct appeal.

(c) Briefly explain why you are again raising these grounds. To insure that the proper procedural method has been used to bring these matters to the Court's attention.

18. If any of the grounds listed in No. 23 or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. Grounds One, Two, Four, Five, Six and Seven as listed in Nos. 23(a), 23(b), 23(d), 23(e), 23(f) and 23(g), respectively, were not previously presented in any other court because the proper vehicle for raising these issues is by way of a Petition for Writ of Habeas Corpus (Post-Conviction). These grounds are as follows:

Ground 1 - The District Court's erroneous disqualification of petitioner's counsel of choice, Daniel J. Albregts, based upon the bad faith actions of the state, in violation of petitioner's Fifth and Fourteenth Amendment rights to remain silent and Sixth Amendment right to counsel of choice and the U.S. Supreme Court's Ruling in U.S. vs. Gonzales-Lopez, is structural error, not procedurally barred, and requires automatic reversal of petitioner's conviction.

Ground 2 - The District Court's improper and unconstitutional canvass of the petitioner regarding his consent to the use of self defense, is plain error, and improperly minimized the state's burden of proof thereby violation petitioner's due process rights guaranteed by the Fifth, Sixth and Fourteenth Amendments to the

United States Constitution and should mandate the recusal of Judge Donald Mosley from any further proceedings in this case.

Ground 4 - The District Court's instructions on reasonable doubt and premeditation improperly minimized the state's burden of proof thereby violation petitioner's due process rights guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

Ground 5 - It was plain error for the state to impermissibly shift the burden of proof to petitioner during closing argument in violation of petitioner's Fifth and Fourteenth Amendment Right to Remain Silent and Sixth Amendment Right to a Fair Trial.

Ground 6 - Petitioner is in custody in violation of his right to effective assistance of trial counsel as guaranteed by the Sixth Amendment to the United States Constitution.

Ground 7 - Petitioner is entitled to relief because of the cumulative effect of the errors which occurred at trial, raised on direct appeal, and in this petition.

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so state briefly the reasons for the delay. Pursuant to NRS 34.726, this petition is being filed within one year after the Nevada Supreme Court issued its remittitur which was on March 27, 2007.

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? No.

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Deputy Special Public Defender, Gloria Navarro and California Attorney Allen Bloom, admitted pro hac vice, represented defendant in the proceedings in the Eighth Judicial District Court which resulted in defendant's conviction. Carmine J. Colucci, Esq. represented defendant at the sentencing in the Eighth Judicial District Court and represented defendant in the direct appeal.

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? No.

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground.

(a) GROUND ONE: The District Court's erroneous disqualification of petitioner's counsel of choice, Daniel J. Albregts, based upon the bad faith actions of the state, in violation of petitioner's Fifth and Fourteenth Amendment Rights to remain silent and Sixth Amendment right to counsel of choice and the U.S. Supreme Court's ruling in U.S. VS. Gonzales-Lopez, is structural error, not procedurally barred, and requires automatic reversal of petitioner's conviction.

Supporting facts:

On June 14, 2001, the district court conducted an improper direct canvass of petitioner which resulted in the erroneous disqualification of Daniel Albregts who was petitioner's retained attorney of choice. This disqualification resulted from the state's contention that defense counsel Albregts had a conflict of interest

with defendant because he might become a witness for the state in the upcoming trial. Later the state conceded that Albregts was not going to be called as a witness by the state in their case-in-chief or in the penalty hearing if it was to occur. This issue arose during the state's Motion to Revoke Bail wherein the state made allegations that petitioner had engaged in a fraudulent act with respect to the sale of the home in San Diego which was owned jointly by petitioner and the decedent. The issue was whether petitioner had committed fraud in order to make the sale and then to get the funds to use to make bail. On June 19, 2001, petitioner agreed that he had not been acting on the advice of Albregts with respect to that. Further, the state asserted that petitioner had sealed his divorce proceedings to keep the San Diego house title from public scrutiny. Petitioner's divorce lawyer later dispelled that allegation.

There were always other witnesses (real estate agent, buyer, and various financial persons involved in the sale) who were readily available, other than Albregts, to refute the fraud allegations. Defense counsel Bloom knew who they were and how to secure their attendance in Las Vegas. So did the prosecutors, who, after making a huge issue of this matter, decided not to pursue the fraud charges or to use Albregts as a witness.

Nevertheless, defense counsel filed nothing to initially preclude the state from using the San Diego real estate transactions such as by filing a motion in limine or a petition for writ of prohibition/mandamus to get Albregts reinstated. Defense counsel Bloom never attempted to have Albregts reinstated on the case after the

state conceded that he was not going to be a witness.

Defense counsel was not a regular practitioner in Nevada criminal courts as Albregts was. That is why the petitioner wanted Albregts - experience and knowledge. It is obvious from the initial proceedings on through the later proceedings that Bloom who was lead counsel and who did virtually all of the work, was not up to speed on Nevada law (i.e. reciprocal discovery) or the holding in the Crawford v. Washington case. These areas generated major legal issues which were not handled competently by defense counsel. This is why the improper disqualification of Albregts was so prejudicial to petitioner despite the fact that at the September 14, 2001 hearing an order was entered which authorized him to help the defense in a limited manner. However, he would not be allowed to try the case or even to sit at counsel table during it. Even though the trial did not commence until March, 2004, the defense did not seek Albregt's reinstatement nor did the Court raise the issue sua sponte.

As a result of the improper canvassing of petitioner which should have been objected to and not participated in by petitioner, the improper disqualification of Albregts and the failure to seek reinstatement, violated petitioner's constitutional rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

The issue is not procedurally barred because the United States Supreme Court decided the case of United States v. Gonzales-Lopez, 548 U.S. 140, 126 S. Ct. 2557, 2564, 165 L. Ed. 2d 409 (2006) (denial of right to counsel of choice), on

June 26, 2006, eight months after the Opening Brief was filed and four months after the Reply Brief was filed. It was decided before the Remittitur was issued by the Nevada Supreme Court and is therefore the law of the case.

Since petitioner has shown good cause for not raising this issue on direct appeal, and the prejudice which has resulted from the erroneous disqualification of Albregts, which constituted plain and structural error, it can and should be considered by this Court. See NRS 34.810.

Therefore, petitioner is entitled to a new trial for the improper disqualification or alternatively, at least, a full evidentiary hearing to determine all of the relevant facts and circumstances for proper consideration by this Court.

(b) GROUND TWO: The district court's improper and unconstitutional canvass of the petitioner regarding his consent to the use of self-defense, is plain error, and improperly minimized the state's burden of proof thereby violating petitioner's due process rights guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

Supporting Facts:

In December 2001, the District Judge, at the state's request, was asked to conduct a pretrial canvass of petitioner regarding his tactical decision to use the defense of self-defense. The Court denied the state's motion without prejudice. On March 15, 2004, the state again requested that petitioner be canvassed and be required to admit that he was the shooter and that he was going to use the theory of self-defense. While defense counsel did object to the canvassing, he still

allowed the canvassing to proceed and petitioner to answer questions posed by the state but asked by the District Judge. Further, petitioner was not given the appropriate pre-plea advice by his counsel nor was he canvassed by the Court in the same manner that the Court must use to take a valid plea, prior to petitioner admitting to the major elements of the crime charged and the enhancement for using a firearm. This process totally violated petitioner's Fifth Amendment privilege against self-incrimination and also violated his rights under the Sixth and Fourteenth Amendments to the Constitution of the United States.

There was no law cited by the state or court which authorized this "canvassing." That was because there simply wasn't any. The state's request constituted prosecutorial misconduct and the defense counsel's failure to refuse to allow petitioner to participate in the "canvassing" was clearly ineffective assistance of counsel.

By allowing the state to have the Court conduct a canvass to compel the petitioner to "concede" a necessary element of the state's case, the state and Court improperly lessened the burden of prosecution and violated petitioner's constitutional rights as guaranteed under the Fifth, Sixth an d Fourteenth Amendments to the Constitution of the United States. Counsel's failure to refuse to participate in or to get a ruling from the Nevada Supreme Court before doing so, via a motion for stay pending a decision on a petition for writ of prohibition to preclude the canvassing, constituted constitutionally ineffective assistance of counsel fell below the standard set forth in Strickland for the reasons set forth

above.

(c) GROUND THREE: Petitioner is entitled to reconsideration of his motion for new trial due to prejudicial prosecutorial misconduct in violation of the U.S. Supreme Court's holdings in Brady, Naput, and Giglio, which rose to the level of plain error.

Supporting Facts:

On June 28, 2004, petitioner filed a Motion for New Trial. The basis for the motion were specific instances of juror misconduct including a juror having a felony conviction and her intentional concealment of it, a juror wearing a t-shirt that said, "Do you know what a murderer looks like?", to (2) juror's who slept during various parts of the trial and another juror conducted an independent firearm experiment. The Court did not hold an evidentiary hearing on the issues raised but instead decided the motion based upon the alleged violation of the seven (7) day time limit set forth in NRS 176.515 when trial counsel failed to file it in that time.

Further, petitioner was not afforded an opportunity to present evidence to support his claims. This tied-in with the finding by the Nevada Supreme Court that petitioner failed to demonstrate that the misconduct occurred and if it did that the misconduct was prejudicial. How could he present evidence in order to demonstrate bias or prejudice if he was not given the opportunity to do so by the District Court? The refusal to grant petitioner an evidentiary hearing denied him due process of law and violated his constitutional rights as guaranteed under the

Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

There is also a question as to whether the prosecutors in this case, knew both before trial and after trial whether juror Barrs had a felony conviction and then withheld and misrepresented that information to the Court and defense counsel. Petitioner provided absolute proof during the hearing of the Motion for New Trial that juror Barrs was a convicted felon and yet the state, even in the face of certified documents showing her conviction and an affidavit from the Clark County Jury Commissioner, kept representing to the Court that Barrs was not a convicted felon.

The issue of prosecutorial misconduct was not raised on direct appeal because it will take an evidentiary hearing on all of the above issues to give the defense the opportunity to establish her unfitness for jury service, her knowledge about her felony status, her intentions of concealment of the conviction, and her bias and prejudice. The state should also be required to testify as to their pretrial and post trial knowledge of her felony status. Refusing to grant a hearing on these issues will deny petitioner his right to due process and a fair trial as guaranteed under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

(d) GROUND FOUR: The district court's instructions on reasonable doubt and premeditation improperly minimized the state's burden of proof thereby violating petitioner's due process rights guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

Supporting Facts:

On December 19, 2001, defense counsel filed a Motion entitled Reasonable Doubt Memorandum of Points and Authorities in Support of Adding the Necessary Level of Certitude to the Reasonable Doubt Instruction to Prevent Undermining Defendant's Due Process and Sixth Amendment Right to a Jury Decision Based Upon Sufficient Evidence of Evidentiary Certainty.

Defense counsel sought to add language to the Reasonable Doubt jury instruction codified in NRS 175.211. The Court denied this request and gave the instruction as set forth in the above statute. Petitioner asserts that the instruction as given suggests a lower burden of proof than due process requires. When the district court denied petitioner's motion requesting the modified instruction, petitioner's counsel had several years before trial to file a petition for writ of mandamus in the Nevada Supreme Court to request that the defense get a ruling allowing the modified instruction. Defense counsel did not file that petition and the modified instruction was not given.

Prior to submission of this matter to the jury, defense counsel objected to Instruction No. 9, the premeditation instruction, known as the Kazalan instruction, on the ground that it defined willful, deliberate, and premeditation as the same thing, and that premeditation only takes successive thoughts of the mind, and thereby improperly permitted the jury to convict petitioner of first degree murder without a finding of the essential element of deliberation. This issue is raised here for the first time here in light of the decision of the United

States Court of Appeals for the Ninth Circuit in Polk v. Sandoval, 503 F.3d 903 (2007). This case was argued and submitted to that Court on February 14, 2007, before the Remittitur in the instant case which was dated March 27, 2007. The decision in Polk was filed on September 11, 2007. The Kazalyn instruction given in the instant case did not give effect to all three (3) elements of first degree murder and the Ninth Circuit Court has directed that the Kazalyn instruction should not be given in future cases as it clearly violates established federal constitutional law. Nevertheless, it was improperly given in the instant case. As a result, petitioner's constitutional rights as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States were violated. It is also settled that the Kazalyn instruction, by its terms, has a substantial injurious effect or influence in determining a jury's verdict of first degree as it leaves no room for deliberation or "coolness and reflection" and permitted the jury to convict petitioner of first degree murder even if the determination to kill was a mere unconsidered and rash impulse or was formed in passion as would be required for a finding of manslaughter.

This instruction was clearly defective because it relieved the state of the burden of proof on whether the killing was deliberate as well as premeditated. Yet this constitutionally defective instruction was given to the jury in the instant case contrary to clearly established United States Supreme Court law which predated the trial in this case and which was cited in Polk.

(e) GROUND FIVE: It was plain error for the state to impermissibly

shift the burden of proof to petitioner during closing argument in violation of petitioner's Fifth and Fourteenth Amendment right to remain silent and Sixth Amendment right to a fair trial.

Supporting Facts:

During closing and rebuttal arguments by the state, there were at least four (4) occasions where the state impermissibly, during trial, shifted the burden of proof to petitioner by improperly arguing that petitioner had failed to call certain witnesses and present certain evidence.

During the initial closing argument, the prosecutor made the following comment without objection by defense counsel, "No person came up here and talked about violence in her life up to 1999 and 2000." This was an impermissible comment on the evidence and a clear indication to the jury that petitioner had failed to present evidence of any other violence by the decedent during the trial.

In another instance of improper argument, the state argued:

> "No one said that on the witness stand. No expert came in here and said, 'Yes catatonia, afterwards, shows he must have been acting in self-defense.' Nobody said that.

This comment was a clear indication to the jury that the defense failed to call expert witnesses on this issue. During rebuttal, the prosecutor made two other improper comments which were finally objected to. However, they show a pattern of improper argument by the state. The state in rebuttal stated:

> Is this anything less than First Degree Premeditated Murder, you would have expected there to be more dispute on the experts you heard.

–and–

If this was anything less than First Degree Murder Premeditated Murder, we'll expect witnesses.

It appears that only the objection on the last comment was sustained. In addition to improper shifting of the burden of proof by the state in all four instances, defense counsel was constitutionally ineffective for failing to object to the first two comments or to request a mistrial or curative instruction at some point before submission of the case to the jury.

It was clearly improper for the prosecutor to comment, under these circumstances, on the petitioner's failure to call witnesses. This impermissibly shifted the burden of proof and resulted in the violation of petitioner's rights under the Fifth, Sixth and Fourteenth Amendments.

(f) GROUND SIX: Petitioner is in custody in violation of his right to effective assistance of trial counsel as guaranteed by the Sixth Amendment to the United States Constitution.

I.

Pretrial Ineffectiveness

1. Defense counsel was ineffective for failing to properly address the issues surrounding the improper disqualification of petitioner's attorney of choice, Daniel J. Albregts, when the state initially asserted that he would be a witness in the state's case because they planned to use the San Diego real estate transaction as other bad acts and there was an issue as to whether Albregts had or had not given petitioner advice on that. After the state contended that Albregts would be a

witness against petitioner, thereby having a conflict of interest, he was disqualified by the Court. However, before trial, the state announced that they would not be calling him as a witness. Neither new defense counsel (Bloom) or disqualified defense counsel (Albregts) moved to have Albregts reinstated. Further, neither counsel filed a pre-trial motion in limine to keep the San Diego transaction from being allowed into evidence in the first instance or to file a petition for writ of mandamus in the Nevada Supreme Court to have Albregts reinstated. Further, Albregts failed to object to the direct canvass of petitioner at the hearing to revoke his bail when these issues were raised. This improper canvassing lead to the improper disqualification of Albregts. It also violated petitioner's constitutional rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

Petitioner asserts that had Albregts been allowed to handle petitioner's case, as petitioner desired, since he was more familiar with Nevada law, the additional errors complained about below, would not have occurred. See additional factual assertions below and those contained in the points and authorities in support of this petition.

2. Defense counsel was ineffective for failing to object to the pretrial canvass of petitioner by the Court at the state's request, with regard to his agreement and consent to the use of self-defense. There was no legal authority or precedence for this and it was not necessary in order to enable petitioner to use this defense. Further, petitioner asserts that defense counsel gave him inaccurate

advice on the state of the law on this. This caused petitioner to make decisions based upon faulty advice. This gave the prosecution an unfair advantage and forced the petitioner to disclose his trial strategy before trial by his own personal statements to the Court in front of the state despite the fact that petitioner was represented by counsel. Defense counsel also failed to properly object to the canvass or to petition the Nevada Supreme Court for a Writ of Prohibition to preclude the canvass before trial.

3. Defense counsel was ineffective for failing to properly handle the evidentiary issues pertaining to the December 1, 2000 domestic violence incident. Defense counsel failed to prepare, develop and present facts supporting the defense theory of self-defense. Petitioner provided defense counsel with documents which would have done this such as sign up sheet and proof of payment for Quito's soccer during the relevant time period. It also included a store register receipt for items purchased on December 1, 2000, which included a time/date stamp. There were also telephone records to show long distance calls to persons about whom petitioner testified. There were also records from Safe Key, LaPetite, telephone and ATM records which would have corroborated petitioner's testimony which was impeached and discredited because defense counsel failed to use these items of proof which were readily available to him. Because of defense counsel's failure to use this evidence, the state was able to argue (unchallenged) that it was Gina (decedent) not petitioner, as he had testified, who picked up their child from school on December 1, 2000. This failure

to corroborate petitioner's testimony enabled the state to call into question the whole event (which they argued was fabricated) and enabled them to attack the theory of defense and petitioner's credibility. This evidence, had it been used by defense counsel, would have corroborated petitioner's testimony and shown that the testimony of the state's witnesses on these issues was false.

4. Defense counsel was ineffective for failing to properly handle the evidentiary issues pertaining to the December 5, 2000 domestic violence incident. This matter was extremely important as the state used their version of the facts of this incident to establish motive and premeditation in their case-in-chief. The state's theory was that petitioner had exaggerated their son's medical condition in order to manipulate Gina to come home. Their theory was that a medical emergency never existed. Petitioner testified about this but his credibility was attacked as defense counsel failed to produce the medical records or the doctor and nurse to testify, all of which and whom were readily available to corroborate petitioner's testimony. Petitioner was also prejudiced when records from the LaPetite Academy and Safe Key were not produced by defense counsel who had them, which also would have corroborated his testimony. Defense counsel also did not produce telephone records of Gina Centofanti which should have been used to show where she called petitioner from, the time and call duration to show that she could not have picked up the children or taken them for medical treatment as the state opined. Without these records and witnesses, all of which were readily available, the state's theory went unchallenged and petitioner was

impeached on cross-examination when he should not have been.

5. Defense counsel was ineffective for failing to properly handle the evidentiary issues pertaining to the December 20, 2000 incident. Petitioner asserts that investigating officers of the Las Vegas Metropolitan Police Department, their CSIs and the state failed to seize, inventory and preserve evidence which was essential to the defense. The items seized but not inventoried, kept, proc essed or turned over to the defense were Gina's purse, cellular telephone, palm pilot, keys, and some shell casings that were not found until months later. These items would have yielded proof that would have corroborated the defense case. Gina and petitioner were divorced yet Gina's key chain had the house key that she was not authorized to use. The defense contended that she let herself in and then proceeded to go after petitioner. The keys seized by the LVMPD were turned over to Gina's family and lost to petitioner before petitioner could view or otherwise process them. This same process was followed with respect to the other evidentiary items mentioned above. The evidentiary value of her cellular telephone and palm pilot was evident as was the condition of her car and its contents. Defense counsel was also ineffective for not seeking a pretrial ruling on his motion to dismiss due to lost or destroyed evidence or to do a motion in limine to preclude the state from using pictures and other evidence derived from this "lost" evidence.

6. Defense counsel was ineffective for failing to properly handle the evidentiary issues pertaining to the state failing to take into evidence the bloody

exercise bike. Petitioner asserts that the police and the state failed to secure and to preserve this important piece of evidence and that defense counsel should have filed a motion in limine to keep out any evidence about the bike and any pictures, reports or tests about it for that reason. Had a motion in limine been made and been successful, the Court would have ruled to exclude this evidence. This evidence, the bike, was important to both the state and defense theories of how the shooting occurred as it had blood pattern evidence which was relevant to how the critical phase of the shooting occurred. Not seeking to exclude this evidence was ineffective assistance of counsel.

7. Defense counsel was ineffective for failing to properly handle and process the missing shell casings. Two shell casings were not found in the petitioner's residence when the home was originally "processed" by the Las Vegas Metropolitan Police Department CSIs. Petitioner, many months later, when moving out of the residence, found them and tried to find out from his attorneys what to do with them. Defense counsel should have challenged the credibility and competency of the state's testifying CSIs due to their poor processing of the scene and their inability to locate these casings. This poor processing should have been made an issue before and during trial and expanded to show the poor practices used to collect other evidence as well. Defense counsel failed to properly investigate, document and process the missing shell casings when they were found. Valuable evidence was lost. The location of the shells was critical to the theories of both the state and defense and would have provided evidence to the

defense which would have provided corroboration as to the shooting sequence and shot locations. This was relevant on the issues of self-defense, premeditation and in addition to the issues of faulty crime scene processing by the state. Defense counsel, upon being contacted by petitioner when the casings were initially found, should have advised petitioner that defense counsel and his investigator would view the scene first and then would call the police so the defense could document the scene. This deprived the defendant of his ability to examine the state's witnesses and experts about the investigative deficiencies which had occurred which would have lead to meaningful cross-examination of these witnesses and a true challenge to their expert opinions.

8. Defense counsel was ineffective for failing to preserve the issue of the cremation order. While petitioner was in the CCDC, following his arrest, he was presented with a cremation order to sign by a LVMPD Lieutenant. Petitioner was told that he had to sign the form so that Gina's body could be released to her family or cremated because he was the "husband." However, they had been divorced prior to that time. Petitioner was told to sign it "or else." Petitioner signed it under duress and then was returned to his cell. Petitioner told defense counsel about this but no effort was made to pursue this despite the fact that this provided a major basis for petitioner to assert the destruction of evidence by the state deprived him of the opportunity to conduct his own forensic tests to support his theories about how the shooting occurred, whether the decedent had drugs in her system at that time, or previously, whether the state's forensic tests were

accurate as to toxicology and ballistics and to challenge the state's theory of how the event occurred. Defense counsel failed to file a motion in limine to exclude or limit the state's use of the toxicology, ballistics and autopsy evidence and failed to file a motion to preserve this issue for appellate review.

9. Defense counsel was ineffective for failing to preserve and present the issue of the invalid search warrant. On December 20, 2000, the police allege that they telephonically applied for a search warrant for petitioner's home. They then searched the residence securing the vast majority of evidence and took a large number of photographs which were all subsequently used against petitioner at trial. In October , 2001, petitioner filed a motion requesting the copy of the telephonic recording in support of the warrant and a copy of the signed warrant since they were not provided to the defense in the course of normal discovery disclosure. Neither a copy of the signed warrant or audiotape was ever provided to defense counsel despite the fact that the prosecutors advised the court and defense that they would provide each of these to them. Defense counsel never filed a motion to suppress the evidence seized pursuant to the warrant before trial or to seek exclusion of the above mentioned evidence seized pursuant to this warrant, during trial. The lack of pursuit of this issue by defense counsel was highly prejudicial to petitioner.

10. Defense counsel was ineffective for failing to preserve and present the issue of the improper production of the photographs and notes of attorneys Janeen Mutch and Harvey Gruber to the state. These photographs were taken as

part of the defense trial preparation. They were taken of petitioner's residence (alleged crime scene) after the police had completed their CSI investigation. They were defense work-product. Mutch and Gruber were attorneys who wound up being represented by an attorney who wrongfully turned these items over to the state despite the fact that the defense had not made a decision whether to use those items at trial or at any other hearing in this case. Defense counsel made no objection regarding the impropriety of turning these over to the state nor was there any objection made to the filing of the transcript of the hearing on work-product privilege in open court five days before trial. These items were privileged and Mutch's testimony was ruled to be privileged by the Court. Defense counsel should have filed and pursued a motion in limine or a motion to suppress to keep these items out of the possession of prosecutors and out of evidence at trial unless the defense intended to use them. Petitioner never waived the privilege. Additionally, the state improperly used one of these pictures in closing argument.

11. Defense counsel was ineffective for failing to interview and secure crucial defense witness testimony. Defense counsel failed to interview percipient witnesses during the first three years after the incident had occurred and before said witnesses had become hostile toward petitioner. Eva Cisneros was petitioner's employer before the incident. Janeen Mutch and Sara Smith were his co-workers. They were initially willing to assist petitioner and would have provided helpful information to the defense but when the case became high profile and defense counsel failed to lo ck down their information, their favorable

testimony was lost. An example of this was that no gun sighting at work had been reported.

Further, except for Sara Smith, Cisneros and Mutch had attorney-client issues which defense counsel should have resolved before a hearing was necessary and before Cisneros' and Mutch's work- product was improperly released to the state. Additionally Sara Smith, who testified against petitioner at trial, had a motive for doing so that Cisneros and Mutch would have exposed. Their testimony would also have been relevant to refute Sara Smith's testimony that petitioner had a gun at the office and about Sara Smith and the computer disc that she took from petitioner's office without anyone's permission. These were percipient witnesses to these events. Petitioner continuously asked that these witnesses and others be interviewed but defense counsel chose not to do so and consequently when they testified at trial, defense counsel was unprepared to conduct a meaningful cross-examination or to use them to present helpful and supportive testimony.

12. Defense counsel was ineffective for failing to properly handle the issues pertaining to the guardianship proceeding. This proceeding was civil in nature and defense counsel should have reviewed information contained therein to impeach witnesses who were common to both proceedings but did not. There were e-mails and other communications which were sent to the Guardian Ad Litem from Gina's family members, co-workers and friends which contained derogatory remarks about petitioner and information and statements which could

have been used to show bias and prejudice and to impeach them at trial. The Guardian Ad Litem also had photographs sent to her by homicide detectives and the district attorney's office. Defense counsel also could have obtained the "lost" evidentiary items such as Gina's purse, keys, palm pilot, etc., through the civil proceeding. Since key witness, Emerline Eisenman, was integrally involved in the proceeding, finding and subpoenaing her during her trips to Las Vegas, would have been an easier task. Later, defense counsel were unable to locate her and thus lost the opportunity to secure her attendance at trial. She was an important witness because her testimony would have refuted the state's contention that there was only one day of violent behavior in the decedent's past instead of the testimony about her much greater history and propensity for violence as the defense had asserted at trial. Because of this lack of investigation, defense counsel was unable to prepare to properly cross-examine a number of uncooperative state witnesses who had testified in both proceedings (i.e. Trisha Miller and Lisa Eisenman, among others). She would have been useful to impeach Trisha Miller's assertions at trial. This lack of preparation to cross-examine the witnesses, stripped petitioner of his ability to show, through cross-examination, the bias and prejudice that these witnesses had against him. This lack of preparation and investigation rendered counsels' assistance constitutionally ineffective.

13. Defense counsel was ineffective in failing to prepare for trial and lessening the burden of the prosecution. Prior to trial, defense counsel, who did

not regularly practice in Nevada, turned over work- product, experts' notes and other items to the prosecution which they were not entitled to have. Bloom turned over the plastic surgery medical records of Gina without reviewing them and then ill-advisedly prepared petitioner to testify about information which was directly refuted by the records and by the testimony of the operating physician who he also did not interview before trial. This set up the total destruction of the credibility of petitioner's testimony. Defense counsel had these records and the name of the operating physicians in late 2001 or early 2002 and the trial occurred in 2004. Defense counsel told the jury in opening statement about the defense position on the plastic surgery records which made it painfully obvious that he had not read them. The state then called the plastic surgeon in rebuttal and his testimony destroyed the representations which defense counsel had made in his opening and also petitioner's trial testimony on that issue. The failure to investigate, improperly turning over of work-product and the failure to properly prepare petitioner to testify, was highly prejudicial and clearly denied petitioner a fair trial and the effective assistance of counsel.

Defense counsel also made an issue at trial that Gina was a "bad mother" and that she left the children with petitioner while she went drinking and carousing with her co-workers. On certain occasions, defense counsel asserted, petitioner was forced to pickup the children from school and day care and to get them medical attention. Petitioner told defense counsel about the records at the schools and medical center which would corroborate these allegations. Defense

counsel failed to review and thereafter use those records at trial. When petitioner testified, the state effectively attacked his credibility because the defense neither used the records or produced witnesses from the schools or produced the doctor and nurse from the medical center who would have corroborated petitioner's version of events. These witnesses were known to defense counsel and were readily available to appear at trial.

14. Defense counsel was ineffective for failing to understand and apply Nevada law in the preparation and trial in this matter. Petitioner incorporates his prior factual allegations with respect to the issues of the improper disqualification of his attorney of choice, Daniel Albregts, his improper canvassing during the second canvassing of petitioner on the issue of self-defense, and the improper response by defense counsel to Nevada's Reciprocal Discovery Statute and Nevada's statute on self-defense. The deficient and improper action of defense counsel in these areas violated petitioner's constitutional rights under the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

In addition, defense counsel improperly advised petitioner that he had to testify in order to present his self-defense case and evidence of Gina's background and history of violence. This conflicted with the Court's prior ruling during December 27, 2001 hearing. Petitioner could have presented self-defense and supporting evidence without petitioner taking the stand. Despite defense counsel's knowledge of petitioner's lack of memory of certain crucial events and his shock and catatonia after the event, defense counsel told petitioner that he

must take the stand in order to present self-defense. This opened petitioner up to cross-examination which highlighted his limited memory (making him seem evasive) and allowed the state to directly attack petitioner due to the lack of defense preparation to corroborate petitioner's testimony through records (i.e. La Petite school records, medical records, telephone records) and testimony of the aforementioned doctor and nurse. This was not a tactical decision based upon a logical and reasonable tactical choice, but an action that unduly prejudiced petitioner and which was constitutionally deficient under the Strickland standard.

15. Defense counsel was ineffective in failing to investigate the defense experts' opinions prior to presentation of that evidence. The defense asserted was self-defense. Therefore, petitioner was asserting that his actions did not constitute a criminal offense. The defense retained experts in forensic pathology, ballistics, blood spatter, shooting and psychology. In order for the defense to be credible, their opinions had to interplay in a supportive manner to each other. During the trial, it became painfully obvious that defense counsel had not properly prepared for trial. Defense counsel had not read various notes and reports of his experts who were not only easily discredited with respect to their opinions, which should have been used to support petitioner's theory of the case, but in Dr. Eisele's own notes, he opined "it would be hard to present this as self-defense" After allegedly interviewing and preparing Dr. Eisele for trial, which must have included reviewing his notes and getting his expert opinion, defense

counsel put him on the witness stand and the state crucified him with that entry in his notes. These notes had been previously been turned over to the state. Not putting Dr. Eisele on would have made more sense. Dr. Eisele became a better witness for the state than their own forensic pathologist, Dr. Sims, who was not so certain about his opinion as defense witness Dr. Eisele was about his. Jimmy Trahin, the defense ballistics expert, also testified better for the state than the defense. He essentially embraced the state's theory. Due to the faulty and prejudicial choices of defense counsel, petitioner was required to go to trial with experts who defense counsel should have known were not going to support petitioner's theory of the case. These witnesses actually did undermine defendant's theory of defense. Further, there were other defense experts (i.e. Lt. Franks, LVMPD) who did not testify as defense counsel had represented they would in his opening statement, again destroying any credibility the defense may have originally had. This lack of preparation of the expert witnesses and the poor choice to present their testimony, undermined the defense theory. Again, this was not a rational tactical dec ision, but was a decision which was constitutionally deficient under the Strickland standard.

16. Defense counsel was ineffective for failing to secure the attendance of all necessary witnesses at trial.

Defense counsel failed to subpoena Emeline Eisenman whose identity, address, telephone number and potential testimony were known. From 2001 to 2004, defense counsel had the opportunity to subpoena and interview her. She

would have testified about the decedent's violent past behavior, how she warned petitioner about it and how petitioner had peacefully handled a dispute with the decedent's former boyfriend. Her testimony was also important on the issue how she and others had attempted to influence Francisco (Quito) Sanchez (i.e. get him to lie about seeing a gun in petitioner's possession on December 5, 2000), about a prior incident involving petitioner and the decedent. Defense counsel in opening statement said she would be called but she was not.

The state also mentioned her in their opening statement and then in a strategic move, decided not to call her as a witness and released her from her subpoena. Emeline's testimony was also crucial to the defense to help impeach state witness Trisha Miller about Miller's conversations with her. Emeline's testimony would also have been important to impeach Lisa Eisenman's testimony about the decedent's prior criminal history. She left the courthouse at the end of the state's case and defense counsel could not thereafter locate her as he anticipated that he would.

During the defense case, petitioner testified about Emeline's involvement in the incident involving petitioner, Richardo Dominquez (decedent's old boyfriend) and the decedent, wherein the decedent had just previously spent the night with her old boyfriend while engaged to petitioner and petitioner resolved the matter peacefully as mentioned above. Emeline's testimony was essential to the presentation of his self-defense case. Without her testimony, critical aspects of the defense case could not be presented or could not be corroborated.

Therefore, her testimony was crucial.

Defense counsel also failed to subpoena or call Lt. Franks, a LVMPD shooting expert, as had been promised in defense counsel's opening statement. His testimony, or that of an expert like him, was critical on the issue of the speed that the shots could be fired and how doing this, during an extremely emotional episode, affects the memory of the shooter. This was critical on the issue of premeditation and on the credibility of petitioner's testimony. This would have explained his lack of specific memories about the shooting. The failure to call him was not a reasonable tactical decision, but one that unduly prejudiced petitioner and which was constitutionally deficient under the Strickland standard.

II.

Trial Ineffectiveness

There were numerous instances of ineffectiveness. They were:

1. Defense counsel was ineffective for failing to object or to make a record about the juror who wore a t-shirt that read, "Do you know what a murderer looks like?" during closing argument.

2. Defense counsel was ineffective for failing to object, at various times, to two jurors who slept intermittently during trial.

3. Defense counsel was ineffective for failing to effectively stop the prosecutors from using the terms "murder," "victim" and "crime scene" to describe the circumstances of the homicide despite the fact that a motion in

limine had been granted earlier in the case.

4. Defense counsel was ineffective for failing to stop, by objection, motion in limine or by other procedures to prevent the prosecutors from using the terms "assassination," "assassination shots" and "mafia hit man" during questioning or argument.

In all of the above instances, defense counsel should have made or renewed objections and/or requested a mistrial. The use of these highly inflammatory and prejudicial terms was extremely prejudicial to petitioner and their use deprived petitioner of his right to due process and a fair trial.

Later in the trial, defense counsel inexplicably embraced these same terms during his re-cross of state expert Sims and defense expert Jimmy Trahin. Defense counsel acknowledged, during closing argument, his failure to object to the word "assassination" when used by the state in their questions and by its witness, Dr. Sims. This was not restricted to only one incident but occurred on several occasions.

The use of the above terms without objection or request for a mistrial prejudiced petitioner and deprived him of a fair trial and the effective assistance of counsel all in violation of his constitutional rights as guaranteed under the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States. Defense counsel's performance with respect to these issues was constitutionally deficient under Strickland.

5. Defense counsel was ineffective for failing to properly handle the issue

of the testimony of Francisco "Quito" Sanchez, a minor, who admitted that his Aunt Lisa Eisenman, and grandmother, Emerline Eisenman, had coached him to lie about seeing a gun. This came to light during a the Petrocelli hearing which was held on October 24, 2001. After the Petrocelli hearing, defense counsel should have filed a motion in limine to exclude his testimony but did not. Further, defense counsel should have attempted to interview Quito before the actual trial commenced two and one-half years later or filed a motion, in the interim, seeking another hearing so that the parties could determine if Quito, who lived with his aunt and grandmother, had been "coached" to lie again. This would have been critical in order to prepare to impeach Lisa and Emeline Eisenman. Lisa Eisenman did testify for the state during the trial. Defense counsel should have also questioned Quito at the October 24, 2001 Petrocelli hearing about the other statements that he was going to testify about at trial. Quito testified later at trial that petitioner had said that he was going to kill him, Nick and himself.

After the Petrocelli hearing, the state and defense argued the admissibility of Quito's testimony. Defense counsel argued that he was not in a position to determine if he could challenge the foundation for the admissibility of Quito's testimony at trial as the state had not turned over all of the necessary discovery (i.e. tape recordings of police/state interviews). These tapes were never secured by the defense.

Defense counsel also failed to effectively impeach Quito about his lack of

memory about going to the doctors on December 4, 2000, with petitioner and Nicholas despite medical records and the doctor and nurse being available to impeach or to refresh his memory. Quito's evasive testimony went virtually unchallenged. Since defense counsel failed to seek the exclusion of the testimony of Francisco (Quito) Sanchez via a motion in limine, he could have attempted to another case, Dr. Scott Fraser, an expert in the reliability of children's testimony, in an effort to show that Quito's testimony was untrustworthy. Bloom has used Dr. Frasier and had secured the vacation of a conviction in Plascencia v. Alameida, 467 F.3d 1190 (9th Cir. Cal. 2006). Funding for this expert was not a problem as petitioner had been granted funding by the Court to secure expert witnesses. There was no reason for defense counsel not to at least consult with this expert or another like him but defense counsel did not.

It was clear that defense counsel had not prepared to cross-examine Quito in any meaningful way or to seek the exclusion of this minor's tainted testimony. This was highly prejudicial to petitioner and denied him due process, the effective assistance of counsel and a fair trial and violated his constitutional rights as guaranteed under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. This violated the standard for counsel set forth in Strickland.

6. Defense counsel was ineffective for failing to properly prepare petitioner to testify and actually set him up for impeachment.

In an effort to explain the decedent's erratic behavior towards petitioner on December 5, 2000 (i.e. decedent was arrested and charged with domestic violence) and on December 20, 2000 (day of the homicide) defense counsel set out to prove that decedent had a history of drug abuse. He intended to show that she had a hole in her nose due to drug abuse. This fact had allegedly been communicated to petitioner by one of the two plastic surgeons who had preformed a rhinoplasty on her several years before the shooting in this case.

To corroborate this, approximately 2-1/2 years before the trial, defense counsel had obtained the decedent's medical records from that procedure. He then turned those records over to the state. As trial approached, defense counsel prepared petitioner to testify about the hole in the decedent's nose as petitioner remembered having been told by one of the surgeons.

However, there were no references in the medical records, obtained by defense counsel, which he had provided to the state, that showed that decedent had a hole in her nose or that there was other evidence of drug abuse. By preparing petitioner to testify about the hole in her nose, it is apparent that defense counsel had never reviewed the medical records or spoke to either surgeon in order to verify that information in some way. Because defense counsel had failed to adequately investigate the accuracy of this information, he set petitioner up to apparently testify falsely and then provided the means for the state to impeach him.

The state secured the testimony of Dr. Sessions, who was one of the

surgeons involved, and he corroborated the lack of reference in the medical records to a hole in decedent's nose and that he had not observed one before or during the rhinoplasty. The state clearly had someone review the medical records before trial and had contacted Dr. Sessions in order to have him available to testify in the rebuttal phase of the trial.

Defense counsel's performance was constitutionally deficient and violated petitioner's rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

7. Defense counsel was ineffective in failing to properly handle the issue of the testimony of Tricia Miller.

Tricia Miller was a crucial witness for the state. She was the state's second witness during petitioner's trial. She testified, without objection from defense counsel, to the threats petitioner allegedly made to Gina on December 5, 2000. Tricia Miller did not personally see or hear these threats. She testified as to what Gina had told her about petitioner putting a gun to Gina's head and telling her he was going to kill her, himself and the kids. This was highly prejudicial hearsay. Defense counsel did not object and did not otherwise preserve this matter for appeal.

Defense counsel also failed to challenge this untruthful testimony on cross-examination despite having her pre-trial statements to the police, and despite Miller being interviewed by defense counsel. Her lack of personal knowledge should have been attacked more strongly and a motion to strike used.

8. Defense counsel was ineffective for using self-defense as petitioner's primary defense at trial.

As mentioned earlier, defense counsel failed to investigate the opinions of the defense's own experts prior to the selection of self-defense. This resulted in the defense experts testifying more in support of the state's case than that of the defense. This was especially clear from the testimony of Dr. Eisele whose notes were provided to defense counsel more than 2 years before the trial. In his notes, he gave his written opinion that this was not a self-defense case. When he testified, the state drove this point home. Again defense counsel set up petitioner's expert to testify, apparently falsely, and provided impeachment material to the state.

Petitioner was led to believe by defense counsel that his defense would be dependent upon the testimony of a psychologist and psychiatrist. Defense counsel told petitioner that they would testify on various psychological issues which would explain the catatonia and memory loss, as well as address the topic of battered spouse syndrome per Boykins v. State, 116 Nev. 171 (2000) as there were at least two predicate instances of abuse (December 1, 2000 and December 5, 2000) leading up to the December 20, 2000 incident. Defense counsel, without explanation or without making a reasonable strategic decision, abandoned this defense at trial. Abandonment of a viable defense has been held to constitute the ineffective assistance of counsel. Petitioner asserts that had defense counsel presented the evidence, there is a reasonable probability that

petitioner would have been found not guilty or at worse, of a degree of manslaughter or murder less than first degree. These actions deprived the petitioner of his rights to due process, a fair trial and the effective assistance of counsel.

9. Defense counsel was ineffective for failing to object to and to preserve for the record the hearsay statements allegedly made by Gina (decedent) to the responding officers and to Mark Smith on December 5, 2000. This failure to object caused these highly prejudicial remarks to be presented to the jury thereby denying petitioner due process of law, a fair trial and ineffective assistance of counsel in violation of his constitutional rights as guaranteed under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

III.

Ineffectiveness Regarding Prejudicial Prosecutorial Misconduct and Prejudicial Rulings of the Court

1. Defense counsel was ineffective for failing to object to, request a mistrial, request an evidentiary hearing or to file a petition for writ of mandamus/prohibition to the Nevada Supreme Court on the issue of the disqualification of petitioner's attorney of choice. Defense counsel never took action to rectify the improper disqualification or to address the prosecutorial misconduct (bad faith disqualification) which lead to it. Petitioner made it clear to defense counsel that he wanted Albregts back but no action was taken to accomplish this even after the state acknowledged Albregts was not a witness.

This failure deprived petitioner of his right to counsel of his choice in violation of his Sixth Amendment right under the Constitution of the United States.

2. Defense counsel was ineffective for failing to prevent the canvass of petitioner by the court who sought to elicit his admission that he was the shooter. While counsel did object in 2001, and Judge Gibbons ruled for the defense at that hearing, that was not the case when the second canvass occurred in 2004. Further, defense counsel should not have allowed his client to participate in this canvass and should have filed a Petition for Writ of Prohibition with the Nevada Supreme Court in order to prevent this. Neither the state nor the court had the authority to do this. This action by them violated petitioner's Fifth, Sixth, and Fourteenth Amendment rights as guaranteed under the Constitution of the United State and defense counsel did not take effective action to properly challenge this improper canvassing. This lack of action constituted ineffective assistance of counsel.

3. Defense counsel was ineffective for failing to request a Petrocelli hearing or to file a motion in limine to preclude the state from presenting evidence alleging a "smear campaign" of decedent by petitioner. The Court had ruled in December, 2001, and the state agreed on the record, that any evidence claiming defendant had engaged in a "smear campaign" against decedent, prior to December 20, 2000, as evidence of premeditation, would **not** be allowed in the state's case-in-chief. Defense counsel failed to object to this when the state raised this in their opening statement and failed to object when they presented

evidence of this in their case-in-chief. Despite the Court's ruling, this was a major theme of the state's case. Defense counsel should have moved for a mistrial or sought assistance from the Court in order to prevent this improper tact from being taken by the state. The failure to do this constituted ineffective assistance of counsel.

4. Defense counsel was ineffective for failing to present witnesses or evidence to impeach the testimony of Sarah Smith although multiple witnesses were available and known to the defense who could have done this. Defense counsel's cross-examination of this witness showed a lack of preparation. The transcript of the police recorded interview of Smith was not provided to the defense until the day she testified despite the fact that the interview was conducted in 2003. She did not testify until April 1, 2004. The state gained an unfair advantage by this tactic in that she was able to testify untruthfully on several matters without being challenged and the defense was not in a position to effectively cross-examine her by confronting her with contrary information which was contained in her statement or elsewhere. She was a critical witness for the state.

The failure to turn over her interview information was a pattern the state intentionally followed as they had done before by not turning over the interview tapes and transcripts of Francisco (Quito) Sanchez over to the defense until he testified at trial. As with Quito testifying, defense counsel was ineffective for not filing a motion in limine to exclude the testimony of this witness on the basis

that the state had intentionally withheld this discovery. At the very least, defense counsel should have requested a continuance so they could have prepared to effectively cross-examine her. Since she was a major witness for the state, defense counsel should have at least had the benefit of reviewing her prior statements before undertaking the crucial task of cross-examining her. Petitioner asserts that her testimony about petitioner lying to police about the December 5, 2000 incident was untrue, her testimony about petitioner bragging to her that he was an attorney and could talk his way out of anything, that he told anyone who would listen that his wife was a slut, and that he would have his wife killed for personal and financial reasons were all also untrue. Sarah Smith also claimed that she gave petitioner self-help books and that petitioner was depressed. Defense counsel had the names of witnesses who were not called but who could have refuted those allegations as well.

Amanda Pearson, as well as numerous other witnesses including several of petitioner's former co-workers, could have refuted Sarah Smith's untruthful statements and would have explained to the court her motive for being untruthful. As for her testimony that petitioner months earlier had brought a gun to work, petitioner's co-workers were available to refute that statement as it seems no one else saw the gun in his desk and she did not bring this allegation to anyone's attention for months after she claimd to have "accidently" seen it. She didn't even mention it to petitioner even in general conversation, after her inadvertent "discovery." Defense counsel also failed to call Scott

Stonebreaker and Donna Coffee to impeach the testimony of Sarah Smith.

And as with Smith, defense counsel was not given the statement of Adrienne Atwood until the day she testified. Again, defense counsel failed to object to her testimony or to make a motion in limine. Counsel was unprepared to effectively cross-examine this witness.

Defense counsel also failed to object to the state's improper use of the fact that petitioner was an attorney in an effort to inflame the jury. The state was allowed to present testimony that petitioner was an attorney and that because of that he was somehow able to use his attorney skills to convince the police to arrest Gina on December 5, 2000, and not to arrest him. The state presented this theory despite the fact that the police observed physical i njuries to petitioner, his torn shirt and had Gina's admission that she hit petitioner with a glass picture frame cutting his head. The state had filed a domestic battery charge against petitioner and would have successfully prosecuted her had she lived. Yet they put forth the theory that petitioner was the aggressor that night, not the decedent.

Defense counsel did not object to the state's presentation of evidence asserting that petitioner had lied to police about the December 5, 2000 incident. This "bad act" evidence should have been subjected to a Petrocelli hearing or should have been excluded. Nevertheless, due to the lack of objection, this matter was not preserved for appellate review and counsel's inaction in response to the above issues constituted ineffective assistance of counsel.

5. Defense counsel was ineffective regarding the issue of the violation of attorney-client and work product privilege as it related to attorneys Janeen Mutch and Harvey Gruber.

Defense counsel failed to object to the improper way that the Ex Parte Hearing Outside the Presence of the State was conducted or to otherwise preserve this issue for appellate review. Although Mutch's testimony was excluded from trial, defense counsel did not develop or adequately explore the issues of defense counsel Mutch and Gruber turning over photographs and notes made by them to the state **prior** to any ruling by the Court. Further, once the Court ruled that this was all privileged and work-product, defense counsel did not seek to have these items returned by the state to the defense, or to preclude their use by the state and to preclude the public filing of the transcript of this proceeding.

Further, it was prosecutorial misconduct for the state to accept and review this defense work-product material before a ruling from the Court. Petitioner asserts that at trial, the state used one or more of these photographs again without objection from defense counsel. Defense counsel also failed to object to the state using the fact that petitioner was approached in the police car by his attorneys on December 20, 2000, and appeared to communicate with them. The state used this to improperly initiate a preemptive strike on any psychological defense (catatonia) petitioner might raise. This was improper and defense counsel failed to object, file a motion in limine or to otherwise make a record for

appellate review on this improper conduct. This constituted ineffective assistance of counsel.

6. Defense counsel was ineffective for failing to object to the issue of the Fifth Amendment violation regarding the testimony about petitioner's post-arrest silence on December 20, 2000.

Defense counsel failed to object to the state introducing testimony that petitioner appeared to communicate with his attorneys at the scene on December 20, 2000. This testimony was presented through the testimony of Detective Tom Thownsen. Not only were Thownsen's observations of and conclusions about petitioner's communications with his lawyers improper but his further testimony that petitioner was a lawyer constituted irrelevant and highly prejudicial testimony that was only intended to inflame the jury. Thereafter, defense counsel failed to move to strike or to request a mistrial or to otherwise preserve this improper testimony for appellate review. This constituted ineffective assistance of counsel and violated petitioner's rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

7. Defense counsel was ineffective for failing to file pretrial motions regarding the issue of the admissibility of testimony and records of Mark Smith.

Smith was a New York state licensed therapist who provided helpline service to employees of Eva Cisneros. On December 5, 2000, petitioner contacted him and he spoke to petitioner and the decedent to discuss their

marital and domestic violence problems. During the trial on March 23, 2004, the state called Dr. Shirley Repta who brought records of the telephone conversation between petitioner with Mark Smith. The records arrived in a sealed envelope with an order from the judge in New York ordering Dr. Repta to comply with the judge's order here. In the records, undoubtedly was the decedent's statement that petitioner had held a gun on her and threatened to kill her. In addition to this hearsay, the state had already spoken to Mark Smith and had apparently already obtained the records and information and had a conversation with Mark Smith before the Court ruled on the issue of privilege. The state made an offer of proof as to what petitioner and the decedent said to Mark Smith before a hearing was held on the privilege and admissibility. The state conceded this. At this point, the court limited Smith's testimony but still allowed enough testimony about the initial conversation with petitioner and the decedent to violate petitioner's privilege and to violate the holding in the Crawford case as well as petitioner's right to due process, a fair trial and his rights as guaranteed under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

Defense counsel's failure to do a pretrial motion in limine to exclude the records and testimony from Dr. Repta and Mark Smith constituted ineffective assistance of counsel. Defense counsel could have asked for a continuance or could have sought an emergency petition for writ of mandamus from the Nevada Supreme Court. Had defense counsel filed the motion in limine well in advance

of the trial, instead of being forced to react to this orally during trial, he would have had adequate time to have the matter heard and decided. Additionally, he would have had adequate time to file the petition for writ of mandamus and bring this matter to the attention of the Nevada Supreme Court who could have issued a stay order.

By failing to do these things, defense counsel's performance fell below the standard set forth in Strickland and constituted ineffective assistance of counsel in violation of petitioner's constitutional rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

8. The issue of the improper vouching during the testimony of Tricia Miller, Mark Smith, Kim Fovea, Sarah Smith and Eva Cisneros.

Improper vouching, elicited by the state, occurred during the testimony of these witnesses. The state improperly had their witnesses vouching for certain theories and opinions. Tricia Miller was asked by the state to give her view about her fear of petitioner. Kim Fovea was asked to give her analysis of an audio tape by being asked, "Did you have a concern?" was a question put to her. Mark Smith was asked whether he thought Gina's statements to him were genuine or not. These witnesses were improperly asked about giving an opinion about what they feel the evidence holds.

This same approach was used improperly during the questioning of Sarah Smith and Eva Cisneros on the issue of petitioner bringing a gun to work and being fired from his job as a result. The fact that the state infected the entire

proceedings with multiple instances of vouching and improper opinion is evident in the testimony of both Sarah Smith and Eva Cisneros on the issue of petitioner bringing a gun to work and getting fired for it.

In all instances, the state was making both explicit and implicit references to information outside of the record (facts and circumstances of petitioner's firing) or was in a constant state of vouching for each of the state's witnesses. Other than the objection during the testimony of Mark Smith, no objection was made to the improper opinion and vouching testimony of the other witnesses mentioned above.

The failure to object to the testimony of these witnesses during the testimony of each, the failure to move for a mistrial, a curative instruction or motion to strike, resulted in an adequate record for appeal being made (except for plain error review) and caused defense counsel's performance with respect to this issue to be constitutionally deficient resulting in a denial of his rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

9. The issue of the admissibility of petitioner's employment records/evidence of petitioner's alleged firing for violation of the fire-arms policy.

Petitioner was fired from his employment some time after his arrest on December 20, 2000. No explanation was ever given. The firing of petitioner was not brought up before trial by either the state or defense. A pretrial Petrocelli hearing was never conducted on the issue of whether petitioner brought a gun

to work and was fired as a result. The defense never filed a pretrial motion in limine to exclude evidence of this event. This "alleged" gun possession at work supposedly occurred three to four months before the homicide and before he was terminated. There was no corroboration that the gun was ever in petitioner's office or that if it was, that there was a lawful reason for it being there. Sarah Smith testified that she saw it only once. There was no proof that she ever reported it to anyone.

Subsequently to the state making an issue of the fact that petitioner was fired and insinuating the reason for it, the state, during petitioner's trial, moved for the admission of petitioner's personnel file. Defense counsel did not object to its admission and admitted that he had not reviewed it but didn't have any objection to the state asking Eva Cisneros (petitioner's former boss) questions about it. Cisneros was asked generally about her office policy about bringing a gun to the office. The insinuation was that petitioner was fired for that. He was not. This was false testimony that defense counsel knew was false. Again, defense counsel should have anticipated this approach by the state and should have filed a motion in limine to exclude this irrelevant and highly prejudicial line of questioning. Again, if the motion had been done in a timely manner, defense counsel would have had ample time to petition the Nevada Supreme Court for a writ of prohibition, if necessary, to keep this testimony out. Defense counsel failed to do so and was ineffective for failing to do so.

10. Defense counsel was ineffective for failing to object and hold the state

accountable for failing to provide discovery in violation of Nevada's reciprocal discovery statute and Brady v. Maryland.

The state consistently failed to turn over discovery as required by NRS 174.235 and relevant U.S. Supreme Court decisions (cited in supporting points and authorities). As mentioned above, the state intentionally withheld the witness statements of Tricia Miller, Francisco Sanchez, Sarah Smith, Adrienne Atwood, Tom Thompsen as well as voice mails left and stored on decedent's telephone, cellular telephone and palm pilot. In addition, petitioner asserts that various witnesses were told directly or indirectly by the state's agents not to speak with defense counsel or his investigators. Defense counsel failed to file motions in limine to exclude the testimony of these witnesses which petitioner asserts would have been successful or to seek a hearing on what recalcitrant witnesses were told by the state when they refused to speak with the defense. These motions should have been filed before trial thereby allowing the defense adequate time to address these issues. This tact would have lead to a motion to dismiss which would have been successful if the uncooperative witnesses had indicated that they were refusing to be interviewed because of advice from the state. Simply put, because defense counsel did not object to or otherwise move to exclude this evidence, these issues were not preserved for appellate review and petitioner was prejudiced at trial.

11. Defense counsel was ineffective for failing to preclude the state from improperly shifting the burden of proof in their rebuttal and closing statement.

The prosecutors, impermissibly during closing argument, commented on petitioner's failure to call witnesses which was not objected to and which impermissibly shifted the burden of proof to petitioner. One example is where the prosecutor, Clark Peterson, said, "No persons came up here and talked about violence in her (decedent's) life up to 1999 and 2000." This was a clear message to the jury that petitioner had failed to present evidence of any other violence by decedent during trial and this comment and others were improper and highly prejudicial. A second impermissible shifting occurred when the prosecutor also said, "No expert came in here and said, 'Yes, catatonia, afterwards, shows he must have been acting in self-defense. Nobody said that." This too was improper and highly prejudicial. Nevertheless, defense counsel failed to object to either statement, move for a mistrial or otherwise preserve this issue for appellate review. This failure to object or request a mistrial during each incident constituted ineffective assistance of counsel and violated petitioner's rights to due process, a fair trial and the effective assistance of counsel as guaranteed under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. Defense counsel's lack of action was constitutionally deficient under the Strickland standard.

12. Defense counsel was ineffective for failing to require the Court to rule on various pending pretrial motions.

Defense counsel's failure to have the Court rule on pending pretrial motions until the day witnesses and evidence were to be presented in trial shows

that defense counsel could not have been prepared. Further, although there were instances where a pretrial motion was made and decided (i.e. signed warrant and recorded statement in support thereof was requested), the Court denied petitioner's motion based upon the state's promise to provide these. Yet, even when the state failed to provide those items and to comply with prior court rulings, defense counsel did not bring these issues to the Court's attention. Petitioner was prejudiced thereby and defense counsel's failure to force the state to comply, constituted ineffective assistance of counsel and violated petitioner's rights as guaranteed under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. Defense counsel's performance fell below the standard set forth in Strickland.

13. Defense counsel was ineffective for failing to request a critical jury instruction.

Defense counsel failed to request a jury instruction on the alleged loss of evidence by the state with regards to the decedent's property which had been collected at the Centofanti residence and from her work, as well as the bloody exercise bike and other items mentioned above, despite the fact that this was an issue both pretrial and at trial. The mishandling of evidence prejudiced the defendant, entitling him to a special jury instruction setting forth the conclusive instruction which embraced the petitioner's self-defense theory. No request for such an instruction was made by defense counsel and this matter was not preserved for appellate review. Further, petitioner asserts that the Court also

erred in not allowing petitioner to amend the reasonable doubt instruction by adding the language requested by defense counsel.

Defense counsel should have filed a petition for writ of mandamus and a motion for stay in order to get a ruling from the Nevada Supreme Court on these issues before the matter was submitted to the jury for decision. This could have even been sought in a pretrial motion. However, defense counsel did not do that.

The failure to do this constituted ineffective assistance of counsel and violated petitioner's rights to due process, a fair trial and the effective assistance of counsel as guaranteed under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

14. Defense counsel was ineffective for failing to object, in a timely manner to improper cross-examination of petitioner and other improper impeachment techniques used by the state.

Petitioner was advised to testify by defense counsel who represented that he was prepared to present the self-defense as well as the issue of petitioner's mental state as an element of the defense. Defense counsel's lack of trial preparation is set forth above especially as to the preparation to present a self-defense case. This failure to prepare set up a cross-examination which allowed the state to argue to the jury to disregard all of petitioner's testimony, thus essentially vitiating any defense at all (since the mental state defense had been abandoned by defense counsel during trial). The cross-examination of petitioner regarding the plastic surgery on decedent is a prime example of what happens

when defense counsel fails to review the medical records, contact the doctor or properly prepare his client to testify despite having the records and access to the doctor who performed the surgery. Petitioner was impeached by information not reviewed by defense counsel but nevertheless provided by defense counsel to the state.

Defense counsel also failed to object to various instances of improper cross-examination of petitioner's mother and father. Essentially, the prosecutor improperly asked petitioner and his parents questions asking them specifically whether other witnesses were lying. The state's improper questions to petitioner's father and mother were not objected to when they should have been. Defense counsel should also have objected and asked for a mistrial as each improper questioning incident continued to occur. However, he did not. Defense counsel's performance fell below the standard set forth in Strickland.

15. Defense counsel was ineffective for failing to object to the improper introduction of improper evidence by the state.

Defense counsel failed to object or request a mistrial when Tricia Miller opined that petitioner lied about putting a gun to the decedent's head during the December 5, 2000 incident. This "opinion" was not based upon personal knowledge or observation. Defense counsel also failed to object or to request a mistrial when the state got Sarah Smith to testify during trial that petitioner lied about the events of December 5, 2000. This testimony was also clearly improper and defense counsel should have asked the Court to admonish the state and these witnesses in order to put a stop to this behavior. However this did not

occur. Defense counsel's performance fell below the standard set forth in Strickland.

POST TRIAL INEFFECTIVENESS

Defense counsel was constitutionally ineffective when he made himself unavailable during the seven day period within which it was necessary to file the Motion for a New Trial. This constituted ineffective assistance of counsel under the circumstances mentioned previously.

The jury returned the guilty verdict in April 16, 2004. Petitioner asserts that he had grounds for a new trial (i.e. juror misconduct) but lead defense counsel left the country right after the verdict and local counsel was unable to do anything. Bloom received two letters during this time period outlining the juror misconduct (juror wearing t-shirt with printing, "Do you know what a murderer looks like?" and the other sitting jurors periodically sleeping). While it appears that lead defense counsel was aware of the juror issues, it also appears that he was not aware of the time period to bring the motion for a new trial as set forth in NRS 176.515.

When petitioner did bring the motion for a new trial, the district court denied it based upon being filed outside of the seven (7) day time limit. Petitioner was prejudiced by not being able to present this motion despite having clear grounds to do so. Further, Bloom failed to take steps to preserve these issues for appellate review. Defense counsel's performance fell below the standard set forth in Strickland and petitioner's right to due process, a fair trial and the effective assistance of counsel as guaranteed under the Fifth, Sixth and

Fourteenth Amendments to the Constitution of the United States.

(g) GROUND SEVEN: Petitioner is entitled to relief because of the cumulative effect of the errors which occurred at trial, raised on direct appeal, and in this petition.

Supporting Facts:

Petitioner incorporates the facts and arguments set forth above and asserts that the cumulative effect of the above mentioned errors violated his important state and federal constitutional rights. Although any one of the above-mentioned errors may be deemed harmless, the cumulative effect of the multiple errors outlined above show that petitioner's constitutional rights to a fair trial, due process and the effective assistance of counsel were violated. Petitioner has demonstrated prejudicial errors based upon the improper disqualification of his counsel, improper canvassing of petitioner on the use of self-defense, improper denial of his motion for a new trial, faulty jury instructions, the impermissible shifting of the burden of proof and the ineffective assistance of counsel.

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WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

EXECUTED this 20th day of February, 2008.

ALFRED P. CENTOFANTI, III
Petitioner
Ely State Prison
P.O. Box 1989
Ely, NV 89301-1989

CARMINE J. COLUCCI CHTD.

CARMINE J. COLUCCI, ESQ.
Nevada Bar No. 000881
629 South Sixth Street
Las Vegas, Nevada 89101
Attorney for Petitioner

VERIFICATION

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

ALFRED CENTOFANTI, III
Petitioner
Ely State Prison
P.O. Box 1989
Ely, NV 89301-1989

CARMINE J. COLUCCI CHTD.

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Attorney for Petitioner

CERTIFICATE OF SERVICE BY MAIL

I hereby certify pursuant to NRCP 5(b), that on this 29 day of February, 2008, I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS addressed to:

E.K. McDaniel, Warden
Ely State Prison
P.O. Box 1989
4569 North State Rt. 490
Ely, NV 89301

David Roger
Clark County District Attorney
200 Lewis Avenue, 2nd Floor
Las Vegas, NV 89155

Nevada Attorney General
Heroes' Memorial Building
Capital Complex
Carson City, NV 89710

Zoe McCough

An employee of
CARMINE J. COLUCCI, CHTD.

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FILED

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CLERK OF THE COURT

PTAT
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Attorney for Petitioner,
ALFRED P. CENTOFANTI III

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK

ALFRED P. CENTOFANTI III, Petitioner, vs. E.K. McDANIEL, WARDEN ELY STATE PRISON, Respondent.	CASE NO. C172534 DEPT NO. VII

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

Petitioner, ALFRED P. CENTOFANTI, hereinafter referred to as petitioner, by and through his attorney, Carmine J. Colucci, Esq., of the law firm of Carmine J. Colucci, Chtd., hereby submits his Memorandum of Points and Authorities in Support of his Petition for Writ of Habeas Corpus (Post Conviction).

I.

PROCEDURAL BACKGROUND

Petitioner was taken into custody on December 20, 2000, by Las Vegas Metropolitan Police (LVMP) after LVMP were summoned to the residence located at 8720 Wintry Garden Avenue, Las Vegas, Nevada.

Petitioner was charged on January 10, 2001 by way of Indictment by the Clark County Grand Jury of the crime of Murder with Use of a Deadly Weapon (Open Murder) (Felony - NRS 200.010, 200.030, 193.165).

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CLERK OF THE COURT

At the initial arraignment on January 17, 2001 petitioner appeared before the Honorable Mark Gibbons, District Court Judge, Eighth Judicial District Court, Department VII, in the case denominated # C172534. Petitioner entered a plea of not guilty and waived the 60-day rule. Trial was set for July 9, 2001. The trial was delayed due to the disqualification of petitioner's counsel of choice, Daniel J. Albregts and the request for a continuance for petitioner's new counsel, Allen Bloom and Gloria Navarro.

Trial was re-set for January 2, 2002 in front of Judge Gibbons. Before jury selection, the state made an oral request to have a psychological examination conducted on petitioner. This motion was denied and a writ filed by the state which stayed the proceedings. Oral arguments were held in June of 2002 and a decision was not reached by the Nevada Supreme Court until December of 2002. At that point, Judge Gibbons had been elected to the Nevada Supreme Court and could no longer hear the case. The matter was randomly assigned to Judge Donald Mosley and trial set for November of 2003.

Jury trial commenced on March 22, 2004, and concluded on April 16, 2004, with the jury returning with a verdict of guilty of First Degree Murder with use of a Deadly Weapon. A Penalty Hearing was set for April 20, 2004.

On June 28, 2004 petitioner filed a Motion for a New Trial.

On August 10, 2004 the state filed their Opposition to the Motion for a New Trial.

On August 26, 2004, Judge Mosley denied the Motion for a New Trial.

Petitioner filed a Writ of Mandamus/For a Writ of Prohibition with the Nevada Supreme Court, Case Number 43895, with regards to the denial of the Motion for New Trial.

On September 8, 2004 the Nevada Supreme Court issued an Order Directing Answer and Granting Temporary Stay.

On February 16, 2005 petitioner filed a Motion for Rehearing and Request for Stay Pending Decision, which was denied by the Nevada Supreme Court.

On March 9, 2005 the trial court adjudged petitioner Guilty of First Degree Murder with the Use of a Deadly Weapon and sentenced petitioner to two consecutive terms of Life Without the Possibility of Parole with (374) days credit for time served.

The Judgment of Conviction was filed on March 11, 2005 and the Notice of Appeal was timely filed on March 24, 2005.

II.

DIRECT APPEAL

An Opening Brief was filed in the Nevada Supreme Court, Case Number 44984, on October 27, 2005, a copy of which is filed under separate cover as Exhibit 1. The following issues were raised:

I. WHETHER APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE OF JUROR MISCONDUCT WHICH OCCURRED WHEN THE JUROR CONCEALED HER PRIOR FELONY CONVICTION AND THEN MISREPRESENTED THAT HER CIVIL RIGHTS HAD BEEN RESTORED WHEN THEY HAD NOT BEEN.

II. WHETHER APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE OF JUROR MISCONDUCT WHICH OCCURRED WHEN A JUROR PERFORMED HIS OWN FIREARM TESTING EXPERIMENT DURING THE TRIAL.

III. WHETHER APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE OF JUROR MISCONDUCT WHICH OCCURRED WHEN A JUROR WORE A TEE-SHIRT DURING CLOSING ARGUMENTS THAT READ, "DO YOU KNOW WHAT A MURDERER LOOKS LIKE?"

IV. WHETHER APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE OF JUROR MISCONDUCT AS TWO JURORS SLEPT DURING THE TRIAL OF THE CASE.

V. WHETHER THE PROSECUTOR'S CONTINUOUS USE OF THE TERMS "MURDER" AND "VICTIM" IN THEIR QUESTIONS DURING TRIAL CONSTITUTED PROSECUTORIAL MISCONDUCT AND VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL AND DUE PROCESS AS GUARANTEED UNDER THE CONSTITUTION OF THE UNITED STATES AND UNDER STATE LAW.

VI. WHETHER THE ADMISSION OF VARIOUS HEARSAY STATEMENTS VIOLATED THE CONFRONTATION CLAUSE AND DENIED APPELLANT HIS RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW AS GUARANTEED UNDER THE