

1 established an effective screen precluding the individual's lawyer's direct or indirect participation
2 in the prosecution." Id. While Collier speaks of "extreme cases" it should be considered here where
3 one of Petitioner's trial attorneys is now employed with the office responsible for opposing a writ
4 on ineffective assistance of counsel grounds. It is anticipated that she will be called as a witness by
5 both sides and will be called upon to explain her actions and those of her co-counsel as they relate
6 to the issue of ineffective assistance of counsel. This is further compounded by the failure to comply
7 with the necessary rules of professional conduct.

8 While Ciaffone and Leibowitz addressed the issue of non-lawyer employees who switched
9 firms, they are distinguishable here as we are discussing the movement of attorney. And it was not
10 simply an attorney who worked in an office where a case was handled, but one of the actual trial
11 attorneys for the defense who now works for the same district attorney's office who prosecuted the
12 case. Therefore, the impute disqualification rule should apply to the district attorney's office under
13 NRS Rules of Professional Conduct.

14 Other jurisdictions have held disqualification is required when screening devices were not
15 employed or timely employed (See, Schiessle v. Stephens, 717 F.2d 417, (C.A. 7 (Ill.) 1983, or when
16 screening arrangements are not established or employed until the disqualification motion was filed
17 (See LaSalle National Bank v. County of Lake, 703 P.2d 252, 256 (7th Cir. 1983) Even if they are
18 in place, she is a percipient witness on a major issue which alone requires disqualification.

19 Since Petitioner was not properly contacted or notified and because Ms. Navarro is a
20 percipient witness with respect to many of the major issues raised in the pending Petition for Writ
21 of Habeas Corpus (Post-Conviction) and especially the issue of ineffective assistance of counsel, the
22 District Attorney's Office should be disqualified by this Court. The attorney General's office is fully
23 capable of handling this matter on behalf of the State.

24 III.

25 CONCLUSION

26 WHEREFORE, based upon the above stated points and authorities and arguments, Petitioner
27 respectfully requests this Court issue an Order:

1. Granting Petitioner's Motion to Disqualify the Clark County District Attorney's Office from further involvement in this matter.

2. In the alternative, set this for an evidentiary hearing to make a record of the facts and circumstances raised in this Motion; and

3. Any additional relief this Court deems necessary under the facts and circumstances in this case.

DATED this 10 day of June, 2008.

CARMINE J. COLUCCI, CHTD.

CARMINE J. COLUCCI, ESQ.
Nevada Bar No. 000881
629 South Sixth Street
Las Vegas, Nevada 89101
Attorney for Petitioner

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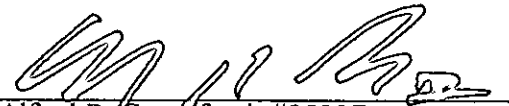
AFFIDAVIT OF INMATE ALFRED P. CENTOFANTI, III

STATE OF NEVADA)
) ss:
COUNTY OF WHITE PINE)

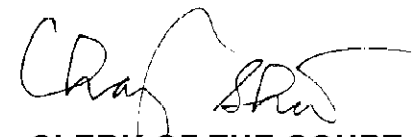
I, Alfred P. Centofanti, III, Petitioner in the above-entitled matter, hereby swear, under penalty of perjury, pursuant to Nevada Revised Statute 208.165 (Execution of Instrument by Prisoner) that the assertions made in the attached Petitioner's Notice of Motion and Motion to Disqualify the Clark County District Attorney's Office are true and correct to the best of my knowledge.

FURTHER AFFIANT SAYETH NAUGHT.

DATED this 9th day of June, 2008.



Alfred P. Centofanti, #85237
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301-1989


CLERK OF THE COURT

OPPS
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
JAMES R. SWEETIN
Chief Deputy District Attorney
Nevada Bar #005734
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ALFRED P. CENTOFANTI, III,
#1730535

Defendant.

CASE NO: C172534
DEPT NO: VIII

STATE'S OPPOSITION TO DEFENDANT'S MOTION TO DISQUALIFY

THE CLARK COUNTY DISTRICT ATTORNEY'S OFFICE

DATE OF HEARING: JULY 21, 2008
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through JAMES R. SWEETIN, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion to Disqualify the Clark County District Attorney's Office.

This opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

//

//

1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On January 10, 2001, Alfred P. Centofanti III, (hereinafter "Defendant") was charged
4 by way of Indictment with Murder With Use of a Deadly Weapon (Felony – NRS 200.010,
5 200.030, 193.165).

6 The Defendant's jury trial commenced on March 15, 2004, and ended on April 16,
7 2004, with the jury finding the Defendant guilty of the charge on April 22, 2004.

8 Defendant filed numerous motions and writs over the course of his case.

9 On March 4, 2005, Defendant was sentenced to Life Without the Possibility of Parole
10 plus an equal and consecutive Life sentence Without the Possibility of Parole for use of a
11 deadly weapon, with three hundred seventy-four (374) days credit given for time served.
12 Judgment of Conviction was filed on March 11, 2005.

13 On March 24, 2005 Defendant filed Notice of Appeal. On December 27, 2006, the
14 Supreme Court of Nevada affirmed the judgment of the District Court. In addition to the
15 aforementioned proceedings Defendant filed numerous motions and writs over the course of
16 his case.

17 On February 28, 2008 Defendant filed a Petition for Writ of Habeas Corpus. The
18 instant Motion was filed July 9, 2008. The State responds as follows.

19 **ARGUMENT**

20 **I. Prosecutorial Function Can Be Carried Out Impartially and Without**
21 **Breach of Privileged Communication.**

22 Defendant asserts that because one of his former trial attorneys is now employed by
23 the Clark County District Attorney, that the entire office must be disqualified.

24 The disqualification of a prosecutor's office rests with the sound discretion of the
25 district court. Collier v. Legakes, 98 Nev. 307, 646 P.2d 1219 (1982) (citing Tomlin v. State,
26 81 Nev. 620, 407 P.2d 1020 (1965); Hawkins v. 8th District Court, 67 Nev. 248, 216 P.2d
27 601 (1950); Trone v. Smith, 621 F.2d 994 (9th Cir. 1980)). In exercising that discretion, the
28 trial judge should consider all the facts and circumstances and determine whether the

1 prosecutorial function could be carried out impartially and without breach of any privileged
2 communication. Id.

3 Nothing on the face of these facts or in the allegations of the Defendant indicates that
4 the District Attorney's Office will be unable to carry out its prosecutorial function
5 impartially. Regarding privileged communication, the Defendant asserts that he himself is
6 likely to call on Ms. Navarro to testify about the effectiveness of the counsel she provided to
7 the Defendant at trial. As a result Defendant would be exposing privileged communications
8 between himself, Ms. Navarro, and co-counsel at his own behest.

9 **II. The Defendant Has Failed to Demonstrate Extreme Circumstances to**
10 **Warrant Disqualification of the District Attorney's Office**

11 To support his allegation that extreme circumstances exist to warrant disqualification
12 of the District Attorney's Office, Defendant asserts that despite effective screening
13 procedures Ms. Navarro will be participating in the prosecution as a consequence of her role
14 as a witness to the effective assistance of counsel issue.

15 "(E)thical rules require that a lawyer should avoid even the appearance of
16 professional impropriety and that in certain situations the disqualification of one lawyer
17 within a law firm means that all members of the firm are also disqualified. Collier, 98 Nev.
18 307 (citing State v. Tippecanoe, 432 N.E.2d 1377, 1379 (Ind. 1982)). However this principle
19 is less strictly applied to government agencies, and where a lawyer who has represented a
20 criminal defendant on prior occasions is one of the deputy prosecutors, disqualification of
21 the entire office is not necessarily appropriate. Id. (citing Tippecanoe, 432 N.E.2d at 1379).
22 Vicarious disqualification may be warranted in ... cases where the appearance of unfairness
23 or impropriety is so great that the public trust and confidence in our criminal justice system
24 could not be maintained without such action. Collier, 98 Nev. at 310. A Defendant must
25 demonstrate extreme circumstances to warrant the disqualification of the entire District
26 Attorney's office. Rippo v. State, 113 Nev. 1239, 1255, 946 P.2d 1017, 1027 (1997) (citing
27 Collier, 98 Nev. at 310).

28 //

1 Defendant assertion that the potential for calling on Ms. Navarro to testify creates an
2 extreme circumstance ignores the fact that Ms. Navarro's involvement in the case at this
3 point would be as witness testifying about the effectiveness of the counsel she provided
4 during trial, and not as a participant in the prosecution. Were Ms. Navarro to testify at all it
5 would be per the request of the Defendant himself.

6 **CONCLUSION**


7 WHEREFORE, for the foregoing reasons, the State respectfully requests that this
8 Honorable Court DENY Defendant's Motion to Disqualify the Clark County District
9 Attorney's Office.

10 DATED this 15th day of July, 2008.

11 Respectfully submitted,

12 DAVID ROGER
13 Clark County District Attorney
14 Nevada Bar #002781

15 BY

16 
17 JAMES R. SWEETIN
18 Chief Deputy District Attorney
19 Nevada Bar #005734

20 **CERTIFICATE OF FACSIMILE TRANSMISSION**

21 I hereby certify that service of State's Opposition to Defendant's Motion to Disqualify
22 the Clark County District Attorney's Office, was made this 15th day of July, 2008, by
23 facsimile transmission to:

24 CARMINE COLUCCI, ESQ.
25 FAX #384-4453

26 /s/ HOWARD CONRAD
27 Secretary for the District Attorney's Office

28 hjc/SVU

30

FILED

DISTRICT COURT

CLARK COUNTY, NEVADA

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ORIGINAL

Edna J. Smith

CLERK OF THE COURT

THE STATE OF NEVADA,

PLAINTIFF,

VS.

CASE NO: C172534

ALFRED CENTOFANTI,

DEFENDANT.

REPORTER'S TRANSCRIPT

OF

DEFT'S MOTION TO DISQUALIFY ATTORNEY

BEFORE THE HONORABLE JUDGE LEE A. GATES
DISTRICT COURT JUDGE
DEPARTMENT VIII

DATED MONDAY, JULY 21, 2008

FOR THE PLAINTIFF: JAMES SWEETIN, ESQ.

FOR THE DEFENDANT: CARMINE J. COLUCCI, ESQ.

REPORTED BY: SONIA L. RILEY, CCR NO. 727

SONIA L. RILEY, INC.

(702) 526-1298

RECEIVED

SEP 2 2008

CLERK OF THE COURT

1 APPEARANCES:

2 FOR THE PLAINTIFF:

3 JAMES SWEETIN, ESQ.
4 DISTRICT ATTORNEY'S OFFICE
5 200 Lewis Avenue
6 Las Vegas, Nevada 89155
7 (702) 671-2501

8 FOR THE DEFENDANT:

9 CARMINE J. COLUCCI, ESQ.
10 COLUCCI CHTD.
11 629 S. Sixth Street
12 Las Vegas, Nevada 89101
13 (702) 384-1274

14 DEFENDANT PRESENT

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1 LAS VEGAS, NEVADA; MONDAY, JULY 21, 2008

2 P R O C E E D I N G S

3 * * * * *

4 THE COURT: Alfred Centofanti.

5 MR. COLUCCI: The D.A. who is handling
6 that is in another department.

7 (Matter re-called.)

8 THE COURT: Mr. Sweetin.

9 MR. SWEETIN: The Centofanti case on
10 page 4.

11 THE COURT: Proceed.

12 MR. COLUCCI: Your Honor, this is our
13 motion to disqualify the District Attorney's Office.
14 It's based on the facts as set forth in our motion.
15 At trial, Miss Navarro and Allen Blum represented
16 Mr. Centofanti. At the time of trial, Miss Navarro
17 was a member of the Special Public Defender's
18 Office. Since that time, she has gone over to work
19 for the District Attorney's Office.

20 Presently, we have pending in this Court a
21 petition for writ of habeas corpus post conviction.
22 One of the issues in this petition is the
23 ineffective assistance of counsel. We learned that
24 Miss Navarro had gone over to the D.A.'s Office in
25 April after they had filed their opposition to our

1 petition, and the basis for our motion is this:
2 There was a failure to follow the rules. When an
3 attorney who represents a client changes sides,
4 they're supposed to follow certain procedures that
5 are set forth in the Rules of Professional Conduct.
6 They're supposed to give notice. They're supposed
7 to obtain a written waiver from the client, and it's
8 our position, and we set that forth in our --

9 **THE COURT:** The only problem with that is
10 that case is over with and done. I would agree if
11 it was a current, active case that they probably
12 should have done that, but this wasn't a current,
13 active case.

14 **MR. COLUCCI:** This was a petition, and
15 here is the problem.

16 **THE COURT:** When she went over, this case
17 was not pending, was it?

18 **MR. COLUCCI:** No. She went over after the
19 case was completed at trial; that's correct. What
20 I'm talking about now is there's a conflict of
21 interest. One of the issues that's raised is the
22 ineffective assistance of counsel. She obviously
23 was part and parcel with the other attorney who
24 conducted the trial. She was local counsel for an
25 out-of-state attorney.

1 We have alleged in the petition that
2 certain strategic decisions and certain applications
3 of Nevada law were incorrectly used, and that she
4 will be called, not only as a witness for the
5 defense, but more than likely a witness for the
6 State. She's now in a position where she works for
7 the State, and her job would be essentially to
8 preserve the conviction in this case. She has
9 inside information, of course, as to strategy and
10 trial decisions that she's privy to. So, to us,
11 it's a conflict of interest, your Honor. It's not
12 like she's just a defense lawyer put up there to
13 explain what she did wrong. Now she's on the side
14 of the State who is going to be trying to defend
15 against our petition and issues raised in our
16 petition. The rules are clear that no screening --
17 we still don't know if there are any screening
18 procedures in place. We don't know what her
19 position is over in the D.A.'s Office, and we think
20 this creates an appearance of impropriety. She's
21 over there; she's going to be testifying probably
22 for both sides, and she has inside information as
23 trial counsel. So, we're just asking that the Court
24 disqualify the D.A.'s Office. Certainly the AG's
25 office can pick this case up. They have more than

1 able people that can handle this matter. Like I've
2 said, the rules are pretty -- they're set forth.

3 THE COURT: You're repeating yourself.
4 What's the response?

5 MR. SWEETIN: The State opposes it. We
6 would note that Gloria Navarro was hired in the DA's
7 Office. She was in the civil division where she had
8 no responsibility over civil cases. She is
9 Chinese-walled off this pending case that she had
10 any association with before she came to the D.A.'s
11 Office.

12 THE COURT: I know, but if you call her as
13 a witness or he does, the folks are going to think
14 she might not want to be forthcoming or whatever
15 because she might offend her employer or her
16 office --

17 MR. SWEETIN: Judge --

18 THE COURT: -- or cause a problem.

19 MR. SWEETIN: -- it's been addressed by
20 the courts, and the defense has to show extreme
21 circumstances.

22 I would note by analogy, when Stu Bell was
23 elected to the bench, he was a prominent defense
24 attorney before coming to the bench. At the time he
25 came to the bench, the State continued to prosecute

1 even the cases that he had defended prior. He
2 Chinese-walled himself off those cases, and the
3 prosecutors who had no contact with him were allowed
4 to prosecute those cases up through conviction, up
5 through any sort of appeals or challenges of
6 ineffective assistance of counsel.

7 In this particular case, we have no even
8 causal relationship between Gloria Navarro and the
9 State and the State's prosecution of this case, and
10 now defense of the case on appeal and through
11 petitions. The State would submit that clearly
12 based upon the law -- the D.A.'s isn't a law firm --
13 it's held to a standard that's consistent with that
14 detailed in the Ps and As that the State has filed.

15 The State would submit that the defense
16 has not shown extreme circumstance in this case, and
17 the motion should be denied.

18 **THE COURT:** Another thing is why do you
19 care since the case is over with a petition?

20 **MR. SWEETIN:** The point is, Judge, the
21 State regularly handles these particular cases.
22 There's no reason in this particular case to deviate
23 from that.

24 **THE COURT:** What's your response?

25 **MR. COLUCCI:** Your Honor, disqualification

1 is something that's left to the good judgment of the
2 Court, and it's just clear that she's going to be a
3 percipient witness in this case. That creates a
4 conflict, and that's our position. We would ask you
5 to disqualify the D.A.'s Office.

6 THE COURT: Anything else?

7 MR. COLUCCI: No, your Honor.

8 THE COURT: I'll take it under advisement.

9 MR. COLUCCI: Thank you.

10 (WHEREUPON, THE PROCEEDINGS WERE
11 CONCLUDED.)

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I, SONIA L. RILEY, CERTIFIED COURT REPORTER, DO HEREBY CERTIFY THAT I TOOK DOWN IN STENOGRAPHIC ALL OF THE PROCEEDINGS HAD IN THE BEFORE-ENTITLED MATTER AT THE TIME AND PLACE INDICATED, AND THAT THEREAFTER SAID STENOGRAPHIC NOTES WERE TRANSCRIBED INTO TYPEWRITING AT AND UNDER MY DIRECTION AND SUPERVISION AND THE FOREGOING TRANSCRIPT CONSTITUTES A FULL, TRUE AND ACCURATE RECORD TO THE BEST OF MY ABILITY OF THE PROCEEDINGS HAD.

IN WITNESS WHEREOF, I HAVE HEREUNTO
SUBSCRIBED MY NAME IN MY OFFICE IN THE COUNTY OF
CLARK, STATE OF NEVADA.

SONIA L. RILEY, CCR 727

30

1 **ORDR**

2 DAVID ROGER
3 Clark County District Attorney
4 Nevada Bar #002781
5 JAMES R. SWEETIN
6 Chief Deputy District Attorney
7 Nevada Bar #005144
8 200 Lewis Avenue
9 Las Vegas, NV 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

ORIGINAL

FILED

JUL 30 11 07 PM '08

Clark Sweetin
CLERK OF THE COURT

8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

11 THE STATE OF NEVADA,
12 Plaintiff,

13 -vs-

14 ALFRED P. CENTOFANTI, III,
15 #1730535

16 Defendant.

Case No. C172534
Dept No. VIII

17 **ORDER DENYING DEFENDANT'S MOTION TO DISQUALIFY**

18 **THE CLARK COUNTY DISTRICT ATTORNEY'S OFFICE**

19 DATE OF HEARING: JULY 21, 2008

20 TIME OF HEARING: 9:00 A.M.

21 THIS MATTER having come on for hearing before the above entitled Court on the
22 21ST day of July, 2008, the Defendant not being present, represented by CARMINE
23 COLUCCI, ESQ., the Plaintiff being represented by DAVID ROGER, District Attorney,
24 through JAMES R. SWEETIN, Chief Deputy District Attorney, and the Court having heard
25 the arguments of counsel and good cause appearing therefor,


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JUL 30 2008
CLERK OF THE COURT

1 **IT IS HEREBY ORDERED** that the DEFENDANT'S MOTION TO DISQUALIFY
2 THE CLARK COUNTY DISTRICT ATTORNEY'S OFFICE, shall be, and is DENIED.

3 DATED this 29 day of July, 2008.

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6 
DISTRICT JUDGE

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8 DAVID ROGER
9 DISTRICT ATTORNEY
 Nevada Bar #002781

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11 JAMES R. SWEETIN
12 Chief Deputy District Attorney
13 Nevada Bar #005144

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28 hjc/SVU

1 held that the very conduct engaged by Peterson in the cross-examination of witnesses was
2 improper.

3
4 We adopt a rule prohibiting prosecutors from asking a defendant whether
5 other witnesses have lied or from goading a defendant to accuse other
6 witnesses of lying, except where the defendant during direct examination
7 has directly challenged the truthfulness of those witnesses . . . appellant
8 did not directly challenge the veracity of other witnesses during his direct
9 examination, so asking him whether other witnesses had lied was inappropriate. *Id.* at
10 904.

11 During trial there were at least three witnesses that the district attorney asked if other
12 witnesses had lied or goaded into saying someone else had lied. The instances with regards to
13 Alfred Centofanti Jr. (petitioner's father) and Camille Centofanti (petitioner's mother) were not
14 objected to when they should have been. Therefore the issue as to the misconduct as to these
15 witnesses was not preserved for direct review on appeal.

16 As to the petitioner, counsel was ineffective for failing to object to the entire line of
17 questioning which was in essence asking petitioner to say Sessions was a liar or to goad him into
18 accusing Sessions of lying. The misconduct in the cross-examination was so severe that the
19 proper remedy would have been to ask that the cross-examination itself be stricken and a motion
20 for a mistrial requested. None of these things were requested and those issues were not preserved
21 for appeal.

22 C. Conclusion

23 While there were at least three instances of improper questioning, only the questioning of
24 the petitioner was objected to by counsel. There was no request for a mistrial, a curative
25 instruction, or motion to strike made with regards to the state's efforts in this regard. Defense
26 counsel's failure to have objected to the state's tactics is inexplicable, and there is no possible
27 strategic reason for such failure. Not only did the failure to object ensure that the jury could use
28 the improperly received evidence in assessing the credibility of the defense, defense attorney's
and petitioner in this case, but it also guaranteed that both the admission of the evidence by the
state and the trial court's admission of the evidence would be analyzed on review only for plain
error. Defense counsel's performance with respect to this issue was constitutionally deficient

1 under the Strickland standard.

2 **17. Defense counsel was ineffective on the issue of the improper introduction of**
3 **improper evidence by the state.**

4 **A. Factual and procedural background**

5 In addition to the smear campaign evidence which was improperly introduced as evidence
6 against petitioner, the state also elicited testimony from witnesses that they were "afraid" of
7 petitioner. Specifically, the state used Tricia Miller to testify as to her fear of petitioner and that
8 petitioner was a liar.

9 **1. Tricia Miller**

10 During the examination of Ms. Miller the state kept eliciting improper testimony
11 regarding the defendant's character as evidenced by the following exchange during Ms. Miller's
12 March 23, 2004 testimony:

13 Q. You made a statement on cross-examination that after he [defendant] called me
14 that night, meaning December 5th, I was afraid?

15 Why was that?

16 MR BLOOM: Objection, Your Honor. I didn't go into -- it happens to be absolutely
17 irrelevant as to this person's state of mind.

18 MS. GOETTSCH: Oh, something made her afraid that night. Something made her very
19 afraid that night.

20 THE WITNESS: I've been afraid for four years.

21 MR. BLOOM: This is all very dramatic Your Honor.

22 MS. GOETTSCH: Well, it's the truth, unfortunately, I don't think dramatic is a proper
23 objection, Judge.

24 MR. BLOOM: It's irrelevant is what it is.

25 THE COURT: Now, the response was that she was not only, as I recall, something about
26 Gina's mind-set as to the defendant, and then she says she was afraid too; is that correct?

27 MS GOETTSCH: There was a question and answer session on cross-examination in
28 which her fear was explored after December 5, who was afraid, what everyone's state of
mind was.

THE COURT: You mean Gina?

MS. GOETTSCH: Gina, was well as I am not sure exactly whether it went to the
defendant's state of mind. And the witness made a comment: I was afraid after he talked
to me that night.

I want to know what it was that the defendant said or did, or what happened that made her
afraid.

THE COURT: And your objection is?

MR. BLOOM: My objection is we know what it was a foundation for it because she's
already told us the full content of that conversation.

1 Her opinion as to why she's afraid is irrelevant. It has nothing to do with the jury having
2 to decide anything on, Your Honor. Her state of mind is not relevant.

3 AA, Volume 2, 117, p. 35, line 8 to p. 36, line 25.

4 The discussion continued on the record:

5 THE COURT: Well, we're not going to poll various witnesses to determine who was
6 afraid and when and why. But when a question is asked by one side which elicits a
7 response that we have here, I'm going to allow a follow-up.

8 MR. BLOOM: And I'm going to ask that the statement be stricken, Your Honor. I didn't
9 ask at the time. It was not responsive to any question I put on there.

10 When I asked about Gina, the witness then decided on her own, perhaps out
11 of friendship to Gina, to volunteer this information.

12 THE COURT: I understand, that is true.

13 MR. BLOOM: I move to strike it then, because didn't elicit that statement.

14 MS. GOETTSCH: Well, he didn't like the answer, Judge. It's still her response. THE

15 COURT: Strictly speaking, he didn't elicit that response, but it was her
16 response. And because I evaluate it to be relevant, as I would if the situation
17 was reversed, I'm going to allow it and it wouldn't be stricken.

18 But in the future if we have a reverse situation it will be the same. It does not mean we're
19 going to encourage people to get into this area and voice their opinions, however,
20 proceed.

21 AA, Volume 2, 118, p. 38, line 6 to p. 39 line 6.

22 The state then is allowed to question her as to why she was afraid to which she
23 responded:

24 He told me a different story than what Gina had told me, and he lied to
25 me that he never put a gun to her head.

26 Id. at 118, p. 39, lines 16-18.

27 This was received without objection. It was clearly hearsay and was highly prejudicial. It
28 was improper opinion. Bloom brings the topic up again on re-cross, which elicited the
following:

I've been scared of this man for four years. He knows where I live.

AA, Volume 2, 121, p. 50, lines 7-8.

2. Sarah Smith

Petitioner incorporates the facts and other evidence contained in Ground 6, Part 3,
Section 3, regarding Sarah Smith being allowed to testify to the jury that petitioner lied about the

1 events of December 5, 2000.

2 **B. Argument and legal authority**

3 It was prosecutorial misconduct to elicit this testimony and it was error by the Court to
4 allow the testimony to be received by the jury. The state cannot call the petitioner a liar. A
5 prosecutor calling a witness a liar is improper, and even asserting that defendant is lying is
6 equally impermissible. Pascua v. State, 122 Nev. Adv. Rep. 86, 145 P.3d 1031 (2006), citing to
7 Daniel v. State, 119 Nev. 498, 519, 78 P.3d 890, 904 (2003); and Rowland v. State, 118 Nev. 31,
8 39, 39 P.3d 114, 119 (2002) (footnote omitted). See, also Ross v. State, 106 Nev. 924, 927-28,
9 803 P.2d 1104, 1106 (1990) (holding that a prosecutorial statement that a defense witness is a liar
10 is not proper argument); Skiba v. State, 114 Nev. 612, 614, 959 P.2d 959, 960 (1998) (holding
11 that it is improper for a prosecutor to state, "[t]he defendant is lying"); Witherow v. State, 104
12 Nev. 721, 724, 765 P.2d 1153, 1155 (1988) ("The characterization of testimony as a lie is
13 improper argument."); United States v. Francis, 170 F.3d 546, 552 (6th Cir.1999) (holding that
14 the prosecutor's calling the defendant "a liar" and "con man" was impermissible); Boyd v.
15 French, 147 F.3d 319, 328-29 (4th Cir.1998) (holding that it is improper for a prosecutor to
16 comment during closing arguments with repeated references to defendant's credibility).

17 These instances were not simply a demonstration to the jury through inferences from the
18 record that a defense witness's testimony is untrue, which is allowed under Ross v. State, 106
19 Nev. 924, 927, 803 P.2d 1104, 1105 (1990), but denigrated to name-calling and improper
20 vouching, which is prohibited. Though a prosecutor may properly explain to the jury why
21 defense witness might be lying, the statement that a witness was a liar, both as a fact and as a
22 conclusion, and that her situation provided assurance that she was liar, were not proper argument.
23 Id. The state had obviously interviewed these witnesses and asked questions that specifically
24 lead to the witnesses calling petitioner a "liar."

25 **C. Conclusion**

26 While at least two witnesses which the state introduced improper evidence, only the
27 instances regarding Tricia Miller were objected to on the record, the other instances were not.
28 During the hearing held there was no request for a mistrial, a curative instruction, or motion to

1 strike was made with regards to the state's efforts in this regard. Defense counsel's failure to
2 have objected to the state's tactics is inexplicable, and there is no possible strategic reason for
3 such failure. Not only did the failure to object ensure that the jury could use the improperly
4 received evidence in assessing the credibility of the defense, defense attorney's and petitioner in
5 this case, but it also guaranteed that both the admission of the evidence by the state and the trial
6 court's admission of the evidence would be analyzed on review only for plain error. Counsel's
7 performance with respect to this issue was constitutionally deficient under the Strickland
8 standard.

9 IV.

10 Post Trial Ineffectiveness

11 Defense counsel was ineffective as Bloom made himself unavailable during 12 the 7-day period in which to file a motion for a new trial

13 A. Factual and procedural background

14 The jury returned the verdict in this matter of Friday, April 16, 2004. Petitioner was
15 found guilty of First Degree Murder with Use of a Deadly Weapon. Immediately following the
16 verdict, Bloom and Navarro requested and received permission to speak with the petitioner
17 before he was taken into custody. At that time petitioner discussed with his attorney his options
18 with regards to a penalty hearing and was told by Bloom that he would be in contact with him
19 soon. Nevertheless, Bloom left the country and thereby made himself unavailable to petitioner
20 during the seven (7) day period within which to file a motion for a new trial. All efforts to
21 contact Bloom from the Clark County Detention Center, and through others, were unsuccessful.
22 petitioner eventually heard from Bloom via telephone on or about May 5, 2004. He again spoke
23 to Bloom on May 6, 2004. During these conversations Bloom indicated he had received letters
24 from two people, one who "observed one juror wear a tee-shirt that said something like, you don't
25 know what a killer looks like" and another who observed a juror sleeping "at some point in the
26 trial."

27 Bloom advised what steps could be taken to interview the witnesses and then "attempt to
28 locate and interview the jurors." He offered to coordinate the process and to "determine if a

1 motion for new trial could be brought." He then went on vacation.

2 **B. Argument and Legal Authority.**

3 NRS 176.515, entitled New trial: Grounds; time for filing motion, provides:

4 1. The court may grant a new trial to a defendant if required as a matter of law or
5 on the ground of newly discovered evidence.

6 2. If trial was by the court without a jury the court may vacate the judgment if
7 entered, take additional testimony and direct the entry of a new judgment.

8 3. Except as otherwise provided in NRS 176.0918, a motion for a new trial
9 based on the ground of newly discovered evidence may be made only within
10 2 years after the verdict or finding of guilt.

11 4. A motion for a new trial based on any other grounds must be made within
12 7 days after the verdict or finding of guilt or within such further time as the court
13 may fix during the 7-day period.

14 Juror misconduct, if proven and determined to be prejudicial, provides a valid basis to
15 grant a Motion for New Trial. See, Roever v. State, 111 Nev. 1052, 901 P.2d 145 (1995) appeal
16 after new trial 114 Nev. 867, 963 P.2d 503 (1998), rehearing denied, rehearing denied 115 Nev.
17 31, 979 P.2d 1285 (1999).

18 Bloom received at least two letters from observers of the trial regarding a number of
19 issues that arose during the trial. Bloom only had a 7-day period in which to file a motion for a
20 new trial on the issues of juror misconduct. Well it appears he was aware of the juror issues and
21 that they may provide a basis for a new trial, it also appears he not aware of the 7-day period in
22 which to bring the motion for a new trial. This is evident in his communications with petitioner
23 in which he seems to indicate, well after the 7-day period expired, that he could coordinate the
24 investigative efforts to determine if the motion for new trial could be filed. The problem here is
25 that it was too late.

26 How this prejudiced petitioner was that had Bloom known about the 7-day requirement of
27 NRS 176.515 then he could have taken the necessary steps to have the matter brought to the
28 Court in a timely manner and not waited until almost twenty (20) days after verdict (and a full
thirteen (13) days after the 7-day period expired) to investigate the matters and decided whether
or not to file the Motion. If the motion was filed in a timely manner and decided on the merits by
the trial court, and it would have been properly preserved for review by the Nevada Supreme
Court. Because of Bloom's failure, petitioner was unable to have an evidentiary hearing held on

1 the issues to establish the misconduct and prejudice necessary to have his motion for a new trial
2 properly decided on the facts, evidence and law applicable.

3 **C. Conclusion.**

4 Bloom's performance fell below the standard for effective representation. Bloom's
5 failure to know the applicable law of Nevada with regards to the 7-day period in which to file a
6 motion for a new trial under NRS 176.515, fell below the applicable standard of care and
7 prejudiced the petitioner's ability to have the juror misconduct issues heard on the merits and
8 resulted in the issues being procedurally barred on appellate review. What Bloom should have
9 done was have this issue presented in a timely manner and heard by a properly brought motion
10 for a new trial.

11 **Deficient Performance and Prejudice**

12 No strategic or tactical reason existed for counsel's failure to adequately investigate the
13 numerous issues outline above prior to petitioner's trial proceedings. Counsel's failure to fully
14 and
15 properly investigate petitioner's case and failure to adequately prepare for trial fell below the
16 objective standards of reasonableness and thereby deprived petitioner of effective representation
17 guaranteed under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.
18 Had counsel adequately investigated these issues, it is reasonably probable that the outcome of
19 the proceedings would have been different.

20 Counsel's lack of effective representation substantially and injuriously affected the
21 process to such an extent to render petitioner's conviction and sentence fundamentally unfair and
22 unconstitutional. The state cannot show beyond a reasonable doubt that these failures did not
23 affect the conviction and sentence.

24 **GROUND SEVEN**

25 **PETITIONER IS ENTITLED TO RELIEF BECAUSE OF THE CUMULATIVE**
26 **EFFECT OF THE ERRORS WHICH OCCURRED AT TRIAL, RAISED ON DIRECT**
APPEAL, AND IN THIS PETITION.

27 **A. Factual and procedural background**

28 The errors set forth in Ground One through Six, above, implicate important state and

1 federal constitutional rights. The individual and cumulative effect of the errors severely
2 prejudiced petitioner, deprived him of a fair trial on the issues of his guilt or innocence of the
3 charges and also rendered his convictions unreliable.

4 **B. Argument and legal authority.**

5 The Nevada Supreme Court has held under the doctrine of cumulative error, "although
6 individual errors may be harmless, the cumulative effect of multiple errors may violate a
7 defendant's constitutional right to a fair trial." Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361,
8 368 (1994); citing to Sipsas v. State, 102 Nev. 119, 716 P.2d 231 (1986); see also Bog Pond v.
9 State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). The relevant factors to consider in
10 determining "whether error is harmless or prejudicial include whether 'the issue of innocence and
11 guilt is close, the quantity and character of the error, and the gravity of the crime charged." Big
12 Pond, 101 Nev. at 3, 692 P.2d at 1289. The doctrine of cumulative error "requires that numerous
13 errors be committed, not merely alleged." People v. Rivers, 727 P.2d 394, 401 (Colo.App.
14 1986); see also People v. Jones, 665 P.2d 127, 131 (Colo.App. 1982) Evidence against the
15 defendant must therefore be "substantial enough to convict him in an otherwise fair trial" and it
16 must be said "without reservation that the verdict would have been the same in the absence of
17 error. Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1156 (1988).

18 It cannot be said that petitioner has failed to establish any error which would entitle him
19 to relief, and therefore there is cumulative error. In this instance, petitioner has demonstrated
20 prejudicial errors with regards to disqualification of his counsel, canvassing on the issue of self-
21 defense, Motion for New Trial, faulty jury instructions, the impermissible shifting of the burden
22 of proof and the ineffective assistance of his pre-trial and trial counsel. Petitioner has also
23 provided this Court with enough facts, evidence and supporting case law as to entitle him to an
24 evidentiary hearing on the issues of ineffective assistance of counsel. See, Drake v. State, 108
25 Nev. 523, 836 P.2d 52, 55-56 (1992). Appellant's petition for post-conviction relief plainly
26 contained contentions, supported by specific allegations of fact which, if true, would entitle
27 appellant to relief. The question in this case is not whether appellant proved his counsel was
28 ineffective, but whether appellant made allegations which entitled him to an evidentiary hearing.

1 Therefore, appellant was entitled to an evidentiary hearing. See also Hargrove v. State, 100 Nev.
2 498, 686 P.2d 222 (1984); Grondin v. State, 97 Nev. 454, 634 P.2d 456 (1981).]

3 **C. Conclusion.**

4 Petitioner has clearly established that prejudicial errors were committed during the trial of
5 this matter and by his counsel in the preparation, therefore, these errors, both individually, and as
6 a whole denied petitioner a fair trial. Since it cannot be said that the verdict would have been the
7 same in the absence of error, petitioner is entitled to a new trial.

8 **V.**

9 **PRAYER FOR RELIEF**

10 Issues raised in this petition reveal that petitioner's trial was tainted with unfairness. The
11 prosecutorial misconduct of the state and ineffectiveness of his counsel, deprived petitioner of a
12 fair trial. These errors undermine any confidence in the jury verdict and sentence. Petitioner
13 could have been convicted of a lesser offense had the errors mentioned above not occurred.
14 Petitioner is serving life in prison without the possibility of parole as the result of this
15 misconduct and the lack of effort by trial counsel who decided to give up. Petitioner seeks to
16 have this verdict vacated so that he may be permitted a fair and impartial trial.

17 Therefore, petitioner respectfully requests that this Court:

- 18 1. Issue a Writ of Habeas Corpus to have petitioner brought before this Court so that
19 he might be discharged from his unconstitutional confinement;
20 2. Conduct a hearing during which proof may be offered concerning the allegations
21 in this petition and any affirmative defenses raised by the respondent;
22 3. Grant leave to perform additional necessary and reasonable discovery to
23 substantiate the claims for relief addressed in this petition; and

24 /////

25 /////

26 /////

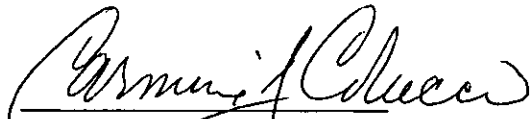
27 /////

28 /////

1 4. Grant any other relief that may be appropriate in the interests of justice.

2 Dated this 28 day of February, 2008.

3 CARMINE J. COLUCCI, CHTD.

4 

5 Carmine J. Colucci, Esq.
6 Nevada Bar No. 0881
7 629 South Sixth Street
8 Las Vegas, Nevada 89101
9 Attorney for Petitioner,
10 ALFRED P. CENTOFANTI III
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1 CERTIFICATE OF SERVICE BY MAIL

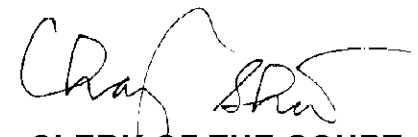
2 I hereby certify pursuant to NRCP 5(b), that on this 29 day of February, 2008, I mailed
3 a true and correct copy of the foregoing Memorandum of Points and Authorities in Support
4 of Petition for Writ of Habeas Corpus (Post-Conviction) addressed to:

5 E.K. McDaniel, Warden
6 Ely State Prison
7 P.O. Box 1989
4569 North State Rt. 490
Ely, NV 89301

8 David Roger
9 Clark County District Attorney
200 Lewis Avenue, 2nd Floor
Las Vegas, NV 89155

10 Nevada Attorney General
11 Heroes' Memorial Building
12 Capital Complex
Carson City, NV 89710

13 
14 An employee of
CARMINE J. COLUCCI, CHTD.


CLERK OF THE COURT

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Attorney for Plaintiff

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

-vs-

ALFRED CENTOFANTI III,
#1730535,

Defendant.

CASE NO: C172534

DEPT NO: VII

STATE'S OPPOSITION TO DEFENDANT'S PETITION

FOR WRIT OF HABEAS CORPUS

(POST-CONVICTION)

DATE OF HEARING: April 15, 2008

TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through JAMES R. SWEETIN, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Petition for Writ of Habeas Corpus.

This opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On December 22, 2000, Alfred P. Centofanti III, hereinafter “Defendant”, was
4 charged by way of Criminal Complaint with Murder With Use of a Deadly Weapon (Felony
5 – NRS 200.010, 200.030, 193.165). On January 10, 2001, an Indictment was filed setting
6 forth the same charge. Thereafter, the Defendant pled not guilty at his initial arraignment on
7 January 17, 2001, and waived the 60-day trial rule.

8 The Defendant then filed a petition for writ of habeas corpus which was denied by the
9 district court on May 22, 2001.

10 The Defendant’s jury trial commenced on March 15, 2004, and lasted for thirteen
11 days, concluding on April 16, 2004, with the jury finding the Defendant guilty of the charge
12 on April 22, 2004. On June 28, 2004, the Defendant moved for a new trial, and the State
13 opposed the motion on August 10, 2004. That motion was ultimately denied on August 26,
14 2004. In response to the district court’s holding, the Defendant filed a Writ of
15 Mandamus/Prohibition with the Nevada Supreme Court to which the Court issued an Order
16 Directing Answer and Granting Temporary Stay on September 8, 2004. On February 16,
17 2005, the Defendant filed a Motion for Rehearing and Request for Stay Pending Decision,
18 yet this was denied by the Nevada Supreme Court.

19 On March 4, 2005, he was sentenced to Life without the possibility of parole plus an
20 equal and consecutive Life sentence without the possibility of parole for use of a deadly
21 weapon. The aforementioned is in addition to the \$25.00 Administrative Assessment Fee,
22 and the Defendant received three hundred seventy-four (374) days credit for time served.

23 A Judgment of Conviction was filed on March 11, 2005.

24 Thereafter, Defendant filed his Notice of Appeal on March 24, 2005. The Supreme
25 Court of Nevada affirmed the judgment of the district court on December 27, 2006. The
26 instant petition was filed February 29, 2008, and the State’s response follows.

27 //

28 //

1 **ARGUMENT**

2 **I.**

3 **GROUND ONE THROUGH FIVE OF DEFENDANT'S**
4 **PETITION ARE BARRED BECAUSE THEY SHOULD**
5 **HAVE BEEN RAISED ON DIRECT APPEAL, OR WERE**
6 **RAISED THEREBY BECOMING LAW OF THE CASE.**

7 **A. The Doctrine of Law of the Case Bars Reconsideration of Ground Three,**
8 **Since It Was Previously Addressed by the Nevada Supreme Court on**
9 **Defendant's Direct Appeal.**

10 The law of a first appeal is the law of the case on all subsequent appeals in which the
11 facts are substantially the same. Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969);
12 Graves v. State, 84 Nev. 262, 439 P.2d 476 (1968); State v. Loveless, 62 Nev. 312, 150 P.2d
13 1015 (1944); Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). Defendant has previously
14 argued the issues pertaining to prosecutorial and juror misconduct. The Supreme Court of
15 Nevada reviewed these claims at length and decided after all consideration to affirm
16 Defendant's conviction. The Supreme Court's findings and conclusions of law from the
17 direct appeal are the law of the case. Consequently, further litigation of the issues already
18 previously raised in Defendant's direct appeal is prohibited.

19 The Defendant is again asserting different instances of supposed juror misconduct
20 which he feels entitles him to a new trial to which the Nevada Supreme Court has already
21 denied his request. In particular, his petition consists of: (1) an allegation that one juror
22 intentionally concealed a prior felony conviction, (2) the implication of prejudice as a result
23 of a shirt worn by a juror which he claims was designed to trigger certain emotions from the
24 other jurors, (3) a claim professing two jurors slept during the trial, and (4) a contention that
25 another juror conducted an independent firearm experiment. These are exactly the same
26 allegations contained in Defendant's Opening Brief to the Supreme Court of Nevada on
27 Direct Appeal.

28 In its Order of Affirmance, the Court expressly held [as it pertains to the allegations
of juror misconduct] that "Centofanti has failed to demonstrate that misconduct actually
occurred or, if it did, that the misconduct was prejudicial. Therefore, Centofanti's argument

1 is without merit.”¹ The support for Defendant’s contentions has already been exhausted at
2 length, and has since become the law of the case in accord with the holdings in Hall, Walker,
3 and Loveless.

4 **B. Grounds One, Two, Four, and Five are Deemed Waived Pursuant to NRS**
5 **34.810(1)(b)(2), Since They Were Not Raised on Direct Appeal.**

6 “Application of the statutory procedural default rules to post-conviction habeas
7 petitions is mandatory.” State v. Eighth Judicial District Court, 121 Nev. 225, 112 P.3d
8 1070, 1074 (2005). Pursuant to NRS 34.810(1)(b)(2), claims that a Defendant raises for the
9 first time in a post-conviction proceeding that could have been raised on appeal are barred
10 from review. See also Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994) (overruled on
11 other grounds by Thomas v. State, 110 Nev. 750, 877 P.2d 1058 (1994)). However, where a
12 Defendant shows good cause for the failure to raise the claim and shows that he will actually
13 be prejudiced by the absence of review, this requirement may be excused. Id.

14 **1. The disqualification of Daniel J. Albregts**

15 The Defendant is now alleging he was improperly canvassed by the district court
16 which ultimately led to the disqualification of defense counsel at the time, Daniel J.
17 Albregts, due to a conflict of interest. This is the sort of claim which Defendant should have
18 raised on direct appeal yet he failed to do so. Despite his recitation of the circumstances
19 surrounding the disqualification, he has not met his burden to defeat the application of this
20 procedural default rule; he has not shown good cause for his failure, nor has he shown that
21 he will actually be prejudiced without a review. As such, his claim is waived.

22 **2. The trial court’s canvass of Defendant regarding self defense.**

23 The Defendant also failed to raise the issue concerning the district court’s canvass of
24 him as it pertains to his theory of self defense. Again, there is no basis stated for his failure
25 to raise the issue on direct appeal, and prejudice is not shown based on Defendant’s
26 unsupported claim that he was forced to incriminate himself and that he was not given

27
28 ¹ See Exhibit 4 of Defendant’s Exhibits to the Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction).

1 appropriate advice from counsel. The substantive nature of his claim his deemed waived; as
2 it relates to his claim by disguising it as ineffective assistance of counsel, it must be noted,
3 “Trial counsel need not lodge futile objections to avoid ineffective assistance of counsel
4 claims.” Ennis v. State, 122 Nev. 694, 137 P.3d 1095, 1103 (2006). The Defendant is
5 basing this ground on the allegation that his counsel should have objected to the canvassing
6 of the Defendant about his claim of self defense. The tactical decision not to object was well
7 within counsel’s discretion, and Defendant was not thereby prejudiced by it.

8 **3. Jury instructions did not minimize State’s burden of proof.**

9 The Defendant now contends the jury instructions given at trial. In particular, he
10 claims the reasonable doubt and premeditation instructions, as given, improperly shifted the
11 State’s burden of proof. If Defendant wished to lay his foundation for disagreement with the
12 jury instructions, then these should have been raised on direct appeal. However, he did not,
13 and the substantive basis of his claim is waived as it has procedurally defaulted.

14 **a. Reasonable doubt.**

15 The next basis of the Defendant’s dispute is that his counsel should have filed a
16 petition for a writ of mandamus with the Nevada Supreme Court to request that the defense
17 get a ruling on the proposed modified instruction. Defense counsel was not required to file
18 the petition, because this would have been futile. See Ennis, 122 Nev. 694, 137 P.3d at
19 1103. Perhaps counsel did not see any merit in the claim the Defendant is now setting forth,
20 because the instruction given at trial was the precise wording as codified in NRS 175.211.
21 Subsection (2) of the statute expressly states, “No other definition of reasonable doubt may
22 be given by the court to juries in criminal actions in this State.” The court followed the
23 statute, and the Defendant cannot now urge the court to rule in direct contradiction to this
24 binding statutory authority.

25 **b. Premeditation**

26 Despite the fact that Defendant’s claim is waived, there is no merit to his argument
27 and a brief reading of the premeditation instruction given in this case reveals it is not the
28 “Kazalyn” instruction, which was subsequently disagreed with by the Ninth Circuit Court of

1 Appeals in Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007). The premeditation instruction in
2 Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992), provided in pertinent part, “If the jury
3 believes from the evidence that the act constituting the killing has been the result of
4 premeditation, no matter how rapidly the premeditation is followed by the act constituting
5 the killing, it is willful, deliberate and premeditated murder.” The Defendant insists the
6 instruction given in this case relieved the State of the burden of proof on whether the killing
7 was deliberate as well as premeditated. However, Jury Instruction No. 9 set out in detail the
8 showing the State must meet for a finding of “deliberate.” It states:

9 “Deliberation is the process of determining upon a course of action to
10 kill as a result of thought, including weighing the reasons for and against the
action and considering the consequences of the action.

11 A deliberate determination may be arrived at in a short period of time.
12 But in all cases the determination must not be formed in passion, it must be
13 carried out after there has been time for the passion to subside and deliberation
to occur. A mere unconsidered and rash impulse is not deliberate, even though
it includes the intent to kill.”²

14 There was no injurious effect from the given instruction. As opposed to the
15 premeditation instruction in Kazalyn, this instruction laid out an entire two paragraphs
16 describing precisely what deliberation is and what the State must show in order to prove
17 there was deliberation. The Defendant’s misrepresentation of the instruction provides no
18 merit to warrant further review.

19 4. Closing arguments did not shift burden of proof to Defendant.

20 Defendant’s claim of prosecutorial misconduct by the use of improper argument is
21 another claim which should have been raised on direct appeal and is now waived pursuant to
22 NRS 34.810(1)(b)(2). The burden of proof was never shifted to the Defendant and the State
23 overwhelmingly met its burden to uphold the convictions. In so much as Defendant is
24 claiming he received ineffective assistance of counsel for counsel’s choice not to object to
25 two of the comments cited by the Defendant, the un-objected to comments did not give rise
26 to plain error, which is required for consideration of Defendant’s claim.

27 _____
28 ² See Exhibit 11 of Defendant’s Exhibits to the Memorandum of Points and Authorities in Support of Petition for
Writ of Habeas Corpus (Post-Conviction).

The defendant has not shown, however, that the prosecutor's statements were erroneous or prejudicial to the defendant. See Hernandez v. State, 118 Nev. 513, 525, 50 P.3d 1100, 1108-09 (2002). "Generally, for this court to consider whether a prosecutor's remarks were improper, the defendant must have objected to them at the time, allowing the district court to rule upon the objection, admonish the prosecutor, and instruct the jury." Id. "Failure to object during trial generally precludes appellate consideration of an issue," but "this court has the discretion to address an error if it was plain and affected the defendant's substantial rights." Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001); see also NRS 178.602. This discretion must be used sparingly. U.S. v. Young, 470 U.S. 1, 105 S.Ct. 1038, 1047 (1985) ("the plain error exception to the contemporaneous objection rule is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result"). The defendant must show that an error was prejudicial in order to establish that it affected substantial rights. Gallego, 117 Nev. at 365, 23 P.3d at 239.

Aside from the failure to object at trial, the issue was never contested on direct appeal, and this inaction now bars re-litigating the prosecutor's minor remarks at trial. Even if the claim was not waived, the Defendant has not come anywhere near grasping the threshold required for plain error review. All he has done is misrepresent quotes from the prosecutor who is commenting in response to the theories urged by the Defendant and then somehow suggesting the prosecutor is not permitted to comment on the lack of evidence to support Defendant's theories.

II.

**THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE
OF COUNSEL BEFORE, DURING, AND AFTER TRIAL.**

A. The Standard for Review

Defendant alleges a multitude of instances in which he claims his counsel rendered ineffective assistance prior to, during, and after trial. The Defendant fails to meet his burden of proof and fails to provide more than bare allegations in support of his petition. Therefore, his claim for ineffective assistance of counsel should be denied.

1 The United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104
2 S.Ct. 2052 (1984), established the standards for a court to determine when counsel's
3 assistance is so ineffective that it violates the Sixth Amendment of the U.S. Constitution.
4 Strickland laid out a two-pronged test to determine the merits of a defendant's claim of
5 ineffective assistance of counsel: First, the defendant must show that counsel's performance
6 was deficient. This requires showing that counsel made errors so serious that counsel was
7 not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second,
8 the defendant must show that the deficient performance prejudiced the defense. This requires
9 showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial
10 whose result is reliable. Unless a defendant makes both showings, it cannot be said that the
11 conviction or death sentence resulted from a breakdown in the adversary process that renders
12 the result unreliable. Id. at 687, 2064. The defendant must further show the representations
13 of defense counsel were not within the range of competence demanded of attorneys in
14 criminal cases. See Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

15 The Nevada Supreme Court has held that "claims of ineffective assistance of counsel
16 must be reviewed under the 'reasonably effective assistance' standard articulated by the U.S.
17 Supreme Court in Strickland, requiring a defendant to show that counsel's assistance was
18 'deficient' and that the deficiency prejudiced the defense." Bennett v. State, 111 Nev. 1099,
19 1108, 901 P.2d 676, 682 (1995); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107
20 (1996). "In meeting the 'prejudice' requirement, the defendant must show a reasonable
21 probability that, but for counsel's errors, the result of the trial would have been different. . . .
22 'A reasonable probability is a probability sufficient to undermine confidence in the
23 outcome.'" Kirksey, 112 Nev. at 988 (citing Strickland, 466 U.S. at 694, 104 S.Ct. at 2068).
24 Strategy or decisions regarding the conduct of defendant's case are "virtually
25 unchallengeable absent extraordinary circumstances." Doleman v. State, 112 Nev. 843, 848,
26 921 P.2d 278, 280 (1996) (quoting Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180
27 (1990). The Court has also held that there is a presumption that trial counsel was effective
28 and fully discharged his duties. See Homick v. State, 112 Nev. 304, 310, 913 P.2d 1280,

1 1285 (1996) (citing Davis v. State, 107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991)). “This
2 presumption can only be overcome by strong and convincing proof to the contrary.” Id.

3 In the instant case, the Defendant did not receive ineffective assistance of counsel.
4 Further, Defendant has not met his burden to warrant the granting of this petition. Defense
5 counsel was not deficient, and no prejudice was suffered by the Defendant based on any of
6 the Defendant’s claims set forth herein.

7 **B. Defense Counsel was Properly Disqualified From the Case.**

8 On October 1, 2001, the district court heard State’s Motion to disqualify Counsel.
9 Daniel J. Albregts was current counsel of record, yet he had also previously represented the
10 Defendant in transactions involving real estate that the Defendant and the decedent had
11 owned in San Diego. The basis of the State’s contention was the potential possibility of
12 having to call Albregts as a witness in the criminal case. The court minutes show the Court
13 reflected on the competing interests involved. The State “cited numerous cases that state an
14 attorney cannot be a witness and an advocate at the same time” while Defense pressed
15 forward for application of the exception to the rule that “it would be a substantial hardship to
16 the defense to disqualify Mr. Albregts” AA, Vol. 1, 13.

17 The Court granted State’s motion, but the Court also went one step further to protect
18 Defendant’s rights. As such, the Court allowed Albregts to continue preparing the case for
19 trial with only the limited restriction that he be prohibited from sitting at counsel’s table
20 during the trial. This is not a case in which a court abused its discretion and disqualified an
21 attorney from having any relationship to the case. Rather, the Court understood Defendant’s
22 concerns and allowed Albregts to continue with a limited role, because the Court “[did] not
23 see any danger in allowing Mr. Albregts to help prepare the case.” AA, Vol. 1, 13.

24 “The district court has broad discretion in attorney disqualification matters, and this
25 court will not overturn its decision absent an abuse of that discretion.” Waid v. Eighth
26 Judicial District Court, 121 Nev. 605, 119 P.3d 1219 (2005). The Defendant cites
27 DiMartino v. Eighth Judicial District Court, 119 Nev. 119, 66 P.3d 945 (2003) to support his
28 claim that Albregts was improperly disqualified. While DiMartino provides a good outline

1 on the applicable law, the facts from this case are entirely distinguishable and, here, the
2 Court did not exercise its discretion on the motion “arbitrarily and capriciously” as the court
3 did in the former. In DiMartino, the court did not balance the interests and hardships of the
4 parties and went straight for a complete disqualification. Id. at 121. Here, the district court
5 entertained argument from both sides and the defense even conceded the likelihood that “Mr.
6 Albregts will be a witness in this case.” AA, Vol. 1, 13. The Court did not entirely
7 disqualify Albregts from the case and insisted the defense associate local counsel, and the
8 defense believed the Special Public Defender has the availability. AA, Vol. 1, 14. This was
9 not an abuse of discretion on any standard, and the Court should not grant Defendant’s
10 petition on this ineffective argument.

11 **C. There Was Not an Improper Canvass of Defendant as to His Election To**
12 **Proceed On Self Defense Theory.**

13 At the status check on March 9, 2004, the State “requested Defendant authorize
14 [defense counsel] to admit that [Defendant] was the shooter; they are using a self defense
15 theory and that is one of the elements.” AA, Vol. 1, 38. Any objection to this request on
16 behalf of the State would have been futile. See Ennis, 137 P.3d at 1103. The opening
17 element of the self defense statute states, “Justifiable homicide is *the killing of a human*
18 *being* in necessary self defense,” NRS 200.120 (emphasis added). The Defendant
19 authorized this request and there was no ineffective assistance of counsel or prejudice as a
20 result. AA, Vol. 1, 38. The Court was well aware of exactly what the State was requesting
21 and, after allowing Defendant time to speak with his counsel regarding the issue, the Court
22 admonished Defendant of the ramifications:

23 MR. BLOOM: It’s my understanding what the State wants is a
24 request – a statement from my client that my client understands that I am
25 going to be presenting the issue of self-defense and that he was the shooter in
this case; am I correct?

26 MR. PETERSON: Yeah, essentially that he has authorized you to concede
that he was the shooter, yes.

27 THE COURT: Mr. Centofanti, is that true?

28 DEFENDANT: Yes, your Honor.

1 THE COURT: Simply stated, so that I'm clear in my mind and we
2 understand what we're talking about, simply stated, when a defense is
3 proffered of self-defense it in essence says "Yes, I shot the person, but I was
4 justified, under the circumstances." Do you understand?

5 DEFENDANT: Yes, your Honor.

6 THE COURT: And so obviously when that is submitted to the jury there
7 is that admission, tacit admission at least. Do you understand?

8 DEFENDANT: Yes.

9 Reporter's Transcript "RT", 3/12/04, 61. If the Defendant wished to proceed on a self
10 defense theory, the State does not have to prove that he was the shooter as it is an express
11 concession; rather, the State is only obligated to rebut the Defendant's claim and has the
12 "burden of proving absence of justification or excuse for the homicide" Hill v. State, 98
13 Nev. 295, 297, 647 P.2d 370, 371 (1982), citing St. Pierre v. State, 96 Nev. 887, 620 P.2d
14 1240 (1980). Defendant's claim is without merit.

15 **D. Defense Counsel Was Not Ineffective in Representing the Events of**
16 **December 1, 2000.**

17 Defendant also contests the recount of events from December 1, 2000, and then
18 attacks his counsel for failure "to properly prepare, develop, and present facts supporting the
19 defense theory of self defense." He then proceeds to make self-serving allegations that
20 phone records, receipts, and other documents would support his theory in conjunction with
21 the testimony of certain witnesses. However, counsel (and not Defendant) has the
22 "immediate- and ultimate- responsibility" to choose which witnesses to call to the stand.
23 Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002). There is no evidence to support
24 what testimony or potential hearsay these witnesses would offer. These are bare allegations
25 without any reference to the record for which Defendant is not entitled to relief. See Rudin
26 v. State, 120 Nev. 121, 142, 86 P.3d 572, 586 (2004).

27 **E. Defense Counsel Was Not Ineffective in Representing the Events of**
28 **December 5, 2000.**

Defendant is essentially making the same argument as he did in (D) above. He
contends once again that his counsel should have assembled school records and phone

1 records, among other things, to support his theory. Furthermore, he claims certain witnesses
2 should have been called to testify to the unsupported assertions he is now making years later.
3 It is proper to reference the Nevada Supreme Court's reaction to this sort of argument. "And
4 we take this opportunity to recognize the well-established rule that while the client may
5 make decisions regarding the ultimate objectives of the representation, the trial lawyer alone
6 is entrusted with decisions regarding legal tactics such as deciding what witnesses to call."
7 Rhyne, 118 Nev. at 8, 38 P.3d at 167. Defendant is not now entitled to a reprieve by
8 stepping outside his scope of right and making a claim of ineffective assistance, because his
9 counsel is the one who has the right and counsel exercised that right by selecting the
10 witnesses which he felt would best support the theory of the defense.

11 **F. Defense Counsel Was Not Ineffective in Relation to the Different**
12 **Evidentiary Issues Raised By Defendant.**

13 **1. Standard of Review**

14 While it is true that the State's failure to preserve potentially exculpatory evidence
15 may result in dismissal of the charges if the defendant can show "bad faith or connivance on
16 the part of the government" or "that he was prejudiced by the loss of the evidence," the
17 Defendant has failed to show either. Howard v. State, 95 Nev. 580, 582, 600 P.2d 214, 215-
18 216 (1979). "When a defendant seeks reversal upon the basis of lost evidence, he must
19 show either governmental bad faith, connivance, or prejudice. Rogers v. State, 101 Nev.
20 457, 463, 705 P.2d 664, 669 (1985). The burden of proving that it could reasonably have
21 been anticipated that the evidence sought would be exculpatory and material rests with the
22 defense. Id. at 463. "The State's loss or destruction of evidence constitutes a due process
23 violation only if the defendant shows either that the State acted in bad faith or that the
24 defendant suffered undue prejudice and the exculpatory value of the evidence was apparent
25 before it was lost or destroyed. Sheriff v. Warner, 112 Nev. 1234, 1239-40, 926 P.2d 775,
26 778 (1996); see also Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333 (1988).

27 Where there is no bad faith, the defendant has the burden of showing prejudice. See
28 Warner, 112 Nev. at 1240, 926 P.2d at 778. The defendant must show that "it could be

1 reasonably anticipated that the evidence sought would be exculpatory and material to [the]
2 defense.” Id., quoting Boggs v. State, 95 Nev. 911, 913, 604 P.2d 107, 108 (1979). It is not
3 sufficient to show “merely a hoped-for conclusion” or “that examination of evidence would
4 be helpful in preparing [a] defense.” Id. “It is not sufficient that the showing disclose
5 merely a hoped-for conclusion from examination of the destroyed evidence.” Warner, 112
6 Nev. at 1240, 926 P.2d at 778, quoting Boggs, 95 Nev. at 913, 604 P.2d at 108. “Mere
7 assertions by the defense counsel that an examination of the evidence of the evidence will
8 potentially reveal exculpatory evidence does not constitute a sufficient showing of
9 prejudice.” Warner, 112 Nev. at 1242, 926 P.2d at 779.

10 **2. The Evidence Claimed from December 20, 2005 is Not Exculpatory.**

11 The Defendant makes the claim that trained law enforcement officers from the Las
12 Vegas Metropolitan Police Department failed to adequately seize certain pieces of evidence
13 which would have led to the Defendant’s acquittal. However, he provides no evidence that
14 this evidence (key chain, cellular phone, palm pilot, purse, and shell casings) was not
15 otherwise obtainable or that the witnesses in possession of it were not otherwise available.
16 The choice of how to present the evidence here claimed was another strategic decision made
17 by the defense attorney, and his judgment which was well within his right should not be
18 offended. See Rhyne, 118 Nev. at 8, 38 P.3d at 167. The connection claimed to this
19 proposed evidence and its supposed exculpatory value is nothing more than a blanket
20 assertion which does not afford relief.

21 The defense self-creates an issue regarding the decedent’s keys being present at the
22 crime scene; however, the defense was free to question all detectives about the failure to
23 inventory the keys and then urge whatever inferences it deems necessary during closing
24 arguments. They did just that by questioning CSI Robbie Dahn and Detective Thomas
25 Townsen, yet the argument was ineffective because the State was not claiming the key to
26 Defendant’s home did not exist on decedent’s key ring. Rather, the State was only asserting
27 that, even if the key was on the key ring, it was not material to the case. The decedent’s
28 children were at the home and her presence was expected. The Court recounts the extremely

1 minor significance the Defendant is now pressing and its effect on officers investigating a
2 homicide scene:

3 THE COURT: But I think, clearly, the people in the house all present
4 expected her there. They had the baby garments and the bottles and what not
5 waiting. They knew she was coming, and she was an invitee by virtue of her
legitimate need to go there because she was the mother of the visitation.

6 Now, whether it was polite, good manners or whatever to come in
unannounced, that's another matter. It's not a legal issue.

7 Now, whether the investigating officers should have seized upon this at the
8 time and realized that now this key to the door might be an issue, I think when
9 we're talking about an alleged murder in a home where no one was alleging at
the time she had no right to be and, frankly, I don't think they're alleging it
now.

10 I don't think that an officer is supposed to have that clairvoyant ability to look
11 at the scene and say this must be of *minor importance*. (emphasis added).

12 AA, Vol. 3, 193. As the Court found, the issue of the keys did not rise to the level of
13 importance which would warrant a finding of ineffective assistance of counsel upon review
14 in this petition, especially in light of the fact that counsel vigorously argued the precise claim
15 Defendant is now making. AA, Vol. 3, 190-93. As for the other evidence the Defendant
16 claims was lost, he has not given any substantive information to lead to an inference that the
17 evidentiary value of these supposed items would be exculpatory, thereby failing to meet his
18 burden. He was not prejudiced, especially in light of the overwhelming amount of evidence
19 showing his guilt.

20 3. The Exercise Bike Provides Only a "Mere Hoped-For Conclusion."

21 The next issue Defendant takes with evidence is to proclaim his counsel was
22 ineffective in his presentation of evidence of "blood spatter" on an exercise bike.
23 Photographs of the bike were taken and admitted into evidence. Also, both sides presented
24 expert testimony on the issue. The Defendant was not prejudiced, because his theory
25 regarding the "blood spatter" was adequately represented at trial. The defense questioned
26 their expert, Stuart James, for two days regarding the blood spatter on the exercise bike. AA,
27 Vol. 5, 25-41. Mr. James did not give a definitive answer as to how the blood spatter
28 happened, and the defense was free to create inferences from his testimony during closing

1 argument. There was no prejudice as a result, since both experts for the State and the
2 defense had equal access to information by way of pictures to form their opinions. In short,
3 Defendant has not met the high burden of proving prejudice to an exculpatory level which is
4 placed on him through the opinions in Warner and Rogers. Therefore, his Strickland claim
5 surrounding the evidentiary issues of the exercise bike fails.

6 **4. There Was No Prejudice From The Missing Shell Casings.**

7 Another instance in which Defendant is asserting his counsel was ineffective in
8 regards to evidentiary issues relates to two shell casings he claims to have found upon
9 moving out of the residence. This claim is entirely speculative, and the Court should reject
10 it. There is no evidence provided that these shell casings would be exculpatory, and there
11 certainly was not any prejudice in light of the fact that five shell casings were in fact
12 recovered from the crime scene. His burden of proof has not been met. Warner, 112 Nev. at
13 1240, 926 P.2d at 778. Arguments of such a speculative nature do not provide the necessary
14 basis for a finding of ineffective assistance of counsel.

15 **5. There Was No Bad Faith In Executing the Cremation Order.**

16 Now, Defendant claims bad faith in the destruction of evidence. Defendant signed a
17 cremation order while he was incarcerated, which gave the proper authority the right to
18 cremate the decedent. Since the Defendant has asserted bad faith, he has a high burden of
19 setting forth detailed facts which would corroborate the bad faith. Here, however, he is
20 basing his claim entirely on bare allegations, which would be of no admissibility due to their
21 hearsay nature. The defense attorney was not ineffective and whether or not to file a motion
22 in limine is wholly within the attorney's discretion, and any objection would have been
23 futile. See Rhyne, 118 Nev. at 8, 38 P.3d at 167; Ennis, 137 P.3d at 1103. The Defendant's
24 contentions regarding the cremation order are without merit and do not warrant further
25 review of this issue.

26 **G. Defense Counsel Was Not Ineffective In Challenging the Search Warrant.**

27 The Defendant correctly indicates that his attorney filed a Request for an Order to
28 Produce Cassette Tape, and that request was argued by counsel on both sides. AA, Vol. 1,

1 200. In this petition, the Defendant is hinging his entire argument on his claim that the
2 warrant was unsigned. He references his attorney's remark on the record when he stated, "It
3 is unsigned Your Honor; There is no signature." AA, Vol. 1, 201. Even if true, this would
4 only be a minor defect to an otherwise valid telephonic search warrant.

5 First, Nevada has employed the use of telephonic search warrants since 1981, and has
6 recognized California's use of them since 1973. See Barrios-Lomeli v. State, 114 Nev. 779,
7 781, 961 P.2d 750, 751 (1998). California, with its long history in using telephonic search
8 warrants, has held, "The inadvertent absence of the magistrate's signature on the traditional
9 warrant has been held a technical defect which does not invalidate the warrant [citations].
10 We can find no authority holding the absence of the original telephonic search warrant
11 invalidates the search." People v. Fortune, 243 Cal.Rptr. 189, 195 (Cal. Ct. App. 1988),
12 quoting People v. Sanchez, 182 Cal.Rptr. 430 (Cal. Ct. App. 1982). Nevada's own statute
13 expressly states, "Any failure of the magistrate to make such an endorsement and entry **does**
14 **not in itself invalidate the warrant.**" NRS 179.045(4) (emphasis added). The minutes
15 indicate the Court advised, ".... the search warrant is an exact transcription of the tape
16 recording and, when the Judge signed the written search warrant, that was written
17 certification of the transcription." AA, Vol. 1, 24. Defense counsel was not ineffective
18 after arguing the motion, because the motion was denied and there is authority to support the
19 Court's ruling. Defendant suffered no prejudice as a result.

20 **H. The Photographs Were Not Improperly Turned Over in Violation of the**
21 **Attorney-Client Privilege.**

22 In the early stages of the representation, a former defense attorney for the Defendant
23 took photographs of the crime scene and then immediately passed them onto new counsel for
24 the Defendant. Later counsel turned these photos over to the State and they were eventually
25 used at trial. Now, Defendant claims his counsel was ineffective "for failing to preserve and
26 present the issue of the improper production of the photographs and notes of attorneys"
27 Nevada has not addressed this particular issue directly on point; however, a case in New
28 York presented nearly the same claim and the same facts as those evident here. In People v.

1 Kendall, 678 N.Y.S.2d 182 (N.Y. App. Div. 1998), the defendant claimed photographs of the
2 crime scene were improperly admitted into evidence, and he received ineffective assistance
3 of counsel as a result of his counsel's failure to object to the evidence. The court denied the
4 defendant's contention and supplied the following holding and rationale:

5 "The photographs were *relevant* to show the *layout of the apartment* and the
6 *structure of the swing* on which the defendant *alleged that the infant struck*
7 *his head*. The fact that the photographs *were taken six hours after the crime*
8 *was committed and the crime scene was not protected during that period*
9 would affect the weight to be given the photographs, not their admissibility."
(emphasis added).

10 Id. at 183. The Defendant was in no way prejudiced by the introduction of these
11 photographs, nor was he deprived his right to the effective assistance of counsel. These
12 photographs were taken immediately after investigators had cleared the scene, and they were
13 certainly relevant to the claims Defendant asserted in regards to how the blood from
14 decedent hit the exercise bike. Defendant had full right to challenge the credibility of these
15 photos during trial, and therefore, he should not receive relief based on this faulty claim. In
16 regards to the notes, the court found Ms. Cisneros to be "merely a conduit and that
17 Defendant aired concerns. Further, no legal advice was given and therefore, nothing to
18 protect." AA, Vol. 1, 36. As to Ms. Isaacson, the Court found "she was involved and the
19 attorney/client privilege will be protected," yet Defendant has not made a single claim as to
20 how this information may have been misused, nor has he indicated any prejudice as a result.

21 **I. It Is Counsel's Right to Choose Which Witnesses to Present.**

22 Similar to many of the arguments the Defendant has made and to which the State has
23 responded to above, Defendant is suggesting the Court should stray from the long-
24 announced rule of this Court that it is the defense counsel's right to choose to which
25 witnesses to call to the stand. See Rhyne, 118 Nev. at 8, 38 P.3d at 167. Defense counsel
26 chose to pursue the case the best way he deemed fit. His advocacy should not now be
27 questioned based on mere self-serving allegations, without any reference to the record. "It is
28 the responsibility of the objecting party to see that the record on appeal before the reviewing
court contains the material to which they take exception. If such material is not contained in

1 the record on appeal, the missing portions of the record are presumed to support the district
2 court's decision, notwithstanding an appellant's bare allegations to the contrary." Riggins v.
3 State, 107 Nev. 178, 182, 808 P.2d 535, 538 (1991).

4 The Defendant claims actions by decedent's family, friends and co-workers, the
5 district attorney's office, his former co-workers, and his son's guardian ad litem all had
6 information which would have could have been used to "secure crucial defense witness
7 testimony." The Nevada Supreme Court has held that failure to interview witnesses, or
8 others, is not ineffective assistance if the attorney does not believe they can assist in the
9 defense. Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 952 (1989). The Court went on to
10 reiterate that tactical decisions are virtually unchallengeable absent extraordinary
11 circumstances. Id. citing Strickland v. Washington, 466 U.S. at 691, 104 S.Ct. at 2066. At
12 least two federal courts have held that an ineffective assistance of counsel claim based upon
13 a theory of failure to investigate requires that a "defendant who alleges [a] failure to
14 investigate . . . must allege with specificity what the investigation would have revealed and
15 how it would have altered the outcome of the trial." United States v. Porter, 924 F.2d 395,
16 397 (1st Cir. 1991), citing United States v. Green, 882 F.2d 999, 1003 (5th Cir. 1989).

17 Further, "[u]nder Strickland, defense counsel has a duty 'to make reasonable
18 investigations or to make a reasonable decision that makes particular investigations
19 unnecessary.'" Id. at 691, 104 S.Ct. at 2066. State v. Love, 109 Nev. 1136, 1138, 865 P.2d
20 322, 323 (1993). The role of a court, in considering allegations of ineffective assistance of
21 counsel, is "not to pass upon the merits of the action *not* taken but to determine whether,
22 under the particular facts and circumstances of the case, trial counsel failed to render
23 reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711
24 (1978) (emphasis added); citing, Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977).

25 Defendant's allegations are unsupported, speculative, self-serving, bare allegations
26 that do not warrant relief. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). During
27 the lengthy trial, counsel presented a multitude of witnesses to support the defense theory.
28 Counsel also made numerous tactical trial decisions concerning evidence, questioning of

1 witnesses, and decisions on which witnesses to call and testify. His counsel was not
2 ineffective, because the Defendant has failed to show his counsel did not make a reasonable
3 decision that interviewing these witnesses was unnecessary at the time.

4 **J. There Was No Prejudice From the Guardianship Proceeding**

5 Defendant claims he was prejudiced by his counsel's failure to adequately investigate
6 circumstances surrounding the guardianship proceeding, and the alleged inadequacies
7 deprived him of his right to the effective assistance of counsel. A defendant who alleges a
8 failure to investigate must demonstrate how a better investigation would have benefited his
9 case and changed the outcome of the proceedings. Molina v. State, 120 Nev. 185, 87 P.3d
10 533 (2004). Such defendant must allege with specificity what the investigation would have
11 revealed and how it would have altered the outcome of the trial. United States v. Porter, 924
12 F.2d 395, 397 (1st Cir. 1991) quoting United States v. Green, 882 F.2d 999, 1003 (5th Cir.
13 1989). Defendant's bare allegations do not warrant relief. See Hargrove, 100 Nev. at 502,
14 686 P.2d at 225. Furthermore, it is well established that a claim of ineffective assistance of
15 counsel alleging a failure to properly investigate will fail where the evidence or testimony
16 sought does not exonerate or exculpate the defendant. Ford v. State, 105 Nev. 850, 784 P.2d
17 951 (1989). Since effective assistance of counsel is determined by what counsel did, rather
18 than what counsel did not do, counsel clearly was not ineffective for failing to perform an in-
19 depth investigation of evidence that was not likely to strengthen Defendant's case. See
20 Donovan v. State, 94 Nev. 671, 584 P.2d 708 (1978).

21 The Defendant has only interjected opinions as to what strategy he feels his counsel
22 should have followed, yet the tactical decision rests with counsel. He then asserts counsel
23 was not prepared to question certain witnesses, despite the evidence on the record that
24 counsel vigorously cross-examined the witnesses. The State presented overwhelming
25 evidence of his guilt, and the Defendant has not set forth the requisite burden of proof to
26 show the outcome of his trial would have been different if counsel had proceeded as he now
27 claims counsel should have.

28 //

1 **K. Defense Counsel Was Not Ineffective In His Trial Preparation, and Did**
2 **Not Thereby Lessen the Burden On the Prosecution.**

3 Again, the Defendant is calling into question counsel's investigation and preparation
4 of this case for trial. In particular, he claims a better investigation into the decedent's
5 medical records and the records from the "SafeKey" program would have provided
6 corroborating information which would have been key facts to his acquittal. In addition, he
7 claims a failure to prepare for the testimony of the decedent's treating doctors and the
8 employees from the SafeKey program resulted in his credibility being damaged, thereby
9 leading to his conviction. Also, defense counsel never turned over any protected documents,
10 or any other information he should not have. Rather, he was engaging in mandatory
11 reciprocal discovery and disclosure. See NRS 174.234 and 174.245.

12 **1. The Medical Records and Testimony of Dr. Sessions**

13 Despite the fact that the Defendant is making these rash attempts to allege his
14 innocence by asserting a failure of his counsel to investigate and prepare for Dr. Sessions
15 testimony, he has not shown how his revelation serves to exculpate him of the crime for
16 which he is charged. This showing is necessary and required to award Defendant relief, and
17 he has failed to meet this burden. See Molina v. State, 120 Nev. at 192, 87 P.3d at 538. The
18 Defendant proffered testimony on the stand, and the State chose to rebut Defendant's claims
19 by calling Dr. Sessions. Counsel for the Defendant then cross-examined Dr. Sessions with
20 decedent's medical records to undermine his credibility. AA, Vol. 5, 198. There is no
21 specific factual showing that counsel did not review the medical records, and Defendant has
22 not shown specific facts not offered by counsel, which would have affected the outcome of
23 the trial. Therefore, Defendant has again not met his requisite burden in claiming a failure to
24 investigate or prepare. See Porter, 924 F.2d at 397.

25 **2. The SafeKey Records and Testimony of LaPetite Employees**

26 The Defendant seems to be under the impression that the State was never going to call
27 rebuttal witnesses to counter his testimony. He steadfastly maintained that he picked up the
28 children from school on December 1, 2000, and December 4, 2000. However, there is

1 circumstantial evidence to the contrary which the State produced through the testimony of
2 the two LaPetite employees. Defendant's counsel called into question the testimony of the
3 LaPetite employees on cross-examination by challenging the reliability and creating
4 possibilities that Defendant may have in fact picked up the children. His advocacy was not
5 ineffective, and the Defendant cannot reasonably rely on this claim to challenge the outcome
6 of his trial. See Ford v. State, 105 Nev. at 852, 784 P.2d at 952.

7 **3. The Decedent's Prior Bad Acts**

8 The defense proceeded with a theory of self defense in this case. As such, defense
9 counsel presented evidence of the decedent's prior criminal history, which included prior
10 convictions and specific instances of erratic behavior. AA, Vol. 4, 133-40. Understandably,
11 the State took its best efforts to minimize the impact of this evidence by proceeding on a
12 theory that these instances of bad conduct were not a repeated pattern, but rather were
13 isolated events. The Defendant now claims his counsel was ineffective in investigating,
14 preparing, and responding to this evidence. This is not ineffective assistance. It was a
15 strategic decision of how to argue the issue, which per Strickland, Defendant cannot now use
16 hindsight to second guess.

17 **4. Dr. Eisel's Expert Notes**

18 The production of Dr. Eisel's notes cannot be deemed ineffective assistance of
19 counsel. The Defendant makes only a one sentence bald assertion, yet he has failed to
20 evidence any prejudice or to show how the outcome of the trial would have been different.
21 This Court has determined that it is not reversible error for the State to use information made
22 by an expert at the request of defense counsel. See Floyd v. State, 118 Nev. 156, 167, 42
23 P.3d 249, 256 (2002). In Floyd, the State used psychological evidence garnered by a defense
24 expert, despite the fact the defense ultimately decided not to call the expert as a witness at
25 trial. Id. The Court relied on NRS 174.245(b) to reject the defendant's claim that the
26 expert's report and test results were privileged work-product. Id. "The defendant must
27 allow the prosecutor to inspect and copy any '[r]esults or reports of physical or mental
28 examinations, scientific tests or scientific experiments that the defendant intends to introduce

1 in evidence during the case in chief of defendant.’ Furthermore, resolution of discovery
2 issues is normally within the district court’s discretion.” Id., quoting NRS 174.245(b).
3 Unless and until Defendant can set forth a substantial showing of prejudice, he should not be
4 entitled to relief for another unsupported allegation of ineffective assistance of counsel per
5 Strickland. The State was permitted to use this evidence.

6 **5. The Witness Statements of Mike Edwards and Angelo Ciavarella**

7 The State was also free to use information obtained by the defense investigators, and
8 the Defendant did not suffer any prejudice as a result. Counsel was not deficient for turning
9 over transcripts of the discussions these two witnesses had with defense investigators. He
10 only claims to have suffered prejudice because the State was able to impeach the witnesses;
11 however, the State is permitted to use previous statements made by the witnesses the defense
12 calls at trial. His counsel was prepared and thoroughly examined both witnesses to present
13 their testimony the best way he saw fit.

14 **L. Counsel Was Not Ineffective With the Application of Nevada Law, And It**
15 **Was Defendant’s Ultimate Decision to Testify.**

16 The Defendant’s contention that he received ineffective assistance of counsel for
17 “failing to understand and apply Nevada law in the preparation and trial of this matter” is
18 completely negated by the fact that his counsel associated competent local counsel in this
19 case. Gloria Navarro graduated from Arizona State University School of Law and was
20 admitted to the Nevada Bar over a decade ago in 1994, and she was an experienced criminal
21 defense attorney at the time of the trial.³ She assisted in nearly all phases of the case and
22 was there to advise counsel on the application of Nevada law. The Defendant’s rights were
23 not violated as he was entitled to and received competent Nevada counsel throughout the
24 representation of his case.

25 Defendant’s second claim under this subsection is that he was denied the effective
26 assistance of trial counsel based on his bare assertion that his counsel was not knowledgeable

27 _____
28 ³ See Exhibit 1.

1 on Nevada law. The Defendant made the decision to testify, and he cannot now proceed on
2 a claim for ineffective assistance of counsel based on counsel's advice. "Every criminal
3 defendant is privileged to testify in his own defense or refuse to do so.' Counsel can advise
4 a defendant whether it is wise for him to testify, but ultimately the decision lies with the
5 defendant." Browning v. State, 120 Nev. 347, 360, 91 P.3d 39, 49 (2004), quoting Ingle v.
6 State, 92 Nev. 104, 106, 546 P.2d 598, 599 (1976); Harris v. New York, 401 U.S. 222, 225,
7 91 S.Ct. 643 (1971). At trial, the Court properly admonished Defendant:

8 THE COURT: Mr. Centofanti, I would ask you to stand, please. Sir, I
9 want to advise of something that's required by law, and I'll read to you as
follows:

10 "You have the right under the Constitution of the United States and under
11 the Constitution of the State of Nevada not to be compelled to testify in this
case."

12 Do you understand?

13 DEFENDANT: Yes, Your Honor.

14 THE COURT: You may, if you wish, give up this right and take the
15 witness stand to testify. If you do, you will be subject to cross-examination
16 by the District Attorneys, and anything that you may say, be it on direct or
cross-examination, would be the subject of fair comment when the District
Attorneys speak to the jury in their final arguments.

17 Do you understand that?

18 DEFENDANT: Yes, Your Honor.

19 THE COURT: If you choose not to testify, the Court will not permit the
20 District Attorneys to make any comments to the jury concerning the fact that
you have not testified.

21 If you elect not to testify, the Court will instruct the jury, if your attorney
22 requests, the following instruction, or something very similar to it.

23 Quote, "the law does not compel the defendant in a criminal case to take the
24 stand and testify, and no presumption may be raised, and no inference of any
kind may be drawn from the failure of a defendant to testify," unquote.

25 Do you have any questions thus far?

26 DEFENDANT: No, Your Honor.

27 THE COURT: Lastly, sir, and I don't know if this applies to you, but if
28 you should elect to testify, the District Attorneys could inquire of your
criminal record spanning the last ten years that would be a felony in nature.

1 They couldn't go into it at great length but, certainly, they can bring out the
2 fact that you have such convictions, and I don't believe there are such. But
if there are, they could bring that out.

3 Do you understand?

4 DEFENDANT: Yes, Your Honor.

5 THE COURT: Now, what I tell individuals in your situation is simply
6 this. And, of course, you're an attorney so you have an advantage over
7 most. But there are a lot of strategies involved in the question of whether or
not you testify.

8 Most are not known by the average defendant, and probably not yourself. I
9 don't believe you've been involved much in criminal law in the past. But be
that as it may, your attorney is very, very experienced in this, obviously.

10 I tell individuals that it's their decision as to whether or not they testify or
11 not. It absolutely is your decision. But I commend the attorney's advice to
them, because there's a lot more to this than meets the eye in most instances.

12 So it's a very technical and a very strategic decision to make; do you
understand?

13 DEFENDANT: Yes, Your Honor.

14 AA, Vol. 5, 41. As evidenced by this extensive admonishment, Defendant was well aware of
15 his right to choose whether or not to testify. He was advised by his counsel, but he made the
16 ultimate decision and cannot now seek relief based on ineffective assistance. There are a
17 number of advantages and disadvantages for a Defendant to take the stand and testify on his
18 own behalf. Here, the Defendant should not be permitted to assert his counsel's advice was
19 faulty when counsel in a case such as this takes into account all of these perceived
20 advantages and disadvantages in advising his client.

21 **M. There is No Evidence to Support Defendant's Contention that His Counsel**
22 **Was Ineffective in Investigating Defense Expert's Opinions.**

23 Defendant's next unsupported allegation is that "defense counsel was ineffective in
24 failing to investigate the defense experts' opinions prior to presentation of that evidence." It
25 is counsel's choice to determine which witnesses to present and which questions to ask. As
26 such, the Defendant's multitude of claims regarding what "should have been" done with
27 respect to the expert's is not within his discretion. Rhyne, 118 Nev. at 8, 38 P.3d at 167.

28 //

1 **a. Dr. Larry Simms' Testimony**

2 The State used different facts and circumstances from those posed by the defense
3 when questioning the witness, and the witness acknowledged it is possible to respond with
4 different answers based on the different facts used in the question. This witness was well-
5 attuned to the technique used by the State; he was not impeached, but was rather
6 acknowledging that there might be different answers to different sets of facts being posed by
7 the defense and the State. In response to the State's questions, the witness prefaced his
8 seemingly contradictory answers by stating, "In reality it is true and, actually, it may be
9 reasonable, not just kind of embellish what you're saying a little bit. It may not be an
10 unreasonable opinion; it may be a reasonable opinion. In other words, a competent forensic
11 pathologist can disagree. Just because there's disagreement doesn't mean one is right and
12 one is wrong. Two reasonable interpretations can come out." AA, Vol. 4, 211. This witness
13 essentially indicated two different answers may be reached based on different underlying
14 facts. The jury was to give weight to this expert testimony. How much weight, in fact, was
15 given is unknown but it definitely does not create reversible error based on the Defendant's
16 unwarranted negative interpretation of it.

17 **2. The Testimony of Jimmy Trahin**

18 All Defendant has done is take small portions of the expert's testimony out of context
19 and frame it in his petition as though the witness was impeached. In reality, the expert was
20 being questioned with different underlying facts on direct and cross-examination. The
21 defense theory was not undermined when Jimmy Trahin testified as to the rapid firing of the
22 weapon, because he testified that this was "controllable fire," which means the triggerman
23 must take aim, but it is not decisive as to how long this shooting lasted, but it definitely
24 "took a lot quicker than 20 seconds" AA, Vol. 4, 225. This is consistent with the
25 testimony on direct in which the expert stated, "It's my opinion that the shooting is very
26 rapid. It was very rapidly all over in two-and-a-half, three seconds." AA, Vol. 4, 223.

27 As to the testimony cited by Defendant about the way the shooter was moving and the
28 evidence of whether or not the decedent attacked the Defendant, the Defendant neglects to

1 indicate there is not any evidence that the Defendant did not, in fact, attack her. The basis of
2 the expert's opinion was geared to how her body likely moved after being hit with the shots,
3 not what she was doing just prior to being hit with the shots. The expert stated when asked
4 about the conflicting facts the State and the defense are offering:

5 "It's possible. All these things are possible. I mean, it's possible Michael
6 Jackson didn't have a nose job, but it's highly improbable.

7 It's the same in this particular situation. We can come up with an infinite
8 number of scenarios. It's what's most likely. And when you figure that this
9 appears in a very short span, very physically short-spanned area, that I doubt
10 if the victim would be just standing there having a drink or something with
11 all the shots hitting her.

12 This thing went down very quickly. That means you have a rapid set of
13 shots hitting her and, therefore, it's most consistent with the person getting
14 shot, rotating as all the shots are going in. Because the muzzle height
15 matches all the shots."

16 AA, Vol. 4, 233. The State and the defense crafted the questions based upon their
17 independent favorable facts so that, based on their hypothetical, it is possible the shooting
18 could have happened a number of different ways. This does not make counsel ineffective,
19 and counsel was very diligent in his direct examination of the witness.

20 Defense counsel never engaged in "bolstering state's expert's opinions regarding the
21 proximity of the shots," nor did counsel present damaging witness testimony about the fatal
22 shot. The Defendant is taking testimony out of context and framing a self-serving
23 conclusion; however, it is just as easy for the opposite conclusion to be reached.

24 **3. Dr. John Eisel's Testimony**

25 What is now becoming prevalent in Defendant's argument is that he is taking the
26 State's position at trial in regards to the expert testimony to challenge his counsel's
27 performance. Defense counsel offered a number of experts to pursue Defendant's theory of
28 self defense, which was effective advocacy. As a basis to challenge his conviction, he is
now endorsing the State's theory and inferences created during closing arguments from the
testimony offered to second guess the approach his trial counsel took.

For example, the Defendant attempts to discredit his own expert based on the fact that
his opinion has changed to some extent. He also challenges his expert's preparation on the

1 case, but the record shows differently. On re-examination, defense counsel properly
2 solicited the basis for Dr. Eisel's opinion and the reasoning for why an expert's opinion
3 might change, thereby re-focusing the jury's attention away from the perceptions the State is
4 rightfully creating from the testimony:

5 DEFENSE: Those notes that were there were provided 10/12/2001,
6 have you done work on the case reviewing materials, reviewing Mr. Trahin's
7 materials, getting autopsy pictures in the last two year time period before
8 you testified here today, in 2004?

9 WITNESS: Yes, I have.

10 DEFENSE: Is you're opinion that you're rendering here today based upon
11 all that information?

12 WITNESS: Yes, it is.

13 DEFENSE: Is it unusual for you to make notes as you're going along, as
14 you reach certain points or get certain materials and spend time on a case,
15 write your notes and then as more information comes in consider more
16 information and so forth?

17 WITNESS: Sure. We do that formally on autopsy reports where, at the
18 conclusion, we say based on the circumstances as known at this time.

19 I don't formally do it in my notes, but clearly as more information becomes
20 available I reserve the right to change my opinion.

21 DEFENSE: By the way, in terms of changing that opinion, that's based
22 upon what you had back as of the end of 2001. Is there anything
23 inconsistent with that or is it a more refined opinion?

24 WITNESS: No. I think it's more refined. I think there are other things that
25 have come to light or that I've thought of or been made aware of in the
26 interim that I think make the statement less valid.

27 AA, Vol. 5, 21. The expert testimony offered by the defense benefited the Defendant, and he
28 suffered no prejudice from its articulate presentation. Defense counsel was effective in
calling several experts with specialized expertise in different areas to support the defense
theory.

29 4. Testimony of Stuart James

30 The testimony offered by the blood spatter expert for the defense did not provide any
31 inkling of ineffective assistance of counsel. It is not uncommon for attorney's on both sides
32 of a case to use bits and pieces of an expert for the opposing side to support their case. It is

1 up to the jury to weigh the credibility of the witnesses, and the fact that a couple minute facts
2 might support the opposing side's theory does not entitle a petitioner to relief. If every fact
3 and opinion set forth by an expert gave deference to one side, then that expert's objectivity
4 would come into serious question. Here, however, Mr. James was well aware of his
5 expertise and expressly refused to go beyond his specialization to render opinions for which
6 he was not qualified to opine on:

7 STATE: You agree, do you not, that from the photos of the crime scene
8 we see no evidence of bloodletting that tells us definitively she's upright
when the shots are received. Do you agree with that?

9 WITNESS: Yes. In the sense that I believe he's referring to the flow
10 patterns when he's saying that – it's sort of a flip-flop of saying that the flow
11 patterns are consistent with having been produced laterally, while the
orientation of her face is horizontal and because blood flow follows gravity.

12 That only means that when the blood appeared that she was in that relative
13 position. As opposed to saying, well, there's no evidence to show that any
blood flow pattern is coming downward. And I think that's what he's
translating into there's no evidence that she was standing.

14 However, this gets into pathology is to when the blood flow is sufficient to
15 create a blood flow, the blood volume. So that I can't venture into.

16 AA, Vol. 5, 38. This expert is exercising restraint by not going outside his expertise to
17 render a definitive opinion on certain questions. This was effective, because he gains
18 credibility with the jury by not endorsing an opinion to which there are likely other, if not
19 many, other reasonable possibilities. The Defendant was not denied the effective assistance
20 of counsel.

21 5. The Testimony of the Psychological Experts

22 The Defendant is not entitled to undercut the testimony of the psychological experts
23 by challenging the basis to which they testified. These experts testified, in general, to
24 behavior patterns people often exhibit when acting in response to different, stressful
25 situations. Counsel is laying the foundation as to the scientific basis of Defendant's state of
26 mind and the way in which he reacted the night of December 20, 2000. An attorney often
27 needs to call expert witnesses to provide pertinent background information as to certain
28 mental disorders and reactions; they are not always called to render an opinion specific to the

1 defendant in each case. Dr. Lipson testified as to why a person may shoot seven or eight
2 times under the stress of an event yet feel they only shot once or twice; Dr. Frasier testified
3 to the chemical reactions in the brain when an individual is faced with an immediate,
4 stressful event. Despite the fact that Dr. Lipson and Dr. Frasier did not render an opinion
5 specific to the Defendant, they proffered important testimony to support the defense theory
6 of self defense by creating rationales for why the Defendant might have responded the way
7 he did when he shot the decedent seven times. It is for the attorney to decide which
8 questions to ask, and defense counsel's questioning of Dr. Glen Lipson and Dr. Scott Frasier
9 should not be called into question by Defendant who does not have the discretion and control
10 over what witnesses are called nor the scope of their testimony to be offered. Rhyne, 118
11 Nev. at 8, 38 P.3d at 167.

12 **6. Experts Not Called or Used at Trial**

13 The Defendant's final contention regarding experts is that his counsel was ineffective
14 and he suffered prejudice as a result of his counsel's choice not to call certain witnesses. In
15 particular, he claims experts should have been called in the areas of toxicology,
16 karate/martial arts, self defense, blood spatter, and investigative techniques for a shooting.
17 This claim flies directly in contradiction to the already often-cited holding in Rhyne that it is
18 counsel's discretion to choose which witnesses to call to testify. Id. Furthermore, other than
19 his bare allegations, Defendant has not shown per Molina that the witnesses he now contends
20 counsel should have called would have led to a better result for him.

21 The Defendant has only cited to a number of cases finding counsel's investigation
22 inadequate, and these cases are wholly distinguishable from the facts of this case. See
23 Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527 (2003) (investigation inadequate because
24 counsel did not go "beyond presentence investigation (PSI) report and department of social
25 services records"); Combs v. Coyle, 205 F.3d 269, 288 (6th Cir. 2000) (the expert's
26 testimony was "completely devastating to the defense," whereas such a conclusion cannot
27 reasonably be suggested in this case); Bean v. Calderon, 163 F.3d 1073, 1078 (9th Cir. 1998)
28 (the attorney's confusion over their roles in the case led to expert testimony which was "at

1 worst, deleterious” for not readying experts until day before trial and failing to provide them
2 with material specific to the case). These cases, among others cited by Defendant, are the
3 extremes for which a court may grant habeas relief, but they are far from any reasonable
4 application to counsel’s presentation of expert testimony in this case. This was a very long
5 jury trial in which a multitude of experts were called by the defense to garner support for the
6 defense theory of the case. He was not prejudiced and should not receive relief.

7 **N. Counsel Was Not Ineffective In His Procurement of Witnesses At Trial.**

8 The Defendant is claiming the outcome of his case would have been different had
9 Emiline Eisenman been called as a witness at trial by asserting unfounded, self-serving
10 conclusions as to what the witness would have testified to. However, it is for counsel to
11 decide which witnesses to call to testify, and a reversal of Defendant’s conviction is not
12 warranted based on the speculation of assumptions as to what Defendant is claiming she
13 would have testified to. Emiline Eisenman (the sister of the decedent) can certainly be
14 viewed as a potentially adverse witness, and counsel’s decision, and likely a wise one, not to
15 call her as a witness should not be interfered with.

16 Per Rhyne, the Defendant has no claim which would entitle him to relief. The
17 Defendant has not made a showing to indicate the alleged testimony of Lt. Stephen Franks
18 would have been exculpatory. The substance of his testimony was achieved by the use of
19 other ballistics experts and psychological experts who did testify at trial on behalf of the
20 defense. In addition, it is still questionable whether the Las Vegas Metropolitan Police
21 Department would have allowed Lt. Franks to testify, and whether the Court would have
22 entertained a motion to prevent his alleged testimony. AA, Vol. 1, 173. That adds an
23 additional dose of speculation to the significance, or lack thereof, in Defendant’s claim.

24 The Defendant then cites a number of potential witnesses who he claims would have
25 offered testimony to corroborate his version of the events. However, there is no evidence
26 whatsoever to offer that any of these witnesses⁴ would not have offered damning testimony

27
28 ⁴ Ricardo Dominguez’s grandmother, Michael Stephenson, Defendant’s neighbor “Herb”, Dr. Calixco and Nurse Kruger, Lisa Demeo, and Amanda Pearson.

1 to the Defendant. In addition, deference must be given to counsel's right and choice not to
2 call these individuals. Rhyne, 118 Nev. at 8, 38 P.3d at 167. Counsel's strategy in selecting
3 the proper witnesses to the stand was made based on his extensive experience with the case,
4 and this testimony would have been cumulative and could very well have been damaging to
5 Defendant. It certainly would not have been exculpatory, and Defendant was not denied the
6 effective assistance of counsel in counsel's selection and presentation of witnesses at trial.

7 **O. Defense Counsel Was Not Ineffective During the Course of the Trial.**

8 **a. The Alleged Juror Misconduct**

9 The Defendant claims his counsel was ineffective for failing to object or make a
10 record about an alleged shirt a juror wore. There is no evidence in the record of any shirt
11 worn by a juror, which read, "Do you know what a murderer looks like?" The challenge to
12 Defendant's claim is two-fold. First, this precise argument has already been argued before
13 the Nevada Supreme Court and was rejected. As such, it is barred as law of the case. See
14 Walker, 85 Nev. at 343, 455 P.2d at 38. Second, any objection would have been futile, since
15 there is no showing that a juror even wore this supposed shirt. See Ennis, 137 P.3d at 1103.
16 The Defendant makes another unsupported allegation of juror misconduct by professing two
17 jurors were sleeping intermittently throughout the trial. This claim should also be rejected
18 based on the same argument and authority set forth herein this subsection.

19 **b. Alleged Prosecutorial Misconduct**

20 The Defendant next asserts that he was prejudiced and denied the effective assistance
21 of counsel for his counsel's failure to object to the prosecutor's use of certain terms at times
22 during the trial. Any objection would have been futile. See Ennis, 137 P.3d at 1103. These
23 words were used so sparingly at trial that there was only minimal, if any, effect. The
24 Defendant was certainly not prejudiced, and has failed to meet the Strickland standard for
25 showing his counsel was ineffective.

26 Furthermore, claims of prosecutorial misconduct that were not objected to at trial will
27 not be reviewed on appeal unless they constitute "plain error." Leonard v. State, 117 Nev.
28 53, 82, 17 P.3d 397, 415 (2001); See Mitchell v. State, 114 Nev. 1417, 971 P.2d 813, 819

1 (1998); Rippo v. State, 113 Nev. 1239, 946 P.2d 1017, 1030 (1997). Plain error occurs “if
2 the error either: (1) had a prejudicial impact on the verdict when viewed in context of the
3 trial as a whole, or (2) seriously affects the integrity or public reputation of the judicial
4 proceedings.” Gaxiola v. State, 121 Nev. 638, 654, 119 P.3d 1225, 1236 (2005).

5 The State used the term “assassination” to describe the types of gunshots, which is a
6 permitted inference and the basis of the State’s case, premeditated murder. Dr. Larry Sims is
7 the coroner and an individual who has performed countless numbers of autopsies. As such,
8 there is no prejudice when he compares the shots the decedent suffered to “assassination
9 shots” he has seen in other autopsies he has conducted. Also, defense counsel only used
10 these terms in a situation to counter and discredit their previous use from the witness. Jimmy
11 Trahin was only using the terms in reference to another witness’s testimony. His use of the
12 term “coup de gras” is only used to give the jury an idea of the type of shot which inflicts
13 this sort of damage. Lastly, counsel did not endorse the use of these terms, and any reference
14 was only used as a basis to challenge the State’s theory of premeditated murder.

15 **c. Defense Counsel Was Not Ineffective in Questioning Quito Sanchez.**

16 Defense counsel effectively advocated for the Defendant to question and undermine
17 the credibility of the proposed testimony of decedent’s son, Quito Sanchez. At the
18 evidentiary hearing on December 27, 2001, counsel was able to draw out some
19 inconsistencies in Quito’s testimony; however, it was for the trial court to determine his
20 overall competency to testify. In that, the court made the just and equitable decision by
21 accounting for all relevant factors and determining, “Quito will be allowed to testify and
22 [defense counsel] can bring out any prior inconsistencies in cross-examination.” AA, Vol. 1,
23 21. Defendant was provided with the effective assistance of counsel at the evidentiary
24 hearing and trial.

25 For obvious reasons concerning a child’s competency to testify, the court evaluates on
26 a case by case basis, evaluating among other things: “(1) the child’s ability to receive and
27 communicate information; (2) the spontaneity of the child’s statements; (3) indications of
28 ‘coaching’ and ‘rehearsing’; (4) the child’s ability to remember; (5) the child’s ability to

1 distinguish between truth and falsehood; and (6) the likelihood that the child will give
2 inherently improbable or incoherent testimony.” Evans v. State, 117 Nev. 609, 624, 28 P.3d
3 498, 509 (2001). “This Court will not disturb a finding of competency. Inconsistencies
4 in the testimony go to the weight of the evidence.” Id., citing Lanoue v. State, 99 Nev. 305,
5 307, 661 P.2d 874 (1983) and Wilson v. State, 96 Nev. 422, 423-24, 610 P.2d 184, 185
6 (1980).

7 Here, Quito was much older than the child in Evans, who was “four at the time of the
8 murders and six at the time she testified.” Evans, 117 Nev. at 623, 28 P.3d at 508. Quito
9 was nine years old at the time of the murders and twelve at the time he testified. Despite the
10 difference in age, Quito and the child in Evans did present some similarities, which the court
11 held to enhance the child’s competency to testify. Quito did not appear to answer questions
12 just to make up an answer, and responded with “I don’t remember” to several questions
13 throughout his testimony; he also fully comprehended the questions posed by both counsel
14 and responded with “Can you repeat that?” whenever faced with a question he did not
15 understand. AA, Vol. 1, 174-90. The Court in Evans found “[the child] readily admitted
16 whenever she did not know or could not remember something and did not appear to make up
17 information just to answer a question.” Id. at 624.

18 The Defendant is picking and choosing a couple argumentatively minor
19 inconsistencies in Quito’s testimony out of an entire afternoon’s worth of testimony.
20 However, the court came to the proper resolution by finding Quito competent to testify. The
21 Court also points out the obvious ramifications of the inconsistencies might have on the
22 impact of Quito’s testimony at trial. The Court pointed out one inconsistency on the “gun
23 issue” and held, “That he can testify, subject to cross-examination and impeachment. In fact,
24 you will now have this testimony under oath that you can use for impeachment purposes.”
25 AA, Vol. 1, 195.

26 The Defendant was not prejudiced by this decision, and his counsel effectively
27 advocated for the Defendant at the hearing. Furthermore, Quito was questioned extensively
28 at trial, and defense counsel mitigated the impact of Quito’s testimony to the best extent

possible. Any of Defendant's claims that defense counsel should have better investigated or sought the assistance of expert witnesses are outside his discretion and without merit. See Rhyne, 118 Nev. at 8, 38 P.3d at 167; Molina, 120 Nev. at 192, 87 P.3d at 538. Counsel's representation overwhelmingly exceeded the standard required by Strickland.

d. Counsel Was Not Ineffective In Presenting Defendant at Trial.

The Defendant is contending his counsel failed to meet the Strickland standard in presenting his testimony, and he was prejudiced thereby as a result. The State does not feel the need to unduly burden the Court with the trial court's lengthy admonishment of Defendant prior to him taking the stand to testify. See Browning, 120 Nev. at 360, 91 P.3d at 49; Ingle, 92 Nev. at 106, 546 P.2d at 599; Harris, 401 U.S. at 225. The decision was his, and he should not be able to contest his counsel's assistance in helping present the testimony.

As his complaint pertains to other witnesses that should have been called to corroborate Defendant's testimony, counsel presented numerous experts in various fields to support the credibility of the defense theory. It is counsel's decision, and not Defendant's, to choose which witnesses to call to testify. Rhyne, 118 Nev. at 8, 38 P.3d at 167. The absurdity of Defendant's complaint is even more prevalent when he contends his counsel was ineffective for *relying on his representations*. (emphasis added). It is reasonable for counsel to rely on his client's assertions. See Krauss v. State, 116 Nev. 307, 310, 998 P.2d 163, 165 (2000). The Defendant thoroughly cross-examined Dr. Sessions on his direct examination and used his medical records in doing so, indicating counsel had reviewed the records and was prepared and was prepared to draw questions therefrom. Defendant's final contention that psychiatric witnesses should have been called in addition to other witnesses, is either belied by the record or not within the scope of Defendant's authority. See Rhyne, 118 Nev. at 8, 38 P.3d at 167; Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002) ("A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made."). Dr. Glen Lipson and Dr. Scott Frasier testified at length for the defense, and it is counsel's decision as to what other witnesses are necessary to best support the defense theory. Defendant has failed to meet the Strickland standard yet again.

1
2 **e. Counsel Was Not Ineffective During Testimony of Tricia Miller.**

3 The Defendant was not prejudiced on any standard for counsel's choice not to object
4 to alleged hearsay at trial as any objection would have been futile. See Ennis, 137 P.3d at
5 1103. Hearsay is an out of court statement used to prove the truth of the matter asserted.
6 NRS 51.035. The witness's statement referring to what the decedent said to her about the
7 domestic violence incident on December 5, 2000, shortly after its occurrence was not used to
8 prove the Defendant actually inflicted the harm upon her physically and emotionally; rather,
9 it was used to show her decedent's extreme fear of the Defendant. It was not hearsay,
10 however, even if the court were to find it was hearsay, it is still admissible as a statement of
11 then existing mental, emotional, or physical condition under NRS 51.105 (hearsay
12 exception). In any event, Defendant's claim does not rise to the level of reversible error.

13 As for Defendant's next issue, the State chooses to adopt the prosecutor's and trial
14 court's assessment of the claim about witness contamination as "ridiculous." Further, any
15 assertion by the Defendant that his counsel was not effective on this issue is entirely without
16 merit as counsel made an extensive offer of proof on the issue. The Defendant essentially
17 claims the witness, Tricia Miller, spoke with a family member and a juror from another
18 department to help bolster her testimony. The State feels the trial court placed a proper
19 summarization of the events on the record and made the correct decision in forbidding the
20 defense from calling a previous defense witness (Mark Wright) in the case to testify to the
21 alleged conversations Miller had:

22 "... in all candor I think we would all concede that Ms. Miller is squarely in
23 the prosecution's camp, if you will, and Mr. Wright is squarely in the
defense's camp, in my judgment.

24 No question in the world about that.

25 The fact they might get out there in the hallway and banter back and forth or
26 look for frailties in the other's testimony, et cetera, is certainly
understandable, but back to the more specific matter at hand.

27 You are correct, Mr. Bloom, when you say that all these things are up to the
28 jury to determine to be properly allowed.

1 My function is to allow only relevant evidence before the jury.

2 When you approached the bench, counsel, all present, and I heard just briefly
3 discussed what we are discussing more at length now, I said – and I hope it
4 wasn't considered my brashness or any attempt to be discourteous, but I said
I think it's ridiculous.

5 Having heard more, Mr. Bloom, I have not retracted from that position. It is
totally ridiculous. Let me explain my thinking – and this is for the record.

6 I don't mean to be critical. I know you're doing a fine job representing your
7 client and that's not to be scoffed at or criticized.

8 Here is my thinking in the matter: The witness, Ms. Miller, did not say she
9 knew the family well. She said she knew Gina well, but she didn't talk
about her past, the gang involvement and all those other things. Gina didn't
relate it to her.

10 I see nothing shocking about the fact that she's talking to the sister of her
11 now deceased friend and asking about the family history. Evidently there is
12 a number of sisters. I don't know where I got that thought, but I think that is
the fact.

13 Somehow I don't know where I heard it, but that doesn't, I don't think,
14 suggest a divergence from her testimony and nor do I think that that was
something she needed in order to testify because she had already testified at
length.

15 She didn't change her testimony after she spoke to this lady in the hallway
16 that I'm aware of. She didn't say, as I said earlier, all about how well she
knew about her family and all these things so there's nothing new.

17 As to talking to the juror in another case, I don't know that we can hold
18 against Ms. Miller what some jurors offer by way of suggestion as to
19 testimony. As we know, jurors and witnesses come to Court, they become
experts in a matter of hours and they like to – they tend to talk about things.

20 I don't know what that has to do with the situation, unless – well, I really
21 don't think it's of any consequence. We have here where Ms. Miller told
Mark Wright she is the best friend. Maybe I'm just not grasping that, but I
don't know what that has to do with anything."

22 (emphasis added). AA, Vol. 3, 78-80. Counsel made a valiant attempt to stray the Court's
23 attention to this allegation, and his advocacy in this regard should not be called into question
24 and scrutinized by Defendant. The Defendant has not made the requisite showing of
25 prejudice to warrant any further review based on the Strickland standard.

26 //

27 //

28 //

1 **f. Defense Pursuit of Self-Defense Theory Does Not Give Rise To**
2 **Claim For Ineffective Assistance of Counsel.**

3 Defense counsel consulted with Defendant over the course of the entire
4 representation. Based upon the representations the Defendant made to his counsel, the
5 decision was made by counsel to pursue the defense theory of self-defense. Once again, we
6 must refer to the oft-cited rule pronounced in Rhyne for particular language directly
7 applicable to Defendant's claim on this issue. "Once counsel is appointed, the day-to-day
8 conduct of the defense rests with the attorney. He, not the client, has the immediate- and
9 ultimate- responsibility of deciding if and when to object, which witnesses, if any, to call,
10 and what defenses to develop." Rhyne, 118 Nev. at 8, 38 P.3d at 167, citing Wainwright v.
11 Sykes, 433 U.S. 72, 93, 97 S.Ct. 2497 (1977). Defendant's claim that he was denied the
12 effective assistance of counsel based on the theory pursued by the defense is ludicrous.
13 First, it is counsel's decision as to what defense to pursue and that decision is based on the
14 facts supplied by his client and the evidence in the case. Second, the record indicates this
15 defense was pursued vigorously, and multiple experts were called to testify as to self-defense
16 and defendant's state of mind. His claim that he would have been convicted of a lesser
17 offense is based on pure speculation, and is belied by the record. See Mann, 118 Nev. at
18 354, 46 P.3d at 1230.

19 **g. It Is Counsel's Decision When and If to Object to Hearsay.**

20 Counsel was effective in advocating against the admission of the alleged hearsay
21 statement the Defendant is now disputing. Counsel filed a pre-trial motion to prevent its
22 admission, which was ultimately denied. Also, he preserved the continuing objection at trial,
23 yet the statements were properly admitted under NRS 51.095 and NRS 51.105 when the
24 Court reflected on its admissibility by stating, "I allowed it and I think it could have been
25 under the excited utterance exception because of the Supreme Court's liberal view of that
26 exception, but also state of mind." AA, Vol. 4, 176.

27 Lastly, the Defendant has failed to meet his mandatory burden even if the court were
28 to admit the statement was improperly admitted. The Nevada Supreme Court has placed a

1 stiff standard on awarding a convicted murder defendant a new trial based on the admission
2 of inadmissible hearsay: “Evidence against the defendant must be substantial enough to
3 convict him in an otherwise fair trial, and it must be said without reservation that the verdict
4 would have been the same in the absence of error.” Weber v. State, 121 Nev. 554, 579, 119
5 P.3d 107, 124 (2005), quoting Homick v. State, 112 Nev. 304, 316, 913 P.2d 1280, 1288
6 (1996). In accord with argument already discussed herein about the admissibility of the
7 statements, the Defendant was not prejudiced and should not be entitled to relief.

8 **P. Defense Counsel Was Not Ineffective as to Defendant’s Ill-Advised Claims**
9 **of Prosecutorial Misconduct and Prejudicial Rulings.**

10 The Defendant reiterates the same claims which have already been addressed by
11 disguising his claim of ineffective assistance as counsel’s failure to take the proper
12 procedural route. Among the procedural avenues he claims mandated his counsel’s attention
13 are objection and preservation of a particular issue, request a mistrial, request a full and
14 adequate evidentiary hearing, file a writ or other form of appeal, request a curative
15 instruction, move or make a motion to strike or exclude, and request a continuance.

16 For purposes of establishing the threshold requirements for review, a short reference
17 to the applicable law for the aforementioned procedures is necessary. “As a general rule, the
18 failure to object or request a [curative] instruction will preclude review by this court. In
19 order for error to be reversible, it must be prejudicial and not merely harmless. The test is
20 whether ‘without reservation the verdict would have been the same in the absence of error.’”
21 Ross v. State, 106 Nev. 924, 803 P.2d 1104 (1990), citing Mercado v. State, 100 Nev. 535,
22 538, 688 P.2d 305, 307 (1984), and quoting Witherow v. State, 104 Nev. 721, 724, 765 P.2d
23 1153, 1156 (1988). Defendant has no right to relief for district court’s failure to hold
24 evidentiary hearing when defendant “failed to seek writ of mandamus and has subsequently
25 *failed to demonstrate any prejudice*” Lisle v. State, 113 Nev. 540, 551, 937 P.2d 473,
26 480 (1997) (emphasis added). A request for a mistrial, request for a continuance, and
27 whether or not to file a writ or other form of appeal, are all tactical decisions at counsel’s
28 discretion, and the Defendant steps outside the scope of his authority in asserting he was

1 denied the effective assistance of counsel as a result of counsel's strategic decision not to
2 pursue these enumerated courses of action.

3 **1. The Disqualification of Dan Albregts and Canvass of Defendant**

4 The State has already responded to Defendant's claims about the disqualification of
5 his previous counsel and the canvass of Defendant and self-defense plea at extensive length
6 within this response at (I)(B)(1), (I)(B)(2), (II)(B), and (II)(C). The Defendant was simply
7 not prejudiced by the holdings in the trial court, and his counsel was not ineffective in
8 violation of the Strickland standard.

9 **2. Defense Counsel Was Not Ineffective For Choosing Not To Request**
10 **A Petrocelli Hearing.**

11 The Defendant steadfastly contends the trial court erred by admitting evidence of
12 prior bad acts without a Petrocelli hearing. First, there are multiple avenues for admissibility
13 of the evidence which the Defendant is now contesting. He argues his counsel was
14 ineffective for not objecting to certain parts of the testimony of Sarah Smith and Adrienne
15 Atwood; he further argues the evidence should not have been admitted absent a Petrocelli
16 hearing. The Defendant, however, is not recognizing the multiple avenues for admissibility
17 of the evidence these two witnesses were testifying to. NRS 48.045 governs the
18 admissibility of prior bad acts and states, "Evidence of other crimes, wrongs or acts is not
19 admissible to prove the character of a person in order to show that he acted in conformity
20 therewith. It may, however, be admissible, for other purposes, such as proof of *motive*,
21 opportunity, *intent*, preparation, plan, knowledge, identity, or absence of mistake or
22 accident." (emphasis added). These witnesses testified as to Defendant's demeanor and
23 conversations they had with the Defendant in the immediate time leading up to the murder.
24 He made remarks which evidence a clear motive and intent to do the crime charged. This
25 testimonial evidence was properly admitted, and any objection to its admissibility would
26 have again been futile. See Ennis, 137 P.3d at 1103.

27 Furthermore, "A trial court's failure to conduct a Petrocelli hearing on the record may
28 be cause for reversal, but reversal is not mandated *absent prejudicial effect*." Carter v.

1 State, 121 Nev. 759, 769, 121 P.3d 592, 599 (2005) (emphasis added), citing Qualls v. State,
2 114 Nev. 900, 903, 961 P.2d 765, 767 (1998) (“.... failure to conduct a proper hearing on the
3 record is cause for reversal on appeal unless the result would have been the same if the
4 trial court had not admitted the evidence.”). Here, Defendant suffered no prejudice from the
5 testimony of Smith and Atwood. Smith testified about her conversations and perceptions of
6 Defendant in the weeks leading up to the killing, and Atwood did the same. Based upon the
7 substantial amount of evidence put forth by the State in this long trial, Defendant has also
8 failed to show the result of his conviction would be any different in the absence of the
9 allegations of ineffective assistance he sets forth under this subsection.

10 **3. Counsel Was Not Ineffective Regarding Testimony of Sgt. Winslow.**

11 Counsel cannot be deemed ineffective for not lodging futile objections and requesting
12 a curative instruction; the result of this case would have been the same even if Defendant’s
13 proposed theory of attacking Sgt. Winslow’s testimony had been followed. The trial court
14 determined that, although the “conversations of the next day or Sgt. Winslow’s conclusions”
15 will not be admitted, certain evidence will be admissible to show state of mind. AA, Vol. 1,
16 21. The testimony proffered by Sgt. Winslow was by no means the solidifying force in
17 cementing Defendant’s conviction. The statement the Defendant is singling out was only
18 used to explain his conduct and his justification for accompanying the decedent to the
19 residence on December 6, 2000. Defendant was not prejudiced on any level by the
20 admission of Sgt. Winslow’s testimony, and his counsel’s treatment of the issue was not in
21 violation of the Strickland standard, especially when counsel made a second objection on the
22 record and outside the presence of the jury.

23 **4. Counsel Was Not Ineffective In Regard To Quito’s Testimony.**

24 The State has already addressed this issue at (II)(O)(c) and shown to be without merit,
25 despite Defendant’s efforts at now disguising it as a claim of ineffective assistance from a
26 procedural standpoint. The Defendant is merely casting self-serving allegations that
27 statements given by Quito to the District Attorney’s office would have provided some
28 vindication. However, there is no evidence in the record to support Defendant’s claims of

1 inadequate investigation and preparation, and the Defendant was never prejudiced by Quito's
2 testimony. Counsel performed the necessary work in order to properly prepare himself to
3 cross-examine Quito. As stated earlier, counsel's strategic decisions regarding the treatment
4 of this witness should not be called into question by raising speculative procedural routes
5 which could (or could not) have been taken, because it is for counsel to decide among other
6 things, whether or not to file a motion in limine or request a curative instruction.

7 **5. Counsel Was Not Ineffective Regarding Eva Cisneros's Testimony.**

8 The Defendant was not prejudiced, nor would the outcome of the trial be any different
9 with the exclusion of Cisneros's testimony. At a pre-trial evidentiary hearing, the trial court
10 found, "Ms. Cisneros was merely a conduit and that Defendant aired concerns. Further, no
11 legal advice was given and therefore, nothing to protect." AA, Vol. 1, 36. Defense counsel
12 fully litigated the issue of attorney-client privilege as it pertained to Eva Cisneros. She was
13 subject to thorough cross-examination, and the Defendant should not be entitled to relief
14 based on the Strickland standard. Any objection to this testimony would have been futile,
15 pursuant to Ennis, 137 P.3d at 1103, and the testimony offered about Defendant's ability as
16 an attorney was offered to corroborate other testimony that Defendant "talked" his way out
17 of being arrested for the domestic violence incident on December 5, 2000.

18 **6. The Defendant Suffered No Prejudice Relating to the Issues of**
19 **Attorney-Client Privilege and Work-Product as They Pertain to**
20 **Janeen Mutch and Harvey Gruber.**

21 The Defendant is again asserting prosecutorial misconduct and ineffective assistance
22 of counsel as a result of the pre-trial ruling that Defendant had the attorney-client privilege as
23 to Janeen Mutch. However, photographs of the crime scene are not work product, subject to
24 the privilege. The United States District Court in the District of Nevada has specifically
25 addressed photographs and whether they are protected as work product. See Koninklijke
26 Philips Electronics N.V. v. KXD Technology, Inc., 2007 WL 839939 (D.Nev.). Ordinary
27 work product, like photographs, is discoverable upon a showing of substantial need, and only
28 the "disclosure of the mental impressions, conclusions, or legal theories of an attorney or

1 other representative of a party concerning the litigation” shall be protected. Id. at 6. As
2 such, any objection to the State’s use of the photographs would have been futile. See Ennis,
3 137 P.3d at 1103. In addition, the Defendant did not suffer prejudice from the transcript of
4 the pre-trial ruling on the privilege. Evidence is not excluded from discovery because the
5 source of the information is protected by the attorney-client privilege. The Defendant should
6 not be permitted to assert a Strickland violation supported only with unsubstantiated, bare
7 allegations that the State contrived against him based on the fact that witnesses for the State
8 testified to similar observations (Defendant’s “catatonia”). See Hargrove, 100 Nev. at 502,
9 686 P.2d at 225. By incorporating the argument set forth herein at (II)(H) and in conjunction
10 with Defendant’s lack of ability to establish the outcome of this trial would have been
11 different, his claim should be denied.

12 **7. Defendant’s Fifth Amendment Rights Were In No Way Violated By**
13 **the Presentation of Detective Townsen’s Testimony.**

14 Quite simply, Defendant suffered no prejudice as a result of Detective Townsen’s
15 testimony of his observations and perceptions of the Defendant immediately after the crimes.
16 It was counsel’s choice whether or not to object, and any objection in this context would
17 have been futile. See Ennis, 137 P.3d at 1103. The Defendant’s Fifth Amendment right
18 against self-incrimination was not violated by Detective Townsen’s testimony. In Sampson
19 v. State, 121 Nev. 820, 830, 122 P.3d 1255, 1261 (2005), citing Morris v. State, 112 Nev.
20 260, 913 P.2d 1264 (1996), the Court set out the standard for determining whether or not to
21 reverse a conviction based on a defendant’s claim that the State improperly referred to his
22 post-arrest silence, and it is two-fold: whether “(1) ...there was only a mere passing
23 reference, without more, to an accused’s post-arrest silence, or (2) there is overwhelming
24 evidence of guilt.” First and foremost, the State put forth overwhelming evidence over the
25 course of this extensive trial, and second, Detective Townsen was simply testifying to his
26 observations of Defendant as he arrived at the scene. In Sampson, the Court refused to
27 overturn a conviction despite the detective’s reference to the defendant’s request to speak
28 with an attorney. Id. at 831. Here, the questioning never went that far. Detective Townsen

1 made no mention of anything relating to the Defendant's Fifth Amendment rights other than
2 to state that he was speaking with his attorney when he arrived at the scene; not that he
3 "requested to speak with an attorney."

4 Furthermore, the Defendant relies on NRS 174.235 as the basis for claiming "the state
5 has an obligation to turn over the statements of witnesses it intends to call at trial." This
6 statute adds a little more explanation of the duty and states, "... at the request of a
7 defendant, the prosecuting attorney shall permit the defendant to inspect and to copy or
8 photograph any *written or recorded statements* made by a witness the prosecuting
9 attorney intends to call" NRS 174.235 (emphasis added).

10 The Defendant emphasizes the fact that Detective Townsend's observations were not
11 contained in his report. As such, Detective Townsend's observations were not "written or
12 recorded statements" which would have then and only then triggered the State's duty to turn
13 them over. Any contention by Defendant that the State was "coaching" witnesses is entirely
14 a self-serving, unsupported, bare allegation. There was no prosecutorial misconduct, and
15 Defendant was effectively represented at all stages of Detective Townsend's testimony.

16 **8. The Defendant Did Not Suffer Prejudice As a Result of Admission**
17 **of Records and Testimony Of Psychologist Mark Smith.**

18 The issues surrounding the December 5, 2000, domestic violence were critical to this
19 case, and the Defendant is not justified in contending the Defendant and decedent's actions
20 of calling the therapist in New York should not be admitted. Defense counsel contested the
21 admission of this information, yet any further objection other than that placed on the record
22 would have been futile. See Ennis, 137 P.3d at 1103. There is also no evidence on the
23 record to suggest defense counsel did not review the records of psychologist Mark Smith
24 prior to admission, as the Defendant is implying here.

25 The Defendant has also not made the requisite showing of prejudice to support a
26 finding that the outcome of the trial would have been different. The Defendant's and
27 decedent's state of mind became integral components to this case, and the evidence of the
28 records and testimony of Mark Smith as they pertain to the domestic violence on December

1 5, 2000, were necessary additions to the totality of evidence the jury needed to issue a
2 finding in this case. In Potter v. West Side Transp., Inc., 188 F.R.D. 362 (D. Nev. 1999),
3 citing NRS 49.209, the court held “There is no privilege ‘for communications relevant to
4 an issue of the treatment of the patient in any proceeding in which the treatment is an
5 element of a claim *or defense*’ (emphasis added).” Any privilege the Defendant might have
6 had was waived as a result of their state of mind’s being called into question in this case.
7 Also, the Court effectively limited the testimony to statement made right up until the point at
8 which the Defendant stated, “I need help too.” AA, Vol. 3, 120. Defendant’s counsel was
9 not ineffective and exceeded the standard for representation set forth by Strickland.

10 **9. There Was No Improper Vouching For State Witnesses At Trial.**

11 The Defendant next tries to stretch the testimony of state witnesses as improper
12 vouching by creating self-serving allegations that questions posed by the State were
13 improper. However, the Defendant provides no indicia of anywhere in the record where this
14 happened. The testimony of the witnesses referenced in Defendant’s petition were asked
15 questions well within the prosecutor’s limits to avoid any prosecutorial misconduct claims.
16 “It is improper for the prosecution to vouch for the credibility of a government witness.
17 Vouching may occur in two ways: the prosecution may place the prestige of the government
18 behind the witness or indicate that information not presented to the jury supports the
19 witness’s testimony.” Lisle v. State, 113 Nev. 540, 553, 937 P.2d 473, 481 (1997), citing
20 United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980). The state never attempted to
21 place any “prestige of the government” behind any of these witnesses, and the witnesses
22 were only questioned as to facts set forth during the trial. In addition, the trial judge was
23 properly attentive to this issue at trial, and the decisions of the trial court pertaining to
24 unsupported allegations of prosecutorial misconduct should not overturn the conviction.
25 Even if the Court determines the prosecutor was vouching for state witnesses, the Nevada
26 Supreme Court in Rowland v. State, 188 Nev. 31, 39-40, 39 P.3d 114, 118 (2002), held:

27 “The line between the appropriate argument on the credibility of a witness
28 and improper prosecutorial argument is occasionally difficult to define. We
will have to rely primarily on the trial supervision and good judgment of our

1 district judges and look to them to determine when appropriate argument on
2 witness credibility becomes improper vouching for a witness or the
inappropriate use of the prosecutor's power."

3 There was no improper vouching in this case and the Defendant's conviction should not be
4 overturned based on these unfounded allegations of prosecutorial misconduct.

5 **10. The Evidence of Defendant Having a Weapon at Work is Relevant.**

6 Defense counsel was not ineffective in the treatment of the evidence regarding
7 Defendant's possession of a firearm at work. It is Defendant himself who is creating
8 inferences about the magnitude of the evidence coming in at trial. His counsel objected, and
9 any further action would have been futile and counter-productive for the Defendant. See
10 Ennis, 137 P.3d at 1103. The trial court listened to arguments of counsel and made the
11 proper decision and even restricted the questioning concerning the matter in a side bar:

12 DEFENSE: Yesterday we had a side bar conference regarding a matter
13 and it didn't get on the record, and so I want to put that on the record. We
14 had a side bar today on a small matter, I want to put that on the record. And
we have a issue of discovery I want to put on the record.

15 Number one, yesterday's question was put to a witness, Eva Cisneros, as to
16 why Mr. Centofanti was fired. We had a side bar, and the question was
changed so that: Is it a policy of Traveler's not to have a weapon at work.

17 And I objected to that on the grounds of relevance. I felt two points that I
18 think one has to do with the independent Petrocelli kind of evaluation. It
looks like it's some sort of a bad act if you're talking about why he got fired,
but that didn't come out per se.

19 The policy as to whether or not there was Traveler's to not carry a gun at
20 work I think is irrelevant, a side issue, and so I objected to it and I want to
make sure that's on the record.

21 THE COURT: Response?

22 THE STATE: Our response to that is, I agreed not to ask the question
23 why he was fired, and I solely asked the question in front of the jury of, is it
a policy of Traveler's not to carry a gun at work.

24 We believe there's going to be testimony that, in fact, the defendant was
25 carrying this gun to work prior to December when it was taken away, and
that that is relevant because there have been allegations that somehow it was
26 Gina that was grabbing the gun on the night of December 5th, or that Gina
was the primary aggressor.

27 And it shows that the defendant was certainly comfortable with his gun,
28 carries his gun around, is attached to the gun, and is probably the one that

1 actually thought to pull the gun out of the dresser on December 5th, and
2 that's why the question was asked.

3 THE COURT: Well, I thought it was relevant, and I thought the
4 relevance exceeded any prejudicial value. The fact that he did something
5 contrary to policy, when you compare the nature of the charge against him
6 here, I don't think the jury is going to seize upon something so
7 inconsequential and determine he must be a bad person for violating policy
8 and must, therefore, be guilty of first degree murder.

9 And I realize I'm overstating, but that's my thinking in the matter. But I do
10 think it's relevant in the sense that he was willing, arguendo, to violate the
11 policy of obviously a good job he had because of his desire to have his gun,
12 which shows a certain propensity to carry the weapon or, certainly, some
13 affection for the idea of carrying a weapon, which would be relevant.

14 AA, Vol. 4, 63. It is readily apparent the court saw the relevance in admitting the evidence
15 of the weapon and did not believe the jury would wrongly convict the Defendant of the
16 charge of first degree murder simply for carrying a weapon to work. Absent any showing of
17 prejudice, the lack of a Petrocelli hearing is not grounds for reversal. See Carter, 121 Nev. at
18 769, 121 P.3d at 599; Qualls v. State, 114 Nev. 900 at 903, 961 P.2d at 767. Furthermore, no
19 curative instruction was necessary, and such a request is a strategic decision within counsel's
20 discretion. His counsel effectively advocated this issue in accord with the Strickland
21 standard for effective assistance of counsel.

22 **11. Defense Counsel Was Not Ineffective With Regard to Discovery** 23 **Issues.**

24 The Defendant makes a bare allegation that the State withheld evidence, coerced
25 witnesses not to speak with the defense, and "had a hand in" not having a witness testify,
26 among other things. The statute at issue expressly states, "The defendant is not entitled
27 to the discovery or inspection of an internal report, document, or memorandum that is
28 prepared by or on behalf of the prosecuting attorney in connection with the investigation or
prosecution of the case." NRS 174.235(2)(a). After hearing arguments from counsel, the
trial court refused to grant Defendant's request to essentially conduct an in camera review of
the entire case files the State has in its possession, and this decision was a reasonable
application of NRS 174.235. The trial court's decision should be afforded considerable

1 weight, and the Defendant never showed that a Brady violation, in fact, occurred. More
2 importantly, counsel did advocate for Defendant's position on this issue.

3 The State never engaged in any sort of misfeasance, and is well aware of the potential
4 repercussions of failure to comply with NRS 174.235. The State responded, "And it is our
5 job, Judge, to review items for Brady material, because we are the ones that if we don't give
6 something over there will be serious consequences. So we have no motivation to hold any
7 Brady material back." AA, Vol. 4, 65. Also, the Defendant has cited a number of cases in
8 support of his position, yet he is neglecting to acknowledge the fundamental principle
9 underlying the holding in these cases. He must show that "prejudice must have ensued,"
10 "[it] would have changed the outcome of defendant's trial," and "a reasonable
11 probability of a different result." No such showing is ever made other than bare, self-serving
12 allegations of a speculative nature which do not entitle Defendant to relief. See Riggins v.
13 State, 107 Nev. 178, 182, 808 P.2d 535, 538 (1991). His counsel was not ineffective
14 pursuant to Strickland; much to the contrary, his counsel zealously advocated his claims
15 concerning reciprocal discovery.

16 **12. The State's Burden of Proof Was Not Lessened At Trial.**

17 The Defendant has already raised this issue herein and the State sets forth the same
18 counterargument that the burden was not lessened; he simply misrepresents quotes from the
19 prosecutor who is commenting in response to the theories urged by the Defendant and then
20 somehow suggests the prosecutor is not permitted to comment on the lack of evidence to
21 support Defendant's theories. It is counsel's choice whether or not to object, and his
22 decision should not be interfered with, for any objection would have been futile. Ennis, 137
23 P.3d at 1103; Rhyne, 118 Nev. at 8, 38 P.3d at 167. The Defendant has also not shown any
24 prejudice to support a prosecutorial misconduct claim, and there was no Strickland violation.

25 **13. Defense Counsel Was Not Ineffective With His Treatment of Pre-** 26 **Trial Motions.**

27 The Defendant's main contention under this subsection is to suggest to the court that
28 his counsel was ineffective as to counsel's decision not to pursue certain pre-trial motions

1 which had been filed. First, to grant relief to Defendant on this ground completely
2 contradicts the holding in the oft-cited holding of Rhyne herein. The claims Defendant sets
3 forth have already been addressed at length, and he should not be permitted to challenge his
4 counsel's strategic decision not to challenge certain rulings on pre-trial motions. "Once
5 counsel is appointed, the day-to-day conduct of the defense rests with the attorney." Rhyne,
6 118 Nev. at 8, 38 P.3d at 167. The Defendant only retains discretion for only limited
7 fundamental decisions, and whether or not to file or pursue a pre-trial motion is soundly a
8 strategic decision to be resolved by counsel's professional decision. In short, Defendant's
9 counsel was effective in his skilled representation of Defendant's case, including pre-trial
10 motions.

11 **14. The Jury Instructions Were Proper And Counsel Was Not**
12 **Ineffective For Not Seeking a Lost Evidence Instruction.**

13 Defense counsel was not ineffective for not requesting a lost evidence instruction,
14 because the Defendant was never entitled to one. The Defendant does not suffer a due
15 process violation upon lost evidence unless he shows the State acted in bad faith or that he
16 suffered undue prejudice as a result. Leonard, 117 Nev. at 68, 17 P.3d at 407. No such
17 showing was ever made, and he should not be entitled to relief. Furthermore, "It is not
18 sufficient to show 'merely a hoped-for conclusion' or 'that examination of the evidence
19 would be helpful in preparing [a] defense.'" Id., citing Sheriff v. Warner, 112 Nev. 1234,
20 1239-40, 926 P.2d 775, 778 (1996). Defendant was not entitled to a lost evidence
21 instruction, so counsel cannot be deemed insufficient for not advocating for one. See Ennis,
22 137 P.3d at 1103. Also, as already discussed herein at (I)(B)(3), the reasonable doubt and
23 premeditation instructions never served to shift the burden of proof. He suffered no
24 prejudice, and he was never denied the effective assistance of counsel in the implementation
25 of the jury instructions at trial.

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1 **15. It Was Counsel's Decision Whether to Object on Cross-**
2 **Examination of Defendant, Not the Defendant's.**

3 It is a strategic decision within defense counsel's discretion whether or not to object,
4 and counsel cannot be held to an ineffective standard based on Defendant's frivolous claims
5 of improper questioning. Rhyne, 118 Nev. at 8, 38 P.3d at 167; Ennis, 137 P.3d at 1103. In
6 accord with the holdings in Hernandez, Gallego, and Young, the court should not exercise its
7 discretion to overturn Defendant's conviction, because he has not shown the prosecutor's
8 statements were erroneous or prejudicial. The questions did not infect the proceedings, and
9 it was Defendant's decision to take the stand. He was properly admonished of his rights by
10 the court prior to taking the decision, and he cannot seek relief based on his hindsight
11 reaction to the testimony he proffered. See Browning, 120 Nev. at 360, 91 P.3d at 49; Ingle,
12 92 Nev. at 106, 546 P.2d at 599; Harris, 401 U.S. at 225, 91 S.Ct. 643.

13 **16. Defense Counsel Was Not Ineffective With the Introduction of**
14 **Evidence At Trial.**

15 The prosecution did not exercise misconduct during the questioning of witnesses
16 Tricia Miller and Sarah Smith. The questioning of these witnesses never rose to the level of
17 improper questioning which would have warranted an objection. Therefore, counsel cannot
18 be deemed ineffective for failing to make a futile objection. See Ennis, 137 P.3d at 1103.

19 **Q. The Defendant Was Not Denied His Right To the Effective Assistance of**
20 **Counsel After His Conviction.**

21 Pursuant to NRS 176.515, a Defendant may file a Motion for New Trial based on
22 newly discovered evidence within two years of the finding of guilt. However, a Motion for a
23 New Trial based on any other ground must be made within seven days of the finding of guilt.
24 NRS 176.515. Here, the Defendant is basing his support for the motion for new trial he
25 contends should have been filed on juror misconduct. As such, it should have been filed
26 within seven days and it was not; therefore, it is untimely. Moreover, Defendant has not
27 established good cause. See Hennie v. State, 114 Nev. 1285, 968 P.2d 761 (1988).
28 Furthermore, because Defendant has only asserted bare allegations, he is not entitled to

1 relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Defendant's bare
2 claims of juror misconduct do not constitute a basis for granting a motion for a new trial.
3 Therefore, counsel was not ineffective for failing to file a futile motion. Ennis, 137 P.3d at
4 1103. Any suggestion that his counsel was not astute on Nevada law is also negated by the
5 fact that experienced Nevada counsel was employed and assisted throughout the entire
6 proceedings.

7 **III.**

8 **ALLEGED ERROR, IF ANY, WAS HARMLESS AND** 9 **THERE IS NO SUFFICIENT SHOWING OF CUMULATIVE** 10 **ERROR TO WARRANT A NEW TRIAL.**

11 The Nevada Supreme Court has held that under the doctrine of cumulative error,
12 "although individual errors may be harmless, the cumulative effect of multiple errors may
13 deprive a defendant of the constitutional right to a fair trial." Pertgen v. State, 110 Nev. 554,
14 566, 875 P.2d 361, 368 (1994), citing Sipsas v. State, 102 Nev. 119, 716 P.2d 231 (1986);
15 see also Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). The relevant factors
16 to consider in determining "whether error is harmless or prejudicial include whether 'the
17 issue of innocence or guilt is close, the quantity and character of the error, and the gravity of
18 the crime charged.'" Big Pond, 101 Nev. at 3, 692 P.2d at 1289; See also Mulder v. State,
19 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000). The doctrine of cumulative error "requires
20 that numerous errors be committed, not merely alleged." People v. Rivers, 727 P.2d 394, 401
21 (Colo. Ct. App. 1986); see also People v. Jones, 665 P.2d 127, 131 (Colo. Ct. App. 1982).
22 Evidence against the defendant must therefore be "substantial enough to convict him in an
23 otherwise fair trial" and it must be said "without reservation that the verdict would have been
24 the same in the absence of the error." Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153,
25 1156 (1988).

26 Furthermore, it is of note that a defendant "is not entitled to a perfect trial, but only a
27 fair trial..." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975), citing Michigan v.
28 Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974). In the case at bar, Defendant received a fair

1 trial. All the errors alleged here are without merit. Therefore, this claim must be dismissed.

2 **CONCLUSION**


3 For the foregoing reasons, the State respectfully requests the Defendant's Petition for
4 Writ of Habeas Corpus (Post-Conviction) be denied.

5 DATED this 8th day of April, 2008.

6 Respectfully submitted,

7 DAVID ROGER
8 Clark County District Attorney
9 Nevada Bar #002781

10 BY


11 JAMES R. SWEETIN
12 Chief Deputy District Attorney
13 Nevada Bar #005144

14 **CERTIFICATE OF FACSIMILE TRANSMISSION**

15 I hereby certify that service of STATE'S OPPOSITION TO DEFENDANT'S
16 PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION), was made this
17 day of April, 2008, by facsimile transmission to:

18 CARMINE COLUCCI, ESQ.
19 FAX #384-4453

20 /s/ HOWARD CONRAD
21 Secretary for the District Attorney's Office

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28 hjc/SVU

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Jack DeGree/Attorney Initials/da

EXHIBIT “1”

STATE BAR OF NEVADA

WWW.NVBAR.ORG

Name: Gloria M Navarro
Company: Office of the District Attorney - Civil Division
Address: 500 S. Grand Central Pkwy.
Las Vegas , NV 89106

Phone Number: (702) 455-4761

Fax Number: (702) 382-5178

E-Mail:

navarrg@co.clark.nv.us

Website:

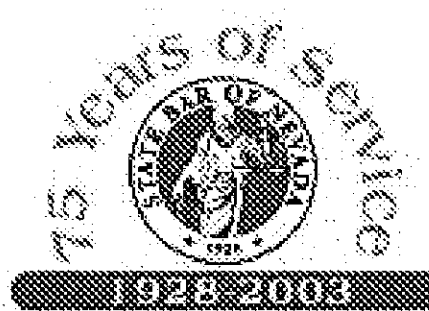
Admit Date 1994/10/03

Law School Arizona State University

Interest Areas No Record, No Record, No Record

Bar Number 5434

Specialization None



STATE BAR OF NEVADA

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Las Vegas, NV 89104
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ORIGINAL

FILED

0143
CARMINE J. COLUCCI, ESQ.
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

2008 JUL -9 15 4: 13

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

ALFRED P. CENTOFANTI, III,

CASE NO. C172534

Petitioner,

DEPT NO. VIII

vs.

E.K. McDaniel, Warden, Ely State
Prison,

Date of Hearing: _____

Respondent.

Time of Hearing: _____

PETITIONER'S NOTICE OF MOTION AND MOTION TO DISQUALIFY THE
CLARK COUNTY DISTRICT ATTORNEY'S OFFICE

COMES NOW, the Defendant, ALFRED P. CENTOFANTI III, by and through his attorney,
CARMINE J. COLUCCI, ESQ., of the law firm of CARMINE J. COLUCCI, CHTD., and moves
this Court for the disqualification of the Clark County District Attorney's Office in the above-entitled
matter.

This motion is made and based upon the Points and Authorities submitted herewith as well
as all the papers, pleadings and other documents on file herein, including Petitioner's Affidavit

/////

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/////

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/////

1 attached hereto.

2 DATED this 10th day of June, 2008.

3 CARMINE J. COLUCCI, CHTD.

4 
5 CARMINE J. COLUCCI, ESQ.

6 Nevada Bar No. 000881
7 629 South Sixth Street
8 Las Vegas, Nevada 89101
9 Attorney for Petitioner

10 **NOTICE OF MOTION**

11 TO: E.K. McDANIEL, Warden, Ely State Prison; Respondent; and

12 TO: DAVID ROGER, DISTRICT ATTORNEY, his Attorney.

13 YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the undersigned will bring
14 the foregoing Motion on for hearing before this Court at the Courtroom of the above-entitled Court
15 on the 21 day of July, 2008, at the hour of 9:00 a.m. of said day, or as soon thereafter
16 as Counsel may be heard.

17 DATED this 10th day of June, 2008.

18 CARMINE J. COLUCCI, CHTD.

19 
20 CARMINE J. COLUCCI, ESQ.

21 Nevada Bar #000881
22 629 South Sixth Street
23 Las Vegas, Nevada 89101
24 Attorney for Petitioner

25 **POINTS AND AUTHORITIES**

26 I.

27 **STATEMENT OF FACTS**

28 Petitioner, Alfred P. Centofanti, III (hereinafter referred to as Petitioner) was represented at
his trial on the charges of Open Murder With the Use of a Deadly Weapon by California attorney
Allen Bloom and Nevada Attorney General, Gloria Navarro. Ms. Navarro was appointed by the

1 Court (Judge Gibbons) as local counsel in compliance with Nevada Supreme Court Rule 42, 3(c).
2 Ms. Navarro was employed as a staff attorney with the Special Public Defender's Office at the time
3 of her appointment to Petitioner's case.

4 Petitioner is presently before this Court on his Petition for Writ of Habeas Corpus (Post
5 Conviction), which was filed on or before February 29, 2008. On or about April 8, 2008, the District
6 Attorney's Office filed and served a copy of the State's Opposition.

7 Contained at page twenty-two of the Opposition is the State's argument that "Counsel Was
8 Not Ineffective With the Application of Nevada Law" and in support thereof, is the following:

9 The Defendant's contention that he received ineffective assistance of counsel for
10 'failing to understand to understand and apply Nevada law in the preparation of this
11 matter' is completely negated by the fact that his counsel associated competent local
12 counsel in this case. Gloria Navarro graduated from Arizona State University School
of Law and was admitted to the bar over a decade ago in 1994, and she was an
experienced criminal attorney at the time of the trial.

13 To the above cited paragraph, they included as Exhibit 1 a one page document which appears
14 to be a print out from the State Bar of Nevada website (www.nvbar.org) pertaining to Gloria
15 Navarro. This document indicates that Ms. Navarro is employed with the Office of the District
16 Attorney. It does not indicate when she was hired or how long she has been working for
17 Respondent's counsel.

18 The Opposition is the first notice or notification to Petitioner that his former counsel is now
19 employed with the Clark County District Attorney's Office.

20 II.

21 LEGAL AUTHORITY AND ARGUMENT

22 NRS Rules of Professional Conduct, 1.9, entitled "Duties to Former Clients" provides, as
23 follows:

24 (a) A lawyer who has formerly represented a client in a matter shall not thereafter
25 represent another person in the same or a substantially related matter in which that
person's interests are materially adverse to the interests of the former client unless
the former client gives informed consent, confirmed in writing.

26 (b) A lawyer shall not knowingly represent a person in the same or a substantially
27 related matter in which a firm with which the lawyer formerly was associated had
previously represented a client:

- 1 (1) Whose interests are materially adverse to that person; and
2 (2) About whom the lawyer had acquired information protected by Rules 1.6 and 1.9(
3 c) that is material to the matter;
4 (3) Unless the former client gives informed consent, confirmed in writing.

5 (c) A lawyer who has formerly represented a client in a matter or whose present or
6 former firm has formerly represented a client in a matter shall not thereafter:

- 7 (1) Use information relating to the representation to the disadvantage of the former
8 client except as these Rules would permit or require with respect to a client, or when
9 the information has become generally known; or
10 (2) Reveal information relating to the representation except as these Rules would
11 permit or require with respect to a client.

12 NRS Rules of Professional Conduct, 1.10, entitled "Imputation of Conflicts of Interest"
13 provides as follows:

14 (a) While lawyers are associated in a firm, none of them shall knowingly represent
15 a client when any one of them practicing alone would be prohibited from doing so
16 by Rules 1.7, 1.9 or 2.2, unless the prohibition is based on a personal interest of the
17 prohibited lawyer and does not present a significant risk of materially limiting the
18 representation of the client by the remaining lawyers in the firm.

19 (b) When a lawyer has terminated an association with a firm, the firm is not
20 prohibited from thereafter representing a person with interests materially adverse to
21 those of a client represented by the formerly associated lawyer and not currently
22 represented by the firm unless:

- 23 (1) The matter is the same or substantially related to that in which the formerly
24 associated lawyer represented the client; and
25 (2) Any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(
26 c) that is material to the matter.

27 (c) A disqualification prescribed by this Rule may be waived by the affected client
28 under the conditions stated in Rule 1.7.

(d) Reserved.

(e) When a lawyer becomes associated with a firm, no lawyer associated in the firm
shall knowingly represent a person in a matter in which that lawyer is disqualified
under Rule 1.9 unless:

- (1) The personally disqualified lawyer did not have a substantial role or primary
responsibility for the matter that causes the disqualification under Rule 1.9;
(2) The personally disqualified lawyer is timely screened from any participation in
the matter and is apportioned no part of the fee therefrom; and
(3) Written notice is promptly given in any affected former client to enable it to
ascertain compliance with the provisions of this Rule.

Therefore, Ms. Navarro and her employer, the Clark County District Attorney's Office, were
required to comply with the applicable Rules of Professional Conduct, and did not. Specifically,

1 Petitioner never gave his informed consent, confirmed in writing, and was never provided any
2 notification or notice as required by NRS Rules of Professional Conduct 1.9 and 1.10. Ms. Navarro
3 has never requested or obtained the written consent of Petitioner as required in NRS Rules of
4 Professional Conduct 1.9. Respondent champions Ms. Navarro as someone well versed in Nevada
5 Law, yet she and her past and present employer have failed to "understand and apply Nevada law"
6 in that neither she nor her employers appear to have understood or applied the applicable rules of
7 professional conduct as set forth above.

8 Neither Ms. Navarro or the District Attorney's Office has provided any written notice
9 to Petitioner so he could ascertain compliance with the rules as is required. And the subsequent
10 inclusion in an Opposition to a Writ of Habeas Corpus (Post Conviction) cannot be considered either
11 prompt or in compliance, since it was not even served on Petitioner, but his counsel.

12 Therefore, since Petitioner contacted or provided proper notice, he could not ascertain
13 compliance as provided for in NRS Rule of Professional Conduct 1.10. Furthermore, Petitioner has
14 not been provided with any information as to what, if any, screening procedures are in place or were
15 utilized with regards to Ms. Navarro's hiring at the Clark County District Attorney's Office, their
16 adequacy or when they were implemented.

17 Petitioner anticipates that the District Attorney's Office will respond that they and Ms.
18 Navarro have substantially complied with the rules of professional conduct or that Ms. Navarro has
19 not been involved in the preparation or filing of the Opposition, or that by raising the issue of
20 ineffective assistance of counsel, Petitioner has waived any issues that may have arisen regarding
21 attorney-client and/or attorney work product privilege.

22 There are a number of leading cases on disqualification in Nevada, including Collier v.
23 Legakes, 98 Nev. 307, 646 P.2d 1219 (1982); Ciaffone v. District Court, 113 Nev. 1165, 945 P.3d
24 950 (1997), overruled on other grounds by Leibowitz v. District Court, 119 Nev. 523, 78 P.3d 515
25 (2003); and Nevada Yellow Cab Corp. V. Eighth Judicial District Court ex rel. County of Clark, 152
26 P.3d 737 (Nev. 2007).

27 Collier instructs us that "disqualification may be warranted" even "where the state has
28

1 Defense counsel failed to object, failed to request a curative instruction, failed to move
2 for an evidentiary hearing or to request a mistrial.

3 Again, with no objection, the following was received by the jury:

4 **7. Allegations that petitioner was depressed/made**
5 **death threats.**

6 Q. How was Chip's demeanor when you went to that party?

7 A. He was quiet and withdrawn. He seemed to be very depressed. He wasn't
8 interacting with anybody.

9 Q. Were you?

10 A. Yes. Donna and I were both talking to people . . . but I kept having to go
11 back over and talk to Chip because he was standing in a corner, not really
12 talking to anybody.

13 Id. at 103, p. 76, lines 11-21.

14 Q. Do you recall him making any comments or threats towards Gina during that drive
15 home?

16 A. Yes.

17 Q. What did he say?

18 A. He said "She's lucky I'm the kind of man that I am and I care about my son,
19 because if I didn't care about my son I'd kill her."

20 Id. at 104, p. 77, lines 7-13.

21 Q. Was that the night of the 18th or the 19th, if you remember?

22 A. . . . [H]e said he had spent the whole weekend with his neighbors and was
23 worried about wearing out his welcome. He was so depressed he didn't
24 want to go home and be by himself.

25 Id. at 104, p. 79, line 25, to p. 80, line 6.

26 Q. The other horrible things he said about her, were they of the magnitude
27 that you would have expected him to mention gangs that they had been
28 on his mind?

A. He felt pretty comfortable saying horrible things about her. I don't think he would
have held that information back.

Id. at 104, p. 80, line 22, to 105, p. 81, line 2.

She also claimed petitioner did not want to go home and be by himself or bother the
neighbors. Id. at 104, page 79, line 18 to p. 80, line 6.

These allegations were belied by the evidence in the case. Petitioner was already dating

1 someone else after the divorce became final. Counsel was given the name, address and telephone
2 number for Amanda Pearson and she was located and interviewed by defense investigators, but
3 she was not subpoenaed for trial.

4 Defense counsel failed to object, failed to request a curative instruction, failed to move
5 for an evidentiary hearing or request a mistrial.

6 The following was received by the jury without defense objection:

7 **8. Allegations that petitioner threatened to commit**
8 **suicide.**

9
10 Q. The night of the 19th in this phone conversation did Chip Centofanti mention
to you that he thought -- was thinking about suicide?

11 A. He said he thought about it. . . .

12 Id. at 105, p. 83, lines 18-21.

13 Q. Did you do your best to talk him out of it?

14 A. Yes.

15 Id. at 105, p. 84, lines 12-13.

16 Defense counsel failed to object, failed to request a curative instruction, failed to move for
an evidentiary hearing or request a mistrial.

17 The following was received by the jury without defense objection:

18 **9. Allegations that petitioner was catatonic at the**
19 **special master hearing.**

20 The state then elicited the following further false testimony regarding December 20, 2000
21 incident:

22 Q. What was Chip's demeanor at the special master hearing?

23 A. He was practically catatonic. He looked awful. He was washed out. He
24 looked tired. He was staring straight ahead.

25 Id. at 106, p. 85, lines 15-22.

26 Besides the fact that this evidence was belied by the record, it also shows a subtle level of
27 prosecutorial misconduct in bolstering and vouching for its defense to the expected (but not
28 mounted) extreme emotional distress or insanity defense created by Officer Tiffany Gogian's
comment that petitioner was "catatonic" when he was arrested. Here, clearly, the state wanted to

1 "sandbag" the defense with evidence from Sara Smith that the catatonic state could be explained
2 to show pre-meditation before the incident. The bolstering was the testimony of detectives that
3 petitioner was seen speaking to counsel after the incident in the police car.

4 She next claimed:

5 We rode the elevator down together and I told him I brought those books. He
6 said good. When he got into the lobby he put his briefcase on to the counter top
7 and opened up his briefcase and I gave him the books and he put books in . . .

8 Id. at 106, p. 86, lines 6-10.

9 This contradicts the testimony of all the witnesses who saw defendant at the same
10 hearing, Ben Ross, Mike Edwards, Lori Sideman and Special Master Patrick Murphy. This also
11 is belied by the evidence as the police specifically searched the residence and the briefcase and
12 no books meeting those descriptions and titles were found. Furthermore, there was no evidence
13 that Ms. Smith was even at Associated Court Reporters on December 20, 2000. Despite all this
14 contradictory testimony there was no effective impeachment or attack by Bloom.

15 There was no defense objection and no request for a curative instruction. Neither was
16 there an evidentiary hearing (Petrocelli) prior to admittance or a defense motion for a mistrial.

17 Then again, with no objection by defense counsel, the following was received by the jury:

18 **10. Allegations that petitioner was angry and not sad**
19 **about the divorce.**

20 Q. Do you think felt sad is the right term to apply to what you saw of Chip in
21 December of 2000?

22 A. Chip was angry.

23 If he said anything about Gina being a bad mother it wasn't that he felt sad
24 that she was a bad mother. It was that he was angry. He was angry at
25 Gina for leaving. He was angry at Gina for ruining his idea of an ideal
26 family.

27 Id. at 114, p. 117, lines 14-22.

28 She also testified that "He didn't want a divorce. He didn't want to be divorced." Id. at
102, p. 69, lines 24-25. She also alleged petitioner claimed that he told her that he knew that
Virginia was having an affair on December 19, 2000. Id. at 105, p. 82, lines 6 through 18.

This is almost word for word what was said in the opening and closing remarks. It

1 appeared to be scripted and rehearsed. The problem was that this testimony was false. Petitioner
2 had provided counsel with the name of the person he was dating, Amanda Pearson, and she was
3 located, interviewed, but not subpoenaed. She would have directly contradicted most, if not all,
4 of the allegations of Sarah Smith on this issue. However, Bloom failed to call this crucial
5 witness to refute her false testimony.

6 Defense counsel failed to object, failed to request a curative instruction, failed to move
7 for an evidentiary hearing or to request a mistrial. He also failed to call a crucial witness for the
8 defense.

9 Therefore, with no objection by defense counsel, the following was received by the jury:

10 **11. Allegations regarding petitioner bringing a gun**
11 **to work.**

12 The state elicited the following testimony regarding the allegations of petitioner bringing
13 a gun to work: Q. Were you aware of whether or not Chip ever had a gun at work?

14 A. Yes.

15 Q. Can you tell me about it.

16 A. He did.

17 I think it was late August, early September at some point. The computer
18 wasn't working in my office or hadn't been hooked up to the network, so
19 I was using Chip's office while he was out and I needed a pencil so I opened up
20 the middle drawer and there was a gun in there.

21 Q. Do you recall whether the gun was a revolver or an automatic?

22 A. I don't recall. It was black and that's about all I can tell you.

23 Id. at 102, p. 70, lines 6-19.

24 This testimony was received without objection by defense counsel, despite the fact that
25 the state was using it to introduce evidence insinuating to the jury that petitioner was fired from
26 his job for violating a policy which prohibited an employee from having a firearm at work.
27 Furthermore, petitioner had a laptop computer that he kept with him at all times which was
28 password protected. There would have been no reason for her to go into his office (as there was
no computer there) and the excuse of going into his office for a "pencil" is as ridiculous as it
reads since pens and pencils were available everywhere in the general office areas. It would
appear that Sarah Smith did not report this alleged incident for quite some time so petitioner was
not fired for that reason.

1 Defense counsel again failed to object, failed to request a curative instruction, failed to
2 move for an evidentiary hearing or request a mistrial.

3 Again, with no objection by defense counsel, the following was received by the jury:

4
5 **12. Allegations that petitioner feigned his condition
after the December 20, 2000 incident**

6 The state next improperly solicited from Sarah Smith her opinion that petitioner's condition
7 post December 20, 2000, was feigned.

8 Q. What was Chip's demeanor on the phone from jail after January?

9 A. He was upbeat . . . He seemed happy.

10 Q. Was that markedly different from how he was before the killing?

11 A. It was like night and day.

12 Id. at 106, p. 88, lines 17-25.

13 She also implied that petitioner was concerned about media coverage of the event, and
14 implied that he was obsessed with her because he kept calling, but she wouldn't take the calls. Id.
15 at 107, p. 80 lines 1-12.

16 Once again, defense counsel failed to object, failed to request a curative instruction, failed
17 to move for an evidentiary hearing or request a mistrial.

18 Again, with no objection, the following was received by the jury:

19 **b. Ineffectiveness regarding state witness Sarah Smith**

20 **1. In general**

21 The ineffectiveness of Bloom with regard to Sarah Smith was substantial. Defense
22 counsel did not object to being provided with her statement until the day she was scheduled to
23 testify. Defense counsel failed to object to the above twelve categories of bad acts evidence
24 which should not have been received by the jury. In most, if not all of each of these twelve
25 instances, Smith was the only source for the information. Furthermore, even the court realized
26 the importance of impeaching her testimony, something that was entirely lost on Bloom.

27 THE COURT: You'll be lengthy, I assume, somewhat.

28 MR. BLOOM: Not super lengthy, but more than maybe nine minutes.

Id. at 107, p. 89, lines 20-23.

1 Bloom also revealed why it was critical that the defense attempt to interview Ms. Smith early
2 on in the case.

3
4 Q. You left Cisneros in May of 2001?

5 A. Yes.

6 Q. And you reported your observations regarding these conversations to the
7 police in February 2003, about two years later; is that right?

8 A. Yes.

9 Q. So the time you talked to the police, your recollection about the events was
10 already, let's see, over two years old, maybe two and a half years; is
11 that right?

12 A. Yes.

13 AA, Volume 4, 112, p. 112, lines 10-18.

14 We see the same response to this line of questioning in re-direct by the prosecutor that we
15 saw with Detective Townsen's (almost word for word)

16 Q. Counsel just made it seem like you didn't come forward about this event
17 until February of 2000 (sic).

18 Is counsel right about that?

19 A. No, that's not correct.

20 Q. When did you call Becky Goettsch of the District Attorney's Office, my co-
21 counsel?

22 A. It was some time in late January or early February 2001.

23 Id. at 113, p. 116, lines 3-10.

24 How could the defense not object to this testimony since this line of questioning made the
25 deputy district attorneys potential witnesses. Yet defense counsel did not object or request a
26 hearing. Ms. Smith went on to further state "The police came in to interview me when it looked
27 like this matter was actually going to trial." Id. at lines 21-23.

28 During cross-examination it did not go any better for Bloom or the defendant. Bloom re-
emphasized the harmful testimony and then was prevented from cross-examination by the Court:

Q. Sometimes he told you she had been a bad mom?

A. Yes.

Q. Sometimes he told you that she had been a drug addict or -- a drug addict a and
was a slut?

A. Yes.

Q. You don't know Gina Centofanti's history, do you?

A. I only know what Chip told me.

1 Q. So independently or from any other source you don't know if what she had
2 been doing, if, for example, she had been unfaithful to him, you don't know that
3 one way or another, do you?
4 A. No.
5 Q. You don't know if she had --
6 MR. PETERSON: Are we going to have this litany again after she's already said
7 she doesn't know.
8 THE COURT: Are we, counsel?
9 The answer is no. Go on to some other area.
10 AA, Volume 4, 110, p. 101, line 24 to p. 102, line 16.
11
12 Q. My question is independently from some information --
13 MR. PETERSON: My Lord, Judge. I don't know what the objection is, but --
14 THE COURT: I assume there might be one.
15 Ma'am, other than what the Defendant told you about this young lady did you
16 know anything about her?
17 THE WITNESS: No, sir, I did not.
18 THE COURT: Move on, please.
19 Id. at 110, p. 103, line 21, to p.104, line 4.
20
21 Q. You don't know, do you?
22 The part about being a slut, you don't know if that's true or not?
23 MR. PETERSON: Judge, I have to -- I don't want to ask the Court to
24 enforce its own ruling.
25 How many times are we going to let him circumvent your ruling? He wants to
26 say there words in front of the jury.
27 It's getting offensive at this point.
28 MR. BLOOM: I don't think it's offensive. I think it's going right to what this
witness's suspicions or thought processes, judge, so the jury can evaluate how
much credibility to give this witness.
THE COURT: She said she had no knowledge other than what your client told
her about this young lady.
I think she said she didn't believe some of the things he said.
Where do you go from there?
MR. BLOOM: I'm simply asking if she has any confirming evidence. If she says no, we
move on. She won't answer.
THE COURT: You're going into itemized areas. Are you asking do you have
confirmation of what Chip told her about Gina?
MR. BLOOM: My question was you don't know if he was telling you the exact
truth.
THE COURT: She answered that.
She said she didn't believe much of anything he said.
MR. BLOOM: My question was if she knew he was telling exactly the truth.
She answers the way she wants.
28 //

1 I just want to find out if she knows or doesn't know.

2 THE WITNESS: No, I don't know if your client was telling me the truth.

3 AA, Volume 4, 110, p. 104, line 11 to 111, p. 105, line 22.

4 Here, Bloom should have requested a side bar or a conference outside the presence of the
5 jury. The Court belittled him and his questions as well as bolstered the state's case with its
6 comments as well as allowing the running commentary from the state in front of the jury.

7 It did not get better regarding the failure of Bloom to properly question and cross-
8 examine this witness. The Court noted the poor questioning techniques.

9 Q. Do you think somebody who was --

10 MR. PETERSON: Objection.

11 I don't even know what the rest of the question it is, but do you think that somebody can't
12 be a proper question.

13 THE COURT: It would seem to be probably a good prediction. Go ahead.

14 MR. BLOOM: I'll rephrase.

15 ...

16 A. Was there a question?

17 MR. PETERSON: Objection as vague.

18 THE COURT: I don't understand.

19 Do you understand the question.

20 THE WITNESS: Absolutely not.

21 Id. at 111, p. 106, line 22 to p. 107, line 1.

22 MR. PETERSON: I can't even follow that.

23 THE COURT: He's asking for her evaluation as to why his emotion was what
24 it was. That's not a proper question.

25 MR. BLOOM: Very well.

26 Id. at 111, p. 107, lines 5-16.

27 The examination went from bad to worse. Bloom went on to emphasize the most
28 damaging parts of her testimony including her allegations that defendant said she "wasn't a good
mom" and "she's lucky I'm the kind of guy I am that I wouldn't kill the mother of my child.
Otherwise I'd kill her." Id. at 112, p. 110, line 17, to p. 111. line 3.

What is interesting about all of this is the failure to object or effectively examine about
this issue. The state then went back to it's checklist to throw in a few more jabs at the defendant
and the defense. Bloom appeared to get flustered and at one point asked Sarah:

Q. There were times he even said things like one time he said "It's lucky,
but, it's lucky I'm the kind of guy -- she's lucky because I'm the

1 kind of guy that wants to have my child to have a baby
2 (SIC). If I didn't care about my son I'd kill him.

THE COURT: Excuse me.

3 The child to have a baby?

MR. BLOOM: Child to have a mom. I apologize.

4 Id. at 112, p. 110, lines 17-25.

5 The failure to investigate and impeach this witness was devastating to the defense and a
6 "field day" for the state. What was not raised at trial was Sarah Smith coming forward with the
7 computer disc that she claimed contained a draft of a story that the defendant wrote prior to
8 December of 2000 allegedly outlining all of the events which occurred. This was the subject of a
9 series of closed door hearings where it was ultimately determined that Sarah's accusations, about
10 the disc that was stolen from petitioner, were absolutely false (as determined by a forensic
11 computer expert retained and used by both the state and the defense). It should be noted that she
12 gave her "statement" to the police around the same time she made this "discovery." So it appears
13 that her response to the following question was disingenuous at best:

14 Q. So if there is a characterization implied by counsel that you're some late
15 comer to this party or that you're now late reporting to try to do something
16 bad to Chip, that would be wholly inaccurate; would it not?

A. It would be.

17 Id. at 113, p. 116, line 24 to 114, p. 117, line 3.

18 That is exactly what occurred. What better way to explain not providing the most
19 damaging statement and testimony until the day the witness was to testify. At that point, the
20 defense would not have the time or the resources to investigate all of the alleged incidents and
21 prepare questioning and cross-examination regarding the testimony and allegations, let alone
22 request that the Court to enforce the ruling regarding this testimony. As for investigation, there
23 was the ability to seek out Sarah's roommate Ms. Coffee, as well as other employees of Ms.
24 Cisneros who could refute most if not all of the allegations. Finally, during the hearings
25 regarding the computer disc, Sarah identified an individual who allegedly found the disc. No
26 effort to interview him and attempt to uncover Sarah's true motivations for testifying.

27 One of the witnesses that the defense should have called was Scott Stonehocker, who was
28 willing to testify as to the ridiculousness of this testimony and the true motivation of Sarah Smith

1 in offering this testimony, as she herself engaged in a "smear campaign" against petitioner in an
2 effort to get her "15 minutes of fame." The defense counsel was given Scott's identity, location
3 and proposed testimony.

4 The defense had in their possession proof that all of the allegations regarding defendant
5 were actually true of Sarah. She was the one who went on a PR campaign against defendant and
6 "wouldn't stop talking about it" with anyone she ran into including Scott Stonehocker. She
7 wanted to be part of something larger than herself like a high profile criminal case and wore her
8 involvement as a badge of honor, and still does to this day.

9 Look at how dramatic the testimony got on re-direct by the prosecutor:

10 Q. How did you take it to mean?

11 A. I took it to be that it was recent and he wasn't calling me up and saying
12 "Sarah, I'm going to commit suicide right now;" that he was saying "This
13 whole thing has got me so depressed I'm considering, you know, I've
had these thoughts."

14 Q. If you heard Chip make threats of violence against Gina . . . did you ever
15 in a million years believe that the very next day he was going to kill his
ex-wife?

16 A. If I would have known for one second - -

17 MR BLOOM: I'm not sure there's any relevance to the question. If there is
relevance, it calls for a yes or no, judge.

18 THE COURT: What is the answer. ma'am?

19 THE WITNESS: The answer is no.

BY MR. PETERSON:

20 Q. In hindsight, do you wish you would have told someone?

MR. BLOOM: That's very interesting, but it's irrelevant.

21 MR. PETERSON: I though we heard him sort of impugning her for how she never did
call anyone.

22 I mean, I was sitting there. I thought I heard those questions.

THE COURT: I'll allow the question and we'll move on.

23 MR. PETERSON: I will be happy to.

BY MR. PETERSON:

24 Q. In hindsight, do you wish you would have called someone?

25 A. Yes.

Q. Is that why you came forward to the police?

26 A. That's the reason, yes.

Q. Or to our office, I'm sorry?

27 A. Yes.

28 AA, Volume 4, 114, p. 118, line 18, to p. 119, line 23.

1 Here, how does one cross-examine this issue? Call the district attorney as a witness in
2 the case? Bloom should have subpoenaed the police and district attorney files regarding notes or
3 other indications that Sarah Smith contacted the office. When she testified, Bloom should have
4 asked for these materials and the time to review them. There was no indication on the witness
5 lists generated by the district attorney in 2001 (recall the trial was to begin in January of 2002) of
6 Sarah Smith. So what exactly happened here? Notes of her alleged calls and interviews were
7 necessary for defense counsel to prepare to meet her testimony. Yet defense counsel did not
8 request them and they were not timely provided.

9 The defense re-cross was totally ineffective:

10 Q. As we sit here now you don't have any information whether those comments were
11 justified do you? You don't have any independent --

12 MR. PETERSON: I didn't ask about that.

13 MR. BLOOM: Yes, you did.

14 MR. PETERSON: We have to talk to him about going over and over.

15 MR. BLOOM: He asked about angry because of leaving and angry because of
16 running around.

17 THE COURT: What does that have to do with confirmation?

18 You're asking does she have any independent confirmation of these things.

19 MR. BLOOM: That would allow the jury to evaluate whether or not her conclusions are
20 accurate or not.

21 THE COURT: It's asked and answered, for one thing. It doesn't go into the cross
22 Mr. Peterson brought up.

23 Proceed.

24 MR. BLOOM: Nothing further.

25 AA, Volume 4, 114, p. 120, line 19 to 115, p. 121, line 14.

26 Bloom failed to explore, in addition to the other issues raised above, the fact that Ms.
27 Smith had contact with defendant's family as well as Virginia's family and her involvement with
28 and her following this case in the press.

Sarah Smith told Bloom what she had done in terms of a negative PR campaign against
petitioner, but he just ignored it.

Q. Would you go to any of your co-workers and tell them that Chip needs
some help?

A. I didn't say anything to my co-workers about Chip needing help until
after he killed Gina.

1 Id. at 112, p. 111, lines 22-25.

2 A. He seemed rather depressed that day [December 20].

3 Q. That's your observation of him, your opinion of him; is that right?

4 A. That would be the opinion of several people I have spoken with,
5 but yes, that is also my opinion.

6 Q. Very well.

7 Id. at 113, p. 115, lines 13-18.

8 There was no attempt to explore this area further. Who were the other people who shared
9 the opinion he was depressed? What did she tell them? The defense did not attempt to identify
10 these witnesses and therefore could not interview them. All of this could have been used to
11 attack her credibility in front of the jury, but instead it was simply let go. Who did she tell about
12 the alleged incident when she allegedly a gun in petitioner's office? Who did she tell about the
13 computer disc that she turned over to the state after retaining it for a number of years? The
14 defense should have investigated her in an effort to determine her hidden agenda and the reason
15 for her clear animosity for petitioner.

16 The defense strategy in dealing with the false testimony was not to attack it directly.
17 Bloom specifically instructed defendant not to call anyone a liar. Instead defendant was
18 instructed and testified "No. I don't believe that that's accurate." and " I don't remember it like
19 that" instead of taking the issue head-on. AA, Volume 5, p. 118, line 22 to 064, p. 124 line 24.

20 During cross-examination defendant was instructed and answered all inquiries in a
21 similar fashion:

22 Q. Are you denying that you said that?

23 A. I'm not denying anything Sarah said. I don't recall it like that, Mr.
24 Peterson, I don't. I don't recall the way she put that. . .
25 I don't remember it the way she does, that's all.

26 AA, Volume 5, 093, p. 105, lines 17-24.

27 Even to the most horrendous of allegations, the alleged suicidal thoughts, threats to have
28 Virginia "taken care of" and that he'd "kill her" the defendant did as instructed to do by defense
29 counsel and answered:

30 "I don't recall saying that to Sarah."

31 Id. at 093, p. 107, line 8 to p. 109, line 9.

1 This tact gave the jury the impression that petitioner was lying or was hiding something.

2 **2. Failure to object to the state's failure to comply with**
3 **reciprocal discovery/Brady**

4 As stated above, the state did not turn over the statement of Sarah Smith until the day she
5 testified. No objection to this was placed on the record by defense counsel. Defense counsel
6 also did not request a continuance of her testimony or of the trial to prepare. Defense counsel did
7 not request that her testimony not be allowed for the failure to turn the statement over in a timely
8 manner. This could **not** have been a rational strategic decision not to object to her being allowed
9 to testify. Once she did testify, it became clear that she had given other statements that were not
10 turned over to the defense.

11 Q. Counsel just made it seem like you didn't come forward about this event
12 until February of 2000. (SIC)

Is counsel right about that?

13 A. No, that's not correct.

14 Q. When did you call Becky Goettsch of the District Attorney's Office,
my co-counsel?

15 A. It was either some time in late January or early February 2001.

...

16 A. I had talked to Becky Goettsch a couple of times prior to that time. The
17 police came to interview me when it looked like the matter was actually
going to trial.

18 AA, Volume 4, 113, p. 116, lines 3-23.

19 The only person who could have corroborated or refuted that was the prosecutor in this
20 case. It is also amazing the level of detail and clarity her statement had despite the fact that it
21 was taken years after the incidents in question. If the defense would have been given her
22 statements allegedly given to the district attorney's office in 2001 and on other occasions, they
23 could have been used to challenge and impeach both her 2003 statement and 2004 trial
24 testimony. Yet, defense counsel made no effort to cross-examine her on exactly what was
25 discussed, when, with whom, and how many times while she was still on the stand.

26 Furthermore, counsel could have challenged the entirety of her testimony as being the
27 product of multiple interviews by the district attorney's office until she got it "just right" and fit
28 into the prosecutions presentation of the case, as was done with Quito and other witnesses. By

1 not properly handling the situation, the issue was not preserved for appeal and she was not
2 effectively cross-examined.

3 **3. Improper evidence emphasized during closing**
4 **argument**

5 This was emphasized by the state in their Closing:

6 We also have the statements he made to Sarah. He's talking to Sarah
7 about "Yeah, lucky we're not in Boston, because I'd have somebody take
8 care of her. Lucky I'm the kind of man that I am that I don't want my son
9 to grow up without a father or I'd kill her."

10 AA, Volume 5, 239, p. 124, lines 6-10.

11 Again, by Bloom not having the prior statements, it resulted in the unmitigated and untrue
12 testimony coming in from Ms. Smith. In addition to not securing the testimony of Scott
13 Stonehocker and Donna Coffee regarding these issues, Bloom made no effort to elicit testimony
14 from the Wrights and the Centofantis regarding this weekend. Case in fact was that defendant
15 had gone on a date with Amanda Pearson December 15, 2000, and she stayed the night. The
16 defendant spent December 1th and 17th with his parents and in fact went to Mt. Charleston and
17 had photos of this trip available to Bloom.

18 In closing the state argues:

19 We heard all kinds of people saying "He's coming in saying she's a bad mother, she's
20 having an affair."

21 AA, Volume 5, 237, p. 114, lines 23-25.

22 We also have proof of his premeditation in what I'm calling and what we've referred to as
23 a smear campaign -- a meanie. He went around telling a lot of people things that simply
24 weren't true.

25 Dr. Sessions for one. "She was, I think she's been on drugs."

26 "Now, that's what made me kind of scared of her, my druggie, alcoholic wife."

27 We found out from Dr. Sessions that's not true. We heard he was telling people that she
28 was a bad mom, including Lisa Johnson. He even went so far as to tell her that Nicholas
had been neglected.

...

A lot of what he was telling other people simply wasn't true. You ask yourself what does
that tell you about why he would do that?

...

1 [O]r he was building his case like a good lawyer does.

2 AA, Volume 5, 238, p. 120, line 22, to p. 121 line 21.

3 To say that this instance of prosecutorial misconduct "infected the entire proceedings"
4 would be an understatement. Through their misconduct the state introduces evidence which
5 clearly should have been subject to the safeguards of a Petrocelli hearing before introduction.
6 Bloom did not object to this or demand the Petrocelli hearing. This cumulative improper
7 evidence denied defendant a fair trial.

8 **c. Adrienne Atwood**

9 What made Sarah Smith's testimony even more suspect was the testimony of her and
10 defendant's co-worker Adrienne Atwood, who testified immediately after Sarah. Like Sarah, she
11 was not interviewed by the police until March 14, 2003, and like Sarah, the statement was not
12 turned over to the defense until the day Ms. Atwood testified.

13 Again, without objection from Bloom, Atwood was allowed to testify that petitioner told
14 her that (Virginia) "She's a bad mother, bad person, I think she's cheating on me." Id. at 119, p.
15 138, lines 13-19. She also was allowed to testify, **without objection**, regarding alleged
16 complaints about defendant not being at work. Id. at 119, p. 140, line 12, to 120, p. 141, line 9.

17 **B. Argument and legal authority**

18 Prior to admitting evidence of a prior bad act pursuant to NRS 48.045(2), the district
19 court is required to conduct a hearing on the record outside the presence of the jury and
20 determine that: (1) the incident is relevant to the crime charged; (2) the act is proven by clear
21 and convincing evidence; and (3) the probative value of the evidence is not substantially
22 outweighed by the danger of unfair prejudice. Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d
23 1061, 1064-65 (1997); Petrocelli, 101 Nev. 46, 51-52, 692 P.2d 503, 507-508; See NRS
24 48.035(1).

25 In McNelson v. State, 115 Nev. 396, 990 P.2d 1263 (1999), the Nevada Supreme Court
26 held that a district court's failure to hold a Petrocelli hearing does not necessarily require reversal
27 of the conviction. Reversal is not necessary if: (1) the record is sufficient to determine that the
28 evidence is admissible under Tinch; or (2) the result would have been the same if the trial court

1 had not admitted the evidence. Qualls v. State, 114 Nev. 900, 903-04, 961 P.2d 765, 767 (1998).
2 Id. at 1269.

3 In Tinch, the Nevada Supreme Court held that for a prior bad act of defendant to be
4 deemed admissible, trial court must determine, outside presence of jury: that the incident is
5 relevant to the crime charged; the act is proven by clear and convincing evidence; and probative
6 value of the evidence is not substantially outweighed by danger of unfair prejudice.

7 The state was allowed to introduce, without a hearing, and without objection ten different
8 areas of bad acts evidence of petitioner. "[S]pecific instances of the conduct of a witness ...
9 other than conviction of crime" are not admissible for the purpose of attacking credibility. NRS
10 50.085(3). Drake v. State, 108 Nev. 523, 836 P.2d 52, 55 (1992). The prior bad act evidence
11 admitted by the Court, without a Petrocelli hearing, should not have been admitted as it would
12 not have been ruled admissible under Tinch and it cannot be said that the bad acts would have
13 been proven by clear and convincing evidence under Qualls.

14 Sarah Smith was allowed to testify that petitioner lied to the police, told people Virginia
15 was a bad mother and a drug addict, was obsessive with her, money was a motive for the killing,
16 petitioner was depressed and made death threats against Virginia, threatened to commit suicide,
17 was catatonic before the incident, and was angry about the divorce and not sad, brought a gun to
18 work and was "happy" after he was in custody. These twelve specific instances were all used to
19 attack petitioner's credibility and were not admissible under Nevada law.

20 Petitioner's counsel was ineffective regarding this issue on a number of grounds. First an
21 objection should have been lodged with regards to the statements being turned over the day the
22 witness' testimony was given as a violation of the reciprocal discovery act. See, cf. Kimmelman,
23 106 S.Ct. at 2588 (failure to file timely motion amounts to constitutionally ineffective assistance
24 when failure is based on counsel's unreasonable mistake of law about the Government's duty to
25 supply certain information to defense counsel before trial)

26 If counsel had reviewed the statement, he would have realized that the sum and substance
27 of the testimony was already deemed inadmissible by the Court's pre-trial ruling and a Petrocelli
28 hearing should have been requested. Here, either he did not know of the requirement or forgot

1 his own position pre-trial. Harich v. Dugger, 844 F.2d 1464, 1470 (11th Cir.1988) (en banc) ('It
2 is not enough for petitioner to claim his counsel was ignorant of the Florida law. Petitioner must
3 prove that the approach taken by defense counsel would not have been used by professionally
4 competent counsel'). Here, professionally competent counsel would not have allowed the bad
5 acts evidence in without objection and without requesting an evidentiary hearing as provided
6 under Nevada law.

7 Even without requesting a hearing, counsel should have objected to the testimony as
8 violative of the statutes and cases cited above which specifically prohibit it's introduction at trial
9 and then requested a motion to strike, curative instruction, motion to suppress for failure to
10 timely disclose or even a motion for mistrial. None of these things were done and constitute
11 prejudicial and constitutionally defective and ineffective assistance of counsel.

12 Finally, it can be said without reservation that the cross-examination of this witness was
13 completely ineffective and failed to subject the state's presentation of this evidence to any
14 meaningful testing, and in fact bolstered the improper and false testimony and allegations.

15 C. Conclusion

16 Defense counsel's failure to object to the prosecutorial misconduct of turning the
17 statement over the day the state's witness was scheduled to testify (as was done with Quito
18 during the Petrocelli hearing and with petitioner's employment records and the records of Mark
19 Smith), failure to request a continuance, failure to request a Petrocelli hearing, failure to object to
20 the testimony during trial and failure to request a mistrial cannot be said to not have affected the
21 outcome of the trial. The result of the trial would not have been the same if the court had not
22 admitted Sarah Smith's testimony about the ten categories of specific bad act evidence. She was
23 the only witness to testify as to most, if not all of these improper instances of specific conduct.
24 The combination of prosecutorial misconduct, court error and ineffective assistance of counsel on
25 this issue entitles petitioner to a new trial. Counsel's performance with respect to this issue was
26 constitutionally deficient under the Strickland standard.

27 /////

28 /////

1 4. **Defense counsel was ineffective on the issue of the admissibility of the**
2 **testimony of Sgt. David Winslow.**

3 **A. Factual and procedural background**

4 Sgt. David Winslow was one of the officers who responded to the scene of the domestic
5 violence incident on December 5, 2000. Winslow was the supervisor of the first responder's to
6 the call and not a first responder himself. During a hearing held back in December of 2001, it
7 was revealed that Winslow was prepared to testify as to not only his observations and
8 interactions with both petitioner and Virginia on December 5, 2000, but also as to the next day,
9 December 6, 2000.

10 Judge Gibbons ruled that while his observations and statements regarding December 5,
11 2000 were admissible, any opinions and the like from December 5, 2000 and December 6, 2000
12 were not.

13 Court further ordered, he WILL NOT ADMIT the conversations of the next day
14 [December 6, 2000] or Sgt. Winslow's conclusions.

15 AA, Volume 1, 021, at page 21.

16 During opening statements on April 15, 2004, the prosecutor told the jury:

17 You'll also hear from Sgt. Winslow, an officer with some 20 years experience that
18 responded to the battery domestic violence call, and he will tell you that he told her,
19 "Look, you need to get out of here. Whatever you do, just get out. Leave what you have
to leave but get out now."

20 He gave her his cell phone number and says "If you want to go back to get your
clothes or whatever, you call me and I'll escort you. Don't try to go back there alone."
21 On December 6th Gina did exactly that. She had Tricia Miller drive her to a gas station
22 where she met Sergeant Winslow and had Sergeant Winslow return her to the house to
get a few of her belongings.

23 AA, Volume 8, p. 135, lines 9-21.

24 This was not objected to by counsel on the basis of being hearsay, violative of the pre-
25 trial ruling, or the fact that it mischaracterized the evidence and proposed testimony. The court,
26 on it's own did not enforce the pre-trial ruling.

27 Winslow testified on March 31, 2004.

28 Q. You subsequently got a call from Gina Centofanti?

 A. Yes, I did.

1 Q. What was it about?

2 A. She asked me to meet her in a parking lot about a mile or so from her residence, if
we could escort her back to her residence to pick up some items.

3 Q. And did you meet her at that location?

4 A. Yes, I did.

5 Q. How did she appear on that day?

6 A. She appeared better than when I had first met her. She wasn't quite as trembly and
stuff. She seemed hesitant to go back to the residence. At that time I told her her
options, and asked her if she had read her card from domestic violence, and told
her her options.

7 At that time she stated to me that there's no way that her husband would ever let
8 her leave with her kids, or without her kids whether they were in town or out of
town.

9 AA, Volume 4, 048, p. 30, lines 14, to p. 31, line 7.

10 Q. (By Mr. Peterson) Did you give Gina Centofanti any advise on what to do.

11 A. I just told her if her marriage wasn't working to take her kids and go back
12 and live with her mother, is what I basically told her.

13 AA, Volume 4, 048, p. 32, lines 8-12.

14 Counsel attempted to argue against the admission of Winslow's statements, **after** they
were already argued and entered:

15
16 MR. BLOOM: Today we had an objection regarding Sgt. Winslow's statement
the next day with Gina, meaning the statements that came out from Gina on
17 December 6th, the next day he brought Gina to pick up items and so forth at the
house. We had run this motion and that was all part of that big, long hearsay motion that
18 we conducted at the beginning of the case, and this was one of the listed statements that
was on there.

19 It was my recollection that that part of Winslow will be excluded. I'm not trying to rerun
20 the motion. That was my recollection, and the people thought otherwise,
and the Court's recollection was admissible and you so ordered it to be allowed
21 and to be presented.

22 MS. GOETTSCH: . . . But we subsequently addressed the whole state of mind issue, and
I believe that the Court ruled that those type of state of mind statements by the victim in
23 this case would be admissible.

24 THE COURT: Well, my recollection is that we allowed that, so I did allow it
to go forward.

25 AA, Volume 4, 063, p. 91 line 8 to p. 92, line 12.

26 **B. Argument and legal authority**

27 It was prosecutorial misconduct for the state to argue in opening statement regarding
28 Winslow's comments to Virginia, as they were not for the purpose of state of mind, as argued to

1 the Court, but were clearly used to inflame the passions of the jury.

2 "Look, you need to get out of here. Whatever you do, just get out. Leave what
3 you have to leave but get out now."

4 He have her his cell phone number and says "If you want to go back to get your
5 clothes or whatever, you call me and I'll escort you. Don't try to go back there alone."
6 Id.

7 It was error of the Court to "allow it to go forward" for the same reason. The state and the
8 Court basically circumvented the U.S. Supreme Court's opinion in Crawford v. Washington by
9 simply allowing "everything" to "come into evidence" by claiming it showed state of mind. In
10 Crawford the Court specifically held admission of wife's out-of-court statements to police
11 officers, regarding incident in which defendant, her husband, allegedly stabbed victim, violated
12 the Confrontation Clause, regardless of whether statements were deemed reliable by court, where
13 statements were testimonial and defendant was not given prior opportunity to cross-examine
14 wife. 124 S.Ct. 1354, 1374, 541 U.S. 36.

15 It was prosecutorial misconduct to seek the introduction of statements previously
16 excluded and an abuse of the court's discretion to allow evidence of the statements to come in
17 when they were not even subject to a "state of mind" exception to the hearsay rule. This was
18 evident in the opening remarks of the state. Defense counsel failed to object both to the state's
19 use of his statements and the fact that they were not used for the state of mind exception, but
20 instead to inflame the passions of the jury, which is specifically prohibited under Nevada law.
21 See, Shannon v. State, 105 Nev. 782, 789, 783 P.2d 942, 946 (1989); Floyd v. State, 118 Nev.
22 156, 171-72, 42 P.3d 249, 260 (2002). By not objecting in a timely fashion counsel did not
23 preserve the issue for direct review. Id.

24 There was no proper reason to present this opinion to the jury. It should have been
25 excluded and or stricken from the record. The opinions of the officer are not at all relevant and
26 were presented to inflame the passions of the jury. There was no curative instruction requested
27 or given and therefore the jury was left with the impression that what the officer said is what
28 happened.

C. Conclusion

Defense counsel's failure to object to the prosecutorial misconduct and court error in

1 allowing the testimony of Winslow was prejudicial to petitioner. The issues were not properly
2 preserved for direct review, a lesser standard than review under ineffective assistance of counsel,
3 and by allowing the state to improperly inflame the passions of the jury, it cannot be said to not
4 have affected the outcome of the trial. The result of the trial would not have been the same if the
5 court had not admitted Winslow's opinion testimony cloaked in "20 years experience as an
6 officer" about what would happen if she returned to the residence alone (i.e. what she did on
7 December 20, 2000). He was the only witness to testify as to this. The combination of
8 prosecutorial misconduct, court error and ineffective assistance of counsel on this issue entitles
9 petitioner to a new trial. Counsel's performance with respect to this issue was constitutionally
10 deficient under the Strickland standard.

11 **5. Defense counsel was ineffective for failing to challenge the issue of the**
12 **admissibility of the testimony of Francisco Sanchez ("Quito")**

13 **A. Factual and procedural background**

14 Petitioner incorporates the arguments contained, supra, in Ground 6, Part 2, Section Two,
15 as though fully set forth herein. In addition to those facts, the issue of Quito the subject of
16 improper prosecutorial misconduct, court error and ineffective assistance of counsel were also
17 incorporated herein.

18 Quito's testimony was ruled to be the product of the influence of both Emeline Eisenman
19 and Lisa Eisenman. The state also did not turn over the relevant multiple interviews of Quito
20 that were conducted by the district attorney's office and the LVMPD. The Court, despite the
21 ruling regarding Quito's false testimony, still allowed the testimony into evidence. Once that
22 occurred the petitioner believed that the state took the next three years to condition the testimony
23 and prevent the petitioner from seeking to have it excluded or have the benefit of the issue of
24 lying placed before the jury. Another hearing on the influence put on Quito between the
25 original Petrocelli hearing and trial should have been set by Bloom.

26 The ineffectiveness was the failure to properly raise the issue pre-trial in 2001 and obtain
27 a ruling on the admissibility of the testimony (the issue was "reserved" and left alone). Even if
28 the failure to obtain the ruling was not ineffective, the failure to obtain all of the necessary

1 documents and evidence from the state to impeach the testimony was ineffective. There was no
2 attempt to cross-examine Lisa Eisenman regarding the issue when she testified at trial and no
3 effort by the defense to secure the attendance of Emeline Eisenman at trial was made in order to
4 address the same issue. Also no effort was made to raise the issue with the officers who
5 conducted the various taped interviews. Finally, there was no attempt to properly prepare for the
6 anticipated trial testimony. This critical issue was lost to the defense by defense counsel's
7 inaction.

8 **B. Argument and legal authority**

9 Defense counsel's failure to obtain the tapes of the interviews of Quito and to investigate
10 the interview techniques used by the district attorney and the police constituted ineffective
11 assistance of counsel. As the United States Supreme Court said in Rompilla v. Beard:

12 The notion that defense counsel must obtain information that the state has and
13 will use against the defendant is not simply a matter of common sense. As the
14 District Court points out, the American Bar Association Standards for Criminal
15 Justice in circulation at the time of Rompilla's trial describes the obligation in terms no
one could misunderstand in the circumstances of a case like this one:

16 "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the
17 case and to explore all avenues leading to facts relevant to the merits of the case and the
18 penalty in the event of conviction. The investigation should always include efforts to
19 secure information in the possession of the prosecution and law enforcement authorities.
The duty to investigate exists regardless of the accused's admissions or statements to
the lawyer of facts constituting guilt or the accused's stated desire to plead guilty." 1
ABA Standards for Criminal Justice 4-4.1

20 (2d ed. 1982 Supp.). "[W]e long have referred [to these ABA Standards] as
21 'guides to determining what is reasonable.' " Wiggins v. Smith, 539 U.S., at
22 524, 123 S.Ct. 2527 (quoting Strickland v. Washington, 466 U.S., at 688,
104 S.Ct.2052), and the Commonwealth has come up with no reason to think
the quoted standard impertinent here.

23 ...
24 Questioning a few more family members and searching for old records can promise less
25 than looking for a needle in a haystack, when a lawyer truly has reason to doubt there is
any needle there. E.g., Strickland, *supra*, at 699, 104 S.Ct. 2052. But looking at a file
the prosecution says it will use is a sure bet: whatever may be in that file is going to tell
defense counsel something about what the prosecution can produce.

26 Id. at 125 S.Ct. 2456,2465-66, 545 U.S. 374.

27 It was unreasonable for counsel to not have followed up on his pre-trial hearing request
28 for the tapes of the interviews of Quito which would have provided a valid basis to challenge the

1 admissibility of the entirety of his testimony, including the threats allegedly made by petitioner
2 that were relied upon by the Supreme Court to deny relief on direct appeal. Furthermore, any
3 advantage gained by raising the issue of Quito lying was lost by not raising the issue with Lisa
4 Eisenman and not securing the attendance of Emeline Eisenman to confront her about it at trial.

5 Further counsel failed to raise the Brady violation of not turning the tapes over to defense
6 counsel as they had impeachment value for not only Quito, but the person or persons who
7 conducted the interviews (the police and possibly the district attorney's office), were present
8 (Emeline Eisenman) or were found by the Court to have influenced the testimony (Lisa and
9 Emeline Eisenman). Finally there was no effort to raise a possible violation of Davis v. State,
10 110 Nev. 1107, 881 P.2d 657 (1994) concerning any possible involvement the state may have
11 had regarding Emeline Eisenman failing to appear at trial.

12 C. Conclusion

13 Counsel was ineffective in every aspect of the handling of Quito's testimony. At the
14 admissibility hearings, counsel should have filed a motion to continue the hearing to allow for
15 the receipt and response of all the materials that could have been used to exclude his testimony as
16 unreliable. That failing continued from 2001 until trial in 2004 as no effort was made to obtain,
17 listen to, analyze the tapes. When the issue was raised at trial, no effort was made to obtain
18 testimony from the necessary witnesses or a motion renewed to have the testimony excluded.
19 And in closing, no effort was made to request that the jury be instructed to disregard the
20 testimony as the product of outside influence or, as was done with petitioner, to disregard it
21 altogether.

22 This cannot be said to have not effected the outcome of the trial. Quito was the only
23 "eyewitness" to the events of December 5, 2000 and his repeating verbatim the alleged
24 statements of Virginia (incorporated by the state in the presentation of their case) cannot be said
25 to be harmless. The Nevada Supreme Court used Quito's testimony to deny petitioner's direct
26 appeal on the basis that the hearsay of Virginia was corroborated by Quito. Counsel's
27 performance with respect to this issue was constitutionally deficient under the Strickland
28 standard.

1 6. **Defense counsel was ineffective for failing to file a pretrial motion in limine**
2 **challenging the admissibility of the testimony of Eva Cisneros or to seek to**
3 **limit it.**

4 A. **Factual and procedural background**

5 Eva Cisneros was petitioner's employer. Eva initially spoke with police on January 3,
6 2001, and then apparently (according to the state) refused future interview requests by both the
7 police and the district attorney's office on the grounds of attorney-client privilege. Eva was
8 represented by the same counsel as Janeen Mutch, John Moran. It should also be noted that Eva
9 also refused to speak with counsel or investigators for the defense.

10 The state filed a Motion entitled "Motion in Limine to Conduct an Evidentiary Hearing to
11 Establish to What Extent Ms. Cisneros Has An Obligation Of Attorney Client Privilege" on
12 December 21, 2001. See, AA Volume 1, 132.

13 In this motion, the state revealed that Ms. Cisneros was the subject of a police "interview"
14 on January 3, 2001. Id. at 137, lines 3-28. It would appear from the motion and in subsequent
15 documents provided by the state that Ms. Cisneros did not assert any privilege as to her
16 discussions with petitioner and her knowledge of the case. The state also indicated "Initially Ms.
17 Cisneros was very cooperative. In recent months she has hired John Moran Jr. in this matter and
18 is now asserting attorney client privilege." Id. at 138.

19 MR. BLOOM: [B]efore Miss Cisneros should speak to the prosecution, there has
20 to be an determination as to whether or not the info -- there is an assertion on
21 behalf of my client and he holds a privilege as attorney client privilege.

22 THE COURT: Right.

23 MR. BLOOM: He holds the privilege and not Miss Cisneros.

24 THE COURT: Right.

25 AA, Volume 1, 142, p. 10, line 18, to p. 11, line 2.

26 This motion was not heard due to the continuation of the trial as the result of the state's
27 filing a pre-trial writ on the issue of a psychological examination of petitioner.

28 On May 1, 2003, the state filed a Motion for Evidentiary Hearing on their previous
 motion and now also included Janeen Mutch, another employee of Cisneros and co-worker of
 petitioner. See, AA, Volume 2, 012. Important to the motion was the state's acknowledgment ".

1 . . only the defendant can waive the privilege." Id. at 017, line 20. It should also be noted they
2 presented little, if any authority to support their position of waiver, citing a grand total of two
3 cites, an "AGO-83" and a California Supreme Court Case from 1998. That's it.

4 On August 13, 2003, Bloom filed a document entitled "Memorandum of Law Regarding
5 Issues of Attorney Client Privilege." Id. at 024. Bloom argued that the hearing should be
6 conducted in camera (which was granted) and that the privilege should be upheld as to both
7 Cisneros and Mutch. Id. at 026 to 032. On January 8, 2004, the state filed a response, primarily
8 objecting to their exclusion at the hearing. Id. at 033 to 037.

9 Despite the fact that the interview, and it's contents, including factual information and
10 investigative leads may be privileged, nothing was done by defense counsel to address the issue.
11 A hearing was not held until February of 2004, at which time petitioner's counsel asserted
12 attorney-client privilege as to Eva's proposed testimony. The court denied petitioner's motion
13 and Eva was allowed to testify. It is not clear what, if any, materials were turned over to the state
14 by Eva or her counsel. Eva also apparently received a subpoena from the district attorney's office
15 for records regarding petitioner.

16 Eva testified on March 30, 2004. During her testimony she revealed first learning that the
17 petitioner was having trouble in his marriage by way of a phone call she received on her cell
18 phone on December 3, 2000, which was a Sunday. AA, Volume 4, 020, p. 79, line 11 to p. 80,
19 line 20. During this phone call, petitioner related to Eva that Virginia had not come home and
20 that the baby was very sick. Id.

21 The state next solicited testimony in which she claimed that petitioner did not appear at
22 work the next day, December 4, 2000. Id. at 020, p. 80, line 24, to 021, p. 81, line 1. The
23 implication being that somehow petitioner "set up" the events of December 5, 2000. This
24 testimony was false. The very records, that the state subpoenaed, indicated that petitioner had in
25 fact been at work on December 4, 2000. Id. at 028, p. 109, line 4 to line 24. The state then tried
26 to justify the presentation of false testimony by claiming that she told them in January of 2001
27 that petitioner had missed the whole week of work (Id. at 032, p. 126, lines 6-17), which again
28 was belied by the records. None of this was objected to by counsel and thus this instance of

1 prosecutorial misconduct was not preserved for the record. Testimony was then received
2 regarding the events of December 5, 2000. The testimony clearly revealed that petitioner was
3 calling his employer for assistance, but no objection was made or renewed as to whether this
4 testimony was privileged. Id. at 021, p. 81, line 5, to p.82, line 20; Id. at 028, p.110, line 12, to
5 029, p. 113, line 1.

6 Eva then testified that she heard Virginia screaming and say "He's trying to kill me." Id.
7 at 021, p. 83, lines 3-4. No objection was made with regards to this being hearsay. Defense
8 counsel did not attempt to strike the testimony. No attempt was made by defense counsel to
9 request a curative instruction. Eva gave petitioner a phone number for an employee assistance
10 hotline and then called the house back a number of times to try to find out what was going on.
11 Id. at 021, p. 83, line 16 to p. 86, line 11. During these calls, she spoke to Virginia who told her
12 petitioner was going to jail. Later, petitioner informed her that Virginia had been arrested. Id.

13 The state next went into the area of petitioner being an attorney.

14 Q. Did it surprise you, knowing Mr. Centofanti, that he was able to talk his
15 way out of the arrest?

16 MR. BLOOM: Objection, your honor. Talking his way out of the arrest is an
argumentative question.

17 THE COURT: Well, I think Mr. Centofanti will recover from the heinous comment, but
beyond that is there another objection?

18 Is it the characterization of it perhaps?

19 MR. BLOOM: Yes, Your Honor, not just the form of the question, but also an
opinion of that kind in this case I think is improper.

20 THE COURT: I think that's probably improper.

Let's rephrase.

21 This led to an entire line of improper questioning:

22 Q. Did he indicate to you that he talked to the officers?

23 A. Yes.

24 Q. Did he indicate to you that he talked to the officers after your third
phone call to Gina where she told you that he was going to be arrested?

25 Q. Are you familiar with whether or not the Defendant is a trial attorney?

26 A. Yes.

27 Q. Are you familiar with his verbal advocacy skills?

28 A. Yes.

Q. And how would you rate those skills?

A. I rate them as a skilled advocate.

Q. So did it surprise you that he was able to talk to the officers and explain his
alleged side of the story?

1 A. No.

2 Q. And did it surprise you that based on his discussions with the officer that he was
not arrested?

3 A. No.

4 Id. at 022, p. 86, line 12, to p. 87, line 25.

5 There was no attempt either pre-trial (in the form of a motion in limine) or during the
6 trial, by objection, to the state making it's case against petitioner on the sole basis of his being an
7 attorney. The state was then allowed to inquire further as to petitioner's skills as an attorney on
8 re-direct and allowed to introduce his personnel file and other materials to support this argument.
9 Id. at 032, p. 128, line 1 to 033, p. 130, line 11. Eva next testified that she was contacted on the
10 night of December 20, 2000. She claimed that she was contacted at 7:00 p.m. at her home on her
11 home phone by petitioner's parents. Id. at 024, p. 94, line 12 to 025, p. 97, line 6. She claimed
12 they told her to call them back at a neighbor's house (Herb). Id.

13 Eva was also allowed to testify as to the termination of petitioner from his employment
14 and the reason.

15 Q. At some point after the shooting the Defendant was terminated from your
employment; is that right?

16 A. Yes.

17 Q. Do you know what the reason was.

MR. BLOOM: Objection. It's irrelevant.

18 THE COURT: What is the relevance?

MS. GOETTSCH: We believe the reason was, Your Honor, that --

19 THE COURT: Don't go into the merits or the substance of it.

MS. GOETTSCH: Then we'll have to approach.

20 THE COURT: Please.

(Discussion off the record).

21 THE COURT: You may proceed.

22 BY MS. GOETTSCH:

Q. Is it a violation of Traveler's company policy to bring a gun to work?

23 A. Yes.

24 Id. at 025, p. 99, line 21, to p. 100, line 15.

25 Since the discussion regarding this area of testimony was not had on the record, there was
26 no basis for petitioner to raise the issue of whether or not the Court's ruling was proper. Defense
27 counsel failed to get the reason for the ruling on the record.

28 /////

1 **B. Argument and legal authority**

2 It was prosecutorial misconduct to use the interview of Eva Cisneros prior to the Court's
3 ruling on whether or not it was to be excluded under attorney-client, attorney-work product
4 privilege. It would appear, as it did with many of the state's witnesses, that counsel failed to
5 preserve the Davis v. State objection as Eva refused to speak with the defense only after giving a
6 statement to the police. This issue was not objected to or made part of the record. Similarly,
7 counsel failed to make objections to the introduction of any hearsay statements introduced on
8 December 5, 2000, as being in violation of Crawford v. Washington.

9 It was clearly ineffective assistance of counsel not to object and make an adequate record
10 as to the most blatant prosecutorial misconduct which occurred during Eva's testimony, the use of
11 petitioner's status as an attorney, and the issue of his termination from employment. Petitioner's
12 status as an attorney is not relevant. There was no evidence that petitioner even identified
13 himself as an attorney or attempted to use that fact during any of the events which took place in
14 this case. While the state was allowed to argue it, the evidence did not support it and it should
15 have been the subject to a pre-trial motion in limine. Counsel also failed to object both to the
16 state's use of petitioner's status as an attorney and the fact that this "evidence" was used to
17 inflame the passions of the jury, which is specifically prohibited under Nevada law. See,
18 Shannon v. State, 105 Nev. 782, 789, 783 P.2d 942, 946 (1989); Floyd v. State, 118 Nev. 156,
19 171-72, 42 P.3d 249, 260 (2002). By not objecting in a timely fashion counsel did not preserve
20 the issue for direct review. Id.

21 Petitioner's counsel also did not properly object to what essentially was the state claiming
22 that petitioner lied to the police on December 5, 2000, using his skills as an advocate. This "bad
23 act" evidence should have been excluded or at the very least subject to a Petrocelli hearing.
24 Further, the Court's improper response to the objection was also not preserved for the record, and
25 further compounded the error of allowing the whole line of questioning to be presented to the
26 jury. It was then reinforced by allowing the state to introduce petitioner's personnel file to further
27 bolster their attack of his credibility by implying he lied to the police on December 5, 2000.

28 The issue of bringing a gun to work and then making the inference to the jury that that

1 was why petitioner was fired from his job was also clearly improper. It should have been
2 objected to and a motion to strike or mistrial made by defense counsel. Short of that, it should
3 have been subject to a pre-trial Petrocelli hearing and the failure to request one pre-trial or seek
4 its' exclusion or have references to it stricken from the record was ineffective and prejudicial.
5 After the questions were allowed to be asked and answered, what other false impression could
6 this evidence have on the jury but to lead them to conclude that petitioner was fired for bringing a
7 gun to work? This was prejudicial and should not have been allowed by the Court and an
8 adequate record not made by counsel. Defense counsel failed to handle this properly.

9 C. Conclusion

10 Defense counsel was ineffective in the failure to object to the prosecutorial misconduct
11 with regards to the issues surrounding the testimony of Eva Cisneros and court erred in allowing
12 the state to make an issue of petitioner being an attorney and giving a false impression about the
13 reason for his termination from employment. The court's error in allowing this evidence in was
14 prejudicial to petitioner. Whether or not he was an attorney was irrelevant to the facts and
15 circumstances for which it was offered, that that was the reason he was not arrested on December
16 5, 2000. It was never presented to the jury the real reason petitioner was fired, but was alleged to
17 be for bringing a gun to work. This was never litigated and was improperly put before the jury,
18 as with the improper emphasis of petitioner being attorney to inflame the passions of the jury.
19 Counsel should have handled both issues pre-trial and preserved the record at trial with regards to
20 these issues, the failure to do so prejudiced petitioner and it cannot be said to not have affected
21 the outcome of the trial. The result of the trial would not have been the same if the court had not
22 admitted the improper testimony. The combination of prosecutorial misconduct, court error and
23 ineffective assistance of counsel on this issue entitles petitioner to a new trial. Counsel's
24 performance with respect to this issue was constitutionally deficient under the Strickland
25 standard.

26 /////

27 /////

28 /////

1 **7. Defense counsel was ineffective in handling the issue of the violation of**
2 **attorney-client and attorney work-product privilege as it related to Janeen**
3 **Mutch/Harvey Gruber.**

4 **A. Factual and procedural background**

5 **1. Not allowing Bloom to conduct the examination**

6 On February 20, 2004 the Court conducted what was called "Ex Parte Hearing Outside
7 the Presence of the State." At issue with the hearing was as to how it would proceed. The
8 following exchange took place:

9 THE COURT: Mr. Moran, you are probably the individual in the courtroom that is more
10 conversant than any other as to what [Ms. Mutch now Isaacson]'s
11 conversations were?

12 MR MORAN: Yes, Your Honor.

13 THE COURT: Mr. Bloom?

14 MR. BLOOM: I think my client is.

15 THE COURT: Well, I don't want your client asking the questions. You don't have
16 any knowledge of everything he knows in this instance?

17 MR. BLOOM: I hope I do, but in terms of Mr. Moran going first –

18 THE COURT: I think I'll allow Mr. Moran to lead off.

19 AA, Volume Two, 040, p. 3, lines 2-15.

20 Bloom did not object to the Court's "rulings" and the hearing proceeded with Moran
21 questioning his own client. The Court then inquired on its own. Then, and only then, was
22 Bloom allowed to inquire "further." The ineffectiveness on this issue was two fold. Although
23 the result of the hearing was proper [the exclusion of Mutch's testimony from trial on the basis of
24 attorney-client privilege] by essentially questioning the witness after her counsel and the court,
25 defense counsel did not develop or fully explore the issues with regards to the turn over of the
26 notes and photographs from December 20, 2000 and create an adequate record on review on this
27 issue, thus failing to preserve it for appeal.

28 **2. Allowing the transcript of Janeen Mutch to be filed in open**
 court and the results of her work on behalf of Harvey Gruber
 to be turned over to the state.

 Mutch's testimony was deemed to be protected by the attorney-client privilege at the
February 2004 hearing in which she testified that she was present on December 20, 2000 at the
request of attorney Harvey Gruber, and followed his directions, including taking photos and

1 assisting in interviewing witnesses Id. at 045-047. Despite the ruling of privilege, Bloom did not
2 seek to prevent the disclosure of either the transcript of her testimony (the Transcript of the
3 February 20, 2004 proceedings was filed in open court on March 12, 2004) or seek the return of
4 the photos and notes which had been previously turned over to the state. This was prejudicial
5 because the state used her testimony regarding approaching petitioner while he was still in the
6 back of the police car on December 20, 2000 [See, AA, Volume 4, 044, p. 7, lines 4-22] and
7 elicited testimony from one of the homicide detectives to attack petitioner's credibility on the
8 issue of catatonia.

9
10 **3. Bloom fails to object to the turning over of the photographs**
11 **and notes protected by attorney-client/attorney-work product**
12 **privilege to the state**

13 During the hearings to determine if the attorney-client privilege existed as to Janeen
14 Mutch (Mutch), Mutch's attorney revealed a number of things in open court. One was that
15 Mutch was instructed by de-facto counsel for petitioner, Harvey Gruber, to take photographs and
16 notes at the scene on December 20, 2000. She did so. What was also revealed is that prior to
17 any determination by the Court regarding the existence of privilege, Mutch's counsel turned over
18 the photos and notes to the state and not the defense. AA, Volume 2, 051, p. 14, line 11, to 052,
19 p.15, line 12.

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

24 **4. State's apparent use of the transcripts/photos/notes**

25 **a. Mutch's testimony regarding December 20, 2000**

26 Bloom did not object and demand that the photos and notes be returned and ordered not
27 used by the state for any purpose unless provided by the defense. Instead, Bloom acquiesced to
28 the whole matter and "let is go" and did not file a motion in limine.

Due to this, the following transcript of "in camera" proceedings is put into the hands of
the state:

1
2 Q. (By Mr. Bloom) When you said that you had one conversation with Mr.
3 Centofanti at the scene on December 20th, I guess you wouldn't call it
4 a conversation, but you had one personal communication towards him;
5 is that correct?

6 A. Yes. It was one-sided, yes.

7 Q. And it was only one time?

8 A. Yes.

9 Q. And was that the time you rolled down the window, or had someone rolled
10 down the window, or the window was rolled down and he was in the police car; is
11 that right?

12 A. I believe. I'm trying to get in my head but I believe he was in the police car. And
13 I made the statement to him and he did not respond.

14 Q. When you asked him -- when Mr. Moran asked you did he acknowledge that and
15 you said no, what was his demeanor like at that time?
16 What was Mr. Centofanti's demeanor?

17 A. You know, I'm not a psychologist, but I would say he was probably in some kind
18 of shock, or he didn't seem responsive in any way to anybody.

19 AA, Volume 2, 052 p. 15, line 13 to 053, p. 16, line 12.

20 **b. State's use of Mutch's December 20, 2000 testimony**

21 The prejudice in releasing the transcript, the photos and notes and other items was
22 twofold. For the first time at trial, the state introduced evidence, not found in any reports,
23 interviews or memorandums, but in the aforementioned testimony of Janeen Mutch, that
24 defendant allegedly communicated with his counsel at the scene on December 20, 2000, to
25 undercut any possibility that the defense could present any psychologically based defenses related
26 to the catatonia comments.

27 All of a sudden, "catatonia" finds it's way into the testimony of a number of state
28 witnesses:

1. Eva Cisneros

Q. Could you describe his demeanor at this divorce hearing?

A. Um, he was very without emotion, almost catatonic.

AA, Volume 4, 023, p. 89, lines 2-5.

2. Sarah Smith

Q. What was Chip's demeanor at the Special Master hearing?

A. He was practically catatonic. He looked awful. He was
washed out. He looked tired. He was staring straight
ahead.

1 AA, Volume 4, 106, p. 85, lines 15-19.

2 **3. Detective Tom Towsen**

3 Q. And according to this question you somehow came to realize that the validity of
his catatonia, according to Mr. Peterson, was an important issue in his case?

4 A. It was an issue in the case, yes.

5 AA, Volume 4, at 184, p. 127, line 5 to p. 128, line 11.

6 It appears from the examination of Detective Towsen that it was district attorney Peterson
7 who broached the topic of catatonia and the importance of the state's witnesses testifying to this.

8 **B. Argument and legal authority**

9 As stated in Ground Six, Part One, Section 10, it is clear from the testimony of Mutch
10 and her attorney that privileged materials were turned over to the district attorney's office. While
11 an attorney may claim attorney-client privilege on the client's behalf, only the client has the
12 ability to waive it. N.R.S. 49.095. Manley v. State, 115 Nev. 114, 979 P.2d 703 (1999). Here,
13 counsel failed to request that the district attorney's office return the materials to the defense and
14 to further explore, what, if any, improper discovery and other information was learned from what
15 could only be called the "poisonous tree" of the privileged materials. This was clearly ineffective
16 assistance of counsel as it prejudiced petitioner by lessening the burden of prosecution, as the
17 prosecution was able to use the information to impeach the credibility of the petitioner and the
18 defense.

19 Furthermore, it was prosecutorial misconduct for the state to accept materials that were
20 clearly privileged. Here, the state cannot argue that it did not know since Mutch's attorney made
21 the representation that the materials were purported to be photographs and notes taken on behalf
22 of petitioner's counsel, Harvey Gruber. This conduct is considered prejudicial error in Nevada.
23 Where prosecutor in criminal proceeding sought to rebut defendant's testimony that defendant's
24 wife was unavailable to testify on behalf of defendant and attorney for defendant's wife was a
25 prosecution witness and could have been asked about defense efforts to locate defendant's wife, it
26 was prejudicial error for prosecutor to call defendant's attorney to testify about availability of
27 defendant's wife to testify. Const. Art. 1, § 8; U.S.C.A. Const. Amends. 6, 14. Kaeser v. State,
28 96 Nev. 955, 620 P.2d 872 (1980).

1 There was no effort at trial to raise this issue with the state in any form. By not raising
2 the prosecutorial misconduct for accepting the materials and not questioning the police and other
3 investigators for the state as to how this evidence was utilized, the issue was not preserved for the
4 record. This was ineffective assistance of counsel.

5 **C. Conclusion**

6 Counsel's failure to handle the issue of the privileged materials being provided and
7 utilized by the state was ineffective assistance of counsel. Counsel further did not object to the
8 prosecutorial misconduct with regards to the receipt of the materials and use of them in discovery
9 and at trial. It cannot be said that the violation of the privilege and use of the materials did not
10 effect the outcome of the trial because no adequate record was requested or made by defense
11 counsel to address this issue. Therefore due to the ineffective assistance of counsel and
12 prejudicial error by the court, petitioner is entitled to a new trial. Defense counsel's performance
13 with respect to this issue was constitutionally deficient under the Strickland standard.

14 **8. Defense counsel was ineffective on the issue of the Fifth Amendment violation**
15 **regarding the testimony about defendant's post-arrest silence on December**
16 **20, 2000**

17 **A. Factual and procedural background**

18 There was no objection by defense counsel to the state introducing testimony that the
19 defendant attempted to communicate with his attorneys at the scene on December 20, 2000. The
20 way this testimony was introduced was through the testimony of Detective Tom Townsen:

21 Q. When, if ever, did you notice the presence of the Defendant?

22 A. When I first arrived at the scene he was seated at a vehicle at the scene
in the street.

23 Q. What type of vehicle?

24 A. A marked patrol vehicle.

25 Q. Were there any other individuals at or around him at that time?

26 A. Yes, there was.

27 Q. Can you tell me who your understanding was those, that person or persons
were?

28 A. It was a white male individual that I was told was an attorney.

 Q. Did you see the Defendant interacting with this individual?

 A. Yes, I did.

 Q. Can you tell the jury what you saw?

 A. The police vehicle was facing eastbound also. Mr. Centofanti was seated

1 in the rear passenger seat and the window had been lowered.
2 This other gentleman was leaned over speaking through the window.
3 I was probably 10 feet away where I couldn't hear any conversation,
4 but could see what appeared to be this individual leaning over, speaking.
5 Mr. Centofanti was in the back seat highlighted with a spotlight shining from the
6 front of the vehicle into the back seat and looking up and nodding at the
7 individual that was at the window.

8 Q. Nodding affirmatively in response to the person who was speaking with him?

9 A. That is what it appeared to me, yes.

10 Q. Mr. Centofanti was looking in the direction of the person who was leaning
11 and speaking towards him?

12 A. That's correct. His body would be facing straight and he would be looking to his
13 right at the person outside the vehicle.

14 AA, Volume 4, 179, p. 106, line 19 to p. 108, line 4.

15 Bloom attempted to cover the matter on cross-examination, but the proverbial damage
16 had been done. Townsen admitted that this "sudden revelation" was not contained in any of the
17 "thousands" of pages of documents he brought with him ("Can you point to any single page in
18 there, any notation that shows that? "No, I cannot." AA, Volume 4, 182, p. 118, line 24 to p.
19 120, line 3), contradicted the testimony he gave to the grand jury ("he was staring and not
20 speaking", AA, Volume 4, 182, p. 120, line 4, to 183, p. 121, line 15). Instead he claimed the
21 following:

22 Q. Do you remember ever saying that to anyone else, an attorney at his window
23 seeing him shaking his head?

24 A. I remember talking to the DAs about it.

25 Id. at 182, p. 121, lines 16-19.

26 He admits not telling his partner on the case, Detective LaRochelle, the Sgt. on the scene,
27 Hefner, and their supervisor, Lt. Wayne Peterson, or any other officer. His explanation?

28 A. Normally we don't make reference in our reports when clients are
29 having conversations with their attorneys.

30 This is a bit of an exception.

31 Q. Where is the exception?

32 It's not mentioned in any report.

33 A. That's what I am telling you.

34 ...

35 That's the only time in 26 years as a policeman I've seen it happen. So I
36 remember it.

37 Q. If it's the only time it ever happened in 26 years, it's an unusual
38 situation?

1 A. Yes, it is.

2 Q. Where is that unusual situation reflected in any report?
[objections]

3 A. It's not.

4 Id. at 183, p. 122, line 11, to p. 123, line 8.

5 The examination went on and then the state redirected as follows:

6 Q. You have communicated this information to our office in the past; is that
correct?

7 A. That is correct.

8 Q. And you are not making this up here today?

9 A. Absolutely not.

10 Q. When you said it is normally not documented when defendants speak with
their attorneys because of the various rights and privileges of defendants;
is that true?

11 A. That is correct.

12 Q. And that material can't be documented and turned over to discovery. It's
privileged, also, right?

13 A. That is correct.

14 Id. at 184, p. 125, line 16 to p. 126, line 2.

15 In re-cross the issue continued:

16 Q. And according to this question you somehow came to realize that the validity of
his catatonia, according to Mr. Peterson, was an important issue in his case?

17 A. It was an issue in the case, yes.

18 Q. So at what point in time were you aware of that issue in the case?

19 A. From very early on, that he may possibly go that direction.

20 Q. It was at that point that you became aware that she [Officer Gogian] said
he was catatonic, in her observations; is that right?

21 A. I was aware of that evening that she had made the comment.

22 Q. So that evening is December 20, 2000. Here we are, April 5th, 2004, three
years and four months later, and this is the first time you're making some
announcement about this?

23 A. First time it's been asked.

24 Id. at 184, p. 127, line 5 to p. 128, line 11.

25 As with Quito during the Petrocelli hearings, and Sara Smith, the district attorney's office
26 withheld statements and information, but this time the information and statements were not
27 provided late, they were not provided at all but were revealed only during cross-examination at
28 trial. And again, they set forth the following inadequate and tired response:

1 Q. Is this the first time our office has every asked you about it, detective?

2 A. Yes.

3 Q. I'm not talking about on the witness stand in front of the jury. You related
4 that information to our office in the past?

5 A. That's correct.

6 Q. Do you recall when in the case?

7 A. Early on.

8 Id. at 184, p. 128, lines 17-25.

9 As with Sarah Smith, no objection was made as to the failure to timely provide this
10 information to the defense so it could be properly handled and prepared for in advance of trial
11 and not during it. There was no objection by defense counsel, no request for a curative
12 instruction, no request for an evidentiary hearing (Petrocelli) prior to admittance and no request
13 for a mistrial. All of these should have been utilized by defense counsel but were not.

14 **B. Argument and legal authority**

15 The state has an obligation to turn over the statements of witnesses it intends to call at
16 trial. NRS 174.235. What the state should not be allowed to do, and what in fact happened in
17 this case, is to avoid the requirement that witness statements be turned over by cloaking them in
18 the "work product" privilege or purposely not transcribing statements to "hide" the information
19 from the defense. This approach was specifically rejected by the United States Supreme Court
20 in the case of Banks v. Dretke, 124 S.Ct. 1256, 540 U.S. 668, (U.S. 2004) in which the Court
21 held that "[a] rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a
22 system constitutionally bound to accord defendants due process. Id. at 1275. How else can the
23 Court reconcile the fact that the district attorney's office waited until the eve of trial to discuss
24 with one of the lead detectives in the case the issue of the catatonia and then make sure it was not
25 sprung on defense counsel until the detective testified?

26 The implication in the testimony of the officer as to his need to counter the issue of the
27 catatonia speaks not of witness preparation but improper coaching and even perhaps scripting of
28 testimony of questionable origin. These seem to be a pattern. Did Quito see a gun? Did Quito
hear threats? Is it a coincidence that Eva, Sarah and Townsen all use the word "catatonia" when
it is a medical term and not in the vocabulary of most people? Defense counsel did not object to

1 this pattern of behavior, explore it on cross-examination or otherwise create a record about it.

2 Furthermore, and more importantly, was the issue of testimony regarding, even, arguendo
3 accepting as true, the officer's comment on petitioner's communications with his counsel. This
4 should have been objected to and was not the subject to a motion to strike or a motion for a
5 mistrial. In a similar situation, the Sixth Circuit found such a failure to be ineffective assistance
6 of counsel. In Combs v. Coyle, 205 F.3d 269, (C.A.6 (Ohio) 2000), counsel's failure to object to
7 the prosecution's use of the defendant's statement, in which he the told police officer questioning
8 him at the murder scene to talk to his lawyer, to prove that defendant could form intent to kill
9 despite allegedly being intoxicated constituted ineffective assistance of counsel in murder
10 prosecution; the statement violated the defendant's Fifth Amendment privilege against self-
11 incrimination, was irrelevant under the state rules of evidence, and caused the jury to use
12 defendant's silence against him. U.S.C.A. Const.Amends. 5, 6; Fed.Rules Evid.Rules 401, 403,
13 28 U.S.C.A. A prosecutor may also not use a defendant's post-arrest silence for impeachment
14 purposes, regardless of whether the defendant received Miranda warnings. Further, the
15 prosecution may not refer to a defendant's post-arrest silence in its case-in-chief. Anderson v.
16 State, 121 Nev. 511, 118 P.3d 184,187 (2005).

17 This very type of behavior was condemned by the Nevada Supreme Court in the case of
18 Manley v. State, 115 Nev. 114, 979 P.2d 703 (1999), in which the Court held that the violation of
19 the attorney-client privilege violated a capital murder defendant's right to counsel under the Sixth
20 Amendment. In Manley the state's inquiry into defendant's confidential relationship with his
21 attorneys, damaged defendant's credibility by implying that the defendant had not been entirely
22 truthful even with his own attorneys, and had either omitted information detrimental to him or
23 simply lied to them regarding what happened the night of the shooting, and the jury's assessment
24 of defendant's credibility was crucial. Id.

25 Here, the state used the detective's statement to imply that petitioner was feigning the
26 catatonia that was presented at trial. Since the comment was made by the responding officer, a
27 state witness, it appeared this was the way the district attorney's office chose to deal with it in
28 front of the jury. This was prosecutorial misconduct, which was not properly handled by defense

1 counsel for petitioner.

2 **C. Conclusion**

3 Defense counsel's failure to object to the unconstitutional use of petitioner's alleged
4 communication with his attorney at the scene clearly fell below an objective standard of
5 reasonableness. Although the contours of the privilege against self-incrimination may sometimes
6 be unclear, that a alleged defendant's communication with his attorney cannot be used as
7 substantive evidence against him at trial is a fundamental aspect of the privilege. Petitioner's
8 counsel should have realized that the use of this communication against him was at least
9 constitutionally suspect and he should have lodged an objection on that basis.

10 Counsel's failure to have objected at any point is inexplicable, and there is no possible
11 strategic reason for such failure. Not only did the failure to object ensure that the jury could use
12 the communication against him, but it also guaranteed that both the admission of the statement
13 by the officer and the trial court's admission of the statement would be analyzed on review only
14 for plain error. Counsel's performance with respect to this issue was constitutionally deficient
15 under the Strickland standard.

16 **9. Defense counsel was ineffective on the issue of the admissibility of the**
17 **testimony and records of Mark Smith.**

18 **A. Factual and procedural background**

19 Mark Smith was the counselor who was contacted by petitioner on December 5, 2000
20 through an employee assistance help line that petitioner was given by his boss, Eva Cisneros. An
21 issue arose pre-trial with regard to whether or not Smith's testimony would be protected by
22 privilege. The same issue arose with regards to any records Smith and Smith's employer
23 maintained regarding the December 5, 2000 incident.

24 A hearing was conducted, during trial, first regarding the records and then the testimony.
25 There was no attempt by defense counsel to file a Motion in Limine regarding either or both of
26 these issues.

27 **1. The records**

28 On March 23, 2004, the state called Dr. Shirley Repta, who brought with her from the

1 state of New York the records of the phone call with therapist Mark Smith from December 5,
2 2000. See, in general, AA, Volume 2, 144, p. 142 to 147 p. 156. The documents arrived sealed
3 with "an order from the Judge in New York ordering me to comply with the Judge here." AA,
4 Volume 2, 146, p. 149, lines 6-7. Examination was conducted by each the state and defense. No
5 objection was made by Bloom regarding the privilege and the records were received into
6 evidence.

7 The confidential documents which were received without objection on April 6, 2004, and
8 the record reflects the following:

9
10 MR. PETERSON: Judge, I had the chance to review the evidence list with your
11 Clerk. I believe everything that we've intended to admit is admitted. I have one
12 matter what's marked as 129, is the envelope. The documents inside have been
admitted. Just essentially as a paperwork matter, I would move the admission
of 129 so there's not any confusion. Those are the Harris Rockenberg documents.

13 MR. BLOOM: Can we address that at some later time, Your Honor? I don't think there's
14 much --

15 THE COURT: Do you reserve the right to bring that in?

16 MR. BLOOM: Yes.

17 AA, Volume 4, 218, p. 113, line 1 to line 13.

18 There was no follow-up to this by defense counsel and the records, **unexamined by**
19 **defense counsel**, were allowed into evidence for unrestricted examination by the jury.

2. Testimony of Mark Smith

a. Hearing

20 On March 25, 2004 the matter was placed on the record:

21 MS. GOETTSCH: Yes. We have one witness that will be testifying after we finish
22 up with the remaining witnesses from yesterday. His name is Mark Smith. We
23 need to have a record regarding a potential privilege issue, and have the Court
order him, to, in fact, testify truthfully about what he knows.

24 THE COURT: For the record, what is Mr. Smith's connection with the defendant?

25 MS. GOETTSCH: He is a licensed social worker in New York City. He was
26 manning the phone lines, if you will, for an employee assistance program.

27 On December 5th the defendant called this employee assistance program and was
28 hooked up with Mark Smith in New York City. Mark Smith then took
information from the defendant and Gina Centofanti, and eventually called 911, or called
the police here in Las Vegas to dispatch the police to that house on December 5th.

THE COURT: Is that gentleman Mr. Smith?

1 MR. SMITH: Yes, Your Honor.

2 THE COURT: Thank you. Mr. Smith is present.

3 Mr. Centofanti did you have that conversation, essentially?

4 MR. BLOOM: Excuse me, Your Honor?

5 THE COURT: I'm asking your client, I ask you on behalf of your client if he did
6 have the conversation and he wishes to waive the privilege.

7 MR. BLOOM: He doesn't wish to waive the privilege, Your Honor.

8 THE COURT: I'm sorry. I thought that's what we [were] here for.

9 MR. BLOOM: No. We submit the matter to the Court, but we don't waive
10 the privilege.

11 AA, Volume 3, 118, p. 3, line 17 to p. 4, line 19.

12 The state then made an offer of proof as to what was said by Virginia and the defendant to
13 Mr. Smith. Getting past, for the moment, whether or not the state should have access to the
14 discussions before a evidentiary hearing was held, the state conceded:

15 So, technically, under New York law and probably under our law as well there
16 could be a privilege as to the fact that Mr. Centofanti even accessed that system's
17 program.

18 AA, Volume 3, 119, p. 5, lines 15-18.

19 THE COURT: As to the latter [Conversations Mr. Smith had with Mr. Centofanti] I don't
20 know what basis we would have, and I say "we", the state would have to acquire that the
21 privilege be waived.

22 AA, Volume 3, 119, p. 6, lines 8-10.

23 MS. GOETTSCH: [A]nd gives the state the ability to argue that the defendant, who is a
24 lawyer, would know that that invokes such a privilege.

25 THE COURT: You're saying it's contrived?

26 MS. GOETTSCH: Exactly.

27 Id. at 119, p. 6, lines 20-25.

28 THE COURT: Ms. Goettsch, are you suggesting that Mr. Centofanti had the presence of
mind on the 5th of December of the year 2000, having heard his wife outline what her
explanation of all this was, to get on the phone and say: I need some help too, so that he
could invoke the privilege?

MS. GOETTSCH: Absolutely. And I believe Mr. Smith got the same impression.
Am I going to ask him that? Is he comfortable saying that? No.

*But he has indicated to me that that was his impression. So it's not just me thinking
that. That comes from my witness.* (Emphasis added)

Id. at 120, p. 10, line 23 to p. 11, line 9.

MR. BLOOM: [T]his is so ridiculous but I could find somebody to take a look

1 at that and say: Is that unusual for them to do? And when a person who says
2 I want help too, is that unusual to do.
3 Then we're going to get into a battle over that. It would just be improper. Why?
4 Because that's purely for argument sake. Mr. Smith's view is not at issue here, it's
5 for the jury.

6 Id. at 120, p. 12, lines 1-8.

7 Argument continues and the Court ordered that Mr. Smith did not have to give an opinion
8 as to whether or not it was unusual and was ordered to testify (Mr. Smith was present for the
9 whole hearing and argument).

10 **B. Argument and legal authority**

11 In Nevada, a patient has a privilege to refuse to disclose and to prevent any other person
12 from disclosing confidential communications between himself and his psychologist or any other
13 person who is participating in the diagnosis or treatment under the direction of the psychologist,
14 including a member of the patient's family. NRS 49.209. Also, a client has a privilege to refuse
15 to disclose, and to prevent any other person from disclosing, confidential communications among
16 himself, his marriage and family therapist or any other person who is participating in the
17 diagnosis or treatment under the direction of the marriage and family therapist. NRS 49.247.

18 It was prosecutorial misconduct that the state, again, was provided access to witnesses
19 and documents that were potentially prevented from disclosure by privilege before the issue of
20 privilege was properly decided by the Court. See, NRS 49.209 (psychologist-patient privilege);
21 NRS 49.247 (therapist-patient privilege)

22 Here the state clearly spoke to Mr. Smith about his proposed testimony and records
23 improperly. This was not objected to by defense counsel and no attempt was made to place this
24 issue on the record for review. There was also no attempt to strike the records or the testimony
25 as a result of the violation.

26 As with other records in this case, the plastic surgery records and daycare records to name
27 a few, it appears there was no attempt by counsel to even review the records before allowing
28 them to be turned over to the state and used it again against petitioner at trial. While counsel did
29 force the Court to make a ruling as to Smith's testimony, this is something that should have been
30 litigated before trial and prepared for, which would include filing a pre-trial writ on the

1 admission of the testimony and/or the records.

2 It cannot be said that the failure to preserve the privilege pre-trial did not affect the
3 outcome of the trial of this matter. Smith's testimony and the records were used to impeach the
4 credibility of petitioner and his version of the events of December 5, 2000, which became critical
5 to the presentation of the defense. There was not strategic reason not to properly address the
6 matter and counsel's failure was clearly ineffective assistance of counsel.

7 **C. Conclusion**

8 Counsel's failure to have objected to the state's being provided access to the witnesses and
9 documents prior to a ruling on if they were protected by privilege is inexplicable, and there is no
10 possible strategic reason for such failure. It was also inexcusable not to have the issues decided
11 pre-trial and not wait until the day the witnesses and evidence were to be presented to the jury,
12 and apparently to defense counsel for the first time, and thus not be prepared. This was not an
13 obscure issue but one of the main points of the defense presentation of the case, the events of
14 December 5, 2000. Not only did the failure to object ensure that the jury could use the
15 communications with Smith against him, but it also guaranteed that both the admission of the
16 statement by Smith and the trial court's admission of the statement would be analyzed on review
17 only for plain error. Counsel's performance with respect to this issue was constitutionally
18 deficient under the Strickland standard.

19 **10. Defense counsel was ineffective on the issue of improper vouching by the**
20 **state as it related to witnesses Tricia Miller, Mark Smith and Kim Fovea**

21 **A. Factual and procedural background**

22 During the hearings regarding the admissibility of the testimony of Mark Smith, supra,
23 the following objection was placed on the record regarding the use of vouching by the state:

24 MR. BLOOM: Yes, Your Honor. It brings us kind of an interesting point as it relates to
25 the last portion of asking Mr. Smith his opinion as to what that represents to him.
26 That has happened several times throughout these proceedings. It happened once
with Patricia Miller. It happened once with Kim Fovea, and it's apparently going to
happen again now.

27 It's, in effect, the People polling their witnesses to get their witnesses vouching for some
particular theory or something. That's entirely improper.

28 It's improper, for example, Miller's view about her fear. It's improper about Govea's

1 analysis of this tape: Did you have a concern is a question put to her, what did that mean.
2 However, for Mr. Smith to testify about whether he believes this to have been genuine or
3 not genuine. Mr. Smith doesn't have any clairvoyant ability.
4 These are the matters for the jury to decide.

AA, Volume 3, p. 119, p. 7, line 11, to p.8, line 4.

5 The state then attempts to justifying the improper vouching with a "if they can do it so
6 can we" schoolyard argument. *Id.* at 120, p. 9, lines 2-12. Bloom responds, "But here if we have
7 this witness here and Ms. Fovea giving an opinion about something that the evidence speaks for
8 itself . . . if we let Ms. Fovea or Mr. Smith start giving opinions about what they feel the evidence
9 holds. And that's what I think is improper. AA, Volume 3, p. 120, p. 9, line 24 to p. 10, line 6.

10 This was not just limited to these witnesses, but also occurred with regards to the issue of
11 petitioner bringing a gun to work and being fired from his job as a result. See, supra, testimony
12 of Sarah Smith and Eva Cisneros. This vouching, however, was not objected to as such on the
13 record and therefore not preserved for review on direct appeal by defense counsel as he should
14 have.

15 **B. Argument and legal authority**

16 There was no excuse for such prosecutorial misconduct since it is explicitly prohibited
17 under Nevada law. See, Anderson v. State, 121 Nev. 511, 118 P.3d 184 (2005)(stating that a
18 prosecutor may not vouch for the credibility of a witness or accuse a witness of lying and
19 prosecutor's plain error arising from misconduct during closing argument affected defendant's
20 substantial rights, thus requiring reversal of conviction); Lisle v. State, 113 Nev. 540, 553, 937
21 P.2d 473, 481 (1997) (stating that it is improper to vouch for the credibility of a government
22 witness); Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990) (stating that it is
23 improper argument to characterize a witness as a liar).

24 For improper vouching by a prosecutor to occur, two criteria must be met: (1) the
25 prosecutor must assure the jury that the testimony of a government witness is credible, and (2)
26 this assurance must be based on either the prosecutor's personal knowledge, or other information
27 not contained in the record. U.S. v. Vitillo, 490 F.3d 314, (C.A.3 (Pa.) 2007). For the purpose of
28 demonstrating prosecutor's improper vouching for government witness, the prosecutor's
assurance of the witness's credibility may be based on either an explicit or implicit reference to

1 information outside the record. Id. In Anderson v. State, 121 Nev. 511, 118 P.3d 184 (2005) the
2 Nevada Supreme Court held a prosecutor may not vouch for the credibility of a witness or accuse
3 a witness of lying. Id. at 187.

4 The state infected the entire proceedings with multiple instance of vouching as placed on
5 the record by Bloom, supra, and evident in the testimony of both Sarah Smith and Eva Cisneros
6 on the issue of the petitioner bringing a gun to work and getting fired for it which he was not. In
7 all instances the state was making both explicit and implicit references to information outside the
8 record (the facts and circumstances of petitioner's firing) or was in a constant state of vouching
9 for each of the state's witnesses. As the court said in Anderson, a prosecutor's duty is to fairly
10 present cases, not just to obtain convictions. Id. at 188. See, also Lisle v. State, 113 Nev. 540,
11 553, 937 P.2d 473, 481 (1997) (vouching for the credibility of a witness is impermissible because
12 it invades the jury's function of assessing credibility).

13 C. Conclusion

14 It was prosecutorial misconduct for the state to vouch for the credibility of it's witnesses.
15 While this was objected to in and out of the presence of the jury during the trial, it was not
16 objected to during the testimony and no request for a mistrial, a curative instruction, or motion to
17 strike was made with regards to the state's efforts in this regard. Defense counsel's failure to have
18 objected to the state's vouching as it occurred and to make an adequate record for review is
19 inexplicable, and there is no possible strategic reason for such failure. Not only did the failure to
20 object ensure that the jury could use the vouching in assessing the credibility of the state's
21 witnesses and of their case, but it also guaranteed that both the admission of the vouching and the
22 trial court's admission of the vouching would be analyzed on review only for plain error.
23 Counsel's performance with respect to this issue was constitutionally deficient under the
24 Strickland standard.

25 11. Defense counsel was ineffective on the issue of the admissibility of
26 defendant's employment records/evidence of defendant's alleged firing for
27 violation of a fire-arms policy.

28 A. Factual and procedural background

Petitioner was let go from his employment with Travelers' Insurance after his arrest on

1 December 20, 2000. The exact facts and circumstances of why he was let go were never fully
2 explained or provided to petitioner as Nevada is an employment at will state and no explanation
3 was necessary and none was given. The firing of petitioner was not the subject of any pre-trial
4 request by either the state or defense to have this presented or excluded from the jury or ruling on
5 its admissibility. A Petrocelli hearing was required. The admission of this was error for this
6 reason and because the documents contained in his personnel file, which was improperly
7 admitted, were not relevant.

8 **1. Allegations regarding bringing a firearm to work**

9 The state improperly introduced to the jury the issue regarding defendant's employment
10 with Travelers' Insurance being terminated on allegations he brought a gun to work in violation
11 of company policy. These allegations should have been subjected to a Petrocelli hearing, or at
12 the very least the subject of a motion in limine (pre-trial) or a motion to strike (during trial) as
13 this issue was not relevant to the issues raised at trial or in these proceedings at all. The their use,
14 the state was trying to bolster a false representation about why the petitioner was terminated from
15 his employment.

16 Q. Were you aware of whether or not Chip ever had a gun at work?

17 A. Yes.

18 Q. Can you tell me about that?

19 A. He did. I think it was late August, early September at some point. The
20 computer wasn't working in my office or hadn't been hooked up to the
21 network, so I was using Chip's office while he was out and I needed a
22 pencil so I opened up a middle drawer and the gun was in there.

23 Q. Do you recall whether the gun was a revolver or automatic?

24 A. I don't recall. It was black and that's all I can tell you.

25 Id. at 102, p.70, 6-19. (Testimony of Sarah Smith)

26 Here, there is no evidence this ever took place and if it did, why did she not report it to
27 Eva Cisneros, her boss, or to anyone else she worked with or anyone else she knew?

28 Defense counsel failed to object, failed to request a curative instruction, move for an
evidentiary hearing or request a mistrial.

Additionally, the following was received by the jury without defense objection:

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2. Allegations regarding termination of employment

Q. At some point after the shooting the Defendant was terminated from your employment; is that right?

A. Yes.

Q. Do you know what the reason was?

MR. BLOOM: Objection. It's irrelevant.

THE COURT: What is the relevance?

MS. GOETTSCH: We believe the reason was, Your Honor, that --

MR. BLOOM: Don't go into the merits or the substance of it.

MS. GOETTSCH: Then we'll have to approach.

THE COURT: Please.

(Discussion off the record.)

THE COURT: You may proceed.

BY MS. GOETTSCH:

Q. Is it a violation of Traveler's company policy to bring a gun to work?

A. Yes.

AA, Volume 4, 025, p. 99, p. 21, to p. 100, line 15. (Testimony of Eva Cisneros).

Defense counsel failed to object, failed to request a curative instruction, move for an evidentiary hearing or request a mistrial. Ms. Cisneros never said that petitioner was terminated for that reason.

Thereafter, without objection by defense counsel, the following was received by the jury:

3. Admission of personnel file

Subsequent to the examination, the state moved for the admission of defendant's entire personnel file and it was received without objection. Id. at p. 129.

The state introduced evidence at trial that petitioner was allegedly let go from his employment from Travelers Insurance due to an allegation that he violated the company's policy regarding having firearms at work. This simply was not true.

The records were introduced during the testimony of Eva Cisneros.

Q. I'm going to show you what's been marked for identification as 169. Do you recognize this set of documents?

A. Yes.

Q. What are they?

A. It's his personnel file.

Q. Did you provide that to my office at our request in response to a subpoena?

A. Yes.

AA, Volume 4, 032, p. 128, lines 1-9.

1
2 Q. Do these fairly and accurately depict his personnel records that you kept as part of
Traveler's?

3 A. Yes.

MS. GOETTSCH: state move for admission of state's 169.

4 THE COURT: Any objection.

5 MR. BLOOM: Subject to -- I don't mind her asking questions subject to the whole file
coming in. **I have not looked at the whole file.** (Emphasis added)

6 I don't know what's in there, but that page I don't have any objection to, nor do I have an
objection to the question.

7 THE COURT: It's only fair. You were just apprised of this.

8 MR. BLOOM: Yes. I don't mind her asking the question.

9 THE COURT: We'll go ahead and conditionally receive the whole file subject to
redaction or review at the time. The document will be allowed that you're alluding to.

BY MS. GOETTSCH:

10 Q. In that document does the defendant outline his legal experience?

11 A. Yes.

12 AA, Volume 4, 033, p. 129, line 5 to p. 130, line 4.

13 **4. Hearing and ruling after evidence already received by jury**

14 MR. BLOOM: Thank you, Your Honor.

15 Yesterday we had a sidebar conference regarding a matter and it didn't get on the
16 record, and so I want to put that on the record. We had a side bar today on a
small matter, I want to put that on the record. And we have a issue of discovery
17 I want to put on the record. Number one, yesterday's question was to put to a
witness, Eva Cisneros, as to why Mr. Centofanti was fired. We had a side bar,
18 and the question was changed so that: Is it a policy of Traveler's (sic) not to have
a weapon at work.

19 And I objected on the grounds of relevance. I felt two points that I think one has to do
20 with the Independent Petrocelli kind of evaluation. It looks like it's some sort of bad act
if you're talking about why he got fired, but that didn't come out per-se.

21 The policy as to whether or not there was a Traveler's to not carry a gun to work
22 I think is irrelevant, a side issue, and so I objected to it and I want to make sure
that is on the record.

23 THE COURT: Response?

24 Ms. GOETTSCH: Our response to that is, I agreed not to ask the question why he
was fired, and I solely asked the question in front of the jury or, is it a policy of
25 Traveler's not to carry a gun to work.

...

26 And it shows that the defendant was certainly comfortable with his gun, carries
his gun around, is attached to the gun, and was probably the one that actually
27 thought to pull the gun out of the dresser on December 5th, and that's why the
question was asked.

28 THE COURT: Well, I thought it was relevant, and I thought the relevance

1 exceeded any prejudicial value. . . And I realize I'm overstating, but that's my
2 thinking in the matter. But I do think it's relevant in the sense he was willing;
3 arguendo, to violate the policy of obviously a good job because of his desire
4 to have his gun, which shows a certain propensity to carry the weapon or,
5 certainly, some affection for the idea of carrying a weapon, which would be
6 relevant.

7 AA, Volume 4, 063, p. 89, line 5 to p. 91, line 5.

8 **B. Argument and legal authority**

9 If the state wished to introduce evidence of petitioner bringing a gun to work and his
10 being fired, in both testimony of witnesses (Sarah Smith and Eva Cisneros, supra) a Petrocelli
11 hearing should have been requested by defense counsel and conducted. The testimony of Sarah
12 Smith was untested and uncorroborated. There may even have been evidence available to the
13 defense to show that this was not true. A Petrocelli hearing should have been conducted prior to
14 the admission of this testimony and petitioner's personnel file. It was error not to do so.

15 This evidence clearly fell within the "smear campaign" pre-trial ruling as the state used
16 the evidence to show some level of pre-meditation or as they phrased it a "certain propensity to
17 carry the weapon." Not requesting a Petrocelli hearing and sandbagging petitioner at trial, and
18 not adhering to the Court's pre-trial ruling on the introduction of such evidence was clear
19 prejudicial misconduct. The problem was that counsel failed to object to the testimony when it
20 was given, and then even when brought to the Court's attention after the testimony did not
21 request a motion to strike, mistrial or curative instruction. The jury was left with the impression
22 that something that was not properly before them (the gun, the firing, the personnel records)
23 could be used to convict the petitioner.

24 This very situation was addressed by the Washington State Court in the case of State v.
25 Miles, 162 P.3d 1169 (Wash.App.Div. 2 2007). In Miles the Court held:

26 "A person being tried on a criminal charge can be convicted only by evidence,
27 not by innuendo." State v. Yoakum, 37 Wash.2d 137, 144, 222 P.2d 181
28 (1950). The Sixth Amendment to the United States Constitution and article I,
section 22 of the Washington State Constitution grant criminal defendants the
right to confront and cross-examine adverse witnesses. State v. Hudlow, 99
Wash.2d 1, 14-15, 659 P.2d 514 (1983). A prosecutor's impeachment of a
witness by referring to extrinsic evidence that is never introduced may violate
a defendant's right to confrontation. State v. Babich, 68 Wash.App. 438,
445-46, 842 P.2d 1053 (1993). A prosecutor may not use impeachment

1 as a means of submitting evidence to the jury that is otherwise unavailable.
2 Babich, 68 Wash.App. at 444, 842 P.2d 1053 (citing United States v.
3 Silverstein, 737 F.2d 864, 868 (10th Cir.1984)). And a prosecutor who
4 asks questions that imply the existence of a prejudicial fact must be prepared
5 to prove that fact. Babich, 68 Wash.App. at 444, 842 P.2d 1053 (citing
6 Silverstein, 737 F.2d at 868).

7 Id. at 1172.

8 The Miles court also noted where, as here, "a defendant does not object or request a
9 curative instruction", he waives the error unless the Court finds the remark " 'so flagrant and ill-
10 intentioned that it causes an enduring and resulting prejudice that could not have been neutralized
11 by a curative instruction to the jury.' Id. at 1172.

12 In the instant case, defense counsel did not even request a curative instruction or seek
13 other proper relief.

14 In further analyzing misconduct similar to what the state did in the instant case, the Court
15 stated that where a prosecutor's questions refer to extrinsic evidence that is never introduced:

16 [d]eciding if the questions are inappropriate requires examining whether the focus
17 of the questioning is to impart evidence within the prosecutor's personal knowledge
18 without the prosecutor formally testifying." State v. Lopez, 95 Wash.App. 842, 855, 980
19 P.2d 224 (1999) (citing 5A KARL B. TEGLAND, WASHINGTON PRACTICE,
20 EVIDENCE LAW AND PRACTICE, § 258 at 125 (3d ed. supp.1998-99)). There is no
21 conceivable purpose for asking these questions without rebuttal witnesses available other
22 than to impart to the jury the
23 prosecutor's knowledge of facts Miles allegedly participated in without
24 presenting direct evidence of them.

25 Id. at 1173.

26 Similar reasoning dictates that both what the state did with regards to the issue of the gun,
27 the firing and the personnel records, in imparting to the jury the prosecutor's knowledge of these
28 things, without presenting direct evidence of them, was prosecutorial misconduct and the failure
to object and attempt to cure the error constituted ineffective assistance of counsel.

29 C. Conclusion

30 It was prosecutorial misconduct for the state to present to the jury the issues of petitioner
31 allegedly bringing a gun to work and being fired for it and introducing petitioner's employment
32 records in violation of the Court's pre-trial order and without requesting a Petrocelli hearing

1 before their introduction. While this was objected to in an out of presence hearing during the
2 trial, it was not objected to during the testimony and no request for a mistrial, a curative
3 instruction, or motion to strike was made with regards to the state's efforts in this regard. Defense
4 counsel's failure to have objected to the state's tactics is inexplicable, and there is no possible
5 strategic reason for such failure. Not only did the failure to object ensure that the jury could use
6 the improperly received evidence in assessing the credibility of the state's witnesses and of their
7 case, but it also guaranteed that both the admission of the evidence by the state and the trial
8 court's admission of the evidence would be analyzed on review only for plain error. Counsel's
9 performance with respect to this issue was constitutionally deficient under the Strickland
10 standard.

11 **12. Defense counsel was ineffective on the issue of the state failing to provide**
12 **discovery in violation of Nevada's reciprocal discovery statute and Brady v.**
13 **Maryland.**

14 **A. Factual and procedural background**

15 The state took the cavalier position in this matter that they could circumvent their
16 obligation to turn over discovery under Nevada's reciprocal discovery statute and the relevant
17 U.S. Supreme Court precedents on this matter, to prevent the discovery of Brady material. The
18 issue arose specifically as to the testimony of state witness Tom Thompsen, but also applied with
19 both the destruction of evidence (such as the voice mails left and stored on Virginia's phone, the
20 cell phone, keys, purse, etc.) and the failure to provide statements of other witnesses (such as
21 Tricia Miller, Francisco Sanchez, Sarah Smith, Adrienne Atwood, Dr. Escajeda and others).

22 An argument ensued where the state claimed that there was no duty to turn over anything
23 they self-determined was protected by privilege.

24 MR. BLOOM: The last matter, Your Honor, has to do with obtaining District
25 Attorney investigator notes, statements made by witnesses, in this case a witness
26 who is next on the stand, Tom Tompsen.

27 He is about to testify. And it is my recollection he was interviewed at some point.
28 The District Attorney's investigator memorialized that interview by making a
recording, notations as to what Mr. Thomsen said.

 And it's my belief that the statutorily created discovery in 174.235 that talks about
the Prosecutor's obligated to provide written or recorded statements made by a
witness they intend to call, should include whether or not the notes are made

1 in any form; videotaped, audio taped, verbatim or summarization of the words.
2 The response that I'm aware that that very same section has a No. 2A portion
3 which says that "Internal reports, documents or memos that are prepared on
4 behalf of the DA are not required to be provided."

5 It's my belief that when the Legislature spoke about internal reports, documents
6 or memorandums, they're talking about evaluations of witnesses. They're
7 talking about strategy. They're talking about memos that would deal with the
8 down side of calling someone, the up side of calling someone, the dangers
9 of calling someone, a variety of things like that.

10 And that just because a document, a statement is obtained by
11 an investigator who is working for the DA or a police officer, there is no
12 distinction. You have the right to get the notes of what was actually stated.
13 Obviously, these notes may come in the form of kind of shorthand notes,
14 cryptic notes.

15 But nonetheless, if there were words in some fashion from the witness,
16 then it's my opinion they should be provided.

17 Of course, Brady requires them to be provided if there is exculpatory nature
18 in them. Exculpatory nature included impeachment.

19 [I]t would be my request to have these documents or this document which
20 Ms. Goettsch has regarding this witness at the very least be marked as a
21 Court's Exhibit, be made part of the Court record, and the Court can make
22 part of the Court record, and the Court can make it's determination as to
23 whether or not there's any exculpatory nature it, and then the matter is
24 preserved for any future reference.

25 THE COURT: Well, as to the latter, is there any reason that you have to
26 believe that there would be Brady material, these notes, that the state is
27 withholding that?

28 MR. BLOOM: The United States Supreme Court has addressed just that very
question, Your Honor. They stated repeated times that, of course, the defense
can't point, nor should they be required to point to specifics within documents
of which they have no knowledge.

So I do not, I cannot point to anything. But the United States Supreme Court
says that I shouldn't be required to do so.

The discovery statute in Nevada doesn't say that just because it's discoverable it
admissible. It just says it might lead -- admissibility is a different issue than
discoverability. So, no, I can't point to anything, but of course, I couldn't
possibly point to something I have not seen or know it's dimensions.

AA, Volume 4, 063, p. 92, line 13 to 064, p. 94, line 18.

THE COURT: Well, I understand what you're saying, and I'm not quarreling
with that at all. . . [I] don't know if I want to open that policy where we start
ferreting through everything the state has in court, and placing in into evidence
as Court's exhibits for later appeal purposes, if in fact the state was withholding
anything. It looks to me like it's a rather unworkable as a general proposition.

MR. BLOOM: I don't think it's a task of a dimension that the Court talks
about, Your Honor. As an officer of the Court, the district attorney can

1 present to the Court those matters which are purported to be statements
2 of summarizations, or notes about statements from a witness.
3 And you can clearly distinguish that between notes that the attorney makes
4 about demeanor of a witness, or tactics of when to call it and so forth. I don't
5 see that as being that onerous of a task.

6 AA, Volume 4, 064, p. 95, line 4, to p. 96, line 4.

7 MS. GOETTSCH: My response to that is, we're really talking about two different
8 things here. First of all, we do not have to give up our work product. I think this
9 part of this is work product. Because what I have is a memo to me from my DA
10 investigator. The memo is titled DA's Office to me from my investigator. It's an
11 internal memo as part of our investigation, and it does have some of the tactical
12 stuff that he describes. That's work product.

13 ...
14 There's no verbatim statement in this. It's paraphrasing what Tom Tompsen discussed
15 with her two years ago, my investigator. There's no quotes.

16 ...
17 Now as far as Brady material, this particular witness has always been on our witness
18 notice. He can go talk to him and make his own memo. As far as that goes, if he wants
19 to know what Tom Tompsen is possibly going to say, if they have anything exculpatory,
20 Tom Tompsen can tell him. That's no secret, he's available, has always been available for
21 possible contact.

22 THE COURT: Of course, what Mr. Bloom is saying, and I don't think he's being
23 unpleasant or confrontational about it, he's saying how do we know that?

24 In fairness, we as attorneys, we don't just take it if someone says something that's
25 okay, that must be what it is. Would there be a problem in that vein lodging as a
26 Court's exhibit, or copy of it, and just let it sit there as a court exhibit, and on appeal if
27 someone wants to open it up and look at it, who would it hurt?

28 MS GOETTSCH: Well, I have a problem with that. There's a lot of things that I
prepared that my investigator prepared over the three years of this case. I have
boxes and boxes of this.

Where do we draw the line on that? Why should I have to give that up just for the
convenience when it's not discoverable?

AA, Volume 4, 064, p. 96, line 6 to 065, p. 98, line 13.

MR. BLOOM: With regard to that, Your Honor, in terms of not having it written or
something like that, the United States Supreme Court has dealt with that issue. They
have required the Prosecution provide the name and the address, location of a witness
which the Prosecutor would have reason to believe is-- could provide exculpatory
information.

But they have never required the prosecution to write down reports. They have never
required them to make a report if they didn't make one. But if they make one, then it
becomes within the recorded statement.

And I believe once it gets weight to paper, recorded in some fashion, it fits within the 174
statutes of Nevada.

1 THE COURT: Now, what Ms. Goettsch is suggesting is what I was concerned about and
2 that is the volume of the material that this might include. It looks to me to a daunting
3 task for a Court to go through these documents, determine what, arguably, would be
4 Brady material, and then the Prosecution is not acknowledging such, if there is any.
5 I guess we could redact all those portions of a report that is not Brady material, that would
6 not be discoverable if they were to be given over to defense counsel. But it looks to me to
7 be a major undertaking.

8 MS. GOETTSCH: And it is our job, Judge, to review items for Brady material,
9 because we are the ones that if we don't give something over there will be
10 serious consequences. So we have no motivation to hold any Brady material
11 back.

12 And let me say, Tom Tomsen is alive and well and living in Las Vegas, and has been for
13 the last three years. If he has any Brady material in his head, it's accessible by the
14 defense. So they have a way to go out and find out if there's anything exculpatory with
15 Tom Thomsen.

16 And I don't know if they haven't done that or what have you but --

17 MR. BLOOM: He's actually refused to speak to our investigator. But that's not the issue.
18 Did I hear the prosecution say they don't have any motive in this matter? They are an
19 advocate in these proceedings. And I'm not trying to say that there is some sort of
20 conspiracy on the part of the prosecution to hide evidence from us. But they have a
21 prosecutorial mind. They have a view as to what is exculpatory and not. That's why
22 there's a distinction between discoverability and admissibility. So we have an adversarial
23 system.

24 AA, Volume 4, 065, p. 98, line 23, to p. 100, line 21.

25 THE COURT: I think [the state] is absolutely right as far as the work
26 product, this is absolutely what is contemplated in that statute, so you are protected
27 in that regard.

28 As far as Brady material, it's somewhat troubling because what Mr. Bloom says is right.
How can a Defense attorney know what's in a document until he sees the document. And
that's one of those catch-22 situations. We give them the document to see if they ought to
get the document. I mean, it gets to be a little ridiculous. But I am not going to open
Pandora's box here in the sense that the Court, in my judgment, would have the
responsibility of ferreting through the DA's files to determine if, in fact, they are being
candid about whether there is Brady material there or not.

That would be the process that would be never ending. I would have to have a
full-time clerk with the volume of cases I try hear or deal with. It's just not
workable.

And, candidly, there's nothing -- that's why I asked Mr. Bloom earlier if there's
any reason that you have to believe there is Brady material. And I'm not
saying you're accusing them of anything. You may have heard someone say
something that should have been reflected in the report, that kind of thing.
I don't see that here. I don't believe it's here, in all candor, in this instance. So

/////

1 I'm not inclined to go into this investigation, if you will of the prosecution.
2 So that will be my ruling.

3 AA, Volume 4, 067, p. 105, line 1, to p. 106, line 5.

4 This came up with the testimony of another employee of Eagle Sentry (Ingrham) who
5 indicated on the stand that he listened to a alleged voice recording of the defendant left on
6 Virginia's answering machine at work regarding her coming to pick up Nicholas for visitation the
7 night of December 20, 2000. Id. at 061, p. 84 line 15 to 062, p. 88, line 17. During this
8 testimony he indicated that "Sometime later, I don't know when, a Metro Officer came back in
9 and tried to operate the voice message and it had been lost or destroyed." Id. at 062, p. 86, lines
10 1-4.

11 This was an incorrect ruling by the Court [Trial court is vested with authority to order
12 discovery and inspection of materials in possession of state; exercise of court's discretion,
13 however, is predicated on showing that evidence sought is material to preparation of defense and
14 existence of evidence is known or, by exercise of due diligence, may become known to district
15 attorney. N.R.S. 174.235, 174.245. Riddle v. State, 1980, 613 P.2d 1031, 96 Nev. 589.]
16 Furthermore, the Court improperly concerned itself with the inconvenience of the defense request
17 instead of concerning itself with petitioner's rights. [Goettsch: "There's lots of things I prepared
18 that my investigator prepared over three years of this case. I have boxes and boxes of this." Id.
19 at 065, p. 98, lines 7-10; THE COURT: "Now, what the [state] is suggesting is what I am
20 concerned about, and that is the volume of the material that this might include." Id. at 065, p. 98,
21 lines 12-14.]

22 As Bloom had explained to the Court:

23 The discovery statute in Nevada doesn't say that just because it's discoverable it's
24 admissible. It just says it might lead -- admissibility is a different issue than
25 discoverability.

26 AA, Volume 4, 064, p. 94, lines 22-25.

27 This complied with the request by the defense and Nevada Supreme Court's opinion in
28 the case of Lay v. State, 14 P.3d 1256, 116 Nev.1185 (2000) stated that due process does not
require simply the disclosure of "exculpatory" evidence; the evidence also must be disclosed if it
provides grounds for the defense to attack the reliability, thoroughness, and good faith of the

1 police investigation or to impeach the credibility of the state's witnesses.

2 **B. Argument and legal authority**

3 Prosecutorial suppression of evidence favorable to the accused implicates the Due
4 Process Clause of the Fifth and Fourteenth Amendments. In Brady v. Maryland, 373 U.S. 83, 87,
5 83 S.Ct. 1194 (1963) the Supreme Court held that, where the accused makes a pre-trial request
6 for evidence favorable to his case, the government violates his due process rights in suppressing
7 such evidence "where [it] is material either to the guilt or punishment, irrespective of the good
8 faith or bad faith of the prosecution." It matters little whether the government suppresses the
9 evidence out of oversight or guile. Id. at 88, 83 S.Ct. 1194.

10 In the case of U.S. v. White, 492 F.3d 380 (6th Cir. 2007), the Sixth Circuit faced with a
11 very similar situation ruled that the failure of the state trial court to conduct a in-camera review
12 of the evidence sought was improper.

13 As the Supreme Court recently summarized, a "true Brady violation" has three
14 aspects. "The evidence at issue must be favorable to the accused, either because it is
15 exculpatory, or because it is impeaching; that evidence must have been suppressed
16 by the state, either willfully or inadvertently; and prejudice must have ensued." Id. at
17 281-82, 119 S.Ct. 1936. A deprivation of due process occurs where all three aspects
18 are present. However, in camera review of the evidence sought may be appropriate
19 upon a lesser showing.

20 Id. at 410.

21 The Court cited favorably to the United States Supreme Court decision in Pennsylvania v.
22 Ritchie, 480 U.S. 39, 43, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987), in which the Court held:

23 [F]ound remand for in camera review of the file appropriate and necessary to
24 the district court's "determin[ation] whether it contains information that probably
25 would have changed the outcome of [the defendant's] trial." Id. at 58, 107 S.Ct.
26 989. Notably, the Court did not hold that the government must give defense
27 counsel unbridled access to the information; only that the court be permitted to
28 examine it. Id. at 58-59, 107 S.Ct. 989. Accordingly, once a defendant
"establish[es] a basis for his claim that [the records sought] contain [] material
evidence," even though he cannot articulate with specificity the materiality of
those records, remand for in camera review may be appropriate. See
id. at 58 n. 15, 107 S.Ct. 989.

Id. at 410.

In White, the Court found the district court abused its discretion in failing to hold an

1 evidentiary hearing to more carefully consider the nature of the documents and the information
2 contained therein. Id. at 413.

3 The Ninth Circuit stated recently the appropriate test for failure to provide Brady material
4 in the case of U.S. v. Jernigan, 492 F.3d 1050 (9th Cir. 2007):

5 The touchstone of materiality review is whether admission of the suppressed
6 evidence would have created a " 'reasonable probability' of a different result."
7 Kyles v. Whitley, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490
8 (1995) (citing Bagley, 473 U.S. at 682, 105 S.Ct. 3375). And as the Kyles
9 Court emphasized, the adjective "reasonable" is important. Id. A defendant
10 need not show that [he] "would more likely than not have received a different
11 verdict with the evidence." Id. Instead, [he] must show only that "the
12 government's evidentiary suppression 'undermines confidence in the outcome
13 of the trial.' " Id. (quoting Bagley, 473 U.S. at 678, 105 S.Ct. 3375).

14 Id. at 1054.

15 There were a number of concrete issues as to information not provided to the defense by
16 the prosecution. This would include, but not be limited to, all of the notes, tapes and interviews
17 with Quito, Tricia Miller and Sarah Smith, as discussed, supra. In particular, with Quito, all
18 evidence which supported the finding on the record that he was coached to lie under oath at the
19 Petrocelli hearing after being interviewed by members of the both the district attorney's office
20 and LVMPD. This information was withheld as "work product."

21 There was also the issue of the testimony of Eva Cisneros, Sarah Smith, Judy Estrada,
22 Adrienne Atwood, and Janeen Mutch who's statements were either not provided in a timely
23 manner (Smith, Estrada and Atwood) and who refused to speak with the defense, only after
24 speaking with the state (Smith, Cisneros and Mutch). This information was improperly withheld
25 and the issue of multiple interviews to "get it right" was presented in the statement given to
26 police by Mike Stevenson (another co-worker of petitioner). Again, this was not turned over as
27 alleged "work product." As to Virginia's former co-workers, Steve Ciulla, Richard Ingram and
28 Tom Thompson, they specifically told investigators they were told not to speak to the defense
investigators after talking or consulting with "their people" (the police and district attorney's
office).

With respect to witnesses refusing to speak with counsel for the defense or the defense

1 investigators, this was not preserved for the record, except in passing as to Tom Thompson. It is
2 believed that a number of the witnesses were told directly or indirectly by the state not to speak
3 with defense counsel and defense investigators. This is specifically prohibited under Nevada law
4 as noted in the case of Davis v. State, 881 P.2d 657, 110 Nev. 1107 (Nev. 1994). It is also
5 believed that the state had a hand in not having Emeline Eisenman testify for the defense as the
6 state "released" her from her subpoena and she went missing. The address and phone number
7 (contact information) provided to the defense from the state on her was bogus. Although they
8 claimed she was "out of town," they were the ones who put her up in the Golden Nugget (with
9 other members of Virginia's family) and she miraculously "re-appeared" (along with the "sister"
10 who was thrown out of the Court for coaching Tricia Miller) for Closing Arguments.

11 C. Conclusion

12 The state committed prosecutorial misconduct in misstating the law with regards to their
13 obligation to turn over the requested material to the defense and objecting to the defense request
14 to have the material turned over to the Court for an in-camera inspection. The Court committed
15 error by not following the applicable law with regards to this issue. While counsel did object to
16 the situation outside the presence of the jury, there was no attempt to preserve the objections to
17 the evidence, as it was received by the jury, so that the matter would be preserved for review or
18 object to the witness statements being turned over late or not being turned over at all.

19 Furthermore, the issue of witnesses refusing to speak with counsel for the defense or
20 defense investigators was similarly not preserved for the record. While this was objected to in an
21 out-of-the-presence hearing of the jury during the trial, it was not objected to during the
22 testimony and no request for a mistrial, a curative instruction, or motion to strike was made with
23 regards to the state's efforts in this regard. Defense counsel's failure to have objected to the
24 state's tactics is inexplicable, and there is no possible strategic reason for such failure. Not only
25 did the failure to object ensure that the jury could use the improperly received evidence in
26 assessing the credibility of the state's witnesses and of their case, but it also guaranteed that both
27 the admission of the evidence by the state and the trial court's admission of the evidence would
28 be analyzed on review only for plain error. Defense counsel's performance with respect to this

1 issue was constitutionally deficient under the Strickland standard.

2
3 **13. Defense counsel was ineffective on the issue of the state improperly shifting
the burden of proof in their rebuttal closing statement**

4 **A. Factual and procedural background**

5 Petitioner incorporates the facts and procedural background contained in Ground 5, supra,
6 as though fully set forth herein.

7 **B. Argument and legal authority**

8 Clark Peterson, an experienced litigator, and arguably Becky Goettsch, a district attorney
9 of lesser experience, knew or should have known better than to comment on the petitioner's
10 alleged failure to call witnesses and present evidence during Closing Argument. "It is generally
11 improper for a prosecutor to comment on a defendant's failure to call a witness. Such comment
12 can be viewed as impermissibly shifting the burden of proof to the defense." Rippo v. State, 113
13 Nev. 1239, 1253, 946 P.2d 1017, 1026 (1997) (citation omitted), cert. denied, 525 U.S. 841, 119
14 S.Ct. 104, 142 L.Ed.2d 83 (1998). This constituted prosecutorial misconduct, yet defense
15 counsel was ineffective in dealing with this behavior.

16 In Ross v. State, 106 Nev. 924, 926, 803 P.2d 1104, 1105 (1990), the prosecutor directed
17 the jury's attention to the fact that a person whose testimony would have supported the defense
18 theory did not testify and called on defense counsel to "explain why [this person] didn't come
19 forward." The Nevada Supreme Court stated that such a comment could be viewed as
20 impermissibly shifting the burden of proof to the defense. Such shifting is improper because it
21 suggests to the jury that the defendant has the burden to produce proof by explaining the absence
22 of witnesses or evidence. Id. at 927, 803 P.2d at 1105-06. The Court concluded that the impact
23 of the prosecutor's comment, along with other of the prosecutor's statements including that the
24 main defense witness was a liar, had the practical effect of shifting the burden of proof to the
25 defendant. Id. at 927-28, 803 P.2d at 1106. The judgment was reversed on the ground that the
26 errors were not harmless and deprived the defendant of a fair trial. Id. at 928-29, 803 P.2d at
27 1106-07.

28 The same factual situation was present in petitioner's case. The state impermissibly told

1 the jury that the petitioner had failed to call witnesses, and focused on the failure to call someone
2 to explain the "catatonia" and other areas of expert testimony. The state also called the main
3 defense witness, the petitioner, a liar, and this had the practical effect of shifting the burden of
4 proof to petitioner, which was specifically prohibited under Rippo, Ross and the other authority
5 mentioned in Ground Five, supra.

6 It was an error for the Court to simply "brush off" the state's misconduct and it was
7 ineffective assistance of counsel not to request a curative instruction, move to strike or request a
8 mistrial as a result of the state's improper actions which deprived petitioner of a fair trial.

9 C. Conclusion

10 While at least two instance of the shifting of the burden of proof were objected to on the
11 record, there were at least two additional instances that were not. During the hearing held
12 outside the presence of the jury after the trial was over, there was no request for a mistrial, a
13 curative instruction, or motion to strike made with regards to the state's efforts in this regard.
14 Defense counsel's failure to have objected to the state's tactics is inexplicable, and there is no
15 possible strategic reason for such failure. Not only did the failure to object ensure that the jury
16 could infer the petitioner was obligated to call witnessed and present evidence, and failed to do
17 so, but it also guaranteed that both the impermissible shift by the state, and allowed by the Court
18 without a motion to strike or curative instruction would be analyzed on review only for plain
19 error. Defense counsel's performance with respect to this issue was constitutionally deficient
20 under the Strickland standard.

21 14. Defense counsel was ineffective on the issue of the Court failing to rule on 22 various pre-trial motions.

23 A. Factual and procedural background

24 There were a number of instances in which defense counsel inexplicable waited until the
25 start of trial in which to address a number of matters that were pending with the Court. As
26 further explained below, it was inexplicable to do this as it allowed the prosecution to "sandbag"
27 the defense at trial with documents and evidence whose admissibility was suspect and should
28 have been ruled upon by the Court before the trial commenced. The Court also had a duty to

1 ensure that the various motions and issues were handled in an expedited fashion. But they were
2 not decided pre-trial which would have enabled the defense to prepare for issues and ruling
3 which affected the outcome of the trial.

4 **1. Failure of the state to provide discovery**

5 Petitioner incorporates Section 12, supra, as though fully set forth herein. In addition,
6 petitioner notes that defense counsel waited until during the trial to comment on the Court's
7 failure to exclude certain evidence which was received at trial. Prior to the calling of witness
8 Thomas Thompsen (Thompsen), see, Ground 6, Part 3, Section 13, Bloom raised the issue of the
9 failure of the state to turn over evidence under Nevada's reciprocal discovery statutes (NRS 174,
10 et. seq.) and United States Supreme Court decisions. Thompsen was one of several witnesses
11 who refused to speak to defense investigators ("He's actually refused to speak to our
12 investigator", See, AA, Volume 4, p. 100. lines 11-12)("I don't have anything on Mr. Thompsen.
13 He won't talk to us", Id. at p. 101, lines 11-12). This was not a new issue at trial. Bloom should
14 have brought this motion months before trial and have the matter placed on the record so the
15 Court could properly decide how best to handle the allegations of both the failure to turn over
16 discovery and whether or not the state had a hand in witnesses not cooperating, which was an
17 issue.

18 In the seminal decision of Davis v. State, 110 Nev. 1107, 881 P.2d 657 (1994), the
19 Nevada Supreme Court found:

20 In State v. York, 291 Or. 535, 632 P.2d 1261, 1264 (1981), a case cited to the trial
21 court by Davis, the court, on a similar set of facts, held "that a prosecutor should not
22 improperly interfere with the effort by the defense to interview prospective witnesses by
23 instructing them not to talk to the defense attorney or by telling them that 'it would be
24 better if they didn't say anything.' . . . As York and the Pennsylvania case relied upon
25 therein both note, prosecutors and police are not required to encourage or advise
26 witnesses to speak with defense counsel, and witnesses may not be compelled to do so.
27 Rather, the rule simply recognizes that, given the respect accorded police and prosecutors
28 by victims and witnesses, when such officials suggest that a witness not speak to the
defense this may have the same practical effect as directly telling a witness not to do so.
Such a course of action violates the policy against non-interference with a defendant's
access to witnesses and with a defendant's legitimate efforts to prepare a defense. We
conclude that this rule applies in Nevada. Absent special circumstances, prosecutors and
police officers are not to suggest to witnesses and victims that they refrain from speaking
to others about the case in a manner which would include the defense or tend to

1 discourage witnesses from cooperating with defense counsel and defense investigators.

2 Id. at 665.

3 Having announced the rule and found the violation the Court concluded:

4 Because of the violation of the rule announced above, we are forced to conclude
5 that Davis's convictions arising out of the Sanchez incident must be vacated and
6 dismissed with prejudice, as the harm resulting from the violation is not susceptible to
7 repair upon retrial. First, the Sanchezes may continue to decline to speak with defense
8 counsel or defense investigators based upon the earlier advice they received. Second, and
9 more importantly, even if the victims were willing to view pictures of other suspects,[110
10 Nev.1121] there would be a natural tendency not to deviate from previous trial testimony
even if a review of the pictures caused some doubt concerning their earlier identification
of Davis. The prospects for "unringing the bell," if indeed the sounds of the first bell were
untrue, are sufficiently slight as to constitute a denial of due process if we were to remand
for a new trial.

11 Id. at 665-666.

12 Petitioner incorporates the facts and argument of Section 12, with regards to petitioner's
13 co-workers and other witnesses. The defense never brought the issue to the Court regarding
14 petitioner's co-workers claiming attorney client privilege and then not willing to speak with their
15 client, the petitioner. Furthermore, the failure of the prosecution to provide statements at all or in
16 advance of the day of the testimony was only raised as to two witnesses, as is discussed below.

17 In the pretrial investigation the defense was repeatedly told by co-workers of Virginia and
18 others that they were told not to speak to them regarding the case. The co-workers of Virginia
19 were critical witnesses for the state as they helped to establish the facts and circumstances of
20 what was occurring in November and December of 2000, which the state used at trial to try to
21 establish motive and other factors leading up to the events of December 20, 2000.

22 It did not become clear to the defense what exactly the state was trying to hide with
23 regards to the co-worker's of Virginia until the trial, as demonstrated by the following:

24 a. **Steve Shula** - Steve was the one at Eagle Sentry (Virginia's
25 employer) who was having "an affair" with her. Mr. Shula could have contradicted the state's
26 theory that Virginia was the one who picked Nicholas up from day care on December 1, 2000,
27 while she was in fact with Shula and others all the way across town and never left the bar and
28 came back after she had picked up Nicholas. The failure of the defense to produce evidence that

1 Virginia was with Shula and other co-workers on the day that petitioner said he picked up his son
2 at day care was used to attack petitioner's credibility on a number of occasions.

3 **b. Thomas Thompson** - the state used this witness to testify
4 that he either heard or overheard a message, left for Virginia on her answering machine at Eagle
5 Sentry, which was purportedly from the petitioner and was a threatening message. In an ironic
6 twist, not only was this witness instructed not to speak with the defense, but his pre-trial
7 statement to the state and/or its investigators was not turned over to the defense under the guise
8 of attorney-client/work-product privilege. When this witness could not recall the message, the
9 state was unable to refresh his recollection with his statement. However, of more importance
10 was the loss or destruction of this tape, which did not provide the defense the opportunity to
11 counter the inference made at the trial with regards to any alleged threatening messages.

12 **c. Richard Ingram** - the state attempted to have him testify
13 that he allegedly played a message on Virginia's voice mail at work and a male voice was on
14 there threatening Virginia. The problem was they held the statement from the defense until the
15 day of Ingram's testimony, and amazingly (perhaps in reaction the numerous other instances this
16 occurred) the defense objected to and the Court ruled that the statement could not be used to
17 refresh his recollection because the state had not turned it over. Ingram balked on the stand and
18 this attempt at sand-bagging fell victim to it's own methods.

19 **2. Smear campaign evidence**

20 (See, Ground 6, Part 3, Section 3, supra).

21 **3. Sgt. Winslow's testimony**

22 (See, Ground 6, Part 3, Section 4, supra).

23 **4. Francisco Sanchez's testimony**

24 (See, Ground 6, Part 3, Section 5, supra).

25 **5. Janeen Mutch's testimony and evidence**

26 (See, Ground 6, Part 3, Section 7, supra).

27 **6. Mark Smith's testimony and records**

28 (See, Ground 6, Part 3, Section 9, supra).

1 7. **Traveler's employment records and employment issues**

2 (See, Ground 6, Part 3, Section 11, supra.)

3 8. **Failure to provide Brady materials**

4 (See, Ground 6, Part 3, Section 12, supra).

5 9. **Unsealing of the divorce file**

6 There were a number of instances in which the state played fast and loose with the
7 obtaining of testimony and evidence. This applied to the obtaining of attorney client/work
8 product information and documents (Janeen Mutch) and other privileged information (See, Mark
9 Smith and his therapist records). However, this misconduct dated all the way back to pre-trial
10 with regards to the state going "ex-parte" to have the divorce file unsealed. This was evidenced
11 in the state informing the Court and Bloom that they went ex-parte to the family court and
12 unsealed the divorce file to obtain copies of the divorce documents.) See, AA, Volume 1, 154, p.
13 59, line 7 to p. 58, line 23. At the time the Court's only concern seems to be if the defense got a
14 copy. Id. at p. 59, lines 22-23. Bloom then represented to the Court:

15 BLOOM: I will look at it, Your Honor, and see if it's improper.

16 Id. at p. 59, lines 6-7.

17 However, Bloom did not follow up and he failed to put them "in check" early on in the
18 case and allowed the state to get away with improper discovery tactics in violation of NRS
19 174.245.

20 10. **Failure to provide evidence of a valid warrant**

21 As discussed in Ground 6, Part I, Section 9, the state never provided to the defense the
22 necessary documentation to validate the warrant that was used in the search conducted on
23 December 20, 2000, although they did promise to do so. This also was never followed up by
24 defense counsel, even at trial (questioning could have provided a basis for a motion to suppress),
25 and as explained supra could have provided a basis to file a motion to suppress that could have
26 had a devastating effect on the state's ability to prosecute its case.

27 B. **Argument and legal authority**

28 In the case of Adcox v. O'Brien, 899 F.2d 735 (8th Cir. 1990) the Eighth Circuit looked at

1 whether or not counsel was ineffective for failing to obtain a ruling on pending motions in the
2 context of a defendant who had taken a guilty plea. The Court looked at counsel's failure to
3 request a ruling on Adcox's motions to suppress his confession and to suppress physical
4 evidence. Id. at 737. The motion to suppress the confession asserted that Adcox's confession
5 was not knowing and voluntary because it was made without Adcox being given the required
6 Miranda warnings. It also asserted that the confession given by Adcox was a result of coercion
7 and duress. Id. at 737.

8 Because Adcox's confession and the seized evidence were the central focus of the
9 government's case, a favorable ruling on the motions may have led counsel to change his
10 recommendation as to the guilty plea. Id. at 737. Here, each of the above issues was a central
11 focus of the government's case.

12 In Adcox, the Court remanded the matter for consideration of Adcox's motions to
13 suppress, in determining if the failures were ineffective. Id. at 737. Here, the Court is faced with
14 a similar situation in that it should conduct a hearing on the ineffectiveness as it would assist the
15 Court in determining if the failure to handle the above mentioned issues pre-trial affected it's
16 outcome.

17 C. Conclusion

18 Defense counsel's failure to have the Court rule on motions that were pending pre-trial is
19 inexplicable, and there is no possible strategic reason for such failure. It was also inexcusable for
20 defense counsel not to at least request a continuance because the pre-trial issues and motion were
21 not decided. They should not have waited until the day the witnesses and evidence were to be
22 presented to the jury with defense counsel not being prepared. These were not obscure issues but
23 ones known to the defense and integral to the state and defense presentation of the case. The
24 failure to object ensured that the state could use and jury consider these issues, but it also
25 guaranteed that these issues and the trial court's failure to decide or consider their merits would
26 be analyzed on review only for plain error. Defense counsel's performance with respect to this
27 issue was constitutionally deficient under the Strickland standard.

28 /////

1 **15. Defense counsel was ineffective on the issue of the faulty jury instructions.**

2 **A. Factual and procedural background**

3 Petitioner incorporates Ground 5 as though fully set forth herein. In addition, counsel
4 failed to request a jury instruction on the alleged loss of evidence by the state with regards to
5 Virginia's properly collected at 8720 Wintry Garden, her residence and her work, as well as the
6 exercise bike and other items supra, despite the fact that this was an issue both pre-trial and at
7 trial. These were crucial items of evidence for the reasons discussed previously.

8 **B. Argument and legal authority**

9 While counsel did file a motion which was denied pre-trial (in 2001) on the issue of the
10 Reasonable Doubt Instruction, there was no effort to re-raise the issue almost three years later or
11 make a record of the objected to instruction offered by the state and adopted by the Court. There
12 was no objection made as to the faulty Premeditation Instruction.

13 Defense counsel had a duty to ensure that the proper instructions were given to the jury at
14 trial. The failure to object to erroneous jury instructions constitutes ineffective assistance of
15 counsel. See, Kubat v. Thieret, 867 F.2d 351 (7th Cir. 1989); Gray v. Lynn, 6 F.3d 265 (5th Cir.
16 1993); Luchenburg v. Smith, 79 F.3d 388 (4th Cir. 1996). In Carver v. El-Sabawi, 121 Nev. Ad.
17 Rep. 3, 107 P.3d 1283 (2005), the Nevada Supreme Court held that jury instructions that tend to
18 confuse or mislead the jury are erroneous. Id. at 107 P.3d 1283. The Nevada Supreme Court
19 reviews an allegedly erroneous jury instruction for prejudicial error in light of the evidence.
20 Mainor v. Nault, 120 Nev. 750, 101 P.3d 308 (2004). The Nevada Supreme Court also reviews
21 the giving of erroneous jury instructions under a harmless error analysis, Santana v. State, 122
22 Nev. Adv. Rep. 121, 148 P.3d 741 (2006),

23 However, the United States Supreme Court has held a defective reasonable-doubt
24 instruction structural error. See, Recuenco, 126 S.Ct. at 2551 n. 2. The Ninth Circuit has also
25 held in Polk v. Sandaval, No. 06-15735, that a faulty premeditation instruction was not harmless.
26 And the matter was reversed and remanded. Id. at 12228. In both instances the Court
27 determined that faulty instructions are a violation of the federal constitutional right to due
28 process.

1 Finally, defense counsel was ineffective for **not** making a request for a jury instruction on
2 the alleged loss of evidence by the state as to Virginia's property, and the exercise bike after the
3 incident. In the case of Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1991) a murder case
4 involving self-defense, the Nevada Supreme Court concluded that the mishandling of the
5 evidence had prejudiced Sanborn, entitling him to a jury instruction setting forth the conclusive
6 presumption that the victim had held and fired the gun. No such request was made by counsel
7 and the matter was not preserved by defense counsel for the record.

8 C. Conclusion

9 It was improper for the Court to deny the defense request to amend the reasonable doubt
10 instruction, which was defective and therefore denied petitioner his right to due process and a fair
11 trial. It was ineffective for counsel not to have raised this issue on the record prior to the
12 instructing of the jury in this case. It was also error by the Court in improperly instructing the
13 jury on the issue of premeditation and was ineffective assistance of counsel for not recognizing
14 that the instruction given was unconstitutional. Finally, counsel was ineffective in not
15 requesting an instruction on the loss of evidence, thus not preserving the issue for direct appeal
16 and forcing it to be reviewed for plain error. It cannot be said that the failure to instruct the jury
17 properly did not affect the outcome of the trial and counsel's failure to properly address the issue
18 did not fall below the standard set in Strickland.

19 **16. Defense counsel was ineffective for failing to object in a timely manner**
20 **to the improper cross-examination of petitioner and several other witnesses**
21 **and the use of other improper impeachment techniques.**

22 A. Factual and procedural background

23 Petitioner was advised to testify by counsel on the representation that petitioner's counsel
24 was properly prepared to present to the jury the issues of self-defense as well as the issue of
25 petitioner's mental state as an element of the defense. However, defense counsel was in
26 possession of information prior to the commencement of trial, in the form of expert reports and
27 consultations, that a number of elements of the defense case would be undermined by the
28 evidence provided to defense counsel prior to trial.

As previously stated, and incorporated herein by this reference from Ground Six, Part 1,

1 Section 13, counsel failed to prepare for trial and this failure set up a cross-examination which
2 allowed the state to argue to the jury to disregard all of petitioner's testimony, thus essentially
3 vitiating any defense at all (since the mental state defense was abandoned by defense counsel
4 during trial without petitioner's knowledge or permission.

5 The issue of the plastic surgery being essential to the knowledge by petitioner of drug use
6 and a history of violence was the subject of the following:

7 **1. Cross-examination of petitioner**

8 Q. What you have, though, according to what you told us on direct, is Dr.
9 Scott Sessions or Dr. Sessions or a doctor who told you that she had
10 damage to her nose from extensive drug use; is that right?

11 A. Yes, that's correct.

12 Q. This doctor pulled you aside and said "Gina had damage to her nose from
13 drugs," right?

14 A. Yes.

15 Q. You weren't -- you weren't this doctor's patient, but he pulled you aside and told
16 you this information; is that true?

17 A. Yes, he told me that information.

18 Q. You remember that pretty vividly on the witness stand, didn't you?

19 A. Yes.

20 Q. I mean, you told us on direct how he pulled you aside, the words he told you.
21 You even kind of mimicked sort of the concern in his voice. "Hey, I got
22 something to tell you. There's all this drug use."
23 You did that on direct; is that right?

24 A. I explained to you what I recall him telling me, yes.

25 Q. You're sure that happened?

26 A. Yes, I'm sure that happened.

27 Q. You're as sure that happened as you are of your innocence in this case?

28 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?

1 A. No, I wouldn't.

2 Q. And one of the reasons why you're so sure of this is, as you told us on direct, Dr.

3 Sessions' comments to you were what led you to question Gina about drugs, right?

4 A. Yes.

5 Q. So if Dr. Sessions never told you that you would never have questioned Gina

6 about drugs; isn't that true?

7 A. No. I don't believe that would be true.

8 Q. Okay. That doctor's full name is Scott Sessions; is it not?

9 A. I don't know the doctor's full name.

10 Q. The guy who did her nose and eventually some other cosmetic surgery, is that

11 true?

12 MR. BLOOM: Is what true? Objection. Vague.

13 THE COURT: Vague?

14 BY MR. PETERSON:

15 Q. Though you don't know the doctor's full name, it's Dr. Sessions; is it not?

16 A. Actually there was another doctor as well.

17 Q. All right. Well, I think Mr. Bloom said Dr. Sessions, you said Dr. Sessions. That

18 is who we're talking about.

19 A. There was also a Dr. Scaheda (phonetic) because Dr. Sessions didn't have --

20 Q. Was that question confusing?

21 The doctor who told you those words to you is Dr. Sessions, is that true.

22 A. Yes, Dr. Sessions.

23 Q. Okay. Do you know where Dr. Sessions is right now?

24 A. I have no idea at all.

25 Q. He's on vacation. Want to know what he's going to do when he get's back? MR.

26 BLOOM: This is really cute. Mr. Peterson always talks about experienced

27 counsel. Experienced counsel, Mr. Peterson, knows that's an improper form.

28 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.

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

2 Defense counsel should have objected much sooner to stop this question from being
3 completed as it was highly prejudicial and amounted to the prosecutor "testifying" via improper
4 hearsay statements. It was ineffective for defense counsel not to do that or to contact Dr.
5 Sessions, after being put on notice by this question, prior to Dr. Sessions being called as a
6 witness for the state. This served to compound the previously discussed failure by defense for
7 not contacting the plastic surgeon or his partner prior to allowing petitioner to testify about the
8 decedent's surgery.

9 **2. Cross-Examination of Camille Centofanti**

10 The state also employed improper techniques on petitioner's parents.

11 Q. Did you tell the police that night that you were in a state of shock?

12 A. I don't think I had to tell them. I think they could see it.
13 Peterson: Would you be surprised to learn that they disagree with that
14 assessment?

15 AA, Volume 3, 144, p. 93, lines 2-8.

16 **3. Cross-Examination of Alfred Centofanti**

17 Peterson: Would you be surprised if Eva Cisneros says that you called her from the house
18 shortly after the shooting?

19 A. Would I be surprised?

20 Q. Yes.

21 A. She wouldn't say that.

22 Q. Okay. And she wouldn't say that she handed the phone to your wife and your
23 phone -- and your wife said "Chip shot Gina."

24 A. She wouldn't say that either.

25 AA, Volume 3, 169, p. 70, line 18 to p. 71, line 2.

26 Peterson: If the Wrights said that you said . . . do you have any reason
27 to dispute their recollection.

28 AA, Volume 3, 170, p. 73, lines 10-12.

B. Argument and legal authority

In Daniel v. State, 78 P.3d 890, 119 Nev. 498 (Nev. 2003) the Nevada Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED P. CENTOFANTI III,)
)
)
Appellant,)
)
vs.)
)
E.K. McDANIEL, WARDEN,)
ELY STATE PRISON)
)
Respondent.)
_____)

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17	State's Opposition to Defendant's Petition for Writ of Habeas Corpus (Post-		
18	Conviction) (April 8, 2008)	11	144-197
19	State's Response to Defendant's Memorandum of Law Regarding Issues of		
20	Attorney Client Privilege (January 8, 2004)	2	33-37
21	State's Response to Defendant's Motion for Reconsideration, Withdrawal,		
22	and Appointment of Alternative Counsel, and Stay of Proceedings (May 25,		
23	2011)	14	27-34
24	Stipulation and Order to Continue Sentencing Date (May 25, 2004)	6	15-16
25	Substitution of Attorney (May 25, 2004)	6	13-14
26			
27			
28			

1	Transcript of Proceedings State's Motion to Strike Defendant's Expert/		
2	Evidentiary Hearing/ Petition for Writ of Habeas Corpus, July 30, 2010		
	(August 30, 2010)	13	1-168
3	Transcript of Proceedings Evidentiary Hearing and Petition for Writ of		
4	Habeas Corpus, September 24, 2010 (October 19, 2010)	13	169-206
5	Verdict (April 16, 2004)	6	3
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1 would be called as a "20 year police officer criminalist and blood spatter expert out of San Diego
2 California" to assist the jury with the forensic evidence. AA, Volume 8, 062, p. 183, lines 6-25.
3 DeMeo was to be called as the only police criminalist to be called by the defense to assist the jury
4 with understanding the processing of the crime scene evidence. The jury was given no
5 explanation as to why she was not called at trial and the issues she was to address were not
6 covered by other witnesses.

7 Considering that the failure to collect evidence by LVMPD and the state on December 20,
8 2000 (Virginia's property and the exercise bike) as well as other evidence (Virginia's apartment
9 and work) were such critical issues for the defense at trial, the failure of the defense to call it's
10 own crime scene analyst was both ineffective and prejudicial. DeMeo's testimony would not
11 have been cumulative or merely impeaching but was essential to the presentation of the defense
12 theory of the case.

13 8. Amanda Pearson

14 Amanda was an employee of one of the Court Reporting Agencies utilized by the insurance
15 defense industry to conduct depositions, hearing and other services related to petitioner's
16 employment as an insurance defense attorney. They knew each other for years and had dated briefly
17 in San Diego. Petitioner ran into Amanda in Las Vegas in December of 2000 while he was going
18 through his divorce. They eventually went on a few dates during the critical time period of
19 December of 2000. Petitioner met with Amanda after his divorce hearing on December 12, 2000
20 and they had drinks. She commented to him how well he was doing under the circumstances. They
21 then went out during the weekend of December 16, 2000 and were supposed to go out the night of
22 December 20, 2000. Amanda even spent the night at petitioner's house on the night of December
23 16, 2000 and met his parents and Nicholas on the morning of December 17, 2000. She is the only
24 witness that could have been called to refute the scandalous and false allegations of Sarah Smith as
25 well as could have offered favorable defense testimony about petitioner, his demeanor and his
26 character. Defense counsel had been given the identity of Amanda. She had been located and
27 interviewed by defense investigators, but she was not subpoenaed for trial and did not testify.
28 Pearson's testimony would not have been cumulative or merely impeaching but was essential to the

1 presentation of the defense theory of the case.

2 **B. Argument and legal authority**

3 In State v. LaPena, 968 P.2d 750, 114 Nev. 1159, (Nev. 1998) the Nevada Supreme Court
4 held counsel not to be ineffective for not calling certain witnesses because that decision was based
5 upon strategic reasoning made after reasonable investigation. The Court further denied relief
6 because defendant did not elaborate on what the witnesses' testimony might have been. Here,
7 petitioner has established both the ineffectiveness and what the testimony might have been. As to
8 the witnesses listed above:

9 Emeline Eisenman was not called because counsel failed to subpoena her and when time
10 came for her to testify she could not be located. This is not the product of strategic reasoning or
11 reasonable investigation, but the failure to subpoena. See, Goodman v. Bertrand, 467 F.3d 1022,
12 1029 (C.A.7 (Wis.) 2006). Petitioner has clearly established the substance and importance of her
13 testimony and the fact that it would not be merely cumulative or impeaching.

14 Furthermore, it was ineffective for counsel to fail to make a record of the facts and
15 circumstances surrounding her sudden "disappearance" during the trial including the state's excuse
16 that they did not know where she was. The state was able to locate Dr. Scott Sessions while he was
17 on vacation. They were able to have him return from his vacation to testify against petitioner, but
18 they were unable to locate a person who they paid to have come to Las Vegas and testify at trial.

19 Lt. Franks, an expert petitioner and the jury were told was a retained defense expert, was not
20 called because he refused to honor his subpoena. No motion was filed and no attempt was made to
21 compel his attendance. This is not the product of strategic reasoning or reasonable investigation.
22 Petitioner has clearly established the substance and importance of his testimony and the fact that it
23 would not be merely cumulative or impeaching.

24 Ricardo Dominguez's grandmother was not called because counsel failed to take the steps
25 to subpoena her, despite the fact that they subpoenaed a number of other out-of-state witnesses. This
26 is not the product of strategic reasoning or reasonable investigation. Petitioner has clearly
27 established the substance and importance of her testimony and the fact that it would not be merely
28 cumulative or impeaching.

1 Michael Stephenson was not called because counsel failed to subpoena him to trial. This is
2 not the product of strategic reasoning or reasonable investigation. Petitioner has clearly established
3 the substance and importance of his testimony and the fact that it would not be merely cumulative
4 or impeaching.

5 Herb was not called because counsel failed to locate, interview and subpoena him. This is
6 not the product of strategic reasoning or reasonable investigation. Petitioner has clearly established
7 the substance and importance of his testimony and the fact that it would not be merely cumulative
8 or impeaching.

9 Dr. Calixico and Nurse Kruger were not called as witnesses even though they were located
10 and willing to testify. They were the only witnesses to the medical events of December 4, 2000,
11 which the state strongly argued were fabricated by petitioner. This is not the product of strategic
12 reasoning or reasonable investigation. Petitioner has clearly established the substance and
13 importance of their testimony and the fact that it would not be merely cumulative or impeaching.

14 Lisa DeMeo, a retained defense expert, was not called without any explanation by defense
15 counsel after she was introduced in opening statements. There was no other expert criminalist
16 retained or called by the defense. Not calling her, or providing an explanation to the jury for her
17 failure to testify is not the product of strategic reasoning or reasonable investigation. Petitioner has
18 clearly established the substance and importance of her testimony and the fact that it would not be
19 merely cumulative or impeaching.

20 There was no reason not to call Amanda Pearson as a witness in the trial. She was the only
21 witness who could have supported petitioner's version of events regarding December of 2000, and
22 refuted the scandalous and false testimony regarding petitioner offered by Sarah Smith, who seemed
23 offended when petitioner wanted to leave the party she took him to be with Amanda.

24 C. Conclusion.

25 When petitioner attempted to present his version of events the failure of his counsel to
26 properly prepare, develop and present the facts and evidence properly, prevented petitioner from
27 providing support to the defense theory of the case. This prejudiced petitioner in that the state used
28 the failed and faulty presentation to attack not only the defense theory of the case, but the credibility

1 of petitioner. Since the presentation of the defense in this matter largely rested on the credibility
2 of petitioner it cannot be said that the failure on this issue did not affect the outcome of the trial.
3 Counsel's performance with respect to this issue was constitutionally deficient under the Strickland
4 standard.

5 **II.**

6 **Trial Ineffectiveness**

- 7
8 **1. Defense counsel's was ineffective for failing to object or do anything about**
9 **the juror who wore a t-Shirt which read "Do you know what a murdered**
10 **looks like?" during closing arguments constituted ineffective**
11 **assistance of counsel.**

12 **A. Factual and procedural background**

13 Incorporate by reference as previously set forth herein.

14 **B. Argument and legal authority**

15 See, Daniel v. State, 78 P.3d 890, 119 Nev. 498, (Nev. 2003) [Defendant's right to an
16 impartial jury was violated when trial court refused to question juror about juror's comment to
17 bailiff, asking why defendant was not in shackles].

18 **C. Conclusion**

19 Incorporate by reference as previously set forth herein.

- 20 **2. Defense counsel was ineffective for failing observe or object to the two jurors**
21 **who were sleeping intermittently during the trial constituted ineffective**
22 **assistance of counsel.**

23 **A. Factual and procedural background**

24 Incorporate by reference as previously set forth herein.

25 **B. Argument and legal authority**

26 Incorporate by reference as previously set forth herein.

27 **C. Conclusion**

28 Incorporate by reference as previously set forth herein.

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1
2 **3. Defense counsel was ineffective for failing to stop the prosecutors from using**
3 **the words "murder", "victim" and "crime scene" to describe the**
4 **circumstances of the homicide constituted ineffective assistance**
5 **of counsel.**

6 **A. Factual and procedural background**

7 Incorporate by reference as previously set forth herein.

8 **B. Argument and legal authority**

9 Incorporate by reference as previously set forth herein.

10 **C. Conclusion**

11 Incorporate by reference as previously set forth herein.

12 **4. Defense counsel was ineffective for failing to stop the prosecutors from using**
13 **the words "assassination," "assassination shots" " mafia hit man"**
14 **to describe the circumstances of the homicide and petitioner, and**
15 **incorporating those terms and "execution" and "coup de grace"**
16 **into the defense case constituted ineffective assistance of counsel.**

17 **A. Factual and procedural background**

18 During trial, counsel failed to object to the state's use of the terms "assassination,"
19 "assassination shots" and " mafia hit man. " By not objecting to the terms, and then incorporating
20 those terms into the defense case, counsel in essence, endorsed them. Defense counsel also used the
21 terms "execution" and "coup de grace" which, as explained below, was ineffective assistance of
22 counsel.

23 1. The term "assassinate" has a very clear definition. To murder (a prominent person)
24 by surprise attack, for political reasons. See, The American Heritage Dictionary of The English
25 Language, Third Edition, 1992, at page 110.

26 2. An assassin is one who murders by surprise attack, especially one who carries out a
27 plot to kill a prominent person. Id. at p. 110.

28 3. To execute is the act or an instance of putting someone to death. Id. at 640.

 4. A coup de grace is a death blow delivered to end the misery of a mortally wounded
 victim. Id. at 429.

 5. The Mafia is a secret terrorist organization in Sicily and also an alleged international

1 criminal organization believed active, especially in Italy and the United States. Id. at 1079.

2 6. A "hit man" is a slang term for a murder plan planned and carried out usually by a
3 member of an underworld syndicate. Id. at 858.

4 These terms are conclusory and inflammatory and should not have been allowed in the
5 presentation of the case to the jury.

6 **1. Opening statements**

7 In the prosecutor's opening statement on March 17, 2004, Peterson used the following to
8 describe the shooting which took place on December 20, 2000:

9 [T]he shots to the head were very focused, assassination type shots.

10 AA, Volume 8, 005, p.126, lines 1-2.

11 These comments were presented to the jury by the state without objection by the defense.

12 **2. Testimony of Dr. Larry Simms**

13 Bloom did not object to the assassination comments in the opening statement and little did
14 he know how prominent a role they would play in the subsequent examination of Dr. Larry Sims,
15 the coroner who performed the autopsy of Virginia on December 21, 2001, as the term assassination
16 was not found anywhere in the report provided to the defense before trial.

17 Q. How would you characterize the shots to the head based on what you've seen with
18 violent death and the injuries you have noted in years in autopsies?

19 A. Yeah. I call those assassination shots.

20 Q. And why do you call them that?

21 A. . . . this is the type of thing that after you take them down and you go up to
22 them, it's the same thing you see in the movies.

You go up to them in the head, and you put one placed shot or a number of shots.
But that's what I've seen over and over again.

23 AA, Volume 4, 204, p.60, lines 2-14.

24 There were two more questions asked and answered, and received by the jury, as to why he
25 considered them assassination shots that were received, as was the preceding cited questions, without
26 objection by Bloom. See, Id. at lines 15-23.

27 When it came time for re-direct, the Prosecutor really hit the point home:

28 Q. Is there anything that was brought up on cross-examination that would

change your opinion of how you characterize the head shots as assassination shots?

A. No.

Q. And would you say as a reason[able] degree of medical certainty the shots in the head appeared to be execution or assassination shots?

A. That is still my opinion.

AA, Volume 4, 215, p. 104, lines 14-21.

Q. Now in those situations, do you see the type of well placed, directed shots that occurred to Mrs. Centofanti's head in this case?

A. No, in the police shootings I've done, which probably are around 40 to 50, I have never seen an assassination shot.

AA, Volume 4, 216, p. 106, line 22 to page 107, line 2.

Q. Would you every see them in this sort of directed assassination shots?

A. **As I said before**, I've never seen that in a police shooting, no.

AA, Volume 4, 216, p. 108, lines 4-7. (emphasis added)

So, not only did Bloom fail to object to the terminology being used, which was conclusory, inflammatory and prejudicial, not to mention yet another clever way the state avoided the pre-trial rulings to not use the terms victim, murder and the like, but he allowed the state to continue to ask the same questions repeatedly without objection. When the witness answered a question "As I said before" an objection on the grounds of "asked and answered" should be placed on the record, especially when inflammatory remarks are repeated. Furthermore, Bloom made no attempt to challenge the substance of the testimony Sims had never seen a police shooting with a shot or shots to the head making the comments even more prejudicial.

3. Use of the objectionable terms by Bloom

Rather than object to the terminology being used, Bloom appeared to embrace it and used it during his re-cross-examination of Sims as well as extensively in examining his first witness Jimmy Trahin. This compounded the undue prejudice as set forth below.

a. Dr. Simms

Q. And the term assassination shots would be a characterization that you were putting on this, if it's down on the ground and it's in that particular scenario?

A. Yes. And that was just the best I could come up with at the time. You could call it something else, but that is something that I've seen and I've actually

1 heard other people use it to, but that's what I'm talking about.

2 Q. And so if a shot is described with her body up, head, mouth, eye, temple,
3 if that was upright, would you still call it that?

4 A. It could be called an assassination shot.

5 Q. And, by the way, the term assassination shot is not a medical term. It's not
6 in your report?

7 A. It's not in the medical dictionary either.

8 AA, Volume 4, 217, p. 112, lines 4-19.

9 That was the last bit of testimony the jury heard from Dr. Sims before Jimmy Trahin, the
10 defense "ballistics expert", took the stand. The use by defense counsel of the improper terminology
11 continued:

12 **b. Jimmy Trahin**

13 Q. Dr. Simms just came up here and gave us a name, not a medical name,
14 name of assassination shots . . .

15 A. . . . It's not consistent with an assassination, a coup de gras (sic) shot with
16 the head to the ground.

17 AA, Volume 4, 223, p. 136, lines 13-25.

18 Q. Can you explain that to the jury?

19 A. . . . the victim fell to the ground where we have his coup de gras (sic)
20 assassination shot. . .

21 AA, Volume 4, 224, p. 137, lines 1-6.

22 The defense "expert" goes on to use either coup de grace or assassination another five times
23 [Id. at p. 137, line 19; p.138 line 25 to page 139, line 1; p. 139, line 11; and p. 139, line 25 to p. 140,
24 line 1.] The use and frequency of the improper terminology evidences either a complete lack of
25 preparation, or a complete abandonment of the defense.

26 **c. Closing**

27 **1. The state**

28 Finally in closing argument, the prosecutor offers this sarcastically delivered remark to the
jury, which when tied in with the planned use of assassination and execution and other remarks,
hardly seems a "slip of the tongue":

We're not prosecuting Chip Centofanti for being a hardened mafia hit man who
can kill unfeelingly.

1 AA, Volume 5, 218, p. 38, lines 7-9.

2 Not only was this snide and inappropriate comment not objected to by Bloom, which is
3 even more offensive considering petitioner is of Italian decent, but is yet another example of the
4 out of control prosecutorial misconduct which infected the entire proceedings.

5 2. The defense

6 Bloom admits his failure to object to the comments in his closing:

7 [T]he whole idea about this assassination style which Dr. Sims chose to add.
8 By the way, Dr. Sims, a very candid witness, those were his words. They are
9 not in the medical vernacular. They are not part of a forensic evaluation. That
10 was his lay interpretation, **beautiful, I might add.** (Emphasis added)

11 AA, Volume 5, 227, p. 73, lines 9-16.

12 If Sims was offering "lay opinion" (which is improper) then why was it not objected to
13 during his testimony? Why was it re-emphasized in closing?

14 Bloom then again emphasized the issue of the assassination shots in his closing remarks to
15 the jury:

16 A whole lot of time was spent with you to try to show this was some sort of
17 assassination-type killing. Assassination-type killing, that's probably the best
18 place to start in terms of evaluating where you should go in terms of what really
19 happened here.

20 AA, Volume 5, 223, p. 62, lines 10-15.

21 B. Argument and legal authority

22 Incorporate by reference the argument and authorities set forth in Ground Three set forth
23 above. In addition, while there is a dearth of Nevada case law on this topic, the Kansas Supreme
24 Court did address it in the case of State v. Miller, 163 P.3d 267, State v. Miller, (Kan. 2007), in
25 which the prosecutor's six references in closing argument to murder defendant as "the killer"
26 were improper and constituted misconduct, as they were inflammatory and injected into
27 argument the prosecutor's personal opinion of defendant's guilt. In reaching this conclusion the
28 Court relied upon the following analysis:

Counsel was ineffective in failing to prepare for trial, lessening the burden of
prosecution.

A prosecutor "is given wide latitude in language and in manner or presentation

1 of closing argument as long as the argument is consistent with the evidence.
2 [Citation omitted.]" State v. Scott, 271 Kan. 103, 114, 21 P.3d 516,
3 cert. denied, 534 U.S. 1047, 122 S.Ct. 630, 151 L.Ed.2d 550 (2001).
4 Nevertheless, this court "cannot condone 'the use of epithets which in any way
5 might be construed in derogation of the presumption of innocence which attaches
6 to one on trial for crime.'" [Citation omitted.]" State v. Collins, 209 Kan. 534,
7 535, 498 P.2d 103 (1972).

8 In Scott, the prosecutor made the following statement during closing argument in
9 a case for first-degree murder where the victim was beat to death:

10 " 'Remember again, these are the hands of a human being that did this to another
11 human being. Don't get desensitized by just the grotesqueness of it, because
12 almost all of you probably have never seen something like this before. You look
13 at it and just think can a human being do this? Yeah, you have about eight feet
14 separating you from the hands of a killer right here.' " 271 Kan. at 114, 21 P.3d
15 516. In determining whether this statement constituted prosecutorial misconduct,
16 we found that "[c]alling Scott a 'killer' was improper, especially considering Scott
17 did not deny having caused Chappell's death and relied upon a theory of self-
18 defense. The use of the word 'killer' is inflammatory and was outside the scope of
19 evidence upon which the prosecutor is allowed to comment." 271 Kan. at 114, 21
20 P.3d 516. However, the Scott court ultimately held that the prosecutor's
21 comment was harmless since it was one isolated incident. In addition, the court
22 found that there was "no evidence to suggest that there was any 'ill will' on the
23 part of the prosecutor," and "[t]he comment was not so gross and flagrant as to
24 have prejudiced the jury against Scott and deny him a fair trial." 271 Kan. at
25 115, 21 P.3d 516.

26 Our conclusion in Scott that the prosecutor's comment calling the defendant "a
27 killer" was impermissible relied in part on this court's previous decision in state
28 v. McCray, 267 Kan. 339, 979 P.2d 134 (1999). In that case, the prosecutor
commented during the summary of his closing argument that "[s]omeone is
responsible for the murder of Onzie. Somebody is, and that somebody,
ladies and gentlemen, is only feet from you. That someone as you know is Damon
LaShawn McCray. Look at him, ladies and gentlemen, you have to look at him.
That's what a murderer looks like, ladies and gentlemen.'" (Emphasis added.)
267 Kan. at 347, 979 P.2d 134.

This court explained in McCray that "[i]t is a well-established rule in this state
that error is committed when a prosecutor injects his or her personal opinion into
closing argument. [Citation omitted.] The statements made by the prosecutor in
this case regarding the prosecutor's personal opinion of the defendant's guilt were
error."

Id. at 292-293.

C. Conclusion

It was clearly prosecutorial misconduct to use the terms "assassination," "assassination
shots" and "mafia hit man." This was clearly an attempt by the prosecution to "get around" the

1 Court's pre-trial ruling against using conclusory and inflammatory terms in the presentation of it's
2 case to the jury. What compounded this prosecutorial misconduct was the failure of counsel to
3 object. This precluded the issue from direct appellate review. What compounded it even further
4 was defense counsel incorporating the objectionable terms and the terms "execution" and "coup
5 de grace" into the defense case. It cannot be said that the use of these terms was not prejudicial,
6 and did not effect the outcome of the trial. Counsel's performance with respect to this issue was
7 constitutionally deficient under the Strickland standard.

8
9 **5. Defense counsel was ineffective in failing to properly handle the
issue of the testimony of Francisco "Quito" Sanchez.**

10 **A. Factual and legal background**

11 Francisco "Quito" Sanchez was Virginia's child from a previous relationship who was
12 living with Virginia, petitioner and Nicholas at the time of the December 5, 2000, domestic
13 violence incident. Quito was nine years old at the time. Quito told the police who interviewed
14 him the day of the incident that he was awoken by the sound of arguing and found himself
15 covered in glass. He then hid under his bed and did not see or hear anything.

16 A Petrocelli hearing held on December 27, 2001, to determine whether or not Quito's would
17 be allowed to testify at trial and if his testimony would be admitted as "bad acts" evidence. Quito
18 was ten years old at the time of the hearing. After Bloom requested the hearing be sealed and
19 witnesses excluded the following was placed on the record:

20 MR. LAURENT: The witness who is on the stand -- in the audience right now is
21 here as moral support, not as a potential witness. And minors are entitled to have
someone like that even come up and sit with them if they want.

22 THE COURT: Mr. Bloom, if he's not going to be a witness in the case and it's the
23 minor's desire to have him there, do you have a problem with that?

24 MR. BLOOM: If this witness -- if this person -- we're talking about that same
gentleman that gave him his name earlier?

25 [Douglas Thorborn, Lisa Eisenman's boyfriend at the time was allowed to be in
the courtroom during Quito's testimony (ostensibly pursuant to NRS 178.571),
See, AA, Volume 1, at 161.]

26 THE COURT: Right.

27 MR. BLOOM: If this gentleman did assist in discussing this matter with this
28 witness and did discuss the potential what's going to happen today, in terms of
testimony or things like that, then the person becomes a potential witness.

...

1 THE COURT: Well, I will let him stay, but I'm going to admonish him on what
2 can be done and can't be done in court.

MR. LAURENT: Okay.

3 AA, Volume 1, 168, p. 115, line 15, to p. 116, line 17.

4
5 THE COURT: I'm welcome to have you here, but I don't want you discussing
6 this case with Quito or say anything to him about testimony or anything unless it's --
7 not only from this point forward, but through the duration of the trial. Okay?
8 Do you understand that?

MR. THORBURN: I understand it.

9
10 MR. LAURENT: Don't talk to Lisa about it; don't talk to anyone about it. What
11 you observed here and heard is to remain here. Okay?

THE COURT: Okay. Thank you.

12 AA, 172, p. 131, lines 10-22.

13 As of the time of the hearing that day, the only evidence provided to the defense
14 regarding Quito were the police reports from December 5, 2000. Unknown to petitioner and his
15 counsel, Quito had been the subject to multiple interviews by members of the both the district
16 attorney's office and the Las Vegas Metropolitan Police Department. These interviews were not
17 disclosed to the defense until after the hearing had begun and Quito already began to testify.

18 This was of course a surprise and shock to the defense who was handed transcripts of the
19 multiple interviews after Quito had testified. It can only be surmised that this was a tactic to
20 prevent the defense from being allowed to adequately prepare and cross examine Quito. Bloom
21 was forced to interrupt the proceedings:

22 MR. BLOOM: Excuse me, Your Honor.
23 I apologize.

(Whereupon, a sotto voce at this time.)

THE COURT: Do you want to break here, Mr. Bloom.

24 MR. BLOOM: Well, I've just had a chance to skim through the materials that I
25 had received today, this morning from the District Attorney, and some documents
26 that I signed for today. And I believe that contained in those documents is an
27 October 24th -- October 24th interview with the witness by the District Attorney.
28 I have never seen this --

THE COURT: Okay.

MR. BLOOM: -- I don't believe I have ever seen this document or this tape
recording.

MS. GOETTSCH: This is a Petrocelli hearing. I mean, I don't understand what
the objection is.

1 MR. BLOOM: The objection is that the defense should have had the opportunity
2 to examine the witness and have all the information that both parties have; and
the District Attorney has been sitting on this for two months and --

3 MS. GOETTSCH: That is not true. It took us a while to get this described. I
4 mean, my secretary, who does a whole lot of track work, transcribed this.

5 THE COURT: Okay. Let's do this --

6 MS. GOETTSCH: And I don't think he's in a position right now to be saying
7 stuff is late.

8 AA, Volume 1, 171, p. 128, line 19, to p. 129, line 22.

9 Based upon the above the Court responded:

10 I'm not going to -- I'll rule on whatever you feel the appropriate motion is and I
11 will hear the state's response to it, but I want to give you a break today, so you
12 can prepare for your examination.

13 AA, Volume 1, 172, p. 130, lines 3-6.

14 Bloom asked for and was granted a brief continuance in the hearing in order to properly
15 prepare for cross-examination. The Court specifically admonished both Quito and Douglas not
16 to discuss the testimony with others. It should be noted that Quito, at this time, was in the
17 custody of Emeline Eisenman and Lisa Eisenman, who were his legal co-guardians, and were
18 present with him at the courthouse along with friends of Virginia, Bridget Masis and Connie
19 Haas, and others (believed to be his Uncle Robert Eisenman) including Lisa's boyfriend, Douglas
20 Thorborn. During the break Quito was observed in the hallway getting congratulations and "high
21 fives" regarding his testimony.

22 At this point, pre-trial, the state was upset at Bloom's alleged failure to provide them a list
23 of expert witnesses and proposed testimony (as required under statute). Apparently their
24 response, as cited above, implied that if the defense could hold onto discovery and provide it late
25 so could they. No objection was made to the state's misconduct regarding the untimely
26 disclosure of the reports (which is contained on the record) and their improper comments. Nor
27 did Bloom follow-up with regards to any other materials pertaining to this and perhaps other state
28 witnesses that were not turned over or were being held back in apparent spite by the state.

Petitioner and his counsel were allowed during the break to review the transcripts of the
multiple interviews which appeared to have taken place some time in October of 2001, yet were

1 never disclosed or provided to the defense until the last minute. At the continuation of the
2 hearing, the following was testified to by Quito.

3 1. Testimony regarding a gun

4 Q. Did you ever see a gun that day [December 5, 2000] in anyone's hand?

5 A. No -- yes.

6 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?

7 A. When I was on the bed.

8 Q. When you were on the bed?

9 A. [nods head affirmatively]

10 Q. Can you describe the gun you saw in Chip's hand?

11 A. It was black.

12 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?

13 A. Yes.

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

15 Quito was cross-examined by Bloom, and the following was revealed:

16 Q. What did she [Emeline] say?

17 A. She said to get Chip [petitioner] in jail.

18 Q. To get Chip in jail?

19 A. Yes.

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

21 A. She -- she didn't like him; doesn't like him.

22 Q. Anything else.

23 A. No.

24 Q. What did she say about jail?

25 A. Um, she doesn't want him to die yet. She wants him to suffer.

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

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

28 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?

1 A. Lie.

2 Q. It's a lie?

3 A. (Nods head affirmatively)

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

5 Q. What's the truth here, seeing a gun or not seeing a gun?

6 A. Not seeing a gun.

7 Q. Say it again.

8 A. Not seeing a gun.

9 Q. So you didn't see Chip with a gun on Burger King day, did you?

10 A. No, cause I was hiding under the bed.

11 Q. But your grandma [Emeline] told you that he had a gun, right?

12 A. Yes.

13 Q. So because grandma [Emeline] told you, even though you didn't see it,
14 that's why you said he had a gun that day?

15 A. Yes.

16 Q. Is that right?

17 A. Yes.

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

19 Q. Do you remember that after your grandma helped you remember some
20 things?

21 A. Yes.

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

23 Q. How do you know he was trying to shoot your mom with it?

24 A. That's what my grandma told me.

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

26 **2. Testimony regarding alleged statements by petitioner**

27 Q. How about this statement about: I'm going to kill you, Nick or myself?
28 I'm going to -- and Quito.

Did you tell that to the first policeman who came to talk to you?

A. Yes.

Q. On -- on Burger King day?

A. Yes.

Q. Are you sure?

A. Oh, no, not on Burger King day, no.

Q. When did you tell him?

A. Because he didn't ask that.

...

Q. Didn't that policeman, on Burger King day, didn't he ask you: Do you

1 remember what Chip said? And you said no.
2 So on Burger King day, didn't the policeman ask you that?
3 A. Yes, I guess.
4 Q. So was that a lie when you told him that you didn't hear what Chip said or
5 was that the truth?
6 A. It was the truth -- no.
7 Q. No what?
8 A. It was wrong.
9 Q. It was wrong?
10 A. Yes.
11 Q. Well, did you do it on purpose and -- lie to him on purpose?
12 A. No.
13 Q. Did you remember about Chip saying this about -- about -- do you
14 remember Chip saying about he's going to kill Nick and kill Quito and
15 kill himself?
16 [No answer given]
17 Q. Do you remember that after your grandma helped you remember some
18 things?
19 A. Yes.

20 AA, Volume 1, 185, p. 184, line 15 to 186, p. 186, line 10.

21 While Bloom did comment on what was observed in the hallway with Quito:

22 Q. Out in the hallway, when you testified -- or you came out for lunch, when
23 you came out, everyone gave you high fives for testifying right?
24 A. Yes.

25 AA, Volume 1, 188, p. 194, lines 8-11.

26 Bloom made no effort to call any of the people in the hallway, in particular Emeline
27 Eisenman, as to what appeared to be her attempt to suborn perjury among other things, and
28 Douglas to discuss what appeared to be his failure to obey the order of the Court regarding
discussing Quito's testimony. Bloom also refused petitioner's request to have a defense
investigator come to the courthouse to attempt to determine who was present and what was being
discussed.

Counsel for the state and defense were allowed to argue the admissibility of Quito's
testimony after Quito testified and was allowed to leave the courtroom. Bloom argued to the
Court that he was not in a position to make the determination to challenge the foundation and
admissibility of Quito's testimony because the state had not turned over all of the necessary

1 information, mainly the actual tape recordings of the statements, for further review.

2
3 MR. BLOOM: At least three statements before, which have been the subject of
4 -- the reports; two of the statements Mr. Laurent - that I received today -- I'm
5 sorry -- Mr. Laurent's statement, which I received today, which is on October 27
6 of this year [2001] statement, tape recorded; and -- and we can present that to the
7 Court, the tape recording -- we don't have it yet, but I assume they have it.

8 Volume 1, AA, 194, p. 220, line 22, to p. 221, line 4.

9 Even though he did not have the tapes in his possession, Bloom argued to the Court:

10 "His [Quito] recollection is so very, very suspect."

11 Volume 1, AA, 220, p. 221, line 21.

12 The Court made a record of it's concerns regarding what occurred at the hearing:

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

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

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

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

21 At no point did Bloom request that he be allowed to call the grandmother (Emeline
22 Eisenman) or the aunt (Lisa Eisenman) as evidence to attempt to have Quito's testimony
23 excluded. This included the failure to use the services of one of his experts, Scott Frazier, who
24 he had employed for just such a challenge in other cases they (he and Bloom) worked on
25 together. See, , Plascencia v. Alameida, 467 F.3d 1190. (C.A.9 (Cal.) 2006). Instead, in
26 response, Bloom voiced his concerns on the record and reserved the right to raise the issue at a
27 later time, perhaps in anticipation of being provided the audio tapes of the interviews with Quito.

28 MR. BLOOM: I don't think, goes to mere admissibility. I think it goes to the
foundational issue of his competence to testify.

AA, Volume 1, 194, p.220, lines 11-12.

[I]t is a function of the planted memory or recollection that he -- he has developed

1 because he's been told it, as opposed to what he can see.

2 Id. at 14-16.

3 THE COURT: So you are not objecting to his testimony in total; it's just about
4 the gun-alleged gun incident then.

5 MR. BLOOM: I'm going to reserve our objection with regards to him as to the
6 total . . .

7 AA, Volume 1, 195, p. 222, lines 7-8.

8 The audio tapes were never turned over to the defense and the issue was never raised
9 again. Furthermore, while Bloom was able to elicit from Quito that he was told to say he saw a
10 gun, he simply let go the issue of him allegedly hearing petitioner threaten to kill himself,
11 Virginia and the kids, despite the fact that this contradicted the testimony he gave to police on
12 December 5, 2000.

13 Bloom was provided information regarding Quito that could have been used at the
14 hearing to further establish a basis for excluding his testimony. This included his school records
15 and other specific instances where Quito had lied. These were supplied by petitioner, but no
16 effort was made to subpoena this information in discovery and for trial. One of the instances was
17 when Quito was caught (with a number of other kids in the neighborhood) stealing lemons from
18 a neighbors yard and gave a false statement to the police about it. Quito also was caught cheating
19 on a school exam and lied about it when caught. This should have been presented to the Court
20 in an effort to make a record to exclude his testimony regarding December 5, 2000 or used to
21 impeach his testimony in 2004.

22 Bloom also did not ask any questions regarding the incidents on December 4, 2000
23 leading up to December 5, 2000 which were crucial to the defense presentation of the case. A
24 motion in limine should have been done in an effort to exclude Quito's (Francisco Sanchez)
25 testimony.

26 That is why an evidentiary hearing on the admissibility of all of his testimony was essential to the
27 defense presentation of the case.

28 3. Trial testimony

Quito testified on March 26, 2004, over three years after the incidents which were the

1 subject of his Petrocelli hearing testimony, when he was twelve years old. Quito, who is small in
2 stature, was "dressed up" to look a lot younger than he was defense counsel was given recent
3 photos of Quito but refused to simply ask him about how he normally dresses versus dressing for
4 Court). In the interim period there was no effort by counsel to interview Quito, nor was there any
5 effort to obtain the tapes of the original interviews taken in October of 2001 by the police and
6 district attorney's office. The prosecutor wasted no time getting to the issue of the alleged
7 statements made by petitioner on December 5, 2000.

8 Q. At some point did you hear anyone threaten anyone else?

9 A. Yes.

10 Q. Who made that threat?

11 A. Chip.

12 Q. Can you remember what you heard Chip say?

13 A. He was gonna kill himself, Gina, me and Nick.

14 Q. Do you remember the order that he said them in?

15 A. No.

16 AA, Volume 3, 154, p. 11, lines 5-15.

17 Quito's examination lasted just thirteen pages of transcript (far less than what had occurred
18 at the all day Petrocelli hearing on the admissibility of his testimony). On cross-examination,
19 Bloom, for the first time in three years, attempts to establish the incidents of December 4, 2000:

20 Q. Do you remember going to a hospital or an emergency room with Chip
21 and Nicholas?

22 A. No.

23 Q. Do you remember that you -- that your mom wasn't home, but Chip had
24 to take the baby, Nick to the doctor's?

25 A. No.

26 Q. Do you remember that also that night going to a pharmacy, Rite Aid
27 pharmacy?

28 A. No, I don't remember anything last night. I just remember that day.

Q. Don't remember anything about the night before?

A. No.

Q. Do you remember going to Burger King the night before?

A. No.

AA, Volume 3, 156, p. 19, lines 2 to 20.

Bloom then proceeded to present Quito with homework dated December 4, 2000 (Id. at 156,
p. 19, line 21 to 157, p. 21, line 11) but did not offer Quito the receipts and prescription bags from

1 Rite Aid, the receipts from Burger King and the hospital records to try to refresh his recollection.
2 He simply lets this issue go (as with any attempt to establish the events of December 1 and 2, 2000,
3 for which he had been provided other documentary evidence (such as the indoor soccer sign up
4 sheets from December 1, 2000)). As the prosecutor pointed out in his Closing Argument, such a
5 strategy is ineffective (They are able to lock these stories down, so now, three years later, they can't
6 change their story. AA, Volume 5, 218, p. 37, lines 2-9) as here it is three years later and here's Quito
7 changing his story.

8 It was clear that Bloom was not prepared to cross-examine Quito on the issues of the multiple
9 interviews by the police and the district attorney's office.

10 Q. And the policeman asked you about what happened that day, right, what
11 you had seen and what you had heard, right?

12 A. Are you talking about the day at San Diego when the cop talked to me?

13 Q. No.

14 AA, Volume 3, 160, p. 33, lines 16-21.

15 Q. When you first talked to the policeman that first day did you ever tell him
16 that you heard this statement from Chip saying something about kill me, the baby,
17 my mom or anything like that?
Did you ever tell that to the policeman?

18 A. Which one?

19 Q. The very first one, the first one that was talking to you that day.
[Objection by Peterson as asked and answered - overruled and re-asked]

20 A. I don't remember.

21 AA, Volume 3, 160, p. 35, lines 2-20.

22 It was clear from this exchange that Bloom had not reviewed the various interview reports
23 and transcripts for if he had why were they not used to either impeach or refresh the witness. What
24 should have occurred was Bloom should have put the statements on an overhead projector and go
25 through the inconsistencies of the testimony to challenge his credibility or he could have at least
26 shown the statements to him. Bloom also could have brought this subject up with the persons who
27 conducted the interviews (the responding officers, the homicide detectives, and Laurent) but that was
28 not done. There was no attempt to do so at any point in the trial. Instead all he got was "I don't
remember."

1 Next Bloom explored the issue of the influence of his grandmother (Emeline Eisenman)
2 and aunt (Lisa Eisenman) (Id. at 160, p. 35, line 21, to 161, p. 38, line 5). This would have been
3 an effective tool to impeach his testimony except for the fact that no questions were asked of Lisa
4 Eisenman regarding it when she testified, and Emeline Eisenman, who was also present at the
5 interviews of Quito, was never called as a witness.

6 Finally, due to the failure to conduct the necessary discovery and nail down the testimony,
7 the prosecutor on cross-examination was able to ridicule the attempts:

8
9 Q. Is it fair to say that you don't remember much about homework and
10 dinners from two or three years ago?

11 A. What?

12 Q. Confusing question, hum?

13 A. Yeah.

14 Q. Do you remember homework projects you did two or three years ago?

15 A. No.

16 AA, Volume 3, 162, p. 41, lines 3-14.

17 When Bloom does bring the "lemon incident" in re-cross, it was similarly dismissed by
18 the state (Id. at 163, p. 46, lines 3-7) and more than likely by the jury as well.

19 **B. Argument and legal authority**

20 While Bloom told the Court he was going to "reserve our objection," the issue was never
21 raised again. This was despite the fact that the tapes of the multiple interviews were never turned
22 over to the defense. Without those tapes, the defense could not make a number of critical
23 determinations with regards to Quito's testimony. First, the defense could not make an objective
24 analysis of the type of the questioning that was employed and to properly evaluate the
25 questioner's and Quito's tone, demeanor and other important factors. Second, by not following
26 up, the defense could not determine if there were other interviews conducted and who was
27 present. In sum, by not requesting and being provided all of the interview material (tapes, notes,
28 etc.), the defense could not properly address this issue. When it came time for the trial in March
of 2004 and Quito's testimony, the state did not turn over any subsequent interviews or notes
from interviews.

Bloom also failed to follow-up in Court or whether or not Quito's testimony should have

1 been entirely excluded under these circumstances, in a motion in limine (by way of example the
2 state had filed a motion to preclude evidence regarding Virginia) which was allowed in, without
3 objection, at trial. The prejudice to petitioner was that Quito was allowed to testify that he heard
4 petitioner state he was going to kill everyone in the house on December 5, 2000. This became a
5 critical piece of evidence at the trial and the Nevada Supreme Court's determination that Quito
6 provided "corroborating evidence" that the statements of the petitioner occurred and was a factor
7 in denying petitioner relief on direct appeal on the hearsay issues raised pursuant to Crawford v.
8 Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) .

9 Quito had told police on December 5, 2000 that he did not see or hear anything that day
10 because he was scared and hiding under the bed when the domestic violence incident occurred.
11 Only after being personally interviewed by the deputy district attorney prosecuting the case and
12 by the police, did his "memory" improve to recall not only hearing this statement, which was
13 vehemently denied by petitioner, but he also claimed he saw petitioner with a gun. Under cross-
14 examination, he admitted that his grandmother had told him that Virginia had told her that
15 petitioner had made the statement and had the gun.

16 Therefore the only real source for this statement was through double hearsay and
17 therefore it should not have been admitted for any purpose, yet the Court allowed this alleged
18 statement to come in a variety of forms (including the testimony of Tricia Miller, which was still
19 inadmissible hearsay). The only other place the alleged statement was found was in Virginia's
20 self serving written statement to the police, which, again, was not admissible as hearsay.

21 What made this evidence and this statement even more unreliable, and the proper subject
22 of exclusion, was the evidence that Virginia consented to giving petitioner custody of their only
23 child together Nicholas. If the statement actually occurred why would she consent to having the
24 child in petitioner's custody? The state's explanation for this, that she would do anything to get
25 out of the marriage, is just not credible. What is credible is the fact that if she was the one who
26 had instigated and perpetuated the domestic violence incident, her family and friends would not
27 have been as supportive of her. Furthermore, if they were in a position financially to assist her in
28 leasing a new apartment and furnishings why would they not have supported her in hiring an

1 attorney to fight for custody? The answer is clear, there was no threat made, even she did not act
2 as if it had occurred. None of these questions were asked of any of the witnesses called by the
3 state or the defense.

4 It was prejudicial error to allow this inadmissible hearsay to come in at trial through the
5 mouth of Quito (and others) and for Bloom not to object. The state argued at various stages of
6 both pre-trial and at trial that this statement was evidence of premeditation and intent that
7 otherwise would not have been allowed into evidence from another source.

8 What should have occurred at that hearing was Bloom call to the stand the grandmother
9 and the aunt, who were in the hall way of the court house (having brought Quito with them from
10 San Diego to Las Vegas for the hearing) to explore and pin down the issues of possible perjury
11 (or suborning of perjury a violation of NRS 199.145 and/or NRS 199.150 and NRS 193.130) ,
12 witness tampering or influence to either seek to exclude Quito's entire testimony or at least
13 provide impeachment material for trial for Quito, the grandmother and the aunt. Petitioner
14 specifically discussed this with Bloom at that time. Also there was no effort to locate or
15 interview Douglas Thorborn, Lisa Eisenman's boyfriend at the time who was allowed to be in the
16 courtroom during the December 2001 hearing regarding what exactly he heard and observed
17 regarding efforts to influence Quito's testimony.

18 Bloom also should have obtained the complete transcripts and the audio tapes of the
19 interviews and turned them over to one of his retained experts to have the expert either testify in
20 a pre-trial hearing regarding the admissibility of the testimony or at trial regarding it's lack of
21 credibility. This technique was well known by Bloom as he had used it in other cases. In
22 Plascencia v. Alameida, 467 F.3d 1190, (C.A.9 (Cal.) 2006) Plascencia's attorney, Bloom,
23 presented an expert witness, Dr. Scott Fraser, whose testimony was designed to undercut the
24 child Jesse's eyewitness identification and to support a motion to exclude the identification as
25 untrustworthy. *Id.* at 1204. It should be noted by this Court that Dr. Scott Fraser was also an
26 expert in the instant case and was available to the Bloom and the defense on this issue. Finally,
27 after a period of almost two and a half years had lapsed between Quito's testimony in December
28 of 2001 and his trial testimony in April of 2004, no efforts were made to request a new pre-trial

1 hearing to determine if any further influences came to bear on his testimony, or seek to exclude it
2 all together.

3 There was also no effort at trial to bring out the inconsistencies and the influence on his
4 testimony (let alone his failed recollection) to the attention of the jury. No attempt to question
5 the witnesses who were called to testify, Lisa Eisenman and the responding detectives and
6 homicide detectives who interviewed Quito, and no attempt to call the other witnesses who could
7 have assisted the defense in attacking the credibility of the testimony, Emeline Eisenman and
8 Douglas Thornburn were made.

9 In Evans v. State, 117 Nev. 609, 28 P.3d 498 (2001), the Nevada Supreme Court
10 addressed the issue of the child witness and the possibility of contamination of the child witness.
11 In Evans, the Court held evidence failed to establish contamination of a child witness' testimony
12 during a two year period between the murders and the trial due to the fact that "nothing in the
13 child's behavior or statements" indicated "that the testimony was deliberately or inadvertently
14 tainted." This is just the opposite of what we have here, as reflected in Judge Gibbons comments
15 after the hearing that the defense had "developed" just that, evidence of deliberate or inadvertent
16 tainting of Quito's testimony.

17 If the state, or Bloom, attempts to take the position that any influence was better left to
18 and handled on cross examination, this "strategy" was specifically rejected in the case of Medina
19 v. Diguglielmo, 461 F.3d 417 (C.A.3 (Pa.) 2006) in which the Court held:

20 Mr. Daly also justified his failure to object to Marcos Toro's competency
21 based on his trial strategy of raising a reasonable doubt by demonstrating
22 that Marcos Toro was not a credible witness because he "flip flopped" in
23 his testimony at the preliminary hearing regarding whether he saw Mr.
24 Medina stab the victim depending on which lawyer asked the question.
25 Mr. Daly's alternative decision not to challenge Marcos Toro's competency
26 because he wanted to discredit the child's testimony on cross-examination
27 was also objectively unreasonable

28 Id. at 429.

The Court in U.S. v. Rouse, also faced with this issue, granted habeas relief on the
following grounds:

1 (1) refusal to allow expert opinion testimony by a court appointed psychologist
2 that the children's evidence and testimony became tainted by suggestive
3 influences to which the children were subject in the investigation and trial,
4 which influences included taking the children (the alleged victims and nine
5 other children) from their families and from their residences and (2) denial
6 by the trial court of the defendants' motion for independent psychological
7 examination of the allegedly abused children--in light of the circumstances
8 of the case.

9 Id. at 562.

10 Here, Bloom failed to properly investigate the extent to which the testimony of Quito may
11 have become tainted both before and after the December 2001 hearing. He did not consider the
12 options regarding this testimony (never asked Lisa Eisenman or Emeline Eisenman (or any of the
13 "supporters" who were there for the December 2001 hearing, including the "witness" who was
14 allowed into the Courtroom during the testimony, identified as Douglas Thorborn, Lisa
15 Eisenman's boyfriend).

16 Quito's testimony became even more critical in light of the Nevada Supreme Court's
17 ruling on direct appeal that the statements regarding December 5, 2000, admitted in violation of
18 Crawford were harmless due to corroborating testimony (Quito and Miller, who's testimony
19 should never have been received by the jury in the first place. A look at the relevant case law
20 further demonstrates Bloom's lack of knowledge/preparedness in this area:

21 In Felix v. State, 109 Nev. 151, 849 P.2d 220 (1993) the Nevada Supreme Court held that
22 although courts must evaluate child's competency to testify on a case to case basis, some relevant
23 factors to consider include ability to receive and communicate information, spontaneity of
24 statements, indications of "coaching" and "rehearsing," ability to remember. In Felix, the Court
25 found that the child only gave damaging testimony after having been subjected to intensive
26 interviews by state officials and police. How much different is that than what occurred with
27 Quito?

28 In Driscoll v. Delo, 71 F.3d 701 (C.A. 8 (M.O.) 1995) the Court upheld a district court
determination that failure to impeach testimony of one of the state's witnesses using evidence of
prior inconsistent statements was not a matter of sound trial strategy. Id. at 709-710. In Barkell
v. Crouse, 468 F.3d 684 (C.A. 10 (Wyo) 2006) the Court held that counsel was deficient in

1 failure to investigate and consult an expert witness with regards to a child [a reasonable attorney
2 would have realized that family and school counseling records could be a valuable resource in
3 determining the [child's] personality, propensity and motives to lie or harm the defendant] Id. at
4 691 [failure to consult a child psychologist to assist in cross examination - this added to the
5 overall effect of the ineffectiveness].

6 In Medina v. Diguglielmo, 461 F.3d 417, 426 (3d Cir.2006) the Court looked at the
7 failure to disqualify:

8
9 This was not a case where counsel had two alternatives that were contradictory
10 or mutually exclusive. In such a case counsel must necessarily choose one or
11 the other alternative. This case presents, instead, the situation where counsel
12 had two alternatives, both of which are available to him.... If he succeeded in
13 [disqualifying the witness], there would be no need to pursue the less certain
14 method of discrediting the witness on cross.... There is no reasonable basis
15 under these circumstances, for, [sic] deliberately eschewing one weapon
16 (out of two available) when both can be used.

17 Id. at 429.

18 Finally, in Barker v. Crouse, 468 F.3d 684 (C.A.10(Wyo.) 2006), petitioner was entitled
19 to evidentiary hearing on an ineffective assistance of counsel claim based on counsel's failure to
20 investigate victim's records and failure to hire expert child psychiatrist. The Court addressed the
21 failure to properly investigate a child witness:

22 In light of the prosecution's complete reliance on the victim's veracity and the
23 leads given by Mr. Barkell and his sister, it would have been unreasonable
24 for Mr. McQueen not to investigate whether records and witnesses regarding
25 BV's counseling and school experiences could suggest her propensity to lie or
26 her motive to harm Mr. Barkell. See Rompilla v. Beard, 545 U.S. 374,
27 125 S.Ct. 2456, 2460, 2467, 162 L.Ed.2d 360 (2005) (it was unreasonable
28 for counsel not to read case file he knew the prosecution would rely on at
sentencing, even though the defendant and his family had suggested that no
mitigating evidence existed). The content of the records submitted by Mr.
Barkell with his motion for limited remand indicates that the results of any
such investigation would have been helpful to the defense. We therefore
conclude that Mr. Barkell is entitled to an evidentiary hearing in federal
district court, at which the court can ascertain whether Mr. Barkell is able
to prove the necessary deficiencies and prejudice.

Id. at 698.

1
2 **C. Conclusion**

3 During the December 2001 hearings to determine the admissibility of the testimony of
4 Francisco Sanchez (Quito) it became quite clear that his recollection and truthfulness were
5 influenced by both his aunt, Lisa Eisenman, and his grandmother, Emeline Eisenman. Judge
6 Gibbons, who conducted the hearings said as much on the record. See, supra, above. It was also
7 revealed that Quito had been the subject of at least 3-4 formal interviews with both the police and
8 members of the district attorney's office, supra.

9 Ultimately, not only did Bloom not seek to address this matter at the hearing, but he did
10 not seek to exclude the testimony via a motion in limine or to attack it sufficiently at trial either
11 through his experts or through Emeline and Lisa Eisenman. Further compounding the problem
12 was Bloom's failure to request, obtain and review the tape recordings and or complete transcripts
13 of the interviews of Quito conducted by the state both before and after the December 2001
14 hearing. An attack could have been made on the interview techniques utilized by both the police
15 and the prosecutor(s) (who conducted the interviews) and the propriety of having Emeline
16 Eisenman present for the interviews in light of his testimony she counseled him to lie. At the
17 very least, Bloom could have used the testimony of Emeline Eisenman and Quito to impeach
18 each other's (and perhaps the state) on the issue of the events of December 5, 2000, a critical
19 issue in the case and on appeal.

20 It cannot be said that Bloom's failure to properly address the issues surrounding Quito's
21 testimony did not affect the outcome of the trial, as his was the only testimony to support
22 Virginia's version of events and was left unchallenged at trial, which was both ineffective
23 assistance of counsel and prejudicial to petitioner. Counsel's performance with respect to this
24 issue was constitutionally deficient under the Strickland standard.

25 **6. Defense counsel was ineffective for failing to prepare petitioner to testify and
26 set him up for impeachment**

27 **A. Factual and procedural background**

28 As discussed in Ground 6, Part 1, Section 13, and incorporated herein by this reference as
though fully set forth herein, Bloom instructed petitioner to testify regarding the issue of the

1 plastic surgery. Bloom knew, or should have known that this assertion, made both in his opening
2 statement and through the eliciting of this testimony from his client while on the stand, would
3 appear to be false based upon either his pre-trial investigation or review of the medical records he
4 himself turned over to the prosecution.

5 Compounding the problem was his extensive pre-trial preparation of his client on his
6 issue and eliciting of testimony which set up his client for the most damaging cross-examination
7 of the trial and closing argument by the prosecutor. Bloom failed to interview either doctor who
8 was involved in the surgery or the records associated there from. Furthermore, he failed to do
9 any follow up investigation or take any steps to counter this issue and rehabilitate both himself
10 and his client on this issue.

11 **B. Argument and legal authority**

12 In the case of Johnson v. Baldwin, 114 F.3d 835 (C.A.9 (Or.) 1997), discussed supra, in
13 Ground Six, Part 1, Section 14, the Ninth Circuit held "counsel had not adequately investigated
14 the case, not adequately conferred with his client, not adequately investigated defense, and had
15 encouraged client to testify falsely." Id. at 836. The Court further held the failure of the attorney
16 to adequately investigate and confer with his client, made the client appear to be a liar to the jury
17 and was both ineffective and prejudicial. The Court held:

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

26 Id. at pp. 838-839.

27 The attorney's ineffectiveness was prejudicial because it would have been the cause of the
28 false testimony that the jury probably held against the attorney's client. Id. at 839. The client
could have elected not to testify, thereby depriving the jury of the adverse credibility
determination that probably tipped the scales against him. Id. at 840. The prejudice from failing
to investigate and confer more fully with his client "is not avoided by the fact that [the client]

1 misinformed his attorney." Id. at 840. The Ninth Circuit found the deficient trial performance
2 was "sufficient to undermine confidence in the outcome" of the trial. Id. at 840.

3 This case could not be any more on point in the situation with Bloom. Petitioner
4 anticipates the state arguing that Bloom could rely upon his client's representations regarding this
5 issue. But as the Ninth Circuit pointed out, this is not an excuse for Bloom's failure to
6 investigate the issue more thoroughly (or in Bloom's case at all) before exposing his client to an
7 "adverse credibility determination" as in Johnson.

8 This also relates to the whole issue of self-defense and the testimony of Dr. Eisele, supra.
9 Bloom told both his client and the jury that his experts would support his and his client's theory
10 of self-defense when, in fact, he had in his possession reports, which dated back to December
11 2001, that undermined the whole theory of self-defense, yet it was still presented to the jury,
12 through petitioner's testimony with devastating results. Further compounding the problem was
13 Bloom literally handed to the prosecution the very records (plastic surgery, day care, criminal
14 history), reports and notes used to contradict his position and his client's testimony to the jury on
15 the matter.

16 Had Bloom presented the expert opinions that he told the jury he would present in his
17 opening statement, there is a reasonable probability the jury would have reached a different
18 result, as the jury would not have told during closing to disregard petitioner's entire testimony..

19 In Hyman v. Aiken, 824 F.2d 1405 (C.A. 4 (S.C.) 1987) the Court stated the exact
20 problem with Bloom's approach:

21 Under the first half of the Strickland test, counsel enjoys the benefit of a strong
22 presumption that the alleged errors were actually part of a sound trial strategy
23 and that counsel's performance was within the limits of reasonable professional
24 assistance. 466 U.S. at 689, 104 S.Ct. at 2065. But this presumption does
25 not overcome the failure of Hyman's attorneys to do basic legal research, to
26 review the testimony of key witnesses--including their own client--and to be
27 familiar with readily available documents necessary to an understanding of their
28 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.

1 Id. at 1416.

2 As discussed in further detail, elsewhere, but mentioned here as to complete the
3 argument, Bloom also told the jury they would be hearing from at least two other witnesses,
4 Emeline Eisenman (who was never subpoenaed) or Lt. Franks (never called as a witness). In
5 either instance, Bloom did not request a continuance and simply "let their critical testimony go."

6 Each of these witnesses was critical to the presentation of the defense, Emeline Eisenman
7 as to a variety of issues related to Virginia's propensity for drug use, violence and lying, as well
8 as discussions with Virginia, petitioner and others regarding these issues as well as those
9 surrounding those which occurred in December of 2000. Lt. Franks was the expert Bloom told
10 the jury would essentially explain away the significance of the amount of shots and the failed
11 memory of the shooter.

12 As the Court stated in Anderson v. Butler, 858 F.2d 16 (C.A. 1 (Mass) 1988) "[T]rial
13 counsel's failure to call psychiatric witnesses during trial was ineffective and prejudicial
14 following counsel's opening statement indicating to the jury that such witnesses would be called,
15 notwithstanding whether counsel's failure to call the witnesses alone would have been
16 ineffective.

17 **C. Conclusion**

18 Bloom's failure to investigate the issue of the plastic surgery records and his own experts'
19 opinions on self-defense before proceeding to trial undermined the whole testimony of petitioner and
20 the defense of self defense constitutes deficient representation and caused prejudice to petitioner, and
21 therefore, amounts to ineffective assistance of counsel. Petitioner testified that the plastic surgery
22 and the information he learned about it supported his fear based upon Virginia's drug use, making
23 truth of that testimony central to his defense and enabling jury to conclude that he was lying about
24 all of his testimony. Counsel's performance with respect to this issue was constitutionally deficient
25 under the Strickland standard.

26 /////

27 /////

28 /////

1 7. **Defense counsel was ineffective in failing to properly handle the issue**
2 **of the testimony of Tricia Miller.**

3 A. **Factual and procedural background**

4 1. **Pre-trial**

5 Tricia Miller (Tricia) was a former co-worker of Virginia's at Security Link, where they
6 were both security alarm salespersons. They met in the fall of 1999 while Virginia was pregnant
7 with Nicholas. Tricia left Security Link and had sporadic contact with Virginia over the next six
8 months or so. Virginia gave birth to Nicholas in July of 2000, and soon after began working for
9 Eagle Sentry as a security alarm salesperson.

10 Tricia did not come to the hospital after Nicholas was born or provide a baby shower gift
11 to Virginia. (See, AA, Volume 2, 112, page 13, lines 1-15). At some point in the fall of 2000
12 Tricia and Virginia began to socialize again. Tricia was invited to celebrate Thanksgiving in
13 2000 with Virginia, petitioner and the children at the 8720 Wintry Garden residence.

14 Tricia claimed to have been with Virginia both on December 1, 2000 and December 4,
15 2000 when Virginia did not return home after work and went drinking and socializing with co-
16 workers from Eagle Sentry, and others. Tricia is said to have spoken with petitioner on the phone
17 at least on one occasion while she was out with Virginia.

18 Tricia also claimed to have spoken with both petitioner and Virginia on the night of
19 December 5, 2000, after the domestic violence incident. She also was the one who accompanied
20 Virginia to meet the police prior to Virginia going to the residence to retrieve some personal
21 property and other items.

22 Tricia also claimed that she spoke with Virginia multiple times on December 20, 2000.
23 Tricia claimed that she and her parents were to meet Virginia on the night of December 20, 2000,
24 the night of the incident, for dinner.

25 Tricia became a critical witness for the state in the prosecution of petitioner. She was
26 interviewed by both the state and defense pre-trial. Tricia told investigators initially that Virginia
27 had to "sleep on the floor" of her new apartment after she moved out because petitioner would
28 not let her have any of the items from the marital home. She also testified Virginia was afraid of
 petitioner and therefore had to lease her apartment in someone else's name.

1 Tricia also took part in a story about petitioner produced and aired by investigative
2 reporter Glen Meeks of the local NBC affiliate in Las Vegas. During the aired portion of the
3 story, Tricia, seemingly acting as a mouthpiece for both the family (who did not appear in the
4 story) and the state (who was ethically precluded from making certain comments) said it was
5 "hard" to present "this case as self defense" due to the number of shots that were fired and that
6 she was unarmed.

7 **2. Trial testimony**

8 On March 22, 2004, Tricia was called as the second witness by the state in their case-in-
9 chief. Tricia was presented to the jury as the "best friend" who Virginia confided in and would
10 be able to provide insight to the jury as to Virginia and petitioner and their relationship
11 (Although Tricia later admitted on cross-exam that she was not her best friend, but close, AA,
12 Volume 2, 112, p. 13 lines 12-15.) Thus Tricia's testimony and credibility was critical to the
13 state as there were no other "friends" of Virginia the state intended to call with regards to
14 Virginia and her background (because they could not locate any friends other than Miller who did
15 not know bad things about Virginia), which became an issue as a component of the defense case
16 of self-defense.

17 Tricia was also only one of two witnesses who testified to the alleged threats petitioner
18 made to Virginia on December 5, 2000 (Quito was the other).

19 Q. What did she tell you happened?

20 A. I had gotten home really late that night, in the early morning, and that
21 Chip and her had a fight and he had put a gun to her head, telling her he was going
22 to kill her, himself and the kids.
23 At that point she hit him with a picture frame. When the police responded
24 they had to arrest somebody and because he had blood on him and kind
25 of a bodily injury they arrested her.

26 AA, Volume 2, 088, page 94, lines 2-9.

27 This testimony was received without objection by counsel, and thus the issue of the
28 hearsay was not preserved for the record. This testimony was also not challenged by counsel on
cross-examination.

The defense had three areas in which to attack her credibility with the jury which were

1 not utilized at trial:

2 **a. Pre-trial discovery**

3 Counsel was able to obtain a variety of pre-trial discovery and/or had discovery available
4 to him that was not used at trial.

5 Miller gave statements to both the state and the defense with regards to her knowledge
6 and involvement in the facts and circumstances leading up to the events of December 20, 2000.
7 In that regard, Miller gave a statement to defense investigators wherein she attempted to paint the
8 petitioner in a negative light and to paint him as the "bad guy" and Virginia as the "good girl." A
9 specific instance involved the issue of Virginia moving out of the marital home and into an
10 apartment. Miller told investigators that petitioner would not let Virginia have any items out of
11 the marital home and that she had to "sleep on the floor." This evolved in statements given to the
12 police to she didn't want anything from THAT house to remind her of their relationship and she
13 preferred to go out and buy all new things. At trial she testified:

14 Q. What did she tell you about that [the furniture]?

15 A. She told me she didn't want any of the stuff in the house, most of the stuff
16 in the house that was there.

17 AA, Volume 2, 090, p. 103, lines 10-25.

18 This was not used at trial to show how her story changed over time, which would have been
19 crucial to attacking her credibility.

20 In 2003, Miller took part of a story which aired on the NBC affiliate in Las Vegas
21 regarding petitioner. Glen Meeks, an investigative reporter, interviewed both Miller and (then)
22 deputy district attorney Laurent. Miller made a number of statements attacking the proposed
23 theory of self defense due to the number of shots and the fact that Virginia was alleged to be
24 unarmed. Crime scene photos and other visual images, including video tape of the petitioner in
25 the back of a police car the night of December 20, 2000 were made part of the story.

26 Petitioner and his counsel conferred as to how to handle the situation. Petitioner
27 requested his counsel obtain a copy of the transcript and videotape of the broadcast, as well as
28 speaking with the reporter to see if they could obtain a copy of his notes as well as any unedited

1 versions of the story, and a list of materials provided to them by the district attorney's office to
2 compare if the defense had been provided access to the same materials.

3 The purpose of obtaining these materials was to impeach Miller's amended version of
4 events as well as to learn more about the state's case. None of these things were done and Miller
5 was allowed to testify at trial without being asked any questions about her participation in the
6 story and the inconsistencies with her trial testimony.

7 Furthermore, Miller testified to the following on re-cross examination:

8
9 Q. Ms. Miller, the fear that you said you felt, it is, as you said before, based
upon Gina's version of what happened on December 5, 2000?

10 A. Yes. I saw her the next day and she was shaking she was so scared. I've
11 been scared of this man for years. He knows where I live.

12 AA, Volume 2, 121, p. 50 lines 3-8.

13 Bloom should have asked: If you were so scared of petitioner "for years" why did you go
14 on television and talk bad about him while he was out of custody? Has he ever contacted you in
15 the past three plus years? Has he ever shown up at your work? Where you live? Where you
16 socialize? Contact you in any fashion? No questions were asked of her regarding the NBC news
story to attack her ever evolving version of the facts and events, or to challenge her credibility.

17 **b. Events during her testimony**

18 The bailiff saw the need to remove an individual from the spectator seats who in his
19 words appeared to be signaling Miller during her trial testimony. This was brought to the
20 attention of the Court, who then called a recess and had a hearing outside the presence of the
21 jury. At this point the Court heard testimony from Marilee Wright, under the mistaken belief
22 that she was the person (Oriental gal) who had been asked to leave the Court.

23 Wright was a witness for the state who was waiting to testify out in the hall, regarding a
24 discussion that was observed between a rather gregarious and friendly Miller with the jury from
25 another department. It was ascertained that her discussions with jury members from another jury
26 were not important and the trial reconvened.

27 THE COURT: The absence of the jury is noted. Have a seat, please.

28 What is your name?

THE WITNESS: Marilee Wright.

1 THE COURT: This is the woman who is to be called next to testify, correct?
2 MR. PETERSON: She's one of our next witnesses, yes.
3 THE COURT: All right. The Oriental gal that was going to be a witness, that's
4 who I want to talk to.
5 THE BAILIFF: I though you said the blonde. I asked her to leave, Your Honor. THE
6 COURT: That's who I'm concerned about. Just so counsel is aware, my
7 bailiff asked the lady to leave a while ago from the courtroom; is that right?
8 THE BAILIFF: Yes.
9 THE COURT: She was becoming a little animated and a little emotional.
10 That's not unusual. I received some information that she was speaking to a
11 juror in another case and had talked to the young lady that was Ms. Miller,
12 at some point. Per se, neither of these things are particularly damning but they
13 are a concern.
14 THE BAILIFF: Your Honor, I hate to interrupt, but the way I gathered it, it
15 was the woman who was testifying, who was having the conversation with the
16 juror from Department 15, not the Oriental woman.
17 A VOICE: Miss Miller, correct.
18 THE COURT: Anyway.
19 THE BAILIFF: It wasn't Ms. Wright. She overheard her having the
20 conversation. That's how I became aware of it.
21 THE COURT: As counsel knows, Mr. Bloom, you're new in this building, but I
22 made mention of this earlier. We're working in such close quarters I have to keep
23 a very close watch on who is where and who it talking to whom. That's a
24 problem.
25 I'll want to admonish the young Oriental gal. I thought she was the major
26 offender here.
27 THE BAILIFF: No.
28 THE COURT: I just wanted you to be aware.
MR. PETERSON: For the record, who is this Oriental gal? That's not one of our
witnesses.
THE BAILIFF: She claimed to be the sister of the victim. She was sitting in the
back row beneath the Nevada Seal.
MS. GOETTSCH: I haven't met all her family. It's possible. The sister I'm normally in
contact with was not present today.
THE COURT: All right. With all that said, then we'll convene tomorrow then.
Anything else to be said.
MR. BLOOM: No.
THE COURT: Court is adjourned.
MR. PETERSON: May I ask this? Do you want us to advise -- we would normally not
talk to Tricia Miller since she is not on the witness stand. Do you want us to advise her to
call and say do not speak with the people prior to testifying to advise her of that?
I wouldn't want any further problems to happen.
THE COURT: I told her that. It wouldn't hurt to remind her. Make sure she's here.
That's all. Same thing for potential witness.
AA, Volume 2, 106, p. 165, line 23 to p. 168, line 12.

1 Amazingly, there was no attempt to identify the person removed from the court room by
2 the bailiff and this person was allowed to leave the court house and was not called as a witness in
3 the impromptu hearing conducted by the Court. Miller was also not called by the Court to either
4 identify the person who was asked to leave the Court or to determine the relationship between
5 them. She was also not asked any questions regarding this during her second day of testimony.

6 It should also be noted that the one family member called to testify during the trial, Lisa
7 Eisenman, claimed to never have met Miller, although she was identified by the state (Lisa) as
8 their contact person.

9 **c. Events in hallway learned after her testimony**

10 As stated above, during the first day of trial, the state called as it's second witness Tricia
11 Miller, a security alarm salesperson who knew the decedent less than a year. Ms. Miller was
12 alleged by the state in opening statements to be the "best friend" of the decedent and was to be
13 called to testify as to a number of aspects of the state's case, including but not limited to certain
14 statements Ms. Miller was to allege the decedent made to her about the petitioner surrounding the
15 events of the decedent's domestic violence arrest on December 5, 2000 and the events leading up
16 to December 20, 2000.

17 While Ms. Miller was awaiting to testify, she was observed in the hallway of the court
18 house speaking with jury members from another jury in another department. That conversation
19 was alleged to have concerned the importance of her demeanor and delivery of her testimony to
20 "sell it" to the jury. This conversation and others were observed by a number of people in the
21 hall way and were eventually reported to petitioner's attorney Allen Bloom.

22 This was not raised with the Court until after Miller has already testified. The defense
23 brought it to the attention of the Court and that the defense was ready to call a witness, Mark
24 Wright, to the stand to testify as to his observations of the above described behavior. The
25 defense wanted to either re-call Miller as a witness to examine her under oath regarding this issue
26 or allow the testimony to come in through Mark Wright. Either way, the defense wanted the
27 opportunity for the jury to hear about it and make it's determination regarding Miller's credibility.

28 The Court allowed the defense to make an Offer of Proof with regards to the issue of Tricia

1 Miller's testimony. Bloom outlined for the court that Mark Wright made a number of observations
2 that the defense felt were proper for purposes of impeachment. See, in general AA, Volume 3, 066,
3 p. 66 to 082, p. 82, lines 5-19.

4 Miller had testified that she was a close friend of Virginia's because that would give
5 credibility to her testimony that she knew and was told certain things. Id. at 067, p. 67, lines 5-19.
6 Mark Wright was in the hallway of the Courthouse and observed Miller being approached by one
7 of Virginia's sisters. Id. at 20-23.

8 [S]he was gesturing in the background and the bailiff asked her to leave.
9 And that this sister when outside and introduced herself to Tricia Miller in the
10 presence of Mark Wright where they are both in the same general vicinity . . .
11 During that time they conversed about a variety of things, some of which Ms.
12 Miller asking the sister questions about Gina's background, how many brothers
13 and sisters there were, when Gina had been born, when -- where she had grown
14 up, various details about Gina's background.

15 Ms. Miller then came in and talked about Gina's background, giving the impression, I
16 believe, to the state's case that she know this because she had gotten it from Gina.
17 In fact, I think she had gotten some of that information a few minutes before her
18 testimony from Gina's sister, when Ms. Miller admitted she didn't know about this
19 information and inquired of the sister to get this information.

20 Id. at 67, p. 67, line 25, to p. 68, line 22.

21 Mark Wright also observed other discussions in which Miller identified herself as "the best
22 friend" and Bloom's point is the above demonstrates "I think that reflects that Ms. Miler didn't know
23 Gina all that well at all and it goes to impeaching on that point." Id. at 69, lines 7-9. There was a
24 further observation that Ms. Miller solicited or was given tips by jurors in another case who were
25 in the hallway as to how to "act" in front of the jury. Id. at 69, p. 69, lines 10-25.

26 Bloom then made a further offer that perhaps Miller's crying and carrying on about being
27 "afraid" were the direct result of the "coaching" she received in the hallway. Id. at 070, p. 70, line
28 1 to 071, p. 71, line 4. He concluded, [I] think goes to impeaching her crying from the witness stand
to try to show that that was very much contrived." Id. at 071, p. 71, lines 2-4.

29 The state's reaction can be summarized as "That's ridiculous." Id. at 71, 071, line 17. But
30 went on to say, "I don't want to have to get into that. This is just a ridiculous hornets' nest that
31 needs to be stayed away from." Id. at 072, p. 72, lines 14-16.

1 The Court then stated, "As, I recall, the alleged sister of the victim, who was in the
2 courtroom was asked to leave while Ms. Miller was on the witness stand." Id. at 72, p. 72, 19-21.
3 The Court then questioned the timing of when the discussions and coaching by the sister may
4 have taken place. Id. at 72, line 24, to p. 73, line 22.

5
6 Bloom's response was "nor is it the issue of whether or not Mr. Peterson believes his
7 second witness's tears were crocodile, fake tears or not. I certainly think they were.
8 What's important to the defense is that quite frankly the only issue here is would this be
9 proper impeachment to do that? . . . [T]he question is her demeanor and her manner is
10 very much at issue in front of the jury. . . The fact of the matter is it's for the jury to
11 decide and Mr. Wright made an observation that goes right to the heart of that. He's here.
12 I would ask to have a chance to come in. He's willing to testify about this . . . and the
13 Court can make its determination.

14
15 Id. at 074, p. 74, line 14 to 076, p. 76, line 1.

16 The Court then asks if that is all the testimony expected from Mr. Wright, to which
17 Bloom responds "He may have more information. He may not." Id. at 076, lines 3-18. The
18 Court, then, curiously adopts the same language of the state:

19 I think it's ridiculous. Having heard more, Mr. Bloom, I have not retracted from that
20 position. It is totally ridiculous.

21 AA, Volume 3, 078, p. 77 [NOTE MISTAKE IN TRANSCRIPT duplicate p. 77] line 25 to
22 079, p. 78, line 2.

23 THE COURT: She didn't change her testimony after she spoke to this lady in the
24 hallway that I'm aware of.

25 Id. at 079, p. 78, lines 22-23.

26 She didn't go on and on in hysterics. She broke into tears and regained her composure. . .
27 . Altogether, it is remote to the issues in this case and it is not relevant in my judgment.

28 Id. at 081, p. 80, lines 6-11.

The Court's observations, while entitled to some deference, were belied by the record.
Miller broke down a number of times and while the Court may have made it's own mind up
regarding the effect on the Court, this should not have been substituted for what effect it may
have had on the jury.

/////

1 **B. Argument and legal authority**

2 Defense counsel "has a duty to make reasonable investigations or to make a reasonable
3 decision that makes particular investigations unnecessary." *Id.* at 691, 104 S.Ct. 2052. "A
4 lawyer who fails adequately to investigate, and to introduce into evidence, [information] that
5 demonstrates his client's factual innocence, or that raises sufficient doubts as to that question to
6 undermine confidence in the verdict, renders deficient performance." *Lord v. Wood*, 184 F.3d
7 1083, 1093 (9th Cir.1999) (quoting *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir.1999)) (internal
8 quotation marks omitted and second alteration in original).

9 In particular, if counsel's failure to investigate possible methods of impeachment is part of
10 the explanation for counsel's impeachment strategy (or a lack thereof), the failure to investigate
11 may in itself constitute ineffective assistance of counsel. See *Tucker v. Ozmint*, 350 F.3d 433,
12 444 (4th Cir.2003) ("Trial counsel have an obligation to investigate possible methods for
13 impeaching a prosecution witness, and failure to do so may constitute ineffective assistance of
14 counsel.").

15 Although trial counsel is typically afforded leeway in making tactical decisions regarding
16 trial strategy, counsel cannot be said to have made a tactical decision without first procuring the
17 information necessary to make such a decision. See *Riley v. Payne*, 352 F.3d 1313, 1324 (9th
18 Cir.2003) (holding that, under clearly established Supreme Court law, when defense counsel
19 failed to contact a potential witness, counsel could not "be presumed to have made an informed
20 tactical decision" not to call that person as a witness); see also *Williams v. Washington*, 59 F.3d
21 673, 681 (7th Cir.1995) ("Because investigation [of the witnesses] might have revealed evidence
22 bearing upon credibility (which counsel believed was the sole issue in the case), the failure to
23 investigate was not objectively reasonable."); *United States v. Tucker*, 716 F.2d 576, 583 (9th
24 Cir.1983) (holding that the failure to interview or to attempt to interview key prosecution
25 witnesses constitutes deficient performance); *Baumann v. United States*, 692 F.2d 565, 580 (9th
26 Cir.1982) ("We have clearly held that defense counsel's failure to interview witnesses that the
27 prosecution intends to call during trial may constitute ineffective assistance of counsel."); cf.
28 *Sanders v. Ratelle*, 21 F.3d 1446, 1457 (9th Cir.1994) ("Ineffectiveness is generally clear in the

1 context of complete failure to investigate because counsel can hardly be said to have made a
2 strategic choice when s/he [sic] has not yet obtained the facts on which such a decision could be
3 made." (citations, emphasis, and internal quotation marks omitted)).

4 The duty to investigate is especially pressing where, as here, the witnesses and their
5 credibility are crucial to the state's case. See Huffington v. Nuth, 140 F.3d 572, 580 (4th
6 Cir.1998) (collecting cases). Moreover, although matters such as counsel's approach to
7 impeachment are often viewed as tactical decisions, and such decisions do not constitute
8 deficient conduct simply because there are better options, a poor tactical decision may constitute
9 deficient conduct if "the defendant [can] overcome the presumption that, under the
10 circumstances, the challenged action [or lack of action] 'might be considered sound trial strategy.'
11 " Strickland, 466 U.S. at 689, 104 S.Ct. 2052 (quoting Michel, 350 U.S. at 101, 76 S.Ct. 158).

12 Excerpt from Reynoso v. Giurbino, 462 F.3d 1099 (C.A.9 (Cal.) 2006) at 1112-1113.

13 When Ms. Miller was testifying Judge Mosley's bailiff observed a spectator in the
14 audience was coaching Ms. Miller as to the answers she was giving to the Prosecutor to questions
15 concerning the decedent and her background. This information was being elicited by the
16 Prosecutor so as to give Ms. Miller credibility that she was indeed "close" to the decedent and
17 therefore the statements she would repeat could be deemed reliable. However, it was one of the
18 decedent's sisters who was coaching Ms. Miller as to information she should, but did not know,
19 such as background information about her, the petitioner and other aspects of her life.

20 The bailiff then had the sister escorted out of the Courtroom and informed Judge Mosley
21 as to what had occurred. The trial was halted and the jury excused. At this point each side gave
22 an explanation as to what they felt occurred to which Judge Mosley stated his concern not about
23 the petitioner's rights, but that he did not want to have to declare a mistrial after they had already
24 impaneled the jury.

25 Instead of holding a full evidentiary hearing to determine what the extent of the
26 misconduct was and by whom the Court simply received testimony from someone who was in
27 the hallway (another witness in the case) and allowed them to be examined with regards to what
28 occurred in the hallway and not in the Courtroom itself. This testimony consisted of Ms. Miller

1 speaking with a jury from another case, that was in recess and had nothing to do with what
2 occurred in the Courtroom.

3 What should have occurred was the Court should have conducted a hearing in which
4 testimony and evidence was heard from the following:

- 5 1. The person or persons who were escorted from the Courtroom for coaching Ms.
6 Miller on the stand;
- 7 2. Ms. Miller herself;
- 8 3. The bailiff;
- 9 4. Any other person or persons who were witnesses and could testify as to what
10 occurred.

11 There really is no reason for the Court not to order a full evidentiary hearing on this
12 matter as it effected the framework of the trial. Furthermore, when the trial was reconvened,
13 there was no questioning [pursuant to a ruling of the Court] of Ms. Miller or anyone else with
14 regards to this incident.

15 Ms. Miller was a critical witness for the state. Miller was the only witness to testify as to
16 certain statements made by Virginia which the state used to prove crucial elements of their case
17 against petitioner as to various incidents which occurred in December of 2000, including the
18 facts surrounding the incidents of December 1, December 5 and those leading up to and
19 including December 20, 2000. By not allowing the defense the opportunity to determine the
20 nature and extent of the misconduct which occurred they were not allowed to impeach the
21 credibility of a critical state witness and therefore petitioner was denied a fair trial. Since there
22 is no way of knowing how it may have impacted the state's case, the presentation to the jury and
23 the evidence, this is plain error which should result in a reversal of petitioner's conviction and a
24 new trial ordered.

25 Counsel's ineffectiveness was the failure to properly investigate the issue and bring it to
26 the attention of the jury. Here, counsel could have requested that the bailiff be called as a
27 witness, and the matter preserved for appeal. Counsel could have then approached the topic with
28 a number of witnesses to the events in both the Courtroom and the hallway (it was alleged that

1 various witnesses were present for Miller's pre-trial and knew the identity of the "sister" who was
2 coaching Miller while on the stand).

3 Finally, counsel should have used his investigators to attempt to locate and interview the
4 sister who was both in the hallway pre-testimony and was told to leave. It wasn't as if this would
5 have taken a Herculean effort by counsel, since the family of Virginia was staying at the Golden
6 Nugget hotel (at the expense of the state).

7 C. Conclusion

8 The Court abused it's discretion with regards to failing to allow petitioner's counsel the
9 ability to explore the issues of the credibility of Tricia Miller with regards to both being coached
10 from the witness stand and her comments and behavior prior to testifying. Counsel was
11 ineffective for failing to object and preserve the issue for direct appellate review, which is a
12 lesser standard than petitioner having to have the matter raised in a post-conviction as ineffective
13 assistance of counsel. Counsel failed to take the necessary steps to preserve this issue by
14 ascertaining the identity of the sister involved and making a record of her actions relative to
15 Miller so the Court could review on appeal. Petitioner is entitled to an evidentiary hearing on
16 this matter, which would preclude Mosley from conducting it since his bailiff will be a witness to
17 the proceedings.

18 Further, counsel was ineffective for failing to object to the testimony regarding the alleged
19 threats petitioner made which were repeated to her by Virginia. This prevented the issue from being
20 preserved for direct appeal, and allowed the evidence to be received by the jury. It cannot be said
21 that this did not effect the outcome of the trial since she was used to bolster this improper statement.
22 Counsel's performance with respect to this issue was constitutionally deficient under the Strickland
23 standard.

24 8. Defense counsel was ineffective for using self-defense as petitioner's primary
25 defense at trial.

26 A. Factual and procedural background

27 Introduction

28 Pre-trial, counsel for petitioner developed two potential theories of defense, those being

1 self-defense and an defense based upon petitioner's observed catatonic state the night of
2 December 20, 2000.

3 As to self-defense, counsel committed a considerable amount of time, resources and
4 energy on this issue. As early as 2001 counsel made statements regarding the intent to use self-
5 defense (see issue of canvass of petitioner, Ground Two, supra) which carried over to 2003,
6 when petitioner's counsel responded with a written statement, over petitioner's objection, which
7 was aired on television essentially committing petitioner to self-defense.

8 This was not the a viable defense for petitioner at trial and was not the petitioner's only
9 option. Extensive time, resources and energy, were spent discussing and litigating the issue of
10 petitioner's mental state relative to the events of not only December 20, 2000, but also December
11 1, 2000 and December 5, 2000 domestic violence incidents. Pre-trial the issue of whether the
12 state was entitled to a pre-trial psychological examination of petition was litigated in a writ which
13 went to the Nevada Supreme Court, which held oral arguments on the issue in June of 2001, and
14 ultimately decided in favor of petitioner not being subjected to the examination.

15 In the meantime, defense counsel had retained experts in the field of psychology to
16 evaluate petitioner and to present this evidence to the jury. Discussions were held regarding
17 battered spouse syndrome and other areas which would explain the events in such a way as to
18 either reduce or completely eliminate petitioner's criminal responsibility for his actions.

19 1. Use of self-defense

20 Petitioner asserts that defense counsel's advice to use self-defense as well as his
21 inadequate presentation of that defense constituted ineffective assistance of counsel in light of the
22 information available to defense counsel regarding the instant offense as well as the opinions of
23 the defense experts that militated against the use of this defense.

24 While counsel's selection of a strategy is unchallengeable, see Strickland, 466 U.S. at
25 691, 104 S.Ct. 2052, the Sixth, Seventh, and Ninth Circuits have held that the selection of a
26 defense strategy before a "reasonable" investigation is ineffective. Richey v. Mitchell, 395 F.3d
27 660, 685 (6th Cir. 2005), reversed on other grounds; Bradshaw v. Richey, 546 U.S. 74, 126 S.Ct.
28 602, 163 L.Ed.2d 407 (2005)' White v. Godinez, 301 F.3d 796, 801, 803 (7th Cir.2002); Rios v.

1 Rocha, 299 F.3d 796, 805-07 (9th. Cir.2002).

2 Counsel failed to investigate his own expert's opinions prior to the selection of a defense
3 strategy of self-defense. This assertion is clearly supported by the record as cited above.

4 **2. Use of psychological defense**

5 During the testimony of Officer Tiffany Gogian on March 22, 2004, an extensive amount
6 of time was spent by both the state and the defense on the issue of the demeanor of defendant on
7 the night of December 20, 2000. By way of background, Officer Gogian put in her report that
8 defendant appeared "catatonic." This became relevant to the litigation in a couple of different
9 manners: 1) Officer Gogian had been a paramedic prior to becoming a police officer; and 2) the
10 entire trial was delayed over attempts by the state to have a pre-trial psychological examination
11 of the defendant to explore this and other "state of mind" issues.

12 Officer Gogan repeated the observations contained in her report with regards to this
13 "catatonic" state. This was repeated, and confirmed, by other witnesses who were present on the
14 night of December 20, 2000, including, but not limited to Mark and Marilee Wright, Alfred and
15 Camille Centofanti, Janeen Mutch (during the evidentiary hearing on attorney client privilege
16 conducted pre-trial) as well as the officer who booked defendant into the jail (brought up during
17 the testimony of CSA Robbie Dahn). This came up during direct examination by the state:

18 Q. What was the Defendant's demeanor like?

19 A. Pretty much sitting there, staring off as though he really wasn't there. I described it
as like a catatonic state.

20 Q. Did the Defendant say anything to you?

21 A. No.

22 Q. What did you do next?

23 A. At that point I asked him to stand up. Again he just was pretty much sitting there
staring.

24 AA, Volume 2, 067, p. 36 line 24, to 068, p. 13, line 7.

25 The issue was explored further during cross-examination:

26 Q. [Y]ou've had experience of treating people who have truly been diagnosed as
catatonic?

27 A. Yes.

28 Q. Tell us -- the tell the jury what that mean.

A. Catatonia is pretty much a state of like a stupor, somebody with no facial

1 expression, almost kind of like a dead pan type facial expression. There's nothing
2 there. They stare as though they are just not, you know. There are just staring off
3 as though there's nothing else going on. Pretty much a stuporous state is the best I
can describe.

4 Q. By stuporous state you mean by in terms of actually absorbing information or
5 seeing things or being able to respond to spoken words of things like that, it's just
not coming in. There's no ability to respond?

6 A. Correct.

7 Q. Have you treated people and brought people to hospitals where they have been
treated for this?

8 A. Not necessarily knowing what that's what -- I've seen people in different levels of
9 shock. I have dealt with people that had appeared in the same demeanor and that's
why --

10 Q. You have?

11 A. Yes. The best -- I guess I reverted back to my paramedic training when I
described him as catatonic.

12 AA, Volume 2, 073, p. 33, line 18, to p. 34, line 25.

13 Bloom went on to further question and clarify this point. Id. at 35, line 1 to 22. He then
14 went on to elicit testimony about the difficulty it took getting the defendant up from a seated
15 position and into custody. AA, Volume 2, 074, p. 40, line 13 to 078, page 48, line 20. During
16 this testimony she indicated defendant was "sitting there. I said I need you to stand up. There
17 was really no response from him at all . . . " Id. at 075, p. 41, lines 4-6. "I remember it was a
18 little bit difficult, because it wasn't as though there was any real dialogue between us." Id. at p.
47, lines 8-10.

19 Her testimony was supported by the testimony of Mark Wright.

20 Q. Describe if you would for the jury the way that Chip looked?

21 A. Chip was staring straight ahead. I mean his eyes, he was just like --

22 Q. You have your eyes wide open?

23 A. He had his eyes wide open, white as a ghost, looking straight ahead like he was
just looking right through you. There was no reaction, no anything.
24 He was like in a catatonic state. To move him you actually had to kind of
physically pull him along. He wouldn't come on his own. It's like you had to kind
of pull him along.

25 Q. Have you ever seen anything like that before?

26 A. No.

27 Q. Did you think it was real?

28 A. Absolutely.

AA, Volume 3, 044, p. 44, line 23, to 045, p. 45, line 13.

1 Mark Wright went on to describe in even more detail, including defendant's encounter
2 with the arresting officer:

3
4 A. . . . [H]e was still standing there and she was trying to kick his feet apart.
5 I don't know why, but she was trying to get his feet spread and she was kicking the crap
6 out of him. She was really wailing on his legs to get him to move.
He was solidly planted. I mean, it was -- believe me, if somebody is kicking me that hard
I'm moving my legs.

7 Q. It made an impression on you?

8 A. Yeah. I was standing right there watching the whole thing in the doorway.

9 Q. Did she finally get his legs apart?

10 A. Yes.

11 Q. Did she finally get him handcuffed?

12 A. Yes.

13 Q. Did his demeanor change at any point that you saw?

14 A. Never, never changed.

15 Q. You talk about his eyes being wide.

16 Did you ever see him blink?

17 A. I never saw him blink. It was looking straight ahead.

18 It was kind of eerie.

19 AA, Volume 3, 050, p. 50, line 15, to 051, p. 51, line 12.

20 During the testimony of Robbie Dahn, the crime scene analyst who photographed
21 defendant when he was taken into custody, she was asked the following:

22 Q. And are you aware the Corrections Officer Talure indicated, filled out a report, to
23 Mr. Centofanti's inability to understand things and to write things and so forth.

24 A. No.

25 AA, Volume 3, 206, p. 70, lines 22-25.

26 Q. Were you aware he was put on suicide watch when he got to the jail?

27 A. No.

28 Q. Were you aware that the jail personnel had evaluated him as being in a state of
shock?

A. No.

AA, Volume 3, 207, p. 75, lines 1-6.

The defense never called the correctional officer regarding his observations of the
petitioner on the night of December 20, 2000 after the arrest or use the records reflecting such at
trial. Despite extensively developing the issue of the state of mind of defendant, Bloom did
nothing to connect this testimony to anything in the case, a point not lost on the state, who,

1 improperly commented during closing the failure of the defense to do just that:

2
3 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.

4 AA, Volume 5, 218, p. 38, lines 1-4.

5 During the testimony of defendant the issue of his mental state was again raised. In response
6 to questions about what occurred with regards to the shooting, the following responses were given:

7 A. I don't remember shooting the gun.

8 AA, Volume 5, 103, p. 145, line 14.

9 A. I don't remember. I don't remember what happened until I was at the jail.

10 Id. at 103, p. 147, lines 4-5.

11 A. I don't recall the shooting. I didn't recall what happened after the shooting.

12 Id. at 104, p. 149, lines 1-2.

13 These answers and the evidence regarding this (defendant's condition observed by the
14 arresting officer, the jailer, the attorney's who first came and visited him at the jail, the first
15 meeting with Harvey Gruber and other attorney's) were consistent with a mental state defense
16 that was never presented to the jury.

17 **B. Argument and legal authority**

18 Petitioner was told pre-trial that his defense would be dependent upon the testimony of
19 psychologist and psychiatrist who would assist defense presentation at trial. Counsel had related
20 to petitioner that experts would testify as to a number of psychological issues which could
21 explain the catatonia and memory loss, as well as address the topic of battered spouse syndrome,
22 as per Boykins v. State, 116 Nev. 171, 995 P.2d 474 (2000), as there were at least two predicate
23 instances of abuse (December 1, 2000 and December 5, 2000) leading up to December 20, 2000.

24 Counsel abandoned this defense at trial, not before it. When it came time for trial, none
25 of this evidence or testimony from the experts was presented or received by the jury, despite an
26 incredible amount of time spent by both the state and defense addressing it in the presentation of
27 facts. Defense counsel's failure to present the battered spouse syndrome through the use of
28 experts (see NRS 48.061) and failing to offer an appropriate jury instruction to coincide with

1 that, deprived petitioner of due process of law and a fair trial and deprived him of his ability to
2 present his theory of defense. See Williams v. State, 97 Nev. 1, 620 P.2d 1263 (1981).

3 Abandonment of a defense has been held to constitute ineffective assistance of counsel.
4 In United States v. Swanson, 943 F.2d 1070, 1072 (9th Cir.1991) the Ninth Circuit held that
5 when trial counsel abandoned petitioner's only defense it deprived petitioner of effective
6 assistance of counsel and due process, thus, not showing of prejudice was necessary. In Deluca
7 v. Lord, 77 F.3d 578 (3rd Cir. 1996) the Third Circuit held when trial counsel abandoned defense
8 of extreme emotional disturbance at early stage for no reason, it constituted ineffective assistance
9 of counsel.

10 Furthermore, in the case of Turner v. Duncan, 158 F.3d 449, 455 (9th Cir.1998) the Ninth
11 Circuit held the failure to adequately investigate or introduce relevant evidence of a defendant's
12 mental state undermined confidence in a defendant's murder conviction. murder. Turner claimed
13 that adequate pretrial preparation and investigation would have produced a different result:
14 conviction of either second degree murder or voluntary manslaughter. The Ninth Circuit noted
15 that this would suffice for a showing of prejudice. Id. at 457.

16 In this case there are factors present that suggest that the failure to present
17 psychiatric testimony may have been especially prejudicial. The only evidence
18 presented in Turner's defense was his own trial testimony, rendering his credibility a
central issue.

19 Id. at 458.

20 The Court further noted that:

21 In Bloom v. Calderon, the attorney's failure to assemble psychiatric evidence
22 that the defendant killed his father in an emotional reaction to past abuse, and
23 that he did not reflect or deliberate, was prejudicial despite strong evidence
suggesting premeditation. Bloom, 132 F.3d at 1275, 1277-78. See also Seidel,
24 146 F.3d at 757 (absence of a mental illness defense prejudiced defendant;
25 there was a "reasonable probability" that defendant would have been found
guilty of manslaughter rather than murder)." Id. at 458.

26 As the record clearly shows, supra, Bloom not only abandoned a mental illness defense,
27 but in doing so prejudiced petitioner due to the fact that as in Turner, the petitioner's credibility
28 was a central issue. And as in Turner, this failure undermined the confidence in petitioner's

conviction as the proper presentation of this evidence would have produced a different result.

C. Conclusion

The potential importance of a mental state defense to petitioner's trial was obvious. If it succeeded, he would have been convicted only of manslaughter and would have received a substantially lower sentence. Moreover, it offered the only realistic escape from the likelihood of a conviction for murder in the first degree. The defense prepared by counsel did not offer any significant likelihood of acquittal. When petitioner attempted to present his version of events the failure of his counsel 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. 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.

9. **Defense counsel was ineffective for failing to object to the admission of hearsay statements allegedly made by Gina Centofanti to the responding officers and to Mark Smith on December 5, 2000, constitute ineffective assistance of counsel.**

A. Factual and procedural background

Court improperly rules that hearsay comes in as "State of Mind Exception"

Bloom filed an Opposition on March 11, 2004, in which he indicated to the Court the following with regards to hearsay statements made by Virginia with regard to the incident on December 5, 2000:

It is anticipated, however, that the prosecution also seeks to introduce the hearsay statements made by Virginia that Defendant stated he would kill Virginia, the kids, and himself. The prosecution infers that because Virginia told this to several people, it gains veracity. Repetition does not equate to reliability for a patently self serving statement at a time when criminal prosecution was pending. Virginia had a clear motive to create a legal defense (she was at the time being charged with domestic violence and was in the midst of divorce proceedings, initiated by the defendant).

AA, Volume 2, 057, page 2, lines 15-22.

1 [T]he statements were self-serving and made at a time when Virginia had a clear
2 motive to contrive the statements for her benefit AND if the difficulty of admitting the
3 statements for a limited purpose (i.e. the state of mind of Virginia), without the jury
4 considering them for an improper purpose - the character of the defendant - would be
overwhelming.

5 Evidence regarding Virginia's hearsay statements regarding prior threats
6 made by Defendant must be excluded as being unreliable and too prejudicial.

7 AA, Volume 2, 058, p. 3, lines 1-8.

8 The Defense contends that the improper prejudicial impact of the statements
9 considerably outweigh the benefit of the statement, the most certainly should
be limited, if not allowed at all.

10 AA, Volume 2, 060, p. 5, lines 21-23.

11 The motion was denied. However, Bloom should have preserved the issue for direct
12 appeal by making the appropriate objections on the records when these statements were brought
13 up by the state throughout their case (opening statements, Tricia Miller, Francisco Sanchez, Lisa
14 Eisenman, Steve Ciulla, Tom Thompson, Officers McGregor and Winslow and in closing
15 arguments and rebuttal).

16 On April 5, 2004 the following was placed on the record by Bloom:

17 MR. BLOOM: I wanted -- I won't belabor it. I'll place on the record my objection to a
18 statement that came out regarding Gina's statement to somebody I believe Officer
19 McLean (sic) later on, but could have been to someone else that she, Gina, commented
that Mr. Centofanti, the Defendant, didn't even know how to use his own gun or
something like that.

20 That comment was -- I want to make it very clear I didn't enter a specific objection at that
21 particular time to that one, just like I didn't to all the other hearsay, because we have ruled
on that beforehand. The court made its ruling.

22 I want it very clear that the defense had a continuing objection to that hearsay statement
and other hearsay statements from Gina.

23 THE COURT: The continuing objection was to the admission of the hearsay statement to
show state of mind is that correct?

24 MR. BLOOM: Yes. That's true. You admitted her statements.

25 I concede and submit her statements made at the time of the incident were within the
26 spontaneous declaration exception. You're right, these later statements -- the one I just
mentioned and other ones I felt should have been admitted. Should not have been
prevented. I entered the objection. We had a long ruling on it.

27 I want to place that one specifically on the record.

28 MR. PETERSON: I agree any hearsay statements that are from Gina Centofanti he has
objected to and he's preserved the issue. That was my position from the beginning.

1 THE COURT: I allowed it and I think it could have been under the excited utterance
2 exception because of the Supreme Court's rather liberal view of that exception, but also
3 state of mind.

MR. BLOOM: Very well.

4 AA, Volume 4, 175, p. 92, line 19, to p. 94, line 6.

5 Once the Court opened the floodgates, the state took advantage to the error and sought to
6 introduce the improper testimony. The record is replete with testimony allowed from witnesses
7 regarding the alleged threats Virginia repeated to police, Tricia Miller and Quito, supra. Under
8 the umbrella of "state of mind" the Court pretty much allowed any witness the opportunity to
9 repeat things Virginia told them with regards to petitioner and the events of December 5, 2000.

10 The improperly admitted hearsay was used by the state in closing argument to make sure
11 it made an impression on the jury.

12 Remember his statement "I'll kill you, I'll kill the kids, I'll kill myself."

13 AA, Volume 5, 219, p. 43, lines 14-15.

14 The only reason he didn't kill me is he didn't know how to work my gun.

15 AA, Volume 5, 219, p. 43, lines 18-19.

16 **B. Argument and legal authority**

17 The admission of this evidence violated petitioner's rights under the confrontation clause
18 because the victim was not available for cross-examination. See, Crawford v. Washington, 541
19 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); California v. Green, 399 U.S. 149, 90 S.Ct.
20 1930, 26 L.Ed.2d 489 (1970); see also Corbin v. State, 97 Nev. 245, 627 P.2d 862 (1981).

21 The admission of this hearsay evidence is similar to Summers v. State, 102 Nev. 195, 718
22 P.2d 676 (1986). In Summers, the district court admitted a co-defendant's suicide note which
23 implicated the defendant in the murder into evidence over defense objection. The district court
24 believed the note was admissible as a prior inconsistent statement. The Nevada Supreme Court
25 found that it was not, and it thus was inadmissible hearsay. Id. at 201, 718 P.2d 676. The Court
26 further found the prejudicial effect of the dramatic statements in the suicide note was significant.
27 Id.

28 In Downey v. State, 103 Nev. 4, 7, 731 P.2d 350, 352 (1987) the Nevada Supreme Court

1 again looked at a court's admission of evidence "from the grave." In Downey the Court found
2 that the hearsay in Downey extremely prejudicial, both because of its content and because it is, in
3 effect, testimony from the dead victim. Id. at 352. And even though the evidence was not
4 objected to at trial, as it was not in petitioner's case, the Court held the erroneous admission of
5 this evidence has compromised Downey's right to a fair trial, and reviewed the issue. Id. at 352-
6 353. The Court concluded that Downey be given a new trial because the improper admission of
7 the hearsay evidence. Id. at 353.

8 Here, as in the cases cited to above, the state improperly solicited hearsay evidence that
9 should not have been presented to the jury. It was ineffective assistance of counsel not to have
10 objected to the hearsay evidence at trial, as it was, as in Downey, and allowed testimony from
11 Virginia, especially the alleged threats and other statements made on December 5, 2000. While
12 counsel did file a pre-trial Motion attacking these statements, it was ineffective to abandon the
13 objections and defenses to it's presentation at trial, especially since the U.S. Supreme Court's
14 decision in Crawford v. Washington, supra, strengthened the ability to oppose the introduction
15 and arguably was not fully understood by the state and the Court, and apparently the defense.

16 C. Conclusion

17 The failure to object to the admission of hearsay evidence under the "state of mind"
18 catchall the Court allowed it to be was ineffective assistance of counsel. This allowed a plethora
19 of witnesses to testify regarding evidence that should have been excluded and not heard by the
20 jury and relied upon in reaching its' verdict. This was especially true of the Court allowing the
21 state to introduce Virginia's claim that petitioner threatened her through the testimony of Miller
22 and Quito as evidence of premeditation, it cannot be said that the failure on this issue did not
23 affect the outcome of the trial. Counsel's performance with respect to this issue was
24 constitutionally deficient under the Strickland standard.

25 III.

26 **Defense counsel was ineffective regarding prejudicial prosecutorial misconduct and**
27 **prejudicial rulings of the Court.**

28 There were a number of instances of prejudicial prosecutorial misconduct and prejudicial

1 court rulings that were not properly handled by defense counsel who failed to provide effective
2 assistance by his failure to:

- 3 1. Object and or preserve a particular issue;
- 4 2. Request a mistrial;
- 5 3. Request a full and adequate evidentiary hearing;
- 6 4. File a writ or other form of appeal;
- 7 5. Request a curative instruction;
- 8 6. Move or make a Motion to Strike or Exclude; and
- 9 7. Request a continuance.

10 Working within these parameters, defense counsel failed to provide effective assistance
11 as demonstrated by the following:

- 12 **1. Defense counsel was ineffective for failing to object or seek relief for an order**
13 **vacation the disqualification of Dan Albregts as petitioner's counsel of**
14 **choice.**

15 **A. Factual and procedural background.**

16 As the facts and law set forth in Ground One and Ground Six, Part I, 1, supra,
17 demonstrate, the district attorney's office committed prejudicial prosecutorial misconduct in the
18 bad faith request to have Dan Albregts removed (disqualified) from the case. It was an abuse of
19 discretion for the Court to consider and conduct the canvass of petitioner and allow that to serve
20 as a basis for the disqualification of petitioner's counsel.

21 After the disqualification the state then "backed off" on it's position regarding both the
22 San Diego real estate transaction and Albregts as a witness, which is further proof of it's bad faith
23 actions and prosecutorial misconduct.

24 While counsel did file a brief in Opposition to the bad faith actions of the District
25 Attorney's Office (both before and after the disqualification) and provided argument as the
26 hearing of the matter, supra, counsel failed to properly challenge the prejudicial and improper
27 canvassing of petitioner which was used to obtain the disqualification and the ruling of the Court
28 disqualifying Albregts by failing to file an immediate Writ of Mandamus/Prohibition to the

1 Nevada Supreme Court. This would have allowed the matter to have been decided before trial
2 was allowed to proceed, and not unprecedented in this case as it was done in the writ filed by the
3 state when the Court denied their request to have a psychological examination of petitioner done.

4 **B. Argument and legal authority**

5 Petitioner incorporates the argument and legal authority contained in Ground One as
6 though fully set forth herein as to the issues of the improper canvass and disqualification. Where
7 the right to be assisted by counsel of one's choice is wrongly denied, it is unnecessary to conduct
8 an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation, since the right
9 to select counsel of one's choice is not derived from the Sixth Amendment's purpose of ensuring
10 a fair trial; thus, deprivation of the right is complete when the defendant is erroneously prevented
11 from being represented by the lawyer he wants, regardless of the quality of the representation he
12 received. U.S. v. Gonzalez-Lopez, 126 S.Ct. 2557 (U.S. 2006).

13 As to the ineffectiveness of counsel, Nevada law is clear as to the proper procedure to
14 challenge the disqualification. A mandamus petition is the appropriate remedy to challenge a
15 district court order that disqualifies attorneys from representing parties. Miller v. Eighth Judicial
16 Dist. ex. rel. County of Clark 148 P.3d 694 (Nev. 2006)[Citing to Cronin v. District Court, 105
17 Nev. 635, 639, n. 4, 781 P.2d 1150, 1152, n.4.] This was either not known or ignored by
18 counsel. The prejudice was that if the writ was filed, it is reasonably probably that the Nevada
19 Supreme Court would have reversed the order of the district court disqualifying Albregts,
20 especially in light of the district attorney admitting in December of 2001 that Albregts would not
21 be a witness.

22 **C. Conclusion**

23 Counsel's failure to properly handle this issue deprived petitioner of proceeding to trial
24 with the his counsel of choice. Where petitioner's Sixth Amendment right to counsel of his
25 choice is violated because the disqualification of his chosen counsel was erroneous, no additional
26 showing of prejudice is required to make the violation complete. Therefore, the failure to have
27 the Sixth Amendment issue heard by the Nevada Supreme Court in a timely manner, the
28 ineffectiveness resulted in the erroneous disqualification was prejudicial to petitioner entitling

1 him to a new trial. Counsel's performance with respect to this issue was constitutionally deficient
2 under the Strickland standard.

3
4 **2. Defense counsel was ineffective for failing to prevent the canvass of petitioner
5 by the Court as to consent to defense/admit petitioner was the shooter.**

6 **A. Factual and procedural background**

7 As the facts and law set forth, supra, in Ground Two, demonstrate, the District Attorney's
8 Office committed prejudicial prosecutorial misconduct in requesting the canvass be conducted by
9 the Court. Again, as with the disqualification issue, while defense counsel filed a brief and did
10 argue (at least back in 2001 regarding this issue), counsel failed to properly challenge the
11 prejudicial and improper ruling of the Court by failing to file an immediate petition for writ of
12 mandamus/prohibition to the Nevada Supreme Court to have the matter decided before trial was
13 allowed to proceed, as was done in the writ filed regarding the state's improper request to have a
14 psychological examination of petitioner done.

15 The district court abused it's discretion and prejudiced petitioner in allowing the request
16 for canvass to proceed without requiring the state to provide any authority or having a hearing on
17 the matter. The court continued it's error by then conducting the canvass of the petitioner itself,
18 making itself a witness, and violating petitioner's Fifth and Fourteenth Amendment Right to
19 remain silent and Sixth Amendment right to counsel.

20 It was further prosecutorial misconduct and court error to conduct the canvass in the
21 presence of the state, which went beyond the purpose of the original request.

22 **B. Argument and legal authority**

23 Petitioner incorporates the argument and legal authority contained in Ground Two as
24 though fully set forth herein as to the issue of the canvass. The ineffectiveness was the failure of
25 counsel to object to each instance of prosecutorial misconduct and court error and not preserve
26 the issues for the record or challenge them pre-trial. Counsel should have objected to the canvass
27 that took place and not allowed it go forward. If the Court insisted that the canvass go forward,
28 counsel should have filed a writ to have the matter heard before trial commenced. Finally, if the
canvass was allowed to go forward, counsel should have objected to having the state present and

1 requested that the record of the canvass be sealed for the record on review. None of these things
2 were done.

3 As to the ineffectiveness of counsel, Nevada law is clear as to the proper procedure to
4 challenge a district court when it exceeds its authority. A writ of mandamus/prohibition is the
5 appropriate to remedy jurisdictional excesses committed by an inferior tribunal, board, or officer,
6 exercising judicial functions. West's NRS 34.020(2). Las Vegas Police Protective Ass'n Metro.
7 Inc. v. Eighth Judicial Dist. Court ex rel. County of Clark, 122 Nev. 230, 130 P.3d 182 (2006).

8 This was either not known by or was simply ignored by defense counsel. The prejudice was that
9 if the writ was filed, it is reasonable probably that the Nevada Supreme Court would have
10 instructed the district court not to conduct the canvass or to conduct it in such a manner as to not
11 violate petitioner's rights.

12 C. Conclusion

13 Counsel's failure to properly handle this issue lessened the burden or prosecution and
14 denied petitioner his Fifth and Fourteenth Amendment Right to remain silent and Sixth
15 Amendment Right to counsel and was prejudicial ineffective assistance of counsel entitling
16 petitioner to a new trial. Counsel's performance with respect to this issue was constitutionally
17 deficient under the Strickland standard.

- 18
19 **3. Defense counsel was ineffective for failing to request a Petrocelli hearing or
20 request that the state not be allowed to argue or present evidence of a 'smear
campaign' by petitioner pursuant to a pre-trial ruling of the Court.**

21 A. Factual and procedural background

22 The Court had ruled in December of 2001, and the state agreed on the record, that any
23 evidence claiming defendant had engaged in a so called "smear campaign" against Virginia prior
24 to December 20, 2000 as evidence of pre-meditation, would not be allowed in the state's case-in-
25 chief. Defense counsel failed to object to the state improperly raising the issue in the state's
26 opening statement. AA. Volume 8, p. 107. Defense counsel further failed to object to the
27 evidence presented during the state's case-in-chief on two grounds, (1) it violated the Court's
28 Order and (2) the transcripts of the statements of the two witnesses brought in to substantiate the

1 allegations were not provided to the Defense until the day they were scheduled to testify.

2
3 **1. The Court ruled back in December of 2001 that any so called**
4 **"smear campaign" evidence would not allowed in the State's**
5 **case-in-chief, if at all.**

6 Back during the Petrocelli hearing that were conducted in December of 2001, the issue of
7 the state wanting to try to prove premeditation by introducing evidence of an alleged 'smear
8 campaign' was brought before the Court. The following discussion on the record is illustrative
9 of the subsequent failure by defense counsel to object to the very thing ruled excluded and how it
10 then infected the entire proceedings.

11 THE COURT: So at trial would you be offering evidence in the case in chief
12 about alleged bad mouthing of Mrs. Centofanti by Mr. Centofanti?

13 MS. GOETTSCH: Not in the case in chief at that point; possibly in rebuttal.

14 MR. LAURENT: If there comes a time, Judge, where we feel it necessary, we
15 will bring it to the Court's attention prior to putting that evidence on and
16 request a hearing outside the presence of the jury.

17 THE COURT: We have to do that hearing whether its rebuttal or case in chief.

18 MR. LAURENT: Right. That's what we understand.

19 AA, Volume 1, 155, page 65, line 18, to 156, p. 66, line 6.

20 Both the state and the Defense contemplated a during trial hearing. Id. 156, pps. 68-69.

21 MR. BLOOM: Now they say its not going to come in their case in chief.
22 Obviously, that means they can't talk about it in opening statement. But if
23 they are going to present it as some point, it is the worst kind of sandbagging
24 to wait until the very end to present it at that point.

25 AA, Volume 1, 157, p. 70, lines 7-12.

26 MR. BLOOM: [S]tatements from the decedent that my client was trying to
27 [discredit] her . . . that Virginia Centofanti reportedly said to -- to these
28 witnesses.

AA, Volume 1, 200, p. 242, lines 8-11.

MS. GOETTSCH: I'm not pursuing that. I'm not, as a -

THE COURT: The state says they're not going to bring that up in their case
in chief.

MR. BLOOM: That's just a case in chief matter.

THE COURT: And if they don't, and it's not put in issue by the defense in

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1 their case in chief, then it's improper rebuttal - and you can make that argument.
2 They won't be able to get into it.

3 AA, Volume 1, 200, p.242, line 16 to p. 243, line 1.

4 **2. State violated court's order in opening statement**

5 These representations and rulings of the Court were either forgotten and or ignored as
6 reflected in the opening statements by the state:

7 [B]ut most importantly, he talked about Gina to others and their relationship.
8 You will hear he started to go on this **smear campaign** that started with his call
9 to Eva Cisneros on the 5th. He would tell everyone who would listen "She's a
10 bad mother. She is sleeping with everyone in town. She's doing drugs. She's
11 doing alcohol. I can't believe it." He continues to paint her in the worst light and
12 himself in the best light. (Emphasis added)

13 AA, Volume 8, 017, p. 138, lines 8-17.

14 Defense counsel did not object. There wasn't a request for a curative instruction. No
15 request for an evidentiary hearing (Petrocelli) prior to admittance. There was no request for a
16 mistrial. There should have been.

17 **3. State violated court's order by presenting evidence of an
18 alleged "smear campaign" during it's case-in chief**

19 **a. Sarah Smith**

20 The true intentions of the state were not revealed until Sarah Smith testified on April 1,
21 2004. The transcript of the recorded interview of Ms. Smith, which was taken back in 2003, was
22 not provided to the defense until the day she actually testified. The reason the state withheld the
23 transcript until the day of her testimony (as they had with other witnesses, such as Francisco
24 Sanchez) was obvious, unfair surprise and to gain an unfair tactical advantage on the defendant
25 and defense and to sandbag them so as they would not be able to respond to the unsubstantiated
26 and scandalous allegations, which were incapable of rebuttal since there wasn't any advance
27 notice. Hence, the reason the Court ruled back in 2001 that this evidence would not be received
28 without a Petrocelli hearing first, if it was going to be allowed at all.

There was no effort made by Bloom to object to failure to provide the transcript earlier, or
any request to prohibit as violative of the above Court ruling regarding the substance of her
testimony, delay or continue her testimony (as was done during the Petrocelli hearing with Quito)

1 to allow the defense to prepare for the allegations contained therein. This could not have been a
2 reasonable strategic decision.

3 At this point in the trial, the state had a number of holes in their theory which were to be
4 filled by just one witness, Sarah Smith. As the prosecutor commented at the beginning of the
5 examination as he was "asking" his "questions", "Maybe because I didn't cross it off on my list."
6 AA, Volume 4, 101, p. 66, lines 1-2. Bloom did not appreciate or understand what was to occur
7 next.

8 The most effective way to demonstrate the ineffectiveness of Bloom, regarding the failure
9 to prepare and respond to the misconduct of the state and the belated testimony of Ms. Smith, is
10 to look at what occurred during her examination:

11 **1. Allegations that petitioner lied to police on**
12 **December 5, 2000.**

13 Q. What was Chip's -- Chip Centofanti's demeanor when he was telling you
14 about these things?

15 A. Chip was a little worked up about it. He was -- he was bragging, I guess
16 you would say, about the fact he was able -- initially he had been the one
17 that the police questioned regarding the incident and he had been the one
18 sitting in the back of the patrol car and then after he had a chance to talk
19 to the police, um, they arrested Gina.
20 So he was saying that -- that he was smarter than she was, that he could
21 talk his way out of anything, and that there was no way the police were
22 going to listen to her.

23 AA, Volume 4, 101, p. 66, line 18, to 67, line 5.

24 She was also allowed to testify that petitioner allegedly said "I'm an attorney. I can talk
25 my way out of everything." *Id.* at 101, p. 68, lines 2-3. There was no evidence presented, by any
26 witness, that defendant had ever been placed in the back of the police car at any point on
27 December 5, 2000. No effort was made by Bloom to bring out this fact on cross-examination.
28 Also, there was no evidence from the officer's involved to support the "he talked his way out of
it", the officer's testimony as to why they arrested her instead of him speaks for itself, but again
was not brought forth by Bloom in cross-examination.

Q. How was he acting while he was telling this story?

A. It was like he had been at a hearing.

1 Q. What do you mean a hearing?

2 A. It was like he had given an argument in Court and won. He was proud
3 of himself , boastful. He considered it a real achievement.

4 AA, Volume 4, 101, p.67 lines 6-12.

5 She also alleged that "the description of events always changed" and that although
6 petitioner claimed to have been injured during the event "I didn't see anything there." Id. at 101,
7 p. 67, lines 16-19, lines 21-24. Defense counsel did not object, did not request a curative
8 instruction nor request an evidentiary hearing (Petrocelli) prior to admittance. He also did not
9 request a mistrial.

10 Then again, with no objection, the following was received by the jury:

11 **2. Allegations that petitioner called Virginia a bad**
12 **mother/drug addict.**

13 Q. At around the end of this week pushing towards the 9th what was Chip's
14 demeanor around the office?

15 A . . . He was either very righteous and saying she was a bad mother and a
16 drug addict and she was a horrible person and she cheated on him or he
17 was -- he was upset. . . .

18 AA, Volume 4, 102, p. 69, line 13 to line 23.

19 What makes this line of question interesting is that it clearly violates the Court's pre-trial
20 order from 2001, the representations to the Court and defense counsel regarding this topic, and
21 that this is the only witness who testified to the remarks, making them even more suspect. Since
22 the state had no evidence and no witnesses to support the obsession theory (defendant never
23 showed up at Virginia's work, or where she went out to meet up with co-workers, etc) this
24 becomes the magic witness to clean up or tie up all the loose ends of the prosecution. Defense
25 counsel did not object to this or ask for a curative instruction. He did not request an evidentiary
26 hearing or move for a mistrial.

27 Then again, with no objection, the following was received by the jury:

28 **3. Allegations that petitioner was obsessed with**
Virginia.

Q. Did he talk frequently about Gina?

A. Constantly. Every conversation that you had with Chip ended up

1 revolving around Gina. It didn't matter how it started.

2 Id. at 102, p.70, lines 2-5.

3 She then suggested that she provided some books to defendant the next day entitled
4 "Obsessive Love" and "How to Fall Out of Love." Id. at 105, p. 84, line 14, to 106, p. 85, line 2.

5 There was no corroboration of this from any of the other five attorneys that defendant
6 worked with regarding this topic, including the two who testified, Adrienne Atwood and Eva
7 Cisneros. How about the other's who testified from Associated Court Reporters and the other
8 attorneys? How about defendant's secretary? This statement is belied by all the other evidence
9 in this case, but there was no effort by defense counsel to cross examine her on any of it.

10 Once again defense counsel failed to object, failed to request a curative instruction failed
11 to move for an evidentiary hearing or request or mistrial.

12 Then again, with no objection, the following was received by the jury:

13 **4. Allegations that petitioner called Virginia a slut.**

14 Q. You told us a little bit ago that Chip would say about Gina that she was a
15 drug addict and a bad mother.

16 Did he have any other pejorative words he used for her?

17 A. He called her a slut.

18 Q. How often would he say these kinds of things about Gina?

19 A. In every conversation.

20 Q. Who would he say them to?

21 A. Anyone who would listen.

22 Id. at 102, p. 70, line 20, to p. 71, line 5.

23 Sarah is the only "witness" to make this allegation.

24 Defense counsel failed to object, failed to request a curative instruction failed to move for
25 an evidentiary hearing or request or mistrial.

26 Then again, with no objection, the following was received by the jury:

27 **5. Allegations that petitioner would have Virginia**
28 **killed.**

The attack continued:

Q. While you were at ice skating did you hear Chip Centofanti make any
statements regarding violence towards Virginia Centofanti?

A. Yes.

1 He said "She's lucky we don't still live in Boston or I'd have her taken
2 care of."

3 Q. What did you take that to mean?

4 A. That he would have her killed.

5 Id. at 103, p. 73, line 24, to p. 74, line 6.

6 It should be noted that petitioner and Virginia never lived in Boston.

7 Defense counsel failed to object, failed to request a curative instruction, failed to move for
8 an evidentiary hearing or to request a mistrial.

9 The following was received without a defense objection by the jury:

10 **6. Allegations that petitioner wanted Virginia dead for
11 financial reasons.**

12 Q. Did the Defendant make any unusual comments or requests while you
13 were ice skating?

14 A. . . [H]e wanted to know how much money his son would inherit when Gina was
15 dead?

16 Q. Do you recall him making a statement to the effect that if she was to die
17 Nicholas would be set for life?

18 A. Yes, that's what he said.

19 Id. at 103, p. 74, lines 12-24.

20 She mentioned that the defendant "brought" this up with her roommate Donna Coffee. Id.
21 at p. 74, line 12 to p. 75, line 18. She claimed that petitioner "wanted to know how much money
22 his son would inherit when Gina was dead." Id. The problem with this statement is that it is
23 false and was refuted by evidence well known to the state and the defense at the time it was
24 made. Had the statement been provided in a timely manner, this "allegation" could have been
25 explored and refuted or at least impeached. [It should be noted that Bloom did in fact address
26 this issue with Lisa Eisenman who testified that the amount of money that Nicholas would be
27 entitled to came out to about \$30,000.00 dollars].

28 The trust documents were already provided to petitioner and made part of the divorce
settlement between Virginia and petitioner. The state already had a copy of the divorce so why
would they elicit false testimony from the witness and then not correct it? The divorce was final
by the time of the ice skating episode on December 14, 2000. Furthermore why would petitioner
say he was "set for life" and then want to know how much money was involved?