No. _____

OCTOBER TERM, 2019

IN THE SUPREME COURT OF THE UNITED STATES

William Patrick Castillo, Petitioner,

v.

William Gittere, Warden, et. Al., Respondent.

Antonio Lavon Doyle, Petitioner,

v.

William Gittere, Warden, et. Al., Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Nevada

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

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APPENDICIES

CASTILLO, WILLIAM

DOYLE, ANTONIO

APPENDIX A

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM P. CASTILLO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73465

ORDER DENYING REHEARING

FILED
SEP 06 2019
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

Rehearing denied. NRAP 40(c).

It is so ORDERED.

Gibbons, C.J.

Pickering, J.

Hardesty, J.

Parraguirre, J.

Stiglich, J.

Cadish, J.

Silver, J.

cc: Hon. William D. Kephart, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

19-37415

APPENDIX B

APPENDIX B

135 Nev., Advance Opinion 16

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM P. CASTILLO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73465

Appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Affirmed.

Rene L. Valladares, Federal Public Defender, and Ellesse D. Henderson, Bradley D. Levenson, Tiffany L. Nocon, and David Anthony, Assistant Federal Public Defenders, Las Vegas,
for Appellant.

Aaron D. Ford, Attorney General, Carson City; Steven B. Wolfson, District Attorney, and Steven S. Owens, Chief Deputy District Attorney, Clark County,
for Respondent.

BEFORE THE COURT EN BANC.

OPINION

By the Court, STIGLICH, J.:

Appellant William Castillo, who was sentenced to death in 1996, filed a procedurally barred postconviction petition for a writ of habeas

corpus asserting that he was entitled to a new penalty hearing. He claimed he demonstrated good cause and prejudice to excuse the procedural bars based on *Hurst v. Florida*, 577 U.S. ___, 136 S. Ct. 616 (2016). He specifically argued that *Hurst* did two things: (1) it established that the weighing component of Nevada's death penalty procedures is a "fact" that must be proven beyond a reasonable doubt, and (2) it clarified that *all* eligibility determinations, regardless of whether they are factual, are subject to the beyond-a-reasonable-doubt standard. We recently rejected the first argument, *Jeremias v. State*, 134 Nev., Adv. Op. 8, 412 P.3d 43, 53, *cert. denied*, ___ U.S. ___, 139 S. Ct. 415 (2018), and in doing so, we reaffirmed our prior decisions that a defendant is death-eligible in Nevada once the State proves beyond a reasonable doubt the elements of first-degree murder and at least one statutory aggravating circumstance, *Lisle v. State*, 131 Nev. 356, 365-66, 351 P.3d 725, 732 (2015). We previously rejected the second argument that the beyond-a-reasonable-doubt standard does not apply to the weighing of aggravating and mitigating circumstances in *Nunnery v. State*, 127 Nev. 749, 772, 263 P.3d 235, 250-51 (2011). Castillo fails to demonstrate that these prior decisions were incorrect or that *Hurst* compels us to reach a different result. Thus, he fails to demonstrate good cause to excuse the procedural bars, and the district court correctly denied his petition.

FACTS AND PROCEDURAL HISTORY

Castillo bludgeoned an elderly woman to death in 1995 and was sentenced to death. After this court affirmed the judgment of conviction on direct appeal, *Castillo v. State*, 114 Nev. 271, 956 P.2d 103 (1998), Castillo filed a postconviction petition for a writ of habeas corpus, which was denied. Later, he filed a second postconviction petition for a writ of habeas corpus,

which was also denied. In 2017, he filed the postconviction petition at issue here, his third petition filed in state court. Because the 2017 petition was not filed within one year after the remittitur issued from his direct appeal and because Castillo had previously sought postconviction relief, the district court denied it as untimely, *see* NRS 34.726, successive, *see* NRS 34.810(2), abusive, *see id.*, and barred by laches, *see* NRS 34.800(2), concluding that Castillo failed to demonstrate good cause and prejudice to excuse the various procedural bars. This appeal followed.

DISCUSSION

Under Nevada law, a petitioner cannot relitigate his sentence decades after his conviction by continually filing postconviction petitions unless he provides a legal reason that excuses both the delay in filing and the failure to raise the asserted errors earlier, and further shows that the asserted errors worked to his "actual and substantial disadvantage." *State v. Huebler*, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012). Castillo argues that he demonstrated good cause and prejudice because the United States Supreme Court's decision in *Hurst* provided him with new and meritorious claims for relief that were not available earlier. *See Bejarano v. State*, 122 Nev. 1066, 1072, 146 P.3d 265, 270 (2006). To resolve this contention, we must determine whether his interpretation of *Hurst* has merit, which we undertake de novo. *See Huebler*, 128 Nev. at 197, 275 P.3d at 95.

The holding in Hurst v. Florida, 577 U.S. ___, 136 S. Ct. 616 (2016)

In *Hurst*, the United States Supreme Court applied *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), to Florida's death penalty statutes. The Florida statutes created a system where the jury considered evidence of aggravating and mitigating circumstances and then recommended to the judge whether to impose a

death sentence. *Hurst*, 577 U.S. at ___, 136 S. Ct. at 620. Under that system, the judge made the ultimate decision whether to impose a death sentence, including her own determination whether any aggravating and mitigating circumstances existed. *Id.* The Court held that "Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance," violated the Sixth Amendment. *Id.* at ___, 136 S. Ct. at 624.

We considered *Hurst*'s impact on our death penalty system in *Jeremias v. State*, 134 Nev., Adv. Op. 8, 412 P.3d 43 (2018). The appellant in that case argued that *Hurst* established, for the first time, that "where the weighing of facts in aggravation and mitigation is a condition of death eligibility, it constitutes a factual finding which must be proven beyond a reasonable doubt." *Id.* And pointing to language in some of this court's prior decisions stating that a defendant is not death-eligible unless a jury concludes both that there are aggravating circumstances and that any mitigating circumstances do not outweigh those aggravating circumstances, he argued that he was entitled to a new penalty hearing because the jury was not properly instructed on the burden of proof. *Id.* We disagreed for two main reasons. First, we held that the appellant was taking language in *Hurst* out of context and the decision did not announce new law relevant in Nevada. *Id.* at 53-54. Second, we explained that while some of this court's prior decisions described the weighing of aggravating and mitigating circumstances as part of the death-eligibility determination, we had reiterated in *Lisle v. State*, 131 Nev. 356, 365-66, 351 P.3d 725, 732 (2015), that a defendant is death-eligible once the State proves the elements of first-degree murder and the existence of at least one statutory aggravating circumstance. *Jeremias*, 134 Nev., Adv. Op. 8, 412 P.3d at 54.

Hurst did not redefine the word "fact"

Castillo first argues that *Hurst* does more than merely analyze Florida's death penalty procedures in light of *Apprendi* and *Ring*. Pointing to language in *Hurst* describing the outcome of the weighing determination in Florida as a fact and suggesting it was a critical finding necessary to increase the defendant's sentence, Castillo asserts that *Hurst* establishes that whenever a State conditions death-eligibility on the weighing of aggravating and mitigating circumstances, the outcome of that weighing is a fact subject to the burden of proof beyond a reasonable doubt. We do not agree. As we indicated in *Jeremias*, a close reading of *Hurst* shows that the few references to the weighing component of Florida law as a factual finding involved quotations from the Florida statute. 134 Nev., Adv. Op. 8, 412 P.3d at 53-54. Our conclusion that *Hurst* broke no new ground in this area is consistent with that of "[m]ost federal and state courts," *State v. Lotter*, 917 N.W.2d 850, 863 (Neb. 2018) (footnotes omitted), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. March 13, 2019) (No. 18-8415), and Castillo fails to demonstrate that it was incorrect.

The beyond-a-reasonable-doubt standard only applies to facts

Castillo also raises a new argument that we have not previously considered: he suggests that *Hurst* eliminated the distinction between factual findings and other determinations for purposes of applying *Apprendi* in the context of capital sentencing. He contends that, under *Hurst*, regardless of whether the jury is being asked to make a factual finding, a moral determination, or something else altogether, if its decision makes a defendant death-eligible, it is an element of the capital offense and therefore must be alleged in the charging document, submitted to a jury, and proven beyond a reasonable doubt. Nothing in *Hurst* can be read to

support this assertion. Like *Apprendi* and *Ring*, *Hurst* clearly limits its reach to *facts* that expose a defendant to a higher sentence. *Hurst*, 577 U.S. at ___, 136 S. Ct. at 619 (holding that "[t]he Sixth Amendment requires a jury, not a judge, to find each *fact* necessary to impose a sentence of death" (emphasis added)); *accord Ring*, 536 U.S. at 589 (holding that "[c]apital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any *fact* on which the legislature conditions an increase in their maximum punishment" (emphasis added)); *Apprendi*, 530 U.S. at 490 (holding that "any *fact* that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" (emphasis added)). Indeed, to support his argument that *Hurst* extends the *Apprendi* rule to all determinations, regardless of whether they involve fact-finding, Castillo circles back to the same mischaracterized language in *Hurst* discussed above, which uses the word "fact" when quoting the Florida statute. We find no credence in the assertion that the Court's scattered references to the language in Florida's statute were intended to broaden the reach of *Apprendi* and *Ring* by obliterating the distinction between factual findings and moral choices regarding the weight to ascribe to a factual finding. *See generally In re Winship*, 397 U.S. 358, 363 (1970) (discussing the genesis of the burden of proof beyond a reasonable doubt and its role in reducing the risk of convictions resting on factual error). Castillo fails to demonstrate that *Hurst* announced a new rule relevant to the weighing component of Nevada's death penalty statutes.

The weighing determination is not part of death-eligibility

Even if *Hurst* announced the new rule Castillo advances, we reiterate that it would have no impact because the weighing of aggravating

and mitigating circumstances is not part of death-eligibility under our statutory scheme. *See Lisle*, 131 Nev. at 365-66, 351 P.3d at 732. In Nevada, the facts that expose a defendant to a death sentence, and therefore render him death-eligible for the purposes of *Apprendi* and *Ring*, are the elements of first-degree murder and any statutory aggravating circumstance.[1] *Jeremias*, 134 Nev., Adv. Op. 8, 412 P.3d at 54; *Lisle*, 131 Nev. at 365-66, 351 P.3d at 732. Although the relevant statutes provide that a jury cannot impose a death sentence if it concludes the mitigating circumstances outweigh the aggravating circumstances, NRS 175.554(3); NRS 200.030(4)(a), that provision guides jurors in exercising their discretion to impose a sentence to which the defendant is already exposed, *Apprendi*, 530 U.S. at 481 (acknowledging that, at common law, a sentencer always had the discretion to "tak[e] into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute"), and checks the unfettered exercise of that discretion, *see generally Gregg v. Georgia*, 428 U.S. 153, 220-21 (1976) (White, J., concurring) (indicating that systems of capital punishment that give the sentencer unguided discretion are cruel and unusual).

CONCLUSION

Because Castillo's arguments regarding *Hurst* lack merit, he fails to demonstrate good cause and prejudice to excuse the various procedural bars precluding him from challenging his sentence at this late

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[1]We reject Castillo's argument that he should be permitted to take advantage of the apparent confusion caused by our prior lack of precision when using the term "eligibility." As Castillo himself points out, "the relevant inquiry is one not of form, but of effect." *Apprendi*, 530 U.S. at 494.

date. We therefore conclude that the district court did not err by denying Castillo's postconviction petition for a writ of habeas corpus and affirm.[2]

_____, J.
Stiglich

We concur:

_____, C.J.
Gibbons

_____, J.
Pickering

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Cadish

_____, J.
Silver

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[2]Castillo also argues that *Hurst* establishes that the practice of appellate reweighing of aggravating and mitigating circumstances is unconstitutional. Setting aside the fact that *Hurst* says nothing on this issue, the Supreme Court has permitted appellate reweighing. *Clemons v. Mississippi*, 494 U.S. 738, 750 (1990). The Court has not overruled *Clemons* and therefore it remains good law. *See Bosse v. Oklahoma*, 580 U.S. ___, ___,137 S. Ct. 1, 2 (2016) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." (quoting *Hohn v. United States*, 524 U.S. 236, 252-53 (1998))).

APPENDIX C

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM P. CASTILLO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56176

ORDER DENYING REHEARING

Appellant William Castillo has filed a petition for rehearing of the court's order affirming the district court's denial of a post-conviction petition for a writ of habeas corpus in a death penalty case. *Castillo v. State*, Docket No. 56176 (Order of Affirmance, July 18, 2013). Although we deny rehearing, Castillo's claim that this court overlooked his argument that he was actually innocent of the death penalty warrants further discussion.

Castillo argues that two of the four aggravating circumstances found in the penalty phase were invalid based on *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004), and that if this court reweighed and considered all of the mitigation evidence that should have been presented to the jury, he would be actually innocent of the death penalty and his death sentence would be reversed. Castillo fails to demonstrate that he would be entitled to relief.

After striking the invalid aggravating circumstances, two remain—Castillo was previously convicted of a felony involving the use or threat of use of violence and he committed the murder to avoid lawful arrest. This court may uphold a death sentence based in part on an

invalid aggravating circumstance by reweighing the aggravating and mitigating evidence or conducting a harmless-error review. *Clemons v. Mississippi*, 494 U.S. 738, 741 (1990); *Haberstroh*, 119 Nev. at 183, 69 P.3d at 682-82. Although Castillo argues that in reweighing or conducting a harmless-error review we must consider new mitigating evidence that was not presented to the trial jury, this court has reiterated time and again that reweighing is based on the trial record. *See Bejarano v. State*, 122 Nev. 1066, 1081, 146 P.3d 265, 276 (2006) ("Reweighing requires us to answer the following question: Is it clear beyond a reasonable doubt that absent the invalid aggravators the jury still would have imposed a sentence of death?"); *Rippo v. State*, 122 Nev. 1086, 1093-94, 146 P.3d 279, 284 (2006) (striking three *McConnell* aggravators and reweighing, looking only to the record for mitigating evidence); *Archanian v. State*, 122 Nev. 1019, 1040-41, 145 P.3d 1008, 1023 (same); *State v. Haberstroh*, 119 Nev. 173, 184 n.23, 69 P.3d 676, 683 n.23 (2003) (reweighing does not involve factual findings "other than those of the jury at the original penalty hearing"); *Bridges v. State*, 116 Nev. 752, 766, 6 P.3d 1000, 1010 (2000) (this court reweighed based on a "review of the trial record"). The special verdict indicates that one or more jurors found the following mitigating circumstances: (1) Castillo's youth at the time of the crime, (2) he committed the murder under the influence of extreme emotional distress or disturbance, and (3) "[a]ny other mitigating circumstances." Based on the record, the "other mitigating circumstances" found by the trial jurors may have included that Castillo admitted guilt, demonstrated remorse, cooperated with police, did not plan the murder, and had a difficult childhood. Considering these mitigating circumstances and the remaining valid aggravating circumstances, we are confident that the jury would

have concluded that the mitigating circumstances did not outweigh the valid aggravating circumstances. We further conclude beyond a reasonable doubt that the jury would have returned a death sentence after considering the evidence as a whole, which reflects a particularly brutal murder: Castillo hit the sleeping elderly victim several times in the head with a tire iron, smothered her face with a pillow, and later returned to burn the house down. Accordingly, we deny the rehearing petition.

It is so ORDERED.[1]

Pickering, C.J.

Gibbons, J.

Hardesty, J.

Parraguirre, J.

Douglas, J.

cc: Hon. David Barker, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

[1]The Honorable Nancy Saitta voluntarily recused herself from participation in the decision of this matter.

CHERRY, J., dissenting:

I would not only grant rehearing, I would allow Castillo to have a new penalty hearing before a jury rather than have this court determine whether to impose the death penalty on a "cold record." My own experience in litigating death penalty cases tells me that there is a vast difference when a defendant is facing two aggravating circumstances rather than four aggravating circumstances.

I am seriously troubled by the majority's conclusion that beyond a reasonable doubt the jury would have returned a death sentence after considering the evidence as a whole. Certainly, almost every conviction for first degree murder with a death-eligible defendant is for a "brutal murder." However, what the majority overlooks is that the jury did in fact find mitigating circumstances and that a new penalty hearing would allow the new jury to weigh the remaining two aggravating circumstances with the mitigating circumstances to be provided by the defense. In light of the above, I would grant rehearing and encourage my colleagues to grant a new penalty hearing.

Cherry, J.

Cherry

APPENDIX D

APPENDIX D

ORIGINAL

FILED
SEP 18 2009
CLERK OF COURT

0232
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DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM P. CASTILLO, Petitioner, v. E.K. McDANIEL, Warden, and, CATHERINE CORTEZ MASTO, Attorney General of the State of Nevada, Respondents.	Case No. C133336 Department No. XVIII **PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)** Hearing Date: 11-4-09 Hearing Time: 8:15AM

Petitioner, William P. Castillo, by and through counsel, files this Petition for a Writ of Habeas Corpus (Post-Conviction) pursuant to NRS 34.724 and NRS 34.820. Mr. Castillo alleges that he is being held in custody in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the Constitution of the United States of America, articles I and IV of the Nevada Constitution, and the rights afforded him under international law enforced under the Supremacy Clause of the United States Constitution. U.S. Const. art. VI; U.S. Const. amends. V, VI, VIII, and XIV; Nev. Const. art. I, §§ 3, 6 and 8, and art. IV, § 21.

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SEP 18 2009
CLERK OF THE COURT

REQUEST FOR AN EVIDENTIARY HEARING

Mr. Castillo respectfully requests the Court grant an evidentiary hearing on the allegations in this petition. It is through the adversarial process that the record herein may be developed to better demonstrate not only that Mr. Castillo's conviction and death sentence are unconstitutional, but also that he may more fully present his complex factual allegations and legal arguments.

Procedural Allegations

1. Petitioner, William P. Castillo, is currently in the custody of the State of Nevada at Ely State Prison in Ely, Nevada, pursuant to a state court judgment of conviction and death sentence. Ex. 1.[1] Respondent, E. K. McDaniel, is the Warden of Ely State Prison. Mr. Castillo's conviction and sentence were entered on November 4, 1996, in the Eighth Judicial District Court of Clark County, Nevada, by the Honorable A. William Maupin. TT, 11/4/96, at 1-11, Ex. 174 at 1-11.[2]

2. On January 11, 1996, a Clark County, Nevada grand jury indicted Mr. Castillo and his co-defendant, Michelle C. Platou, for (1) conspiracy to commit burglary and/or robbery; (2) burglary; (3) robbery where the victim is sixty-five years of age or older; (4) first-degree murder with use of a deadly weapon; (5) conspiracy to commit burglary and arson; and, (6) first-degree arson. NRS 193.165, 193.167, 199.480, 200.010, 200.030, 205.010, 205.060, 200.380.

3. On January 19, 1996, Clark County prosecutors filed the indictment in open court. The indictment charged Mr. Castillo and Platou with the aforementioned felony offenses. Ex. 2.

4. On January 23, 1996, pursuant to NRS 175.552 and 200.033, prosecutors filed their "Notice of Intent To Seek Death Penalty." The notice identified five aggravating circumstances which prosecutors intended to prove at Mr. Castillo's penalty

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[1] Citations to exhibits are designated as follows: Ex. ___ (number of exhibit).

[2] Citations to transcripts are designated as follows: TT, 1/01/01, Ex. _____ (transcript testimony then the date and the exhibit number).

trial: (1) the murder was committed by a person who was previously convicted of a felony involving the use of threat of violence to the person of another; (2) the murder was committed while the person was engaged, alone or with others, in the commission of or an attempt to commit or flight after committing or attempting to commit any robbery; (3) the murder was committed while the person was engaged, alone or with others, in the commission of or an attempt to commit or flight after committing or attempting to commit any burglary; (4) the murder was committed to avoid or prevent lawful arrest; and (5) the murder was committed to receive money or any other thing of monetary value. NRS 200.033.

5. On January 24, 1996, Mr. Castillo pled not guilty to all charges. TT, 1/24/96, at 5-6, Ex. 149 at 5-6. The Nevada State Public Defender's Office was appointed to represent Mr. Castillo at his arraignment.

6. On April 13, 1996, the trial judge appointed David M. Schieck as Mr. Castillo's co-counsel. Ex. 3.

7. On May 29, 1996, prosecutors filed an amended indictment which alleged the same offenses as the original indictment. Ex. 4.

8. On August 26, 1996, jury selection began. Prosecutors and trial counsel completed jury selection on August 28, 1996. TT, 8/28/96 (afternoon session), at 94-95, Ex. 160 at 94-95.

9. On August 28, 1996, Mr. Castillo's trial began, and on September 4, 1996, the jury found him guilty of: (1) conspiracy to commit burglary and/or robbery; (2) burglary; (3) robbery where the victim is 65 years of age or older; (4) first-degree murder with the use of a deadly weapon; (5) conspiracy to commit burglary and arson; and (6) first-degree arson. TT, Trial, 9/4/96, at 83-86.

10. On September 19, 1996, Mr. Castillo's penalty trial began, and on September 25, 1996, the jury sentenced him to death. TT, 9/25/96, at 5-10, Ex. 173 at 5-10. The jury found four aggravating circumstances beyond a reasonable doubt: (1) Mr. Castillo committed the murder after he was previously convicted of a violent felony, to

wit: a robbery committed on December 14, 1992; (2) Mr. Castillo committed the murder while engaged in a burglary; (3) Mr. Castillo committed the murder while engaged in a robbery; and (4) Mr. Castillo committed the murder to avoid or prevent his lawful arrest. Id. at 5-6; Ex. 5. The jury found three mitigating circumstances: (1) Mr. Castillo's youth at the time of the offense; (2) Mr. Castillo committed the murder while he was under the influence of extreme mental or emotional disturbance; and (3) any other mitigating circumstances. Id. at 7; Ex. 6. The jury sentenced Mr. Castillo to death after it determined that the aggravating circumstances outweighed the mitigating circumstances. Id.; Ex. 7.

11. On September 25, 1996, Mr. Castillo's co-defendant, Michelle Platou, pled guilty to burglary, robbery, and first-degree murder. Ex. 8.

12. On November 4, 1996, the Honorable A. William Maupin sentenced Mr. Castillo and Michelle Platou. Platou received a 120-month sentence for her burglary conviction; a 180-month sentence for her robbery conviction; and a life sentence (with the possibility of parole) for the first-degree murder conviction; Judge Maupin ordered that her sentences be served concurrently. TT, 11/4/96, at 4-5, Ex. 174 at 4-5. Mr. Castillo received a 72-month sentence for his conspiracy to commit burglary conviction; a 120-month sentence for his burglary conviction; a 180-month sentence for his robbery with the victim being over the age of 65 years with a consecutive 180-month sentence for use of a deadly weapon; a 72-month sentence for conspiracy to commit burglary and arson conviction; a 120-month sentence for his burglary conviction; a 180-month sentence for first-degree arson; and the death sentence for his conviction of first-degree murder with a deadly weapon. Judge Maupin ordered that Mr. Castillo's sentences be served consecutively. Id. at 8-10.

13. On November 4, 1996, Mr. Castillo filed a timely notice of appeal. Ex. 9.

14. On February 28, 1997, Mr. Castillo's appellate counsel, Mr. David Schieck, filed his brief to the Nevada Supreme Court. Ex. 10. Mr. Schieck raised eight issues:

1. Was it error for the court to allow repeated and prejudicial reference to the booties knitted by the victim.

2. Was it prejudicial error for the court to admit a photograph of the victim and her daughter and granddaughter at the trial.

3. Whether the court should have granted the motion for mistrial after a state witness informed the jury that Castillo had another case in violation of the motion in limine filed by Castillo.

4. Whether improper argument during the penalty hearing mandates a new hearing.

5. Was it error to admit the gruesome pictures taken at the autopsy.

6. Whether the victim impact evidence should have been allowed to the extent presented.

7. Was it reversible error to give an anti-sympathy instruction to the jury.

8. Was it reversible error for the court to refuse to instruct the jury on the defense theory of mitigating circumstances.

15. On April 30, 1997, Mr. Schieck filed a reply brief with the Nevada Supreme Court. Ex. 11.

16. On April 2, 1998, the Nevada Supreme Court affirmed Mr. Castillo's convictions and death sentence. See Castillo v. State, 114 Nev. 271, 956 P.2d 103 (1998).

17. On August 21, 1998, Mr. Schieck filed a petition for rehearing, Ex. 12, which the Nevada Supreme Court denied on November 30, 1998. Ex. 13.

18. On January 25, 1999, Mr. Schieck filed a petition for certiorari with the United States Supreme Court, which the Court denied on March 22, 1999. See Castillo v. Nevada, 526 U.S. 1031 (1999).

19. On April 2, 1999, Mr. Castillo filed a Petition for Writ of Habeas Corpus in the Eighth Judicial District Court. Ex. 14.

20. On April 28, 1999, the Nevada Supreme Court issued its remittitur order. Ex. 15.

21. On October 26, 2000, the Honorable Mark Gibbons appointed Christopher Oram to represent Mr. Castillo in his state post-conviction habeas proceedings. TT, 10/26/00, at 1-4, Ex. 178 at 1-4.

22. On October 12, 2001, Mr. Oram filed a Supplemental Brief in Support of Mr. Castillo's Petition for Writ of Habeas Corpus. Ex. 16. Mr. Oram raised eleven issues:

1. Mr. Castillo is entitled to have his sentence of death and convictions reversed based upon ineffective assistance of counsel.

2. Mr. Castillo was denied due process by the improper argument at the penalty hearing wherein the prosecutor asked the jury to vote against Mr. Castillo and in favor of future innocent victims pursuant to the jury's duty.

3. Mr. Castillo's sentence of death for the use of a deadly weapon in combination with his first degree murder conviction must be overturned based upon a crowbar not being a deadly weapon.

4. Nev. Rev. Stat. §193.165(5) is unconstitutionally vague and ambiguous.

5. Mr. Castillo is entitled to have a reversal of his sentence of death and convictions based upon the failure of trial counsel to properly investigate his case.

6. The district court erred in failing to hold a requested evidentiary hearing to permit Mr. Castillo to establish facts outside of the record.

7. Mr. Castillo is entitled to a new trial and penalty hearing based upon the failure of trial counsel to present a psychological defense to the trial phase of the case.

8. Mr. Castillo's conviction is unconstitutional because of cumulative error.

9. Mr. Castillo's death sentence is invalid under the federal constitutional guarantees of due process, equal protection, and a reliable sentence, as well as his rights under international law, because the death penalty is cruel and unusual punishment. U.S. Constitution Article VI, Amendments VIII & XIV.

10. Mr. Castillo's conviction and sentence are invalid pursuant to the rights and protections afford [sic] to him under the International Covenant on Civil and Political Rights. U.S. Const. Art. VI.

11. Mr. Castillo's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, and a reliable sentence because the Nevada capital punishment system operates in an arbitrary and capricious manner. U.S. Const. Amends. V, VI, VIII and XIV; Nev. Const. Art. In SACS. 3, 6 and 8; Art IV, Sec. 21.

Id.

23. On May 8, 2002, the Honorable Nancy M. Saitta granted a limited evidentiary hearing for the sole purpose of investigating Mr. Castillo's claims of ineffective assistance of counsel. TT, 5/8/02, at 1-5, Ex. 182 at 1-5.

24. On August 2, 2002, Judge Saitta held an evidentiary hearing regarding trial counsel's mitigation investigation and direct appeal counsel's advocacy. TT, 8/2/02, at 1-24, Ex. 183 at 1-24. After the evidentiary hearing, Judge Sattia ordered supplemental briefing.

25. On September 27, 2002, Mr. Oram filed a Second Supplemental Brief in Support of Mr. Castillo's Petition for Writ of Habeas Corpus. Mr. Oram raised three issues:

1. Mr. Castillo was denied due process of law pursuant to the United States Constitution by improper argument at the penalty hearing wherein the prosecutor asked the jury to vote against Mr. Castillo and in favor of future innocent victims pursuant to the jury's duty.

2. Mr. Castillo received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution, wherein trial and appellate counsel failed to object to the bad character evidence which was improperly raised in front of the jury.

3. Mr. Castillo is entitled to a new trial and penalty phase based upon the failure of trial counsel to present a psychological defense to the trial phase of the case.

26. On January 22, 2003, Judge Saitta heard oral arguments regarding the initial and supplemental briefing and denied Mr. Castillo's habeas petition. TT, 1/22/03, at 1-7,

Ex. 184 at 1-7. Judge Saitta requested the prosecutor draft "Findings of Fact, Conclusions of Law and Order" for her signature.[3]

27. On February 19, 2003, Mr. Oram filed a timely notice of appeal. Ex. 17.

28. On June 11, 2003, Judge Saitta filed "Findings of Fact, Conclusions of Law and Order" which were drafted by prosecutors. Ex. 18.

29. On October 2, 2003, Mr. Oram filed Mr. Castillo's opening brief to the Nevada Supreme Court. Ex. 19. Mr. Oram raised ten issues:

1. Mr. Castillo is entitled to have his sentence of death and convictions reversed based upon ineffective assistance of counsel.

2. Mr. Castillo was denied due process by the improper argument at the penalty hearing wherein the prosecutor asked the jury to vote against Mr. Castillo and in favor of future innocent victims pursuant to the jury's duty.

3. Mr. Castillo's sentence of death for the use of a deadly weapon in combination with his first degree murder conviction must be overturned based upon a crowbar not being a deadly weapon.

4. Mr. Castillo received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution, wherein trial and appellate counsel failed to object to the bad character evidence which was improperly raised in front of the jury.

5. Mr. Castillo is entitled to have a reversal of his sentence of death and convictions based upon the failure of trial counsel to properly investigate his case and Mr. Castillo is entitled to a new trial and penalty phase based upon the failure of trial counsel to present a psychological defense to the trial phase of the case.

6. Mr. Castillo's conviction is unconstitutional because of cumulative error.

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[3] Mr. Peterson: Judge, would the Court prefer that we prepare the order?...

The Court: Absolutely, yes. Thank you. Would you please prepare that order and run it by Mr. Oram?

Mr. Peterson: I will, Judge, absolutely.

Id. at 7.

7. Mr. Castillo's death sentence is invalid under the federal constitutional guarantees of due process, equal protection, and a reliable sentence, as well as his rights under international law, because the death penalty is cruel and unusual punishment. U.S. Constitution Article VI and Amendments VIII and XIV.

8. Mr. Castillo's death sentence is invalid under the federal constitutional guarantees of due process, equal protection, and a reliable sentence, as well international law, because execution by lethal injection violates the constitutional prohibition against cruel and unusual punishments. U.S. Constitution Article VI, Amendments VIII & XIV.

9. Mr. Castillo's conviction and death sentence are invalid pursuant to the rights and protections afforded to him under the international covenant on civil and political rights. U.S. Const. Art. VI.

10. Mr. Castillo's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, and a reliable sentence, because the Nevada capital punishment system operates in an arbitrary and capricious manner. U.S. Const. Amends. V, VI, VIII and XIV; Nev. Const. Art. IN SACS. 3, 6 and 8; Art. IV, Sec. 21.

Id.

30. On January 20, 2004, Mr. Oram filed a reply brief to the Nevada Supreme Court. Mr. Oram addressed the same issues raised in his opening brief.

31. On February 5, 2004, the Nevada Supreme Court affirmed the denial of post-conviction relief. Ex. 20.

32. On May 5, 2004, Mr. Castillo submitted his petition for certiorari to the United States Supreme Court, which the Court denied on October 4, 2004. See Castillo v. Nevada, 543 U.S. 879 (2004).

33. On June 22, 2004, Mr. Castillo filed a pro se petition for writ of habeas corpus in the United States District Court for the District of Nevada. On July 7, 2004, the Law Offices of the Federal Public Defender was appointed to represent Mr. Castillo. An amended petition for writ of habeas corpus was filed on December 15, 2008. The federal habeas corpus petition is pending.

34. **Statement with Respect to Previous Proceedings**

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

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

c. Mr. Castillo and previous counsel were prevented from discovering and alleging all of the claims raised in this petition by the prosecutors' actions in failing to disclose all material evidence in possession of its agents.

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

1) The Nevada Supreme Court exercised complete discretion to address constitutional claims, when an adequate record was presented to resolve them, at

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

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

3) The Nevada Supreme Court has now provided a laboratory example of this disparate, and therefore unconstitutional, treatment in the Rippo case. There, the Supreme Court, on appeal from the denial of post-conviction habeas corpus relief, sua sponte directed the parties to argue an issue arising from a penalty phase jury instruction, regarding whether the jury had to be unanimous in finding that the mitigating evidence outweighed the aggravating factors to preclude death-eligibility. Rippo v. State, No. 44094; Bejarano v. State, No. 44297, Order Directing Oral Argument (March 16, 2006), Ex. 135 at 2. The Nevada Supreme Court addressed this issue on the merits. Rippo v. State, 122 Nev. 1086, 146 P.3d 279, 285 (2006). The issue was never raised in any previous proceeding, cf. NRS 34.810(1)(b),(2), or in the habeas proceedings in the

trial court, or in the Nevada Supreme Court itself. The only issue raised with respect to this jury instruction was whether it adequately informed the jury that non-statutory aggravating evidence, that was not relevant to the statutory aggravating circumstances, could be considered in the weighing process for finding death-eligibility. Exs. 136 at 30-33; 137; 138 at 31-34; 139 at 30-32; 140 at 20-23, and 141. The Supreme Court first raised the issue sua sponte in its order directing oral argument in 2006, long after the one year rule, NRS 34.726(1), and the five year rule, NRS 34.800(2), elapsed from the finality of the conviction and sentence in 1998. Rippo v. State, 113 Nev. 1239, 946 P.3d 1017 (1997), cert. denied 524 U.S. 841 (October 5, 1998).

4) Despite the Nevada Supreme Court's repeated claims that it applied its default rules consistently, State v. Eighth Judicial District Court (Riker), 121 Nev. 225, 112 P.3d 1070, 1074-1082 (2005); Pellegrini v. State, 117 Nev. 860, 880-886, 34 P.3d 519 (2001), there can be no rational dispute that in Rippo the Court sua sponte raised and addressed on the merits a claim that was barred under the statutory default rules. If those same rules are applied to bar consideration of the merits of any of Mr. Castillo's claims, the constitutional violation based on arbitrarily disparate treatment of similarly-situated litigants will be complete. See e.g., Bush v. Gore, 531 U.S. 98, 106-109 (2000) (per curiam); Village of Willowbrook v. Olech, 528 U.S. 564-565 (2000) (per curiam); and Myers v. Ylst, 897 F.2d 917, 921 (9th Cir. 1990) (equal protection requires consistent application of state law to similarly-situated litigants).

5) In Rippo, the Supreme Court's decision made no mention of its mandatory default rules. See also, Bejarano v. State, 106 Nev. 840, 843, 801 P.2d 1388 (1990) (on appeal from denial of collateral relief, "[w]e consider sua sponte whether failure to present such [mitigating] evidence constitutes ineffective assistance"); Bejarano v. Warden, 112 Nev. 1466, 1471 n. 2, 929 P.2d 922 (1996) (addressing claim on merits despite default rules); Bennett v. State, 111 Nev. 1099, 1103, 901 P.2d 676 (1995) (addressing claims asserted to be barred by default rules; "[w]ithout expressly addressing the remaining procedural bases for the dismissal of Bennett's Petition, we therefore

choose to reach the merits of Bennett's contentions" (emphasis supplied); Ford v. Warden, 111 Nev. 872, 886-887, 901 P.2d 123 (1995) (addressing claim of error in court's mandatory sentence review on direct appeal raised for first time on appeal in second collateral attack, without discussing or applying default rules); Hill v. Warden, 114 Nev. 169, 178-179, 953 P.2d 1077 (1998) (addressing merits claims raised for first time on appeal from denial of third post-conviction petition because claims "of constitutional dimension which, if true, might invalidate Hill's death sentence and the record is sufficiently developed to provide an adequate basis for review."); see also, Lane v. State, 110 Nev. 1156, 1168, 881 P.2d 1358 (1994) (vacating aggravating circumstance based on instructional error on mandatory review without noting the issue was not raised at trial or on appeal); Lord v. State, 107 Nev. 28, 38, 806 P.2d 548 (1991) ("Normally a proper objection is a prerequisite to our considering the issue on appeal. However, since this issue is of constitutional proportions, we elect to address it now.") (citation omitted); Powell v. State, 108 Nev. 700, 705-06, 838 P.2d 921 (1992) (addressing issue of delay in probable cause determination without indicating that the issue was not raised at trial or on appeal); Farmer v. Director, Nevada Dept. Of Prisons, No. 18052, Order Dismissing Appeal (March 31, 1988) (addressing two substantive claims on merits [guilty plea involuntary, insufficiency of aggravating circumstances] despite failure to raise on direct appeal), Ex. 104; Farmer v. State, No. 22562, Order Dismissing Appeal (February 20, 1992) (denying claim of improper admission of victim impact evidence on merits despite default), Ex. 105; Feazell v. State, No. 37789, Order Affirming in Part and Vacating in Part, Ex. 107 at 5-6 (November 14, 2002) (granting penalty phase relief sua sponte [on appeal of first state habeas corpus petition] on basis of ineffective assistance of post-conviction counsel without requiring petitioner to plead "cause" under NRS 34.726(1) or 34.810)), id.; Hardison v. State No. 24195, Order of Remand (May 24, 1994) (addressing claims and granting relief despite timeliness and successive petition procedural bars raised by prosecutor), Ex. 109; Hill v. State No. 18253, Order Dismissing Appeal (June 29, 1987) (dismissing untimely appeal from denial of second post-conviction relief

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

6) The Nevada Supreme Court disregards the procedural bar arising from the failure to raise claims in earlier proceedings. See Valerio v. Crawford, 306 F.3d 742, 778 (9th Cir. 2002); see also Rippo v. State, 122 Nev. 1086, 146 P.3d 279, 285; Bejarano v. Warden, 112 Nev. 1466, 1471 n. 2, 929 P.2d 922 (1996) (addressing claim on merits despite default rules); Bennett v. State, 111 Nev. 1099, 1103, 901 P.2d 676 (1995) (addressing claims asserted to be barred by default rules; "[w]ithout expressly addressing the remaining procedural bases for the dismissal of Bennett's petition, we therefore choose to reach the merits of Bennett's contentions" (emphasis supplied)); Ford v. Warden, 111 Nev. 872, 886-887, 901 P.2d 123 (1995) (addressing claim of error in court's mandatory sentence review on direct appeal raised for first time on appeal in second collateral attack, without discussing or applying default rules); Hill v. Warden, 114 Nev. 169, 178-179, 953 P.2d 1077 (1998) (addressing merits of claims raised for first time on appeal from denial of third post-conviction petition because claims "of constitutional dimension which, if true, might invalidate Hill's death sentence and the record is sufficiently developed to provide an adequate basis for review."); Farmer v. State No. 22562, Order Dismissing Appeal (February 20, 1992) (denying claim of improper admission of victim impact evidence on merits despite default), Ex. 105; Feazell v. State, No. 37789, Order Affirming in Part and Vacating in Part, at 5-6 (November 14, 2002) (granting penalty phase relief sua sponte [on appeal of first state habeas corpus petition] on basis of ineffective assistance of post-conviction counsel without requiring petitioner to plead or prove "cause" in a successive petition), Ex. 107; Hardison v. State No. 24195, Order of Remand (May 24, 1994) (addressing claims and granting relief despite timeliness and successive petition procedural bars raised by state), Ex. 109; Neuschafer v. Warden No. 18371, Order Dismissing Appeal (August 19, 1987) (addressing merits of claims without discussion of default rules, in case decided without briefing, and in which court expressed "serious doubts" about authority of counsel to pursue appeal, but "elected" to entertain appeal due to "gravity of appellant's sentence"),

Ex. 116; Ybarra v. Director No. 19705, Order Dismissing Appeal (June 29, 1989) (addressing previously-raised claim without reference to default rules), Ex. 132.

7) The Nevada Supreme Court consistently failed to apply the time bar provisions of NRS 34.726, or the rebuttable presumption of NRS 34.800 (2) to capital habeas petitioners. Rippo v. State, 122 Nev. 1086, 146 P.3d at 285 (issue raised by Nevada Supreme Court sua sponte in 2006, when conviction and sentence was final in 1998); Bejarano v. Warden, 112 Nev. 1466, 1471 n. 2, 929 P.2d 922 (1996) (addressing claim on merits despite default rules; successive petition filed approximately five years after direct appeal remittitur issued on January 10, 1989); Ford v. Warden, 111 Nev. 872, 886-887, 901 P.2d 123 (1995) (addressing claim of error in court's mandatory sentence review on direct appeal raised for first time on appeal in second collateral attack, without discussing or applying default rules; successive petition filed November 12, 1991, approximately five years after direct appeal remittitur issued on April 29, 1986); Hill v. State, 114 Nev. 169, 953 P.2d 1077 (1998) (addressing claims on merits filed directly with the Nevada Supreme Court; successive petition claims filed September 19, 1996, approximately ten years after direct appeal remittitur issued on September 5, 1986); Farmer v. State, No. 29120, Order Dismissing Appeal (November 20, 1997) (successive petition filed August 28, 1995, approximately ten years after direct appeal remittitur issued on September 17, 1985), Ex. 106; Jones v. McDaniel, No. 39091, Order of Affirmance (December 19, 2002) (addressing all three-judge panel claims on merits; successive petition filed May 1, 2000, approximately nine years after direct appeal remittitur issued on October 25, 1991), Ex. 112; Milligan v. Warden, No. 37845, Order of Affirmance (July 24, 2002) (successive petition filed December 1992, approximately seven years after direct appeal remittitur issued on October 15, 1986), Ex. 114; Nevius v. Warden (Nevius II), No. 29027, Order Dismissing Appeal (October 9, 1996) (successive petition filed August 23, 1996, approximately eleven years after direct appeal remittitur issued on December 31, 1985), Ex. 118; Nevius v. Warden (Nevius III), No. 29027, Order Denying Rehearing (July 17, 1998) (successive petition filed February 7, 1997,

approximately twelve years after direct appeal remittitur issued on December 31, 1985), Ex. 119; O'Neill v. State, No. 39143, Order of Reversal and Remand, at 2 (December 18, 2002) (petition filed "more than six years after entry of judgment of conviction" and issuance of remittitur on direct appeal on March 13, 1996), Ex. 121; Riley v. State, No. 33750, Order Dismissing Appeal (November 19, 1999) (successive petition filed August 26, 1998, approximately seven years after direct appeal remittitur issued on July 18, 1991), Ex. 123; Sechrest v. State, No. 29170, Order Dismissing Appeal (November 20, 1997) (successive petition filed July 27, 1996, approximately eleven years after direct appeal remittitur issued on September 18, 1985), Ex. 126; Williams v. Warden, No. 29084, Order Dismissing Appeal (August 29, 1997) (addressing claim that trial counsel failed to rebut aggravating evidence; claim rejected under law of the case, successive petition filed December, 1992, approximately five years after direct appeal remittitur issued on July 17, 1987), Ex. 131.

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

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

10) The Nevada Supreme Court took opposite positions on whether application of procedural default rules is waivable by prosecutors. State v. Haberstroh, 119 Nev. 173, 180-181, 69 P.3d 676, 681-682 (2003), (holding that parties could not stipulate to overcome state's procedural defenses, but construing a stipulation as establishing cause to overcome default rules without identifying any theory of cause that such a stipulation would establish or how it existed before the stipulation was entered); contra Doleman v. State, No. 33424, Order Dismissing Appeal (March 17, 2000) (finding stipulation with prosecutor to allow adjudication of merits of claim ineffective because of petitioner's failure to seek rehearing on claim and failing to find "cause" on the basis of the stipulation), Ex. 103. See also, Jones v. State, No. 24497, Order Dismissing Appeal (August 28, 1996) (holding challenge to jurisdiction of court waived by guilty plea), Ex. 111. The definition of cause is completely amorphous, because it is whatever the Nevada Supreme Court says it is on any particular occasion. See also, Leslie v. State, 118 Nev. 773, 59 P.3d 440, 445 (2002) (sua sponte expanding definition of miscarriage of justice exception to default rules to include "innocence" of aggravating circumstance); contra Colwell v. State, 118 Nev. 807, 59 P.3d 463

(2002)(case decided same day as Leslie with the same aggravating circumstance and similar factual circumstances (a robbery case) but failing to take notice of petitioner's "innocence" of aggravating circumstance) (verdict form showing conviction of random and motiveless aggravating circumstance) Ex. 102; Rogers v. Warden, No. 36137, Order of Affirmance, Ex. 125 at 5-6 (May 13, 2003) (raising miscarriage of justice exception sua sponte but failing to analyze petitioner's challenge to aggravating circumstance under actual innocence standard), Ex. 125. See also Feazell v. State, No. 37789, Order Affirming in Part and Vacating in Part (November 14, 2002) (sua sponte reaching both theory of cause not litigated in District Court or Supreme Court, and substantive issue, post-Pellegrini), Ex. 107.

11) Prosecutors admitted that the Nevada Supreme Court disregards procedural default rules on grounds that cannot be reconciled with a theory of consistent application of procedural default rules. Bennett v. State, No. 38934, Respondent's Answering Brief at 8 (November 26, 2002) ("upon appeal the Nevada Supreme Court graciously waived the procedural bars and reached the merits" (emphasis supplied)), Ex. 101; Nevius v. McDaniel, D. Nev., No. CV-N-96-785-HDM-(RAM), Response to Nevius' Supplemental Memorandum at 3 (October 18, 1999) (Nevada Supreme Court noted the issue raised only on petition for rehearing in successive proceeding, "but it did not procedurally default the claim. Instead, 'in the interests of judicial economy' and, more than likely, out of its utter frustration with the litigious Mr. Nevius and to get the matter out of the Nevada Supreme Court once and for all, the court addressed the claim on its merits"), Ex. 120.

e. Default bars which are "graciously waived," or disregarded out of "frustration," are not "rules" that bind the actions of courts at all, but are the result of mere exercises of unfettered discretion; and such impediments cannot constitutionally bar review of meritorious claims. Lonchar v. Thomas, 517 U.S. 314, 323 (1996) ("'There is no such thing in the Law, as Writs of Grace and Favour issuing from the Judges.' Opinion on the Writ of Habeas Corpus, Wilm. 77, 87, 97 Eng. Rep. 29, 36 (1758) (Wilmot, J.).").

The Nevada Supreme Court's practices make review of the merits of constitutional claims a matter of "grace and favor," and they cannot constitutionally be applied to bar consideration of Mr. Castillo's claims.

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

35. Mr. Castillo is filing this Petition more than one year following the filing of the decision on direct appeal. Any delay in filing this Petition was not his "fault" within the meaning of NRS 34.726(2). Mr. Castillo was continuously represented by counsel since the beginning of the proceedings in this case, and counsel were responsible for conducting the litigation. Mr. Castillo committed no "fault," within any rational meaning of that term as used in NRS 34.726(1), in connection with the failure to raise any issue in the litigation. Any failure to raise these claims was the fault of counsel, which is not attributable to Mr. Castillo under Pellegrini v. State, 117 Nev. 860, 36 P.3d 519, 526 n. 10 (2001).

36. **The attorneys who previously represented Mr. Castillo were**:

a. Arraignment and Plea:
Peter LaPorta

b. Trial, Guilt and Penalty and Sentencing:
Peter La Porta and David Schieck

c. Direct Appeal:
David Schieck

d. Post-Conviction:
Christopher Oram

e. Post-Conviction Appeal:
Christopher Oram

Statement of Facts

37. Mr. Castillo worked for Dean Roofing Company and, during Thanksgiving, 1995, he and several co-workers installed a new roof on the victim's home. According to the prosecutors' evidence, the victim died on December 17, 1995, from injuries sustained by blunt force trauma.

38. Mr. Castillo and his roommate, Michelle Platou, were arrested. Mr. Castillo gave police a recorded statement wherein he admitted that he burglarized the victim's home, believing it to be unoccupied. Mr. Castillo was startled when he heard a person in the house, and hit that person with a crowbar. Mr. Castillo and Platou left the victim's home.

39. Some time later, when Mr. Castillo and Platou discovered that Platou did not wear gloves, and possibly left her fingerprints in the victim's home, Mr. Castillo and Platou returned and set fire to the house.

40. Trial counsel did not provide an opening statement and presented no witnesses in the guilt/innocence trial. Mr. Castillo was convicted of First-Degree Murder, Robbery, Burglary and Arson.

41. In the penalty trial, prosecutors presented evidence of Mr. Castillo's juvenile and adult criminal history and victim impact evidence from the victim's daughter and two granddaughters. Prosecutors argued that such evidence, along with the evidence presented in the guilt/innocence trial, was sufficient to support five aggravating circumstances.

42. Mr. Castillo's trial attorneys presented five witnesses in the penalty trial: Mr. Castillo's mother; his girlfriend; a counselor from the Nevada Youth Training Center; a correctional officer employed by the Clark County Detention Center; and, a neuropsychologist. Trial counsel argued the existence of several mitigating circumstances based upon this limited presentation of Mr. Castillo's life and childhood, his remorse and recent behavior in jail.

///

43. The jury found that four aggravating circumstances, and three mitigating circumstances, were proven. The jury held that the mitigating circumstances did not outweigh the aggravating circumstances, and sentenced Mr. Castillo to death.

44. Trial counsel, and their mental health expert, never demonstrated the circumstances in which Mr. Castillo was born, lived and failed to develop as a child. The failure to conduct an adequate investigation into the circumstances of Mr. Castillo's life tainted the entire proceedings and resulted in his conviction and death sentence.

CLAIM ONE

Mr. Castillo's conviction and death sentence are invalid under the state and federal constitutional guarantees of due process, equal protection, the effective assistance of counsel, and a reliable sentence due to the ineffective assistance of counsel. U.S. Const. amends. V, VI, VIII & XIV; Nevada Const. art. I, §§ 1, 3, 6 & 8.

SUPPORTING FACTS

1. Mr. Castillo's trial, appellate, and state post-conviction counsel violated his state and federal rights to the effective assistance of counsel throughout Mr. Castillo's trial, appeal, and state post-conviction proceedings.

2. Mr. Castillo's counsel failed to conduct a thorough, independent, and complete investigation of available evidence, and present such evidence to the jury; failed to develop a thorough, complete, and comprehensive social history; failed to conduct or present to the jury a thorough, independent, and complete investigation of witnesses to support any mitigation theory; failed to research, discover, investigate, and present available mitigating evidence on the effect Mr. Castillo's childhood and upbringing had on his life; failed to present a viable and reliable argument for a sentence less than death; failed to raise substantial constitutional issues on appeal; and, failed to raise substantial constitutional issues during state post-conviction proceedings.

3. There was no strategic or tactical reason for counsels' failures in these areas other than their own indifference, inexperience, or inability to represent a capital defendant. Counsel, appointed to represent a defendant in a death penalty case, were obligated to bring such skills to bear which would provide their client with high quality legal representation in all phases of his trial, appeal, and post-conviction proceedings. Counsel were obligated to investigate and present evidence to rebut the prosecution's case and to take advantage of all opportunities to argue the death penalty was inappropriate. Counsel failed in their obligations to provide effective legal assistance to Mr. Castillo.

I. **Guilt/Innocence Trial**

A. **The Jury Selection Process**

4. During jury selection, trial counsel entered into a stipulation with the prosecutor to allow the trial judge broad discretion to excuse prospective jurors. TT, 8/27/96, at 31, Ex. 158 at 31. The trial judge exercised such discretion when he excused prospective jurors numbered 347, 352, 351, 356, 357, 136, 96, 115, 97, 142, 303, 147, 306, 365, 314, 318, 322, 330, 335, 336, 337, 338, 340, 325, 112, and 331. Id. at 31-54.

5. The trial judge was allowed to excuse any prospective juror without challenge by trial counsel or the prosecutor. Moreover, trial counsels' stipulation resulted in the failure of the record to demonstrate the reasons each of the prospective jurors was excused. See, e.g., TT, 8/27/96, at 38, Ex. 158 at 38. Without an adequate record of the proceedings, Mr. Castillo and the Nevada Supreme Court were denied the opportunity to review the trial judge's decision to excuse prospective jurors. Trial counsel erroneously allowed this flawed procedure and failed to object to and defend Mr. Castillo's right to a fair and impartial jury, and an adequate trial record.

6. Mr. Castillo was entitled to a fair and unbiased jury, selected pursuant to the Nevada statutes. The jury selection process was flawed when the trial judge, without objection, re-ordered the jury list and moved those prospective jurors, who were seeking excusal, to the end of the jury list. TT, 8/27/96, at 32-49, Ex. 158 at 32-49. This procedure allowed the trial judge to increase the likelihood that a prospective juror who sought to be excused for a "non-statutory" reason, such as an economic reason, would not be selected to serve on Mr. Castillo's jury. However, this procedure also denied Mr. Castillo the right to a randomly selected jury and allowed the trial judge to influence which prospective jurors would be questioned, and ultimately serve on the jury. Trial counsel erred in their failure to object, and preserve Mr. Castillo's objections, to this procedure.

7. Appellate counsel and post-conviction counsel held a duty to identify those constitutional errors in Mr. Castillo's trial and raise those issues in the appropriate

proceedings. Mr. Castillo was denied his state and federal constitutional rights to effective assistance of counsel when his appellate and state post-conviction habeas counsel failed to raise these substantial issues.

B. Trial Counsel Failed to Present a Psychological Defense

8. Trial counsel failed to give an opening statement or present any evidence in Mr. Castillo's guilt/innocence trial. Counsel provided the following closing argument:

> Good day, ladies and gentleman. If it please the court, Mr. Bell, Mr. Harmon, and my co-counsel Mr. Schieck, as the Judge informed you, when he was reading the instructions, this is the time known as closing argument. You've heard Mr. Harmon's closing argument. I think it's better to characterize what I'm about to say as some closing comments, as to this phase of the proceedings.
>
> I first want to thank you for your participation in this and the patience that I know you've had to exercise over these past couple of weeks. As Mr. Harmon has correctly stated, you've always been on the stage here. Now you are taking center stage.
>
> You have not heard much from the defense during this phase, as has become quite obvious to you, as the events unfolded in here, but that doesn't lessen your burden or your sworn duty that you took an oath to. All the defense asks you to do is to perform that sworn duty. Your burden is no less because we presented very little and had very little participation. Your duty, as we see it, is to review each and every count, each and every element. Make sure that you believe beyond a reasonable doubt the State has proven beyond a reasonable doubt each and every element within each and every count.
>
> Once you have done that, follow your convictions accordingly.
>
> Additionally, after you've done that, you've done your duty. You've been fair to all the parties, which is all that any of us can ask of you and for that, the defense both thanks and applauds you in your efforts.
>
> I thank you.

TT, 9/4/96, at 67-68, Ex. 166 at 67-68. The jury found Mr. Castillo guilty of, among other things, first-degree murder.

9. Unlike the guilt/innocence trial, trial counsel presented some evidence in the penalty trial. Mr. Castillo's evidence was offered as mitigating circumstances which, if sufficient to outweigh the aggravating circumstances, would have resulted in a sentence less than the death penalty. Counsel presented expert testimony from Dr. Lewis Etcoff, a neuropsychologist, to illustrate Mr. Castillo's background and the effects those

circumstances had on his childhood development. TT, 9/20/96 (afternoon session), at 53-107, Ex. 170 at 53-107. Dr. Etcoff described the psychological findings of experts who evaluated Mr. Castillo during his adolescent years.

10. Based upon his review of the records provided by trial counsel, and a short interview with Mr. Castillo, Dr. Etcoff concluded that Mr. Castillo suffered from several disorders including reactive attachment disorder, attention deficit hyperactivity disorder, conduct disorder, and personality disorder. See TT, 9/20/96 (afternoon session), at 60, 65, 73, 95, Ex. 170 at 65, 73, 95.

11. Counsel essentially presented no defense to the charges of first-degree murder. However, as illustrated by Dr. Etcoff's later testimony, counsel possessed evidence which could have been presented during the guilt/innocence trial– evidence which helped to explain Mr. Castillo's actions– at the same time as the prosecutors presented evidence of the crime. Additionally, an adequate investigation into Mr. Castillo's life, family, and social history would have yielded substantial additional evidence which not only corroborated Dr. Etcoff's limited conclusions, but illustrated a tragic childhood filled with traumatic events such as abuse, neglect, abandonment, mental illness, drug abuse, and violent behaviors.

12. Had trial counsel conducted an adequate investigation, the jury would have been able to examine Mr. Castillo's conduct in light of the host of psychological disorders, including post traumatic stress disorder, from which he suffered, as well as the extreme emotional duress he experienced during this offense. Exs. 36; 38. Such evidence would have allowed a reasonable juror to convict Mr. Castillo of second-degree murder. Even though trial counsel failed to adequately investigate these circumstances, they presented an abbreviated similar theory in the penalty trial which persuaded the jury that Mr. Castillo was under the influence of extreme emotional distress and disturbance at the time of the offense.

13. At the time the jury considered Mr. Castillo's guilt of first- or second-degree murder, the jury was unaware of Mr. Castillo's extensive mental health history, or

the physical abuse, emotional abuse, and neglect he suffered from birth. Such evidence, presented during Mr. Castillo's guilt/innocence trial, would have persuaded at least one juror that Mr. Castillo was only guilty of second-degree murder.

14. During an abbreviated evidentiary hearing in the state post-conviction habeas proceedings, trial counsel admitted they waived Mr. Castillo's opening statement, and presented no real defense in the guilt/innocence trial. TT, 8/2/02, at 10, Ex. 183 at 10. Counsel was questioned regarding his decision not to present the psychological evidence during the guilt/innocence trial:

Post-Conviction Counsel:	Okay, why was Dr. Etcoff not put on in the guilt phase to try to argue to the jury that there was a diminished capacity and therefore there was perhaps a right to convict of second degree murder but not first?
Trial Counsel:	I didn't see any diminished capacity defense that the jury would accept. Mr. Castillo was–his intelligence was not similar to Mr. Dumas'. I mean, there's a number of distinctions between factually Zolie Dumas' situation, the defense that could have been put on in that case and Mr. Castillo's, the facts of this case and his own character.
Post-Conviction Counsel:	So, your testimony is that you did not see it as necessary to put on a psychological defense because you didn't have one?
Trial Counsel:	I did not believe we had one.
Post-Conviction Counsel:	Did you have anybody analyze Mr. Castillo other than Dr. Etcoff.?
Trial Counsel:	I don't recall.

Id. at 10-11. Despite trial counsel's belief that it was not "necessary to put on a psychological defense," extensive evidence existed which would have mitigated Mr. Castillo's first-degree murder conviction and convinced a reasonable juror to convict Mr. Castillo only of second-degree murder. Id; see infra Parts II.A.2-7.

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15. Reasonably effective counsel would have presented evidence which demonstrated Mr. Castillo's state of mind at the time of the offense. Because trial counsel failed to present evidence which was available, and questioned Mr. Castillo's mens rea in this offense, Mr. Castillo's state and federal constitutional rights were violated.

II. Penalty Trial

A. Trial Counsel Failed to Investigate, Identify, and Present Overwhelming Mitigating Evidence in the Penalty Trial

16. Mr. Castillo was denied his right to the effective assistance of counsel when trial counsel unreasonably failed in their duties to investigate, develop, and present significant mitigating evidence.

17. The Sixth Amendment right to effective assistance of counsel extends to the penalty trial in a capital case. Silva v. Woodford, 279 F.3d 825, 836 (9th Cir. 2002). Under the prevailing standards at the time of Mr. Castillo's trial, counsel had an obligation to conduct a thorough investigation of Mr. Castillo's background. See Williams v. Taylor, 529 U.S. 362, 395-98 (2000); Strickland v. Washington, 466 U.S. 668, 688 (1984).

18. In a capital penalty trial, "it is imperative that all relevant mitigating information be unearthed for consideration." Caro v. Calderon, 165 F.3d 1223, 1227 (9th Cir. 1999). "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty 'in the event of conviction.'" Rompilla v. Beard, 545 U.S. 374, 387 (2005) (quoting ABA Standard 4-4.1)); see also ABA Guideline 11.4.1.

19. The Nevada Supreme Court has held that defense counsel in a capital case is obligated to diligently investigate mitigation evidence. See Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 281 (1996).

20. Mr. Castillo's trial counsel failed to discover and present extensive mitigating evidence related to Mr. Castillo's traumatic childhood, his dysfunctional and

violent family environment, his family's history of mental illness and substance abuse, and the effect of these circumstances on Mr. Castillo's cognitive and developmental function. Mr. Castillo's jury was denied overwhelming mitigating evidence that was available and easily obtained.

1. The Mitigating Evidence Trial Counsel Presented to Mr. Castillo's Jury Was Insufficient in Light of Readily Available Evidence

21. In his opening statement at the penalty trial, trial counsel claimed the evidence would show that Mr. Castillo:

> ... came from a[n] extremely troubled and dysfunctional family during his early years. That on his father's side of the family, from the Thorpe side of the family, there is a history of mental illness, violent criminal behavior associated with that illness.

TT, 9/19/96 (morning session), at 28, Ex. 167 at 28. Trial counsel explained that Mr. Castillo spent the early years of his life moving from state to state, and that a degree of stability came to his home life only after his mother married Joe Castillo, his adoptive father. Yet the stability had little impact because of the effect of Mr. Castillo's early childhood. Trial counsel assured the jury that it would:

> ... see that Billy [Mr. Castillo] is really a product of those early years and of his family heritage from his father's side, that he has lived, basically, his life since age eight or nine as a ward of the State of Nevada, in and out of various facilities throughout those years of his youth until he reached the age of 18 and incurred an adult conviction.

Id. at 29. Trial counsel asked the jury to consider these circumstances and spare Mr. Castillo's life.

22. Although trial counsel's opening statement suggested the jury would learn substantial evidence regarding Mr. Castillo's tragic and traumatic childhood, counsel presented only five witnesses whose testimony barely scratched the surface of the dysfunctional and troubling environment in which Mr. Castillo was born and raised. Mr. Castillo's mother was the only relative who testified and the only witness who was personally familiar with much of Mr. Castillo's life. She testified to the lack of stability in the early years of his life, the physical abuse he suffered from an uncle, the violence

she suffered from his biological father, and her own lack of affection for him. TT, 9/24/96, at 25- 49, Ex. 167 at 25-49. According to trial counsel, Mr. Castillo's mother testified to "shed a little light on [his] background." Id. at 49. However, as an adequate investigation revealed, see infra Part II.A.2-7. Mr. Castillo's mother provided the jury with only a limited understanding of Mr. Castillo's social history that was filtered through her own biases or prejudices.

23. Dr. Lewis Etcoff, a neuropsychologist retained by trial counsel, testified to his knowledge of Mr. Castillo's background and the effects of that background on his development. TT, 9/20/96 (afternoon session), at 53-107, Ex. 170 at 53-107. Dr. Etcoff testified that Mr. Castillo suffered from reactive attachment disorder,[4] attention deficit

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[4] Reactive Attachment Disorder is defined as:

> A. Markedly disturbed and developmentally inappropriate social relatedness in most contexts, beginning before age 5 years, as evidenced by either (1) or (2):
>
> (1) persistent failure to initiate or respond in a developmentally appropriate fashion to most social interactions, as manifest by excessively inhibited, hypervigilant, or highly ambivalent and contradictory responses (e.g., the child may respond to caregivers with a mixture of approach, avoidance, and resistance to comforting, or may exhibit frozen watchfulness);
>
> (2) diffuse attachments as manifest by indiscriminate sociability with marked inability to exhibit appropriate selective attachments (e.g., excessive familiarity with relative strangers or lack of selectivity in choice of attachment figures).
>
> B. The disturbance in Criterion A is not accounted for solely by developmental delay (as in Mental Retardation) and does not meet criteria for a Pervasive Developmental Disorder.
>
> C. Pathogenic care as evidenced by at least one of the following:
>
> (1) persistent disregard of the child's basic emotional needs for comfort, stimulation, and affection;
>
> (2) persistent disregard of the child's basic physical

hyperactivity disorder, conduct disorder, and personality disorders. Id. at 60, 65, 73, 95. He concluded Mr. Castillo suffered from neglect and physical abuse. Id. at 60.

24. Tammy Jo Bryant, Mr. Castillo's girlfriend, described her short relationship with Mr. Castillo. TT, 9/24/96 (morning session), at 14-21, Ex. 171 at 14-21. She testified that Mr. Castillo was employed. He lacked social skills, but he tried to improve his life. Id.

25. Sonny Carlman, a correctional officer with the Clark County Detention Center, knew Mr. Castillo for less than three months. TT, 9/24/96 (morning session), at 7-14, Ex. 171 at 7-14. Carlman testified to his supervision of Mr. Castillo's work and that Mr. Castillo caused no problems in the Detention Center. Id.

26. Jerry Harring, a classification counselor for Nevada Youth Training Center, was familiar with Mr. Castillo's juvenile history. TT, 9/20/96 (afternoon session), at 107-126, Ex. 170 at 107-126. Harring described an unsolicited letter from Mr. Castillo in which Mr. Castillo disclosed his criminal problems and advised incoming juvenile offenders to listen to the counselors' advice. Harring routinely read Mr. Castillo's letter to juvenile offenders at the Nevada Youth Training Center and believed the letter had a "very positive impact" on them. Id. at 114.

27. Trial counsel presented minimal mitigating evidence of Mr. Castillo's background and family history. Counsel failed to demonstrate the substantial neglect and abuse Mr. Castillo suffered at the hands of his mother and adoptive father, his routine

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needs;

(3) repeated changes of primary caregiver that prevent formation of stable attachments (e.g., frequent changes in foster care).

D. There is a presumption that the care in Criterion C is responsible for the disturbed behavior in Criterion A (e.g., the disturbances in Criterion A began following the pathogenic care in Criterion C).

American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 130 (4th ed., text revision, 2000).

placement in the foster care system, his mother's abandonment of him, the head injuries he suffered, his family's history of drug and alcohol abuse, his biological father's physical abuse towards him, his biological father's criminal history, his families' extensive mental health history, and his experiences as a child and adolescent in countless residential treatment programs and youth behavioral institutions.

28. Had trial counsel conducted an adequate investigation, counsel would have discovered the substantially mitigating history of Mr. Castillo's family and the traumatic life experiences he suffered.[5] See infra Parts II.A.2-6. With such evidence, trial counsel could have provided Mr. Castillo's jury with an accurate picture of Mr. Castillo's life, and could have provided such information to his mental health expert who would have explained the impact of such circumstances on Mr. Castillo's childhood development. See infra Parts II.A.7.

29. Trial counsels' failure to present such evidence to the jury resulted from the marginal investigation conducted, or lack of investigation, and the insufficient interviews of witnesses prior to trial. Trial counsel expended less than five hours preparing their witnesses, Dr. Etcoff, Mr. Castillo's mother, and Tammy Jo Bryant, for their testimony. Ex. 45.

30. Trial counsel further failed to investigate, prepare, and present mitigating evidence which demonstrated that Mr. Castillo suffered from posttraumatic stress disorder at the time of the offense and throughout his life. See infra Parts II.A.7.ii.-iii. Had trial counsel investigated, or hired an investigator, readily available mitigating evidence would have been discovered. Such mitigating evidence would have explained Mr. Castillo's troubled life and actions to the jury. See infra Parts II.A.2-7.

31. An adequate and complete investigation would have revealed the following mitigating evidence:

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[5] Attached hereto, as Ex. 73, is Mr. Castillo's family tree. Attached hereto, as Ex. 74, is a historical view of Mr. Castillo's social history. These exhibits are incorporated herein by reference as if fully copied and set forth at length.

2. Trial Counsel Should Have Presented Readily Available Mitigating Evidence that Mr. Castillo was Traumatized Before His Birth

32. Mr. Castillo's destiny was determined long before his birth. He was born to a mother whose own childhood was filled with neglect as well as physical and emotional abuse. His mother prostituted herself, was mentally unstable, and verbally abusive. Mr. Castillo was born to a man who grew up watching his own father beat his mother, was consistently in trouble with the law, and spent a considerable amount of time in juvenile detention facilities. Mr. Castillo's father was addicted to heroin.

33. The repeating cycle of physical and emotional abuse, neglect, violence, and mental illnesses which plagued Mr. Castillo's family and its effect on Mr. Castillo's development were never fully investigated and presented to the jury. Such mitigating evidence would have proved important to demonstrate the environment into which Mr. Castillo was born, and explained his childhood development as a result.[6]

i. His Parents' Physically and Emotionally Abusive Relationship

34. Mr. Castillo's mother, Barbara Becker-Thorpe-Castillo-Sullivan-Wickham (hereinafter "Barbara Wickham"), was seventeen years old when she married Mr. Castillo's father, William Thorpe, Sr. Ex. 50, at 27, and 46. Barbara Wickham was forced to marry William Thorpe, Sr. See Ex. 29, at 4.[7] Indeed, Barbara Wickham was "afraid" of William Thorpe, Sr. and "married him because he told [her] if [she] didn't, he would cut [her] up... ." Id. at 4; TT, 9/24/96 (morning session), at 33, Ex. 171 at 33.

35. The physical abuse began shortly after their marriage. William Thorpe, Sr. began to slap Barbara Wickham's face. The "slaps got progressively harder and more intense until they turned into beatings." Ex. 29, at 5. Thereafter, William Thorpe, Sr.

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[6] Mr. Castillo's records from Independence High School, the Clark County, Nevada Juvenile Division, and St. Louis County, Missouri Family Court are attached hereto as Exs. 67; 79; 80.

[7] Barbara Wickham executed a written declaration which is attached hereto as Ex. 29, and incorporated by reference as if fully copied and set forth at length.

"beat the shit out of" Barbara Wickham on a "regular basis." Id. at 4. Barbara Wickham vividly recalled the abuse:

> [William Thorpe, Sr.] beat me for any reason, or even no reason. I was beaten simply because a man looked at me in a store. If a man looked at me, [William Thorpe, Sr.] would say, 'Do you want to fuck him!?'
>
> ***
>
> [William Thorpe, Sr.] hung me over a highway overpass by my legs and said he was going to drop me.
>
> ***
>
> My sexual relationship with [William Thorpe, Sr.] was as one sided as the rest of my life. [William Thorpe, Sr.] controlled me. If [William Thorpe, Sr.] wanted sex, he took it. He raped me under our Christmas tree one year. [William Thorpe, Sr.] controlled what I wore; if he didn't like it, I didn't wear it. Simply put, [William Thorpe, Sr.] controlled every aspect of my life.

Id. at 5.

36. William Thorpe, Sr.'s beatings continued and grew worse even after Barbara Wickham became pregnant with Mr. Castillo. Id. Indeed, William Thorpe, Sr. threw Barbara Wickham down a flight of concrete steps while she was eight months pregnant with Mr. Castillo. TT, 9/24/96 (afternoon session), at 32-33, Ex. 172 at 32-33. The injuries were so severe that Barbara Wickham was taken to the hospital where doctors informed her that if she suffered another beating, she would have a miscarriage. Ex. 29, at 5.

37. William Thorpe, Sr. was "crazy." Id. at 4. He used various drugs, including heroin, marijuana, and LSD. Id. at 5; Ex. 47, at 10. William Thorpe, Sr. became "more explosive and crazier" after he used drugs. His drug usage and constant beatings made Barbara Wickham a wreck, both "emotionally and mentally." Ex. 29, at 6.

38. Barbara Wickham accepted William Thorpe, Sr.'s beatings and verbal abuse because "he told her he loved [her]." Id. at 5. Eventually Barbara Wickham became unstable and could no longer cope with the abuse. She attempted suicide several times. See id. at 6.

39. Testimony concerning the constant beatings and mental instability Mr. Castillo's mother suffered and the drugs his father abused around the time of his conception were never presented to the jury. Such mitigating evidence "is important because having family members with mental illnesses and substance abuse related problems increases an individual's risk of developing these types of problems." Ex. 36, at 13.[8] To understand the environment that nurtured and produced Mr. Castillo, it was important to understand his family background.

ii. Barbara Wickham's (Mr. Castillo's Mother) Chaotic and Unstable Life Destroyed Her Ability to Nurture Mr. Castillo as a Child

40. At the penalty trial, Barbara Wickham testified she resented Mr. Castillo in the first years of his life. TT, 9/24/96 (morning session), at 44, Ex. 171 at 44. Barbara Wickham "didn't love [Mr. Castillo] like [she] should have. Not th[e] way [she] loved [her] other two children." Id. Because she hated Mr. Castillo's father so much, Barbara Wickham "didn't give [Mr. Castillo] the love he needed." Id. Trial counsel failed to investigate and present readily available evidence which supported and explained Barbara Wickham's failure to nurture or love Mr. Castillo.

41. Had trial counsel conducted an adequate investigation, counsel would have discovered Mr. Castillo's mother was abused and neglected as a child: she was physically abused by Mr. Castillo's father; she and her family members had extensive mental health problems; she abused drugs; she routinely abandoned Mr. Castillo to the foster care system; and she failed to maintain a job or a stable home environment during Mr. Castillo's childhood. Barbara Wickham's childhood and upbringing affected the decisions she made, and the manner in which she raised Mr. Castillo.

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[8] Dr. Rebekah Bradley, a well known and respected psychologist, who specializes in Posttraumatic Stress Disorder, evaluated Mr. Castillo and his social history. Dr. Bradley executed a written declaration which is attached hereto as Ex. 36, and incorporated by reference as if fully copied and set forth at length. Dr. Bradley's curriculum vitae is attached hereto as Ex. 37.

a. His Mother was Neglected as a Child

42. Mr. Castillo's mother was born on October 26, 1954, to eighteen-year-old Allegria Dehry-Becker-Gavan-Brawley-Rosene-Hensel-Thieret (hereinafter "Allegria Thieret") and 24-year-old Robert Becker. Exs. 48, at 2; 46. Barbara Wickham was the youngest of her parents' three children.[9] Her parents met in French Morocco. Her father was 21 years old when he married 15-year-old Allegria Thieret. The marriage ended less than a year after Barbara Wickham's birth.

43. Allegria Thieret remarried Clifford Gavan, and they had one child, Ramona Gavan. When her marriage to Gavan failed, Allegria Thieret was left to raise four children alone.

44. Barbara Wickham's mother believed she was too young to be burdened with four children and wanted nothing more than to have a good time. Ex. 48, at 74. Allegria Thieret abandoned Ramona Gavan to the care of Clifford Gavan's mother and step-father. Id. She abandoned Barbara Wickham and her older siblings to the care of German St. Vincent's Children's Catholic Charities (Catholic Charities) in St. Louis, Missouri.

45. Allegria Thieret placed her children in the Catholic Charities orphanage because she wanted to "marry again and ... for money." See Ex. 48, at 74. She was described by case workers as self-centered and she cared more about herself than her children. Ex. 48, at 31. Although Allegria Thieret may have been "interested in the children," it was the case worker's "feeling that it was rather superficial feeling[s]." Id. [10]

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[9] Allegria Thieret and Robert Becker are also the parents of Yolanda Norris and Max Becker.

[10] Allegria Thieret's daughter, Lora Brawley, executed a written declaration which is attached hereto as Ex. 35, and incorporated by reference as if fully copied and set forth at length. Lora Brawley believed her mother was more interested in herself than her children. Lora Brawley indicated, that she and her siblings

> ... grew up in a very unstable and emotionally traumatic environment mostly because of the poor choices and abusive nature of our mother. ... My mother was always more interested in herself than she was in the welfare of her children and she failed to provide us with a safe and loving home environment.

46. Barbara Wickham was three years old when her mother left her and her siblings at the orphanage. Ex. 48, at 24. The caseworker noted the following:

> There appeared to be more rejection operating in regards to Barbara. From May through August, Barbara was living with her aunt, Mrs. (redacted). During this period, [Allegria Thieret] did not visit her even once, nor did she send any money for her clothes and upkeep. Barbara appears rather listless emotionally, and might require a good deal of individual attention and affection. Apparently, she has not recovered this sufficiently from her mother. Behaviorwise she is not a problem, though she appears rather withdrawn in respect to people and fearful of them.

Id. at 3. Barbara Wickham remembered the day her mother left her at the orphanage. Allegria Thieret "told [her] she had to go to the bathroom and never returned to even say good-bye." Ex. 29, at 1.

47. Barbara Wickham and her older siblings spent most of their childhood in the orphanage.[11] Barbara Wickham's "earliest memories involve [her] time at the Catholic Charities orphanage." Id. The nuns at the orphanage smacked Barbara Wickham with rulers and made her stand on her knees with her hands behind her back. Id. She was never shown "affection or love" from the nuns. Id. at 2. Barbara Wickham does not remember love or affection in her life. Id. Instead, Barbara Wickham believed that:

> ... love hurt. I do not remember that anyone ever told me they loved me-just pure love. Instead, when people told me they loved me, it ... always came with a beating or abuse.

Id.

48. Had trial counsel adequately investigated Mr. Castillo's family history, and interviewed Barbara Wickham before her testimony, the jury would have learned that Barbara Wickham suffered the same abandonment and lack of love and affection as a child that she failed to express towards Mr. Castillo. The jury would have learned the history of abandonment in Mr. Castillo's family.

Ex. 35, at 1.

[11] Barbara Wickham's father, Robert Becker was also placed in a foster home as a child. Ex. 48, at 74. Robert Becker and his siblings spent approximately ten years in the foster care system. Id.

b. His Mother was Physically and Sexually Abused

49. Barbara Wickham was seven years old when she was removed from the orphanage. Ex. 48, at 107. Her mother remarried to Alton Brawley, and they had one child, Lora Brawley. Barbara Wickham had a difficult time adjusting to her new home. She failed all of her subjects and her conduct was poor in school. Ex. 48, at 50. A caseworker from the orphanage followed Barbara Wickham's progress and noted her failure in school seemed to be "emotional rather than her ability." Id.

50. Barbara Wickham suffered from much more than emotional problems. She lived in a physically abusive home. Barbara Wickham's mother, Allegria Thieret, was "really scarey and crazy when [she and her siblings] lived with Mr. Brawley." Ex. 29, at 2. Whenever Allegria Thieret became angry with Barbara Wickham and her siblings, "she would tie [the kids] to a post in the basement with no light." Ex. 32, at 1.[12] Barbara Wickham remembered her mother's abuse:

> If she [Allegria Thieret] wanted Max, Ramona, or me to do something, she threw high heeled shoes at us or put a hot iron next to our faces or bodies. One time during this time period mother tied me to the downstair's banister with a rope and forced me to spend the night in the dark. I also remember that mother beat us with an electric cord when she was angry.

Ex. 29, at 3. Barbara Wickham was "punished a lot." Id. at 4. Her mother's "punishment was generally physical or psychological." Id.

51. While the physical abuse Barbara Wickham endured from her mother continued, sexual abuse from her stepfather, Alton Brawley, began. Barbara Wickham was sexually abused on a regular basis by her stepfather. Ex. 32, at 1. Barbara Wickham described Brawley's abuse:

> When I sat on Mr. Brawley's lap, his hand was always in my pants. If I did not let him touch me, he threatened to punish me in some way-like not letting me go out with my friends or to a party, or not giving me spending money. I let him touch me because I wanted out of the house.

[12] Ramona Gavan-Kennedy executed a written declaration which is attached hereto as Ex. 32 and incorporated by reference as if fully copied and set forth at length.

Ex. 29, at 3. Brawley also sexually abused Barbara Wickham's older sister, Yolanda Norris. Barbara Wickham recalled when she learned of the abuse:

> I learned about Yolanda's abuse when she, my mother, and I were in the kitchen one day. I do not remember what exactly happened, but my mother yelled at Yolanda and Yolanda yelled back, 'If I don't let Brawley touch my tits I can't go to the dance.'

Id.

52. Initially, Barbara Wickham's mother was upset and saddened by news that Alton Brawley sexually abused her daughters. She took her daughters to the police station to report Alton Brawley's unlawful conduct but later forced her daughters to recant their story. Allegria Thieret did not want her husband "to go to jail because she could not support [her children]." Ex. 29, at 3. Even after this incident, Brawley sexually abused Barbara Wickham. "Nothing was ever done to stop the abuse." Ex. 32, at 1.

53. Barbara Wickham frequently took things that did not belong to her while she lived with her mother and Alton Brawley. Ex. 29, at 3. Barbara Wickham stole "things for everyone [in her family]—makeup, tennis shoes, and clothing." Id. Barbara Wickham became a better thief as she got older. Id. She "once stole an entire tray of fake diamond rings from a jewelry store." Id.

54. Barbara Wickham's relationship with her mother slowly deteriorated. Barbara Wickham noticed that her mother gave more attention and care to her various husbands than to her and her siblings. Barbara Wickham recalled that, when her mother was married to Alton Brawley,

> ... she [her mother] bought expensive stuff for him to eat—like steaks and hams. She bought bologna for my brother, sisters and me. Max, Ramona, and I always stole Mr. Brawley's food. I remember that my mother made us wait to eat until after her husband ate; she sent us outside while they ate, and once they finished, she called us back in to eat. Mother always put whatever man was in her life first. She always showed them love and affection telling us 'I have to show these men great love and affection, because who's going to marry a woman with 3 children?'

Id. at 4.

55. The neglect, physical abuse, and sexual abuse Barbara Wickham suffered strained her relationship with her mother. Barbara Wickham "did not, and still do[es] not, have a healthy, loving relationship with [her] mother." Id.

56. Had trial counsel adequately investigated and presented evidence of Barbara Wickham's childhood, which included the four years she spent in the orphanage, the physical abuse she sustained from the nuns and her mother, the lack of affection or love shown towards her, and the sexual abuse she suffered by her stepfather, counsel would have been able to support and explain Barbara Wickham's statements to the jury about her inability to love, care, nurture, or protect Mr. Castillo when he was a child. Such mitigating evidence would have convinced at least one reasonable juror to return a sentence of less than death.

c. His Maternal Family's History of Mental Illness

57. Barbara Wickham was mentally unstable. She attempted suicide on at least six occasions. See Ex. 29, at 6; Ex. 66, at 16. After one of her suicide attempts, Barbara Wickham was admitted to St. Vincent's Hospital. Initially, she was treated with psychotherapy, antidepressant drugs, and tranquilizers. Ex. 66, at 65. She was later forced to undergo a course of electroshock therapy.

58. Barbara Wickham underwent electroshock therapy treatment three times a week. She believed the treatment would erase the horrible memories of the beatings she suffered from Mr. Castillo's father, William Thorpe, Sr. Ex. 29, at 6. This did not happen. Instead, she "turned ... into a completely different person." Id. at 7.

59. Barbara Wickham was admitted to Missouri Baptist Hospital after an attempted suicide. Ex. 66, at 16-17; Ex. 68. Barbara Wickham was twenty-one years old and had taken an overdose of pills because her older "sister had an affair with her ex-husband [Mr. Castillo's father]." Ex. 68, at 8. Barbara Wickham related to medical personnel that she did not trust herself and requested that she be "transfer[ed] to St. Louis State Hospital." Id. Barbara Wickham admitted that she abused amphetamines. A psychiatrist evaluated Barbara Wickham and diagnosed her with depression and a

personality disorder. Ex. 68, at 2. Barbara Wickham was subsequently transferred to St. Louis State Hospital for mental health treatment. Id.

60. Barbara Wickham's sister, Yolanda Norris, had a history of mental problems. Yolanda Norris was diagnosed with depression, post traumatic stress disorder, and bipolar disorder. Exs. 71, at 13; Ex. 53. Like Barbara Wickham, Yolanda Norris attempted suicide on many occasions. Indeed, another sister, Lora Brawley, recalled an occasion in which Yolanda Norris attempted suicide:

> My mother was briefly married to a man named Bruno who was a foreigner. About two weeks into the marriage, Bruno came upon a situation where my sister Yolanda attempted suicide by slitting her wrists in the bathroom.

Ex. 35, at 1. When "Bruno" immediately contacted Allegria Thieret concerning Yolanda Norris's attempted suicide, Allegria Thieret was unconcerned and upset that Bruno interrupted her at work. Id.

61. Barbara Wickham and her sister, Yolanda Norris, discussed potential methods of killing themselves. Indeed, Lora Brawley overheard her sisters,

> ... Barbara and Yolanda discussing the best methods of committing suicide in the livingroom in our home. They discussed taking pills, slitting their wrists and someone brought up shooting one's self but the other thought it would be too painful and they both agreed not to try that.

Id. at 3-4. After this conversation, Barbara Wickham attempted suicide again. Id. at 4.

62. Barbara Wickham's father, Robert Becker, suffered from a mental illness which required his hospitalization. Ex. 48, at 5. Becker was discharged from the United States Navy after he attempted suicide, and he was later admitted to the psychiatric ward in a military hospital. Id.

63. Barbara Wickham's mother also appeared to suffer from some form of mental illness. Allegria Thieret experienced several nervous breakdowns and was once admitted to the hospital. Ex. 35, at 2. Allegria Thieret was addicted to prescription medication, and frequently took "nerve pills." Id.

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64. Had trial counsel conducted an adequate investigation into Mr. Castillo's family mental health history, the jury would have learned that his mother, aunt, and grandfather attempted suicide. His aunt suffered various mental illnesses and his mother and grandmother suffered mental health problems requiring hospitalization. Such mitigating evidence would have convinced at least one juror to return a verdict of less than death.

iii. William Thorpe, Sr.'s (Mr. Castillo's Father) Criminal History and Instability Destroyed His Ability to Nurture Mr. Castillo as a Child

65. Mr. Castillo's father, William Thorpe, Sr., was born on December 30, 1953[13], to Vida and Mark Thorpe. William Thorpe, Sr. was the third oldest of his siblings: Chuck Nottingham,[14] Michael Thorpe, Mark Allen Thorpe[15] (hereinafter "Mark Allen"), and Robert Thorpe.

66. Trial counsel failed to interview Mr. Castillo's paternal relatives. Had trial counsel conducted such an investigation, counsel would have discovered mitigating evidence related to the Thorpe family history of domestic violence, unlawful conduct, drug abuse, and the mental health issues which ran rampant in the Thorpe family. The jury, in determining Mr. Castillo's moral culpability, was entitled to learn the relevant mitigating evidence relating to Mr. Castillo's father and his family.

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[13] William Thorpe, Sr. was thirty-one years old when he died on July 17, 1984. Ex. 51.

[14] Chuck Nottingham was conceived prior to Vida Thorpe's marriage to Mark Thorpe.

[15] Mark Allen Thorpe was conceived during his father, Mark Thorpe's prior relationship and marriage to his mother, Georgia Rose Whalen-Thorpe-Forrest. Ex. 33, at 1.

a. His Father, Grandfather, and Great-Grandfather's History of Abuse

67. The men in the Thorpe family had a long history of abusing women. Mr. Castillo's great-grandfather physically abused his wife, Henrietta Thorpe. Ex. 30, at 1.[16] Mr. Castillo's grandfather was an alcoholic and physically abused his wife, Vida. Id; Ex. 29, at 6; Ex. 47, at 4, 15. Mr. Castillo's father and his siblings frequently witnessed their father beat their mother. Ex. 31, at 1;[17] See Ex. 33, at 2.[18]

68. William Thorpe, Sr. and his brother, Michael Thorpe followed in their father's and grandfather's footsteps with their abusive treatment towards woman. Michael Thorpe's wife, Regina Albert, divorced him "due to the physical abuse that [she] suffered at Michael's hands, as well as his constant drug abuse." Ex. 30, at 1.

69. William Thorpe, Sr. sexually, physically, and emotionally abused the women in his life. He routinely beat Mr. Castillo's mother. William Thorpe, Sr. had an explosive personality and "beat the shit out of" Barbara Wickham repeatedly. Ex. 29, at 4. He beat Barbara Wickham for any reason, or no reason at all. Id. Barbara Wickham was "beaten simply because a man looked at [her] in a store. If a man looked at [her], [William Thorpe, Sr.] would say, 'Do you want to fuck him!?'" Id. at 5.

70. William Thorpe, Sr.'s physical abuse oftentimes included other violent acts such as setting fires. Once, when William Thorpe, Sr. had no money to purchase drugs, he attempted to obtain money from his mother and his wife, Barbara Wickham. Both women refused to give him money. William Thorpe, Sr. took actions into his own hands. He locked the women in a bedroom, "doused it with lighter fluid, and set the room on fire." Ex. 29, at 5; see also Ex. 47, at 11.

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[16] Regina Albert executed a written declaration which is attached hereto as Ex. 30 and incorporated by reference as if fully copied and set forth at length.

[17] Cecilia Boyles executed a written declaration which is attached hereto as Ex. 31 and incorporated by reference as if fully copied and set forth at length.

[18] Michael Thorpe executed a written declaration which is attached here as Ex. 33 and incorporated by reference as if fully copied and set forth at length.

71. William Thorpe, Sr.'s brother, Michael Thorpe, remembered when William Thorpe, Sr. attempted to set his mother on fire. He "tied his mother to a bed, poured gasoline on top of the mattress, lit it on fire and then left." Ex. 33, at 5. William Thorpe, Sr. blamed the way his mother raised him in order to explain his actions. Id.

72. The beatings and violent conduct continued when Mr. Castillo's father married Cecilia Boyles.[19] Cecilia Boyles recalled the first time that William Thorpe, Sr. hit her:

> The first time I was physically abused by William was in 1975. We were in Texas visiting one of William's best friends, Jeff Waters. We were at a bar with Jeff and his wife. When we came out of the bar, William viciously attacked me without provocation or reason. I still don't know what happened because we were all having a good time and there were no arguments or disagreements. This was the first of several beatings I would endure while I was married to William.

Ex. 31, at 1.

73. William Thorpe, Sr. put a knife to Cecilia Boyle's throat and threatened to slit her neck. Id. She was afraid of William Thorpe, Sr. and feared for her life throughout their marriage. Id. Cecilia Boyles stated that she spent her entire marriage never knowing whether William Thorpe, Sr. would actually kill her. Id.

74. Cecilia Boyles feared for her child's life after she became pregnant with William Thorpe, Sr.'s child, Joseph Thorpe. She later left William Thorpe, Sr., and never allowed their son to have a relationship with his father. Thereafter, William Thorpe, Sr.'s physical and sexual abuse was directed toward Denean Firle, a 15-year-old girl.

75. William Thorpe, Sr. was "charming and gentle" when he first met Denean Firle. Ex. 27, at. 1.[20] William Thorpe, Sr.'s personality quickly changed and he began to abuse her soon after their relationship started. Id. The drugs and alcohol William

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[19] William Thorpe, Sr. and Cecilia Boyles had one child together, Joseph Thorpe.

[20] Herbert Duzant is an investigator at the Law Offices of the Federal Public Defender and executed a written declaration which is attached hereto as Ex. 27 and incorporated by reference as if fully copied and set forth at length.

Thorpe, Sr. abused "made it easier for [him] to fly off the handle and beat [Denean Firle] for little or no reason at all." Id. at 2.

76. When William Thorpe, Sr. became violent, he appeared to be unattached–as if he had no control over himself, and he had a distant look in his eyes. Id. William Thorpe, Sr.'s appearance terrified Denean Firle. She described one of the worse beatings she received from William Thorpe, Sr.:

> William ... told her [Denean Firle] to run to the store, literally, but she could not do so because she was wearing clog shoes. William ... then made [Denean Firle] remove her clogs and proceeded to beat her about her body and face with her own clogs. [Denean Firle's] eye was injured during this incident.

Id. William Thorpe, Sr.'s abuse intensified with frequent slaps to Firle's face and punches to her stomach. Id.

77. William Thorpe, Sr. nicknamed Denean Firle "slave girl," and he forced her to have sex with members of his gang. Id. at 2. See infra Part b. Denean Firle had "sex with multiple gang members at a time on a single day or evening." Id. at 1. William Thorpe, Sr. further forced Firle to have sex with him. Whenever Firle told William Thorpe, Sr. she was not interested in having sex, he beat her and "forcibly had sex with [her] against her will." Id. at 3.

78. William Thorpe, Sr. threatened to kill Denean Firle if "she ever got him into trouble with the authorities or screwed him over in any way." Id.

b. His Father's Criminal History

79. William Thorpe, Sr. was a juvenile delinquent and spent much of his adolescent years in juvenile residential facilities. His criminal behavior began at the age of fourteen. Ex. 47, at 3. He had committed offenses such as auto theft, stealing under $150, and truancy. Id.

80. Due to his delinquent behavior, William Thorpe, Sr., at fifteen years old, was committed to Lakeside Center for Boys, a juvenile facility. He resided at Lakeside for eleven or twelve months. Id. At sixteen years old, William Thorpe, Sr. was committed to the Division of Youth Services and placed at the Training Center for Boys

in Boonville, Missouri. Id. He resided at the training center for three months and was later transferred to the Camp Avery facility in which he resided for six months. Id.

81. William Thorpe, Sr.'s criminal record continued to grow as he became an adult. He burglarized a business establishment and was sentenced to three years probation. Id. He frequently stole merchandise from various departments stores. Ex. 47, at 3. William Thorpe, Sr. was charged with, and pled guilty to, disturbing the peace and tampering with a motor vehicle. Ex. 52, at 67.

82. Over time, William Thorpe, Sr.'s crimes became more severe. In 1981, William Thorpe, Sr. was indicted for selling morphine. Ex. 52, at 25. He pled guilty to an amended charge of conspiracy to attempt the sale of a controlled substance. Ex. 52, at 69. William Thorpe, Sr. was sentenced to one year in the county jail. Id.

83. William Thorpe, Sr. had a quick temper. Ex. 47, at 12. On one occasion, William Thorpe Sr.'s temper flared and he beat his wife, Barbara Wickham with his fists. Id. at 11. William Thorpe, Sr. brandished a knife and made threatening gestures towards his own father. Id. Although William Thorpe, Sr. escaped his parents' home without arrest, he returned the next day to cause more harm. Id.

84. William Thorpe, Sr. returned to his parents' home and beat his mother with his fists. He drug Barbara Wickham from her bed and beat her. Id. He smashed furniture, causing extensive damage to his parents' home. Id. William Thorpe, Sr. was arrested for his conduct, and admitted to the Maximum Security Unit of Fulton State Hospital ("Fulton Hospital"). Id.

85. At Fulton Hospital, William Thorpe, Sr. underwent a psychiatric evaluation and examination in order to determine whether he was competent to stand trial. The mental health experts determined that William Thorpe, Sr. suffered from "anti-social character disorder." Ex. 47, at 15-16. In his report, the physician noted that, as William Thorpe, Sr. discussed his actions, he "showed no guilt." Id. at 15. The physician further noted, "[t]he most remarkable finding in the psychiatric examination is the lack of guilt or

remorse while discussing his past antisocial behavior." Id. at 16. The physician ultimately found William Thorpe, Sr. competent to stand trial. Id.

86. William Thorpe, Sr. displayed erratic and extreme behavior on Christmas day in 1981. He had spent Christmas Eve partying and drinking. Ex. 52, at 63. When William Thorpe, Sr. returned home around 4 a.m., he repeatedly rang his parents' door bell to wake them. Ex. 52, at 56-61. As William Thorpe, Sr.'s mother unlocked the door, he yelled at his father, "what are you going to do you son-of-a bitch? You were going to jump me." Id. William Thorpe, Sr.'s parents tried to calm him down, however, their attempts failed. William Thorpe, Sr. eventually pulled a gun and aimed it at his father's head. He told his father "you know I can blow your head off! So go ahead and try something if you want to." Id. at 57.

87. William Thorpe, Sr. ordered his parents into a bedroom, and at that point William Thorpe, Sr. pulled the trigger of the gun, the bullet barely missing his father. Ex. 52, at 58. Police arrived to the Thorpe residence and arrested William Thorpe, Sr. He pled guilty to first-degree assault. Ex. 47, at 8. He was sentenced to five years probation. Id.

88. William Thorpe, Sr. violated his probation when he assaulted two women and displayed a weapon. Ex. 52, at 17. He was committed to the Department of Corrections and Human Resources to serve a term of five years for his offense. Ex. 47, at 7.

89. William Thorpe, Sr.'s criminal conduct continued during his membership with the "Brotherhood of the G[y]psy Outlaw" gang, which was also known as "BGO" and "the Brotherhood." Ex. 33, at 3. The BGO was a large and feared gang in Missouri during the 1970s, and they engaged in various criminal acts which included murder, contract killings, rapes, robberies, extortions, assaults, and the sale of narcotics. Id; see also Ex. 72.

90. The BGO members referred to William Thorpe, Sr. as "Animal" because he was a wild person who was capable of doing anything. William Thorpe, Sr. proudly

displayed his affiliation with the BGO with tattoos of swastikas on his chest and a large eagle over it. Ex. 33, at 3. Many members of the BGO had tattoos of "FTW" or "Fuck the World" on various parts of their bodies. Id.

91. William Thorpe, Sr. committed criminal acts as a member of the BGO. He attacked and raped women. Ex. 33. William Thorpe, Sr.'s brother, Michael Thorpe was a member of the BGO. He recalled an incident which involved William Thorpe, Sr.'s criminal acts as a BGO member:

> ... a girl working at a local McDonald's was kidnapped and taken out into the woods after she had been flirting with Bill Sr. [William Thorpe Sr.] and other members of the gang outside. When I met up with the group in the woods, Bill Sr. was in the middle of raping [sic] the girl with 5 or 6 other members lined up and waiting for their turn.
>
> ***
>
> One of the gang members was admiring the girl's breast while my brother Bill Sr. was raping her and told Bill to cut one of them off so they could hang it on the front of a vehicle or on the clubhouse wall. Without thinking twice, Bill Sr. pulled out a large knife, lifted one of the girls breast and was preparing to cut it off when I yelled out for him to stop.

Id. at 4.

92. Trial counsel failed to elicit testimony or discover records regarding William Thorpe, Sr.'s criminal history. Such evidence would have supported and demonstrated the similarities between Mr. Castillo's conduct and that of his father, and the effect his father's criminal behavior had on his life. Such mitigating evidence would have led at least one juror to return a sentence of less than death.

iv. His Paternal Family's History of Mental Illness and Violent Conduct

93. William Thorpe, Sr.'s siblings engaged in unlawful conduct. His brother, Michael Thorpe, was approximately twelve years old when he was arrested for theft and assault. Ex. 33, at 1. He was committed to a juvenile detention facility for his actions. Id. As an adult, Michael Thorpe was alleged to have been involved in a robbery and rape to which he entered into a plea agreement. Id. at 7. He also robbed a store while under the influence of LSD. Id. Michael Thorpe spent at least five years in prison. Id. at 8.

94. Michael Thorpe joined the military and served in Vietnam for approximately one year. Id. He experienced several traumatic events during his service in Vietnam. Id. Michael Thorpe watched men, women, and children burned alive. He witnessed a superior officer and other soldiers killed. He was frequently attacked by gunshots. Michael Thorpe was honorably discharged from the military. Id. at 2. He is disabled and suffers from post traumatic stress disorder. Id.

95. William Thorpe, Sr.'s brother, Chuck Nottingham, was "a habitual offender and he spent most of his life going in and out of correctional institutions, mostly for robberies and violent acts." Id. at 6; See Ex. 57. Nottingham was committed to a juvenile detention facility as a teenager, and ran away. Id. Nottingham and William Thorpe, Sr. committed robbery together. Michael Thorpe recalled his brothers' conduct and related the following:

> [Chuck and Bill] robbed various types of establishments, but their favorite targets were pharmacies because they could [get] money as well as prescription drugs.
>
> ***
>
> [They] robbed a jewelry store. After the robbery, Chuck and Bill Sr. came to our house with bags of jewelry. I remember seeing a picture of Barbara, Billy Castillo [sic] mom, adorned with several diamond necklaces, and rings on all of her fingers and toes, all which were retrieved from this robbery. Bill Sr.'s mom, [Vida] was also given several items of jewelry and she was well aware of their origin.
>
> ***
>
> Chuck and Bill Sr.'s last caper occurred when the two decided to rob the South St. Louis Savings Bank ... the plans did not turn out as they had plan [sic] because Bill Sr. caught a case of cold feet and left the scene while his brother was still inside of the bank making the illegal withdrawal. [For this offense], Chuck was sentenced to 15 years in prison and spent the final years of his life at the correctional facility in Moberly, MO.

Id. at 5-6.

96. Had trial counsel conducted an adequate investigation and discovered this evidence relating to Mr. Castillo's father – and his extended paternal family – the jury would have learned the violent and criminal history which ran throughout Mr. Castillo's

family. Such mitigating evidence would have convinced at least one juror to return a sentence of less than death.

3. Trial Counsel Should Have Presented Mitigating Evidence that Mr. Castillo was Exposed to Repeated Traumatic Events From Birth, Childhood, and Adolescence

i. Mr. Castillo was Abandoned Multiple Times at a Young Age

97. Mr. Castillo "never had a chance to have a normal life from the day he was born." Ex. 33, at 8. Indeed, Mr. Castillo was denied a normal childhood and the ability to develop as a normal child.

98. Mr. Castillo was born on December 28, 1972, in Flourissant, Missouri. Ex. 66, at 3. His parents were teenagers. He was shuffled between caretakers within the first few months of his birth. Ex. 35, at 4. Rather than care for Mr. Castillo, his mother spent time "running the streets and partying." Ex. 34, at 2. Barbara Wickham disappeared for weeks at a time without checking to ensure Mr. Castillo was properly cared for in a safe and healthy environment. See id.; Ex. 35, at 4.

99. A number of circumstances hindered Barbara Wickham's ability to care for Mr. Castillo. Most notably, the physical and mental abuse Barbara Wickham suffered from her husband made her a "wreck." Ex. 29, at 6. She attempted suicide on several occasions and was admitted to St. Vincent's Hospital for psychiatric treatment.

100. The months Barbara Wickham spent in psychiatric treatment, which included electroshock therapy, was months she spent away from Mr. Castillo. Ex. 66, at 65, 5. Although Barbara Wickham believed the electroshock therapy would erase her memories of William Thorpe, Sr.'s violent beatings, the memories remained and Barbara Wickham became a different person. Ex. 29, at 6-7.

101. Barbara Wickham's life spiraled out of control. She suffered a nervous breakdown, was unable to maintain employment or a home, and her mother would no longer care for Mr. Castillo. Barbara Wickham began "spanking" Mr. Castillo even before he was a year old. Ex. 66, at 6. Barbara Wickham's emotional instability, and her

mother's refusal to continue to care for Mr. Castillo, led her to seek placement for Mr. Castillo in the foster care system.

102. Barbara Wickham met with a social worker at Catholic Charities to seek placement for Mr. Castillo. Barbara Wickham explained that she was "fearful that she may be abusive to [Mr. Castillo] when he gets on her nerves although she has never done more than spank him up to this time." Ex. 66, at 6. The social worker believed Barbara Wickham was "not emotionally able to work through her own problems and care for the child at th[at] time." Ex. 66, at 7. It was further noted that Barbara Wickham was "immature and dependent." Id.

103. Mr. Castillo was recommended for placement for "his own welfare." Ex. 66, at 8. However, Barbara Wickham changed her mind about placing Mr. Castillo in a foster home. Id. She and William Thorpe, Sr. decided that Mr. Castillo's paternal grandparents would care for him. Ex. 66, at 9.

104. Two weeks after Barbara Wickham sought placement of Mr. Castillo in the foster care system, Mr. Castillo was admitted to St. Louis Children's Hospital. Mr. Castillo was hospitalized for four days and discharged with a diagnoses of gastroenteritis and pneumonia. It was noted that Mr. Castillo's grandmother was more familiar with his problems than Barbara Wickham. Ex. 58, at 3. The discharge summary noted that Mr. Castillo lived in a "poor home situation." Id. at 4. The family was referred to social services for an evaluation. Ex. 58, at 20.

105. Barbara Wickham abused drugs and routinely left Mr. Castillo's care to his grandparents. Ex. 66, at 8. Mr. Castillo's paternal grandmother, Vida Thorpe was no longer able to care for Mr. Castillo because she attempted suicide and she was hospitalized. Ex. 66, at 9. His maternal grandmother wanted Barbara Wickham out of the house and for her to make plans for Mr. Castillo. Id. Barbara Wickham could not find or maintain employment and she had attempted suicide. Id. Barbara Wickham again turned to Catholic Charities for placement of Mr. Castillo, who was then one and a half years old. Id.

106. Mr. Castillo was placed with the Delbo foster family in 1974, and resided with the family for three months. Ex. 66, at 10-11. He was accepted by the family. Barbara Wickham made "little progress toward rehabilitating herself" during Mr. Castillo's placement. Ex. 66, at 10. Within three months of his placement, Barbara Wickham decided to remove Mr. Castillo from the Delbo home. She was worried that Mr. Castillo would be permanently taken away from her. Ex. 66, at 11. Barbara Wickham told the social worker that she was able to care for Mr. Castillo but refused to state where she was employed. Id.

107. Mr. Castillo was moved from place to place frequently. His mother moved him from St. Louis to Florida. Ex. 66, at 11. She returned to St. Louis to seek someone to care for Mr. Castillo. Barbara Wickham's mother-in-law again took on the responsibility of Mr. Castillo. Ex. 66, at 12. Barbara Wickham left Mr. Castillo in St. Louis to return to Florida.

108. Barbara Wickham's routine of placing Mr. Castillo into foster care presented itself again when his grandparents became unable to care for him. Barbara Wickham sought placement of Mr. Castillo for the third time in a foster care home. Ex. 66, at 12. Mr. Castillo was four years old.

109. Mr. Castillo was placed with a foster care family. He resided with the Knowles family almost a year, while Barbara Wickham met David Abramson and lived with him in Colorado Springs, Colorado. Barbara Wickham informed the social worker that she and David planned to marry. Barbara Wickham decided to remove Mr. Castillo from the Knowles' home and move to New York. The social worker was concerned with Barbara Wickham's plans and requested an agency in Colorado to interview the couple. The caseworker in Colorado conducted an interview and reported:

> Several factors concerned me about Barbara's plans, such as lack of stable employment, and difficulty of follow-up if they move to New York. I question whether Barbara has really given this plan serious consideration for any length of time (for example, she was unable to give me the spelling of her fiance's last name). On the other hand, Barbara and David verbally expressed a great deal of concern for Billy's well-being. They seemed to me to be very enthusiastic about the idea of having Billy with them. Since

> they do not have a particularly stable history, however, I would be concerned for Billy's welfare should their enthusiasm wane significantly.

Ex. 66, at 27.

110. A temporary detention order was issued and a petition was filed with the juvenile court to delay Mr. Castillo's removal based on "anticipated neglect or abuse." Ex. 66, at 28-29; see Ex. 66, at 3. The court rescinded the temporary detention order and refused to authorize the filing of the petition based on "anticipatory" allegations. Id. Catholic Charities further requested the court to intervene on behalf of Mr. Castillo because his parents "have failed to cooperatively plan for [his] well being and provide a reasonably consistent environment for his proper nutrients and development." Ex. 66, at 28-29.

111. Barbara Wickham removed Mr. Castillo from the Knowles' home. The constant moves and disruptions to Mr. Castillo's life began once again. Barbara Wickham and Mr. Castillo relocated to Colorado. Ex. 66, at 20. Thereafter, the relationship between Barbara Wickham and David Abramson failed. Id. Barbara Wickham returned to St. Louis and again requested family members to care for Mr. Castillo. Id. Barbara Wickham and Mr. Castillo were eventually thrown out of her mother's home. Barbara Wickham and Mr. Castillo moved to Lake Tahoe. Id.

112. Barbara Wickham was unable to control Mr. Castillo's behavior and again decided to seek his placement in a foster home through Catholic Charities. Mr. Castillo was about six years old. Catholic Charities informed Barbara Wickham that it could not consider "placement unless the court gave us custody." Ex. 66 at 20, 23-25.

113. Mr. Castillo was sent to live with Barbara Wickham's sister temporarily. Ex. 66, at 21. Barbara Wickham later decided to relocate and left Mr. Castillo behind. Barbara Wickham wrote a letter to William Thorpe, Sr., and requested he take care of Mr. Castillo. In the letter, she asked for William Thorpe Sr.'s help with Mr. Castillo because:

> I no longer can care for Billy right now, because the Catholic Charities won't help unless they have full custody of him and other agency says I have to be living here in St. Louis well I can't right now because I have to get back to Lake Tahoe.

She further noted her concern with Mr. Castillo' stability:

> Billy really needs a good solid home someone to be around him all the time to watch him. He needs special care and I just can't give that to him right now.

Ex. 50, at 18-19. Barbara Wickham attached this letter to her six-year-old son (Mr. Castillo) and left him on his grandparents' doorstep. Ex. 29, at 9.

114. Three days after Barbara Wickham left Mr. Castillo, his father and paternal grandmother reported the circumstances to the court as child abandonment. Ex. 63, at 5-6. Mr. Castillo was removed to the custody of St. Louis Welfare Division of Family Services. A petition was filed indicating that the "parents or other persons legally responsible for the care and support of [Mr. Castillo] neglect or refuse to provide proper support, education which is required by law, medical, surgical or other care necessary for his well-being." Id. The petition was ultimately dismissed, and Mr. Castillo was once again placed into Barbara Wickham's care.

115. The vast majority of the first six years of Mr. Castillo's life was spent in the care of his grandparents, or a foster home. For sporadic periods of time, Mr. Castillo lived with his mother and traveled to various states. Growing up in such uncertain circumstances, Mr. Castillo was denied the opportunity to bond with his mother, or to develop in a stable environment. Whenever Barbara Wickham grew tired of caring for Mr. Castillo, she handed him off to someone else. Such mitigating evidence may have persuaded at least one juror to return a verdict of less than death.

ii. The Stability Mr. Castillo Finally Gained from His Foster Family Was Quickly Destroyed by His Mother

116. As a child, Mr. Castillo experienced, for the first time, some measure of stability in his life when he was placed with the Knowles' Family. He spent almost a year with the family, which consisted of Mary Knowles, John Knowles, and their adoptive daughter Kelly Knowles. The transition was not easy. Mr. Castillo suffered substantial problems initially, but made significant progress throughout his stay with the Knowles' family.

117. Mr. Castillo was three years old when he was placed with the Knowles' family. He had "imaginary playmates and [a] preoccupation with 'monsters.'" Ex. 66, at 14. Mr. Castillo was troubled with nightmares. Id. The Knowles' family grew attached to Mr. Castillo and "loved [him] from the beginning." Ex. 43, at 2.[21]

118. Mr. Castillo was "a mess, physically, emotionally, and socially," when he came to live with the Knowles. Id. It was almost as if he had "been raised by wolves." Id. Mary Knowles described the condition of Mr. Castillo's clothing when he arrived:

> The few clothes that were sent with him were unwearable, being either torn, stained, or much too small. I remember a few socks without mates and a pair of pants with the entire crotch ripped out. The shirt he wore the day he arrived was a girl's shirt, cut off at mid-chest. The canvass shoes on his feet were so small that his toes were curled under. He also had no underwear or pajamas.

Id. Mr. Castillo did not know how to use silverware and ate with his hands. Id. He lacked any social skills, especially in his interactions with other children. Id.

119. Mr. Castillo's first few weeks with the Knowles' family proved difficult. He "often awoke at night screaming and crying." Id. Mr. Castillo believed snakes were crawling on him or that his mother was hurt. During these instances, Mr. Castillo was visibly "sweating, shaking, and really scared." Id. Mr. Castillo's nightmares disappeared as he spent more time in the Knowles' home.

120. Mary and John Knowles spent a significant amount of time with Mr. Castillo, showing him love and affection. Id. at 3. These were feelings he never received from his mother. The Knowles taught Mr. Castillo to brush his teeth, provided him with clean clothes, and read him bedtime stories. Id. Mr. Castillo was not affectionate when he arrived at the Knowles' home but, as time progressed he began to enjoy "snuggling" with the Knowles' adopted daughter, Kelly Knowles. Id

121. Mary and John Knowles enrolled Mr. Castillo in kindergarten. There, the teacher noted that Mr. Castillo was an "outgoing, fun loving boy with a lot of leadership qualities." Ex. 66, at 15. The teacher further stated that Mr. Castillo had problems with

[21] Mary Kathleen Knowles executed a written declaration which is attached hereto as Ex. 43 and incorporated by reference as if fully copied and set forth at length.

socializing but was "learning to channel his aggressiveness." Id. The teacher believed Mr. Castillo was "responding to structure and consistency." Id. This was the first time in Mr. Castillo's life that he experienced either.

122. Barbara Wickham rarely visited Mr. Castillo while he lived with Mary and John Knowles. Barbara Wickham "would be gone for months – no one knew where – and then she would suddenly pop up and demand to see [Mr. Castillo.]" Ex. 43, at 4. Mary Knowles explained how she felt about the relationship between Barbara Wickham and Mr. Castillo:

> [I] never really felt that Barbara had a true bond with [Mr. Castillo]. She showed little interest in his development. I felt that she showed up just often enough so that she would retain custody of him, but that he was more a possession to her than a human being.

Id. at 5.

123. Approximately one year later, Barbara Wickham removed Mr. Castillo from the Knowles' home. After a year of being with a stable family, where he learned to act rationally, show affection, and experienced love and affection, Mr. Castillo once again found himself in uncertain circumstances. The Knowles' family, who considered adopting Mr. Castillo, was "devastated and angry" when he was removed from their home. Id. at 6.

124. Mary Knowles described Mr. Castillo as a "smart, cute, loveable little boy with endless possibilities who had no control over the parents he was born to, the people he was left with, or the way he was cared for. In [her] opinion, [Mr. Castillo] [wa]s as much a victim as those he victimized." Id. at 8.

125. Had trial counsel conducted an adequate investigation, counsel would have discovered evidence which related to Mr. Castillo's early childhood, his placement in the foster care system, and his positive experiences. Such evidence demonstrated that, at least for a short time, Mr. Castillo had a stable and normal life–and he responded well. However, this short time period, less than one year, was insufficient to overcome the trauma and abandonment he suffered throughout his childhood. Such experiences

impacted Mr. Castillo's development. This evidence would have convinced at least one juror to return a sentence of less than death.

4. Trial Counsel Should Have Presented Readily Available Mitigating Evidence that Mr. Castillo was Physically and Emotionally Abused

126. Throughout his childhood and adolescence Mr. Castillo was abused by a host of family members.

i. His Father's (William Thorpe, Sr.) Abuse

127. William Thorpe, Sr. had difficulty controlling his anger and became physically violent towards Mr. Castillo. Ex. 47, at 11-16. One incident occurred when Mr. Castillo was fifteen months old. William Thorpe, Sr. became angry with Mr. Castillo and "fling[ed] [him] against a wall." Id.

128. As a child, Mr. Castillo visited his father and stepmother, Cecilia Boyles. Ex. 31, at 1. William Thorpe, Sr. "was not interested in [Mr. Castillo] and barely spent any time with him." Id. Meanwhile, Mr. Castillo's mother was "absent and running in the streets at the time." Id. Cecilia Boyles spent most of her time caring for Mr. Castillo.

129. Cecilia Boyles remembered that "[w]henever William [Thorpe, Sr.] was around [Mr. Castillo] he spent most of the time yelling at or beating [Mr. Castillo], and just generally being mean to him." Id. at 2. Thorpe got upset at Mr. Castillo for "the smallest and insignificant reasons." Id.

130. William Thorpe, Sr. physically abused Mr. Castillo whenever he did anything which Thorpe perceived as wrong. For instance, Thorpe "got very upset with [Mr. Castillo] and picked him up and threw him across the room." Id. at 2. This was not the first time Mr. Castillo's stepmother intervened to protect him from his father. Id.

131. Steve Reed was one of William Thorpe, Sr.'s best friends. Reed spent a considerable amount of time with Thorpe and had numerous opportunities to observe his conduct. Reed knew Thorpe had a "reputation of abusing women," and he observed Thorpe's relationship with Mr. Castillo. Ex. 27, at 4.

132. Reed witnessed William Thorpe Sr.'s physical abuse of Mr. Castillo. Id. Indeed, Thorpe took two-year-old Mr. Castillo out of Reed's lap, and threw him across a room and onto a couch. Id. This was Thorpe's way of disciplining Mr. Castillo for bitting one of Reed's fingers. Id. at 4-5. Reed believed Thorpe's actions were "uncalled for and told him to relax." Id.

133. Trial counsel failed to conduct an adequate investigation and discover the type of relationship Mr. Castillo had with his biological father. Had counsel conducted an adequate investigation, counsel would have discovered evidence of the physical abuse Mr. Castillo suffered as a young child at the hands of his biological father. The jury needed such evidence in order to fully consider Mr. Castillo's life and the mitigating effect inherent in his tragic childhood. Learning of such evidence, at least one juror would have returned a verdict of less than death.

ii. His Mother's and Adoptive Father's Abuse

134. The physical abuse Mr. Castillo suffered from his mother began before he was one years old. See Ex. 66, at 5-6. Barbara Wickham began to spank Mr. Castillo and was "fearful that she may be abusive to [him] when he gets on he nerves." Id. at 7.

135. Barbara Wickham frequently told Mr. Castillo that "he was not worth anything and that he was just like his father." Ex. 35, at 5. After Mr. Castillo was adopted by her husband, Joe Castillo, Barbara Wickham continued her verbal insults. She told Mr. Castillo "that he still had his father's blood and the adoption made no difference because he would still amount to nothing." Id.

136. Joe Castillo was a strict disciplinarian. Ex. 28, at 3.[22] He married Barbara Wickham in 1979, and later adopted Mr. Castillo. See Exs. 49; 55. [23] Joe Castillo "beat

[22] Joe Castillo executed a written declaration which is attached hereto as Ex. 28 and incorporated by reference as if fully copied and set forth at length.

[23] The prosecution presented testimony through Bruce Kennedy which suggested Barbara Wickham and Joe Castillo were concerned parents. TT, 9/19/96 (afternoon session), at 4-72, Ex. 168 at 4-72. Trial counsel failed to rebut such testimony with the overwhelming available evidence which demonstrated Barbara Wickham and Joe Castillo abused Mr. Castillo. Moreover, Barbara Wickham repeatedly abandoned Mr. Castillo to the care of family members, the foster care system, and juvenile treatment facilities. See supra Part II.A.3; see infra Part II.A.6.

and yelled at [Mr. Castillo] whenever he did something wrong." Id. Joe Castillo believed he could beat the bad behavior out of Mr. Castillo. Joe Castillo recalled a few occasions where he would:

> ... beat [Mr. Castillo] so bad that Barbara intervened out of fear that I might injure [him]. The beatings involved belts and other objects, slapping [Mr. Castillo's] face or other parts of his body, and shaking [him].

Id.

137. Joe Castillo tried various methods to discipline Mr. Castillo. On occasions, he routinely locked Mr. Castillo in his room, "place[d] a frying pan in the corner, and expect[ed] Mr. Castillo to relieve himself in the frying pan." Ex. 26, at 8. Mr. Castillo was forced to "write sentences until the little finger on his writing hand bled." Id.

138. Mr. Castillo was at times forced to eat red hot chilli peppers until he vomited. Joe Castillo's other forms of punishment included, kicking Mr. Castillo in the ribs, and making Mr. Castillo put his hands out in front of himself and hitting them with an "inch-thick leather belt six or seven times." Id.

139. Mr. Castillo's aunt, Yolanda Norris, spent time in the Castillo home. She observed Barbara Wickham and Joe Castillo's "mistreatment" of Mr. Castillo. She witnessed "[Mr. Castillo] receiving severe beatings at the hands of Joe Castillo. Joe Castillo would often fly-off-the-handle over the slightest issues and beat [Mr. Castillo] very badly." Ex. 34, at 3.

140. The Clark County Department of Family Services investigated a report of physical abuse involving Mr. Castillo. Ex. 64, at 8. A child abuse report revealed that Joe Castillo caused physical injuries to Mr. Castillo when he was twelve years old. Id.[24]

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[24] During a clinical evaluation, Mr. Castillo reported that "[Joe Castillo] uses excessive physical punishment." Ex. 61. On another occasion, Mr. Castillo explained that Joe Castillo blamed him for everything and if he were placed in a foster home, "[he] would stop doing bad things." Ex. 62.

141. In addition to their abuse, Mr. Castillo's parents clearly favored their daughter, Crystal Castillo.[25] In 1983, on Christmas, Mr. Castillo and Crystal Castillo celebrated the day with their family. Joe Castillo videotaped and narrated as the children opened their gifts. A copy of this and other family videotapes are attached hereto. See Ex. 70.

142. Mr. Castillo sat on a nearby sofa expressionless as he watched his sister open gift after gift. Barbara Wickham helped Crystal Castillo open her gifts as Joe Castillo spoke with excitement as he described each gift. Crystal received baby dolls, a kitchen set, and other gifts typically given to little girls. She received a race track set and hot wheel toy cars, gifts generally reserved for little boys. At least on the family's videotape, Mr. Castillo did not open any gifts.

143. The following year, Christmas was again videotaped by Joe Castillo. Joe Castillo narrated the day's events. Mr. Castillo was excited and happy as he opened his gifts. Mr. Castillo told his mother and Joe Castillo about each gift he opened. Mr. Castillo constantly sought his mother's attention to look at his gifts, and Barbara Wickham, in most instances, simply ignored Mr. Castillo. Mr. Castillo hugged his mother after he opened a gift she gave him – but she did not return his hug. Ex. 70.

144. Joe Castillo and Barbara Wickham responded to Mr. Castillo's statements some times, with statements such as "oh, pretty nice" or "we'll see how long that one will last." Barbara Wickham's and Joe Castillo's focus remained on Crystal Castillo. They expressed excitement over Crystal's gifts. Ex. 70.

145. Barbara Wickham did not provide Mr. Castillo with "the same love, affection, and tenderness that she gave her other two children." Ex. 34, at 3.[26] Barbara Wickham prepared elaborate meals for everyone to eat, with the exception of Mr.

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[25] Barbara Wickham and Joe Castillo had two children, Crystal Castillo and Joseph Castillo.

[26] Since December of 1995, Mr. Castillo was detained in correctional facilities. His mother, Barbara Wickham visited him seven times during this thirteen year period. Exs. 76; 77.

Castillo. Id. Crystal Castillo and Joseph Castillo had their own bedrooms, while Mr. Castillo slept in the garage and was confined to that area. Id. at 4.

146. Mr. Castillo's birthdays were not a time for celebration, but rather a time to scold him. Joe Castillo videotaped Mr. Castillo's eleventh and twelfth birthdays. On his eleventh birthday, Joe Castillo asked Mr. Castillo what he planned to do in the years to come. Mr. Castillo responded that he wanted to make positive changes to his life. He wanted to stay out of trouble, get a job, and play baseball. Barbara Wickham stated that Mr. Castillo needed to give love rather than receive love. She told him that "what goes around comes around." Joe Castillo advised Mr. Castillo to straighten up and do what he needed to do or he was going to suffer. Ex. 70.

147. Mr. Castillo's twelfth birthday was also videotaped by Joe Castillo. Barbara Wickham, Crystal Castillo, and Joe Castillo sang to Mr. Castillo and presented him with a small cake. Mr. Castillo appeared sad and depressed. Joe Castillo stated that Mr. Castillo did not have a good eleven years, that he made a lot of promises and did not live up to any of them. Mr. Castillo said that he would make no more promises and that he would try to stay out of trouble. Barbara Wickham indicated she had nothing to say to Mr. Castillo for his birthday, and stated that "there will be no next year." Barbara Wickham stated that "one more screw up and that's it, he's gone and I don't care who knows it." Ex. 70.

iii. His Uncle's (Max Becker) Abuse

148. Mr. Castillo lived with his uncle, Max Becker for a short period. Max was a strict disciplinarian. Ex. 34, at 4. He beat Mr. Castillo "frequently and severely." Id.

149. When Mr. Castillo wore the same pair of underwear twice, Max took "a long willow stick and smack[ed] [him] with [it]." Ex. 26, at 10. Mr. Castillo was beaten so severely that he had to "stay home three or four days at a time. Once Max almost killed [Mr. Castillo], and [he] was home for a week with [his] face all beat[en] up." Id.

150. When Barbara Wickham removed Mr. Castillo from Max Becker's care, she observed Mr. Castillo's "legs and back [were] covered with purple marks." Ex. 29, at 9.

151. Trial counsel failed to conduct an adequate investigation which would have disclosed the physical and emotional abuse Mr. Castillo suffered from his mother and adoptive father. An adequate investigation would have recovered videotapes which demonstrated the treatment of Mr. Castillo by his parents – and the disparate treatment of his sister, Crystal Castillo. The abuse Mr. Castillo suffered affected his development. Had trial counsel presented such mitigating evidence, at least one juror would have returned a sentence of less than death.

5. Trial Counsel Should Have Presented Readily Available Evidence that Mr. Castillo was Surrounded by Violent and Sexual Conduct; Drug Abuse; and Physical and Emotional Abuse

152. Mr. Castillo was "often exposed to narcotics and alcohol." Ex. 35, at 5. His mother and father "both drank and did drugs in front of [him] all of the time." Id.

153. Mr. Castillo's mother abused cocaine and marijuana. Ex. 29, at 9. She admitted to a social worker that she abused drugs during the time she sought foster care placement for Mr. Castillo. Ex. 66, at 13. His biological father abused drugs. William Thorpe, Sr. became addicted to heroin in the Army and experimented with LSD and marijuana. Ex. 47, at 12.

154. Mr. Castillo witnessed his father's violent behavior. William Thorpe, Sr. took Mr. Castillo to a bar. Mr. Castillo observed an altercation between his father and another man. The men had a "really bloody fight" Ex. 26, at 6. Mr. Castillo cried in the bar after observing the fight. Id.

155. Mr. Castillo witnessed his parents' abusive relationship. After a visit with his mother, Mr. Castillo stated to his foster parents, "I'm afraid my daddy might hurt my mommy. I want to see my mommy but without my daddy. Sometimes I like him;

sometimes he's mean." Ex. 66, at 15. Mr. Castillo then re-enacted how his dad pounded his fists when he became angry. Id. Mr. Castillo was three years old at the time.

156. Mr. Castillo's mother was, for some period of time, a prostitute. See Exs. 29, at 8; 35, at 4; 33, at 3; 56. She began prostituting herself before Mr. Castillo was born and "throughout much of his adolescence." Ex. 34, at 2. Indeed, Barbara Wickham's sister, Yolanda Norris, remembered Mr. Castillo was present during Barbara Wickham's prostitution:

> I remember taking a trip with Barbara and one of Barbara's friends to the Florida Keys to visit our brother Max. Barbara and her friends prostituted themselves almost the entire time of the trip, and they also tried to pressure me into prostitute[sic] myself during this trip ... Barbara and her friends would hitch hike all over the Keys, and sometimes even when young Billy was tagging along.

Id. at 3.

157. Trial counsel failed to conduct an adequate investigation into Mr. Castillo's family history of violent and sexual conduct; drug abuse, and physical and emotional abuse. Had counsel discovered such evidence and presented it, the jury would have had a better understanding of the environment in which Mr. Castillo grew up. Learning such mitigating evidence, at least one juror would have returned a verdict of less than death.

6. Trial Counsel Should Have Presented Mitigating Evidence that Explained Mr. Castillo's Childhood and Adolescent Behaviors

158. Mr. Castillo had a long history of conduct problems. These problems began at a young age and continued throughout his adolescence. Mr. Castillo was placed in juvenile detention facilities and correctional facilities more than 20 times as a child and adolescent, starting at age 8. He spent more than half of his life in either foster homes, residential treatment programs, juvenile detention facilities, or correctional facilities.

159. At the penalty trial, the prosecution introduced testimony that Mr. Castillo drowned his grandmother's dog and killed several birds. TT, 9/19/96 (afternoon session), at 12, Ex. 168 at 12. The prosecution offered testimony related to Mr. Castillo's juvenile misconduct, which occurred from 1981-1990 and included incidents of running away, attempted murder, arson, threat to life, destruction of county property, vagrancy prowling,

violation of parole, carrying a concealed weapon, petty larceny, curfew, grand larceny auto, grand larceny, battery, unlawfully mingle of a poison or other harmless substance in food, escape, and possession of an unregistered handgun. TT, 9/19/96 (morning session), at 30-51, Ex. 167 at 30-51; 9/19/96 (afternoon session) at 4-73, Ex. 168 at 4-73. The prosecution further presented evidence of Mr. Castillo's adult criminal behaviors, which included attempted burglary, robbery, and battery charges. TT, 9/20/96 (morning session), at 6-22, Ex. 168 at 6-22.

160. As a juvenile, Mr. Castillo was routinely placed within residential treatment programs, such as Children Behavioral Services' ("CBS") Oasis Program and CBS' Parsons' Program. He was placed in the juvenile detention center, boys shelter care, and he was later committed to the Nevada Youth Training Center[27] and the Third Cottage Program.

161. Trial counsel responded to the prosecution's evidence by offering testimony from Dr. Lewis Etcoff. Dr. Etcoff testified that Mr. Castillo suffered from reactive attachment disorder, attention deficit hyperactivity disorder, conduct disorder, and personality disorders. TT, 9/20/96 (afternoon session), at 60-80, Ex. 170 at 60-80. Dr. Etcoff seemed to indicate that Mr. Castillo's reaction to these disorders resulted in his "significant misbehaviors and violent misbehaviors." TT, 9/20/96 (afternoon session), at 60, Ex. 170 at 60.

162. Dr. Etcoff testified that Mr. Castillo's constant runaways from home were related to the abuse he suffered from his adoptive father. However, on cross-examination, the prosecution led Dr. Etcoff to admit that he never reviewed any evidence which indicated Mr. Castillo ran away from residential treatment facilities because of any physical abuse. TT, 9/20/96 at 84, Ex. 170 at 84.

163. Trial counsel failed to investigate, prepare, and provide evidence which described the abuse, neglect, and violence Mr. Castillo experienced while housed in

[27] Mr. Castillo's records from the Nevada Youth Training Center are attached hereto as Ex. 65.

various residential facilities. Counsel further failed to demonstrate how such abuse, violence, and neglect affected Mr. Castillo's development.

164. Undersigned counsel requested Dr. Rebekah Bradley, a well respected assistant professor in the Department of Psychiatry and Behavior Science at Emory University, and the Director of a Post-Traumatic Stress Disorder ("PTSD") treatment program for the Veteran's Administration in Atlanta, to evaluate Mr. Castillo's life and family history, and to determine the impact of Mr. Castillo's exposure to traumatic and other stressful events.

165. Dr. Bradley interviewed Mr. Castillo. He related several instances of inappropriate conduct he observed while housed in multiple juvenile treatment and correctional facilities. Indeed, Mr. Castillo "observed multiple incidents of violence including violence between other children in those institutions as well as violence from institutional staff towards the children in the institutions." Mr. Castillo further reported "one instance of observing a sexual assault between an older and younger child." Ex. 36, at 2.

166. Mr. Castillo was physically abused while housed in the juvenile treatment facilities. He recalled one specific incident in which "a woodshop counselor at the Nevada Youth Training Center at Elko beat him." Id. at 4. The counselor "beat [Mr. Castillo] with a metal clamp" because he stole a pack of cigarettes from the counselor. Id. Mr. Castillo was beaten in the face, head, back, and chest. After he was beaten, the counselor placed "wood putty in [Mr. Castillo's] hair." Id. An allegation of physical abuse was charged against John Moncrief, an instructor at the Nevada Youth Training Center. The State of Nevada Child Welfare Services found the allegation of physical abuse to be substantiated. Id.; Ex. 69, at 5-9.

167. The staff at Nevada Youth Training Center encouraged troubled youth to fight each other. Mr. Castillo described the facility as a "gladiator school." Id. Mr. Castillo was encouraged to fight on two occasions. He recalled, "I won one, I lost one." Id.

168. Barbara Wickham repeatedly abandoned Mr. Castillo to the care of juvenile treatment facilities as she had previously abandoned Mr. Castillo to the care of the foster care system and family members.

169. Barbara Wickham allowed Mr. Castillo to be placed in the Oasis Residential Program when he was eight years old. Within three months of his placement, Barbara Wickham insisted to the teaching parent that: "[Mr. Castillo] not go home as 'that's [not] what we had planned.'" Ex. 59, at 2. The teaching parent noted Mr. Castillo's emotional state while in the program:

> Several times [Mr. Castillo] has gone into a depressive state, saying his mother always sends him to foster homes and relatives and doesn't like to have him around. Mrs. Castillo made only one phone call to the agency this week. We are beginning to feel that [Barbara Wickham] is not interested in [Mr. Castillo] going home at all. She shows very little interest in seeing him and [Mr. Castillo] is very aware of this.

Id.

170. Mr. Castillo appeared to respond well to the Oasis Residential Program. However, Barbara Wickham "seem[ed] to avoid participating in the program." Ex. 59, at 3. The teaching parent stated:

> [Barbara Wickham] seldom attends sessions, will have groceries in the car and needs to leave, or, on two occasions, just failed to pick [Mr. Castillo] up and later sent his father.

Id. The teaching parent felt that

> ... [Barbara Wickham] is not interested in our program but would rather have [Mr. Castillo] in a long-term residential placement out of the home. Another reason for this feeling is that phone calls which [Mr. Castillo] makes to home are often short (less than one minute) and end with [Mr. Castillo] crying, stating his mother is busy. (This has happened about five times.)... .

Id.

171. Barbara Wickham was "seriously lacking in parenting skills." The teaching parent indicated that "[w]hen confronting [Mr. Castillo,] [Barbara Wickham] has trouble with her temper." Ex. 59, at 5.

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172. As soon as Mr. Castillo's exhibited improvement in the Oasis Residential Program, Barbara Wickham removed him from the program against the coordinator's recommendation. Exs. 59, at 6-7; 60. Less than three months after his removal, Barbara Wickham again sought to place Mr. Castillo into the Oasis Residential Program. She noted Mr. Castillo's behavioral problems and stated that her husband, Joe Castillo's "threshold and tolerance is so low at this point, she fears [he] will hurt Mr. Castillo in frustration." Ex. 59, at 10-11.

173. Mr. Castillo continued to enter and exit juvenile treatment and correctional facilities as he grew older. Dr. Bradley noted that "juvenile justice institutions are often violent and dangerous environments for children and adolescents."

174. Dr. Bradley determined that "the extensive amount of time Mr. Castillo spent in institutional settings including juvenile correctional settings is likely to have had a significant impact on Mr. Castillo's development." Id. at 11. Dr. Bradley concluded Mr. Castillo's early and repeated placements in juvenile correctional facilities led to him having an "overall impaired ability to respond to complicated unexpected/unplanned situations when in institutional environments." Id. at 12.

175. Had trial counsel conducted an adequate investigation, counsel would have discovered extensive evidence regarding Barbara Wickham's repeated abandonment of Mr. Castillo, and the abuse and violence he suffered and observed while housed in juvenile detention facilities. Such an investigation would have allowed counsel to discover and present readily available evidence of the physical abuse Mr. Castillo suffered in Nevada juvenile facilities.

176. Counsel should have provided evidence of physical abuse to Dr. Etcoff, which would have rebutted the prosecutors' argument that there was no evidence that Mr. Castillo was abused at any juvenile treatment and correctional facility. Had counsel investigated, prepared, and presented this mitigating evidence, at least one juror would have returned a verdict of less than death.

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7. Trial Counsel Should Have Presented Mitigating Evidence that Explained How Mr. Castillo's Traumatic Life Experiences and Multi-Generational History of Neglect, Abuse, Violence, and Mental Health Problems Impacted His Development

177. Mr. Castillo was consistently neglected from an early age and he was exposed to violence, physical abuse, prostitution, drugs, alcohol, and other traumatic events which had a significant impact on his development– increasing the likelihood that Mr. Castillo, as a child, adolescent, and adult, would engage in negative behaviors. See generally, Ex. 36.

i. Dr. Lewis Etcoff, Psychologist and/or Neuropsychologist

178. Dr. Etcoff, a neuropsychologist, was retained by trial counsel to evaluate Mr. Castillo. Although Dr. Etcoff interviewed Mr. Castillo in 1996, his examination did not include neuropsychological testing or evaluation.[28] Based upon this examination, and review of the records provided by trial counsel, Dr. Etcoff testified in Mr. Castillo's penalty trial.

179. Dr. Etcoff's evaluation was limited to an "objective" personality test, the review of Mr. Castillo's CBS records, Nevada Youth Training Center records, previous psychiatric evaluations, a disposition report in the Eighth Judicial District Court Records, juvenile probation department records, parole violation reports, Las Vegas Mental Health Center's records, a report from Dr. Kirby Reed, police records, and, finally, a two and a half hour interview with Mr. Castillo. Although Dr. Etcoff suggested that other family members be interviewed, Dr. Etcoff conducted no such interviews. Dr. Etcoff's evaluation of Mr. Castillo was limited by the records he was provided and Mr. Castillo's limited abilities to recall significant events which occurred in his childhood.

180. The earliest available record provided to Dr. Etcoff was dated March 25, 1981, approximately eight years after Mr. Castillo's birth. Ex. 54, at 1. Dr. Etcoff was never provided Mr. Castillo's childhood medical records, or records from the Catholic

[28] Dr. Etcoff explained that trial counsel never requested that he perform a neuropsychological examination of Mr. Castillo. Dr. Lewis Etcoff executed a written declaration which is attached hereto as Ex. 42 and incorporated by reference as if fully copied and set forth at length.

Charities foster care program which documented Mr. Castillo's multiple placements into the program. Dr. Etcoff did not receive evidence of Mr. Castillo's biological father's criminal history, or any evidence from Mr. Castillo's family relating to his upbringing and life, the family members' medical and mental history, the family members' substantial drug abuse history, or records which demonstrated that Mr. Castillo's mother was abandoned to the same Catholic Charities program. Because trial counsel failed to retain an investigator, and failed to conduct an adequate investigation, Dr. Etcoff was never provided evidence or records related to a critical portion of Mr. Castillo's life. Ex. 42, at 2.

181. The evidence within the voluminous records trial counsel failed to provide Dr. Etcoff was the type of collateral information critical to an expert asked to evaluate a defendant in a capital trial. This evidence provided the expert a historical perspective regarding the various mental health issues which affected the entire family and, even more important, an accurate understanding of the complex and tragic circumstances which confronted Mr. Castillo from birth. Such evidence provided additional and required substance to much of Dr. Etcoff's testimony–and would have allowed Dr. Etcoff to perform the same type of evaluation which was ultimately conducted by Dr. Jonathan Mack and Dr. Rebekah Bradley. Exs. 36, 38. See infra Parts II.A.7.ii-iii. Moreover, there was no question that such evidence was mitigating and could have provided the jury a better (and accurate) understanding of Mr. Castillo, his childhood, and his actions. While such evidence did not "excuse" Mr. Castillo's crime, these records provided a concrete and complex analysis to explain his behaviors throughout his childhood, continuing until this crime. As Dr. Mack, Dr. Bradley and Dr. Etcoff all acknowledge, their opinions are limited by the evidence provided. Id.; Ex. 42.

182. Dr. Etcoff suggested to trial counsel that Mr. Castillo's "mother and adopted father be interviewed in order to substantiate or corroborate the information Mr. Castillo provided [him]." Id. Although Dr. Etcoff was unsure whether these interviews took place, he is aware that he "never received any information relating to such

interviews." Id. Dr. Etcoff stated that collateral interviews were important to his evaluation. Such evidence would have confirmed the information Mr. Castillo provided– "rebutting any biases inherent in self-reports." Id. Indeed, in Mr. Castillo's case an adequate investigation was critical. Every witness holds at least a potential bias which may distort the manner in which they portray themselves. In Mr. Castillo's circumstances, even collateral interviews of his mother and adopted father were insufficient– both participated in the cycle of abuse which Mr. Castillo suffered. It was only through an exhaustive and comprehensive investigation that any attorney, or expert, could develop an accurate understanding of Mr. Castillo's life, his family dynamics, and the impact of those circumstances on him. Dr. Etcoff was correct that the availability of such collateral information was "pertinent to the opinions [he] rendered in Mr. Castillo's case." Id.

183. Dr. Etcoff concluded that his "evaluation and testimony in Mr. Castillo's case was limited by the information [he] was provided." Id. at 3. Moreover, Dr. Etcoff had "no doubt that such greater resources may have had an impact upon [his] opinions and testimony." Id.

ii. Dr. Jonathan Mack, Neuropsychologist

184. Mr. Castillo received a comprehensive neuropsychological evaluation performed by Dr. Jonathan Mack, a well respected neuropsychologist.[29] Dr. Mack interviewed Mr. Castillo over a two day period, reviewed extensive records relating to Mr. Castillo's life history, and administered a number of neuropsychological tests. Ex. 38.

185. Dr. Mack believed it was "abundantly clear that Mr. Castillo's early childhood was marked by extreme inconsistency, primarily stemming from his mother's intensely ambivalent, approach-avoidance behavior towards him from when he was an

[29] Dr. Jonathan Mack provided a written report regarding his evaluation of Mr. Castillo, the exhaustive evidence of Mr. Castillo's childhood and the results of the neuropsychological tests. This written report is attached hereto as Ex. 38 and incorporated by reference as if fully copied and set forth at length. Dr. Mack's curriculum vitae is attached hereto as Ex. 39.

infant onwards." Id. at 28. He concluded that, throughout Mr. Castillo's lifetime, he was "consistently abandoned and reaccepted, only to be abandoned again." Mr. Castillo was exposed to "extremely violent and scary (especially as a toddler) events, including his mother's sexual exploits with men." Id. at 28.

186. Based on his evaluation of Mr. Castillo's performance on various neuropsychological tests, Dr. Mack concluded, "within a reasonable degree of neuropsychological certainty," that Mr. Castillo exhibited "definite neuropsychological evidence of cognitive/sensory-kinesthetic processing disorder." Id.

187. Dr. Mack determined that, based upon the events which occurred during Mr. Castillo's early childhood, including his mother's mental illness and repeated abandonment, he developed a reactive attachment disorder. See supra note 3. Mr. Castillo also "developed a chronic Posttraumatic Stress Disorder in childhood which was worsened by additional traumatic experiences as he became older." Id. at 29. Dr. Mack concluded this condition was never appropriately treated and therefore continued. Dr. Mack believed Mr. Castillo's Posttraumatic Stress Disorder was triggered by the events which occurred during the instant offense. Indeed, Dr. Mack concluded, based upon his review of exhaustive evidence relating to Mr. Castillo's childhood, his interview with Mr. Castillo and the results of the neuropsychological testing, that– at the time of this offense,

> Mr. Castillo was under extreme emotional duress due to activation of his Posttraumatic Stress Disorder by the specific circumstances of the criminal incident as they unfolded. It is my further opinion, as stated within a reasonable degree of psychological and neuropsychological certainty, that Mr. Castillo's Posttraumatic Stress Disorder combined ...with his organic tendency to be overreactive to environmental inputs as a direct consequence of his Cognitive Disorder NOS and underlying difficulties with sensory integration and sensory modulation to render him incapable of conforming his behavior to the requirements of the law.

Id. at 30. Mr. Castillo's actions, in the underlying offense, were directly related to his mental illness, and his neurological disorder.

188. As a result of Dr. Mack's interview with Mr. Castillo, his review of the substantial records relating to Mr. Castillo's social history, and the results of his own extensive testing, Dr. Mack diagnosed Mr. Castillo with: Cognitive Disorder NOS;

Reactive Attachment Disorder; Posttraumatic Stress Disorder; and Conduct Disorder. Ex. 38. Dr. Mack determined, within a reasonable degree of neuropsychological and psychological certainty, that these "diagnoses were present at the time of the criminal incident." Id. Had trial counsel investigated, prepared, and presented this mitigating evidence, at least one juror would have returned a verdict of less than death. See Exs. 40; 41.

iii. Dr. Rebekah Bradley, Professor and PTSD Expert

189. Dr. Rebekah Bradley is a psychologist, professor at Emory University, and the director of a clinical program which identifies and treats Posttraumatic Stress Disorders in veterans. Dr. Bradley was retained to evaluate Mr. Castillo with regard to Posttraumatic Stress Disorder, review the extensive evidence obtained through an adequate investigation of Mr. Castillo's social history, including records from individuals familiar with Mr. Castillo, the department of Catholic Charities, Children's Hospital in St. Louis, family court of St. Louis County, the State of Nevada's juvenile justice department, Children's Behavioral Health Services, Nevada Youth Training Center, State of Nevada's Department of Human Resources Division of Child and Family Services Reports of Abuse, Dr. Lewis Etcoff's written report of his psychological evaluation, and the psychological and neuropsychological evaluation provided by Dr. Jonathan Mack.

190. Based upon Dr. Bradley's interview with Mr. Castillo, and her review of the substantial records obtained through an adequate investigation, she concluded that "[o]ver the course of [Mr. Castillo's] childhood, adolescence and young adulthood, [he] was exposed to a number of adverse events that are likely to have a significant impact on him." Ex. 36, at 2.

191. Dr. Bradley provided a comprehensive written report which detailed many of the incidents in which Mr. Castillo witnessed violence between others over the course of his life, including: physical violence between his biological father and mother; physical violence between children and institutional staff in the juvenile treatment and correctional facilities; the repeated and severe physical and emotional abuse Mr. Castillo suffered,

which included physical abuse from his biological father, his adoptive father, his mother, his uncle Max, and an instructor in the juvenile treatment facility; the neglect and repeated abandonment by his mother; and the extensive amount of time Mr. Castillo spent in institutional settings. Dr. Bradley concluded that Mr. Castillo's repeated exposure to traumatic events likely had a significant impact on his development. See id. at 11.

192. Dr. Bradley found that the "adverse life events" which Mr. Castillo experienced during his childhood "are likely to have impacted [him] in a number of ways, one of which is that he appears to have developed, beginning at a young age, significant symptoms of Posttraumatic Stress Disorder (PTSD)." Id. at 6. Dr. Bradley explained that PTSD results from the "exposure to a traumatic/stressful event often involving threat to the life or physical integrity of oneself or of others." Mr. Castillo was "exposed to events of this type beginning in early childhood and persisting across the course of his childhood." Id.

193. Dr. Bradley documented numerous instances in Mr. Castillo's childhood when he experienced symptoms consistent with PTSD. According to records from Mr. Castillo's childhood, he experienced "nightmares and also reported [a] fear of 'monsters' at the age of four." Id. at 6. Mr. Castillo reported that nightmares occurred throughout his childhood and adolescence. Dr. Bradley explained that nightmares and fears are symptoms of PTSD expressed by children and adolescents. Id.

194. Dr. Bradley documented the high levels of impulsivity and problems with anger that Mr. Castillo displayed in early childhood and which persisted throughout adolescence. Dr. Bradley explained that "PTSD in children and adolescents may ... present itself in the form of externalizing or 'acting out' behaviors including impulsivity, irritability/anger and inattentiveness." Id.

195. Dr. Bradley stated that "PTSD in children and adults often presents itself in the form of becoming emotionally 'numb' and having difficulty feeling a full range of emotions, including the ability to feel connected to or have positive and loving feelings towards others." Id. Mr. Castillo described such emotions during his interview with Dr.

Bradley. Mr. Castillo "reported that by an early age he experienced restriction related to both positive (e.g., happiness, loving feelings) and negative emotions, stating that he often did not feel fear in situations where such feelings might have been indicated." Id.

196. Dr. Bradley explained that another feature of PTSD in children presents itself through a child's re-enactment of behaviors (e.g., aggression, sexualized behaviors, need to control others). She stated that these "behaviors may emerge in an automatic manner in response to reminders of their traumatic experiences" and "may also represent an effort to obtain 'mastery' or control over the traumatic experiences." Id. at 7. Dr. Bradley explained that "given that many of Mr. Castillo's early traumatic events involved witnessing or being the victim of violence and aggression, it is possible that some of his early childhood aggressive/violent behaviors may have been related to his symptoms of PTSD." Id.

197. Dr. Bradley stated that Mr. Castillo's "exposure to traumatic events in childhood and the development of PTSD as a child/adolescent are related to significantly increased risk for PTSD as an adult." Id.

198. Dr. Bradley explained that Mr. Castillo's early exposure to:

> ... abandonment and to abusive and neglectful environments, his exposure to the harsh, threatening, punitive and at times violent environments in juvenile correctional facilities would have been a "re-traumatizing" environment for Mr. Castillo making him more vulnerable to symptoms of PTSD and associated psychological and behavioral problems.

Id. at 12.

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199. Dr. Bradley concluded that Mr. Castillo exhibited symptoms of "dissociation," which began in early childhood.[30] She explained that dissociation is a "breakdown or disruption in the ability to integrate information and/or experiences in a normally acceptable fashion." Id. In other words, dissociation can be a response to a traumatic event. Id.

200. Dr. Bradley further explained that "[w]hen dissociation occurs, psychological processes and behaviors that would normally be connected are disconnected. This can include a disruption of memory or dissociative amnesia which involved an inability to remember past experiences. Dissociative amnesia often develops in the context of traumatic or very stressful experiences, and it can include amnesia for extreme behavior such as suicidal behavior or violent outbursts." Id.

201. Dr. Bradley determined that Mr. Castillo reported a "significant level of [dissociative amnesia]." Id. Specifically, Mr. Castillo reported "I don't have a good memory." Id. He further indicated that some experiences are absent from his memory, and that "I can't remember the years or the order of things." Id.

202. Dr. Bradley noted that Mr. Castillo also displayed other types of dissociation, such as "sensory anesthesia, a lack of emotional response and a sense of lacking control of one's actions." This type of dissociation often occurs in "response to actual or perceived stress or threat." Id. Mr. Castillo exhibited these types of symptoms in early childhood. Id. Mr. Castillo described what would happen when he was beat as a child:

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[30] According to a learned and oft relied upon treatise,

> Dissociation arises as a self-defense against trauma. Dissociate defenses help persons remove themselves from trauma at the time that it occurs but also delay the working through needed to place the trauma in perspective within their lives. Unlike the phenomenon of repression, in which material is transferred to the dynamic unconscious, dissociation creates a situation in which mental contents coexist in parallel consciousness.

Sadock, Benjamin James, Sadock, Virginia Alcott, Kaplan & Sadocks Synopsis of Psychiatry, 676 (9th ed. 2003).

> ... As soon as it came my mind would shut down and I would take the ass whooping. That was a fight I was going to lose. No pain and not really there during but afterwards, after the beating, it hurt.

Id. at 8. Mr. Castillo described a similar reaction when he was placed in a bathroom to fight another juvenile at Nevada Youth Training Center:

> ... [W]hen it was done I was the one bleeding. I don't remember the event. When the first punch is thrown, I just react. Don't remember or pay attention to anything else.

Id.

203. Mr. Castillo explained to Dr. Bradley that similar events occurred throughout his childhood, adolescence, and into adulthood. Indeed, Mr. Castillo experienced a dissociative episode at the time of the offense. He informed Dr. Bradley:

> ... I made my aggressive move; I went into penitentiary battle mode. Michelle's screams brought me back to reality.

Id.

204. Consistent with the diagnoses by Dr. Etcoff and Dr. Mack, Dr. Bradley diagnosed Mr. Castillo with a reactive attachment disorder. Dr. Bradley explained that attachment related problems are often "particularly severe when caregivers are not only unavailable or absent but are also threatening or abusive as was the case for Mr. Castillo." Id. at 9. As was demonstrated by the conclusions of all three experts– Dr. Etcoff, Dr. Mack, and Dr. Bradley– the relationship between a child and their care giver in the first four years of life provide the critical environment in which a child develops beliefs about himself, beliefs about others, and beliefs about their relationships with others. Id.

205. Dr. Bradley explained that reactive attachment disorder is further associated with exposure to complex trauma. Mr. Castillo's childhood experiences and events in his life are textbook examples of the exposure to complex trauma. Id. Mr. Castillo reported "behaviors and psychological symptoms ... [that] are often associated with exposure to complex trauma in childhood." Id. Dr. Bradley concluded that it was "abundantly clear that Mr. Castillo's childhood did not provide him the appropriate environment for the development of a secure attachment." Id. at 9.

206. Dr. Bradley emphasized that Mr. Castillo's exposure to trauma, and other adverse life events, occurred in the context of multi-generational trauma exposure, which included historical abuse and interpersonal violence on both sides of his family. Id. at 12. Dr. Bradley explained that such exposure to multi-generational trauma

> ... is important [to understand] because children of parents who are exposed to abuse and trauma or of parents with symptoms of post traumatic stress disorder secondary to this abuse, violence and trauma are at greater risk for the development of PTSD than children who, although exposed to abuse, violence or trauma themselves, do not have parents with these types of experiences.

Id. She further explained that, in Mr. Castillo's family, there was "a multigenerational pattern of mothers placing their children in institutional/state care. ..." Id. Mr. Castillo's grandfather, Robert Becker and his siblings were placed in foster homes for at least 10 years. Similarly, Mr. Castillo's mother, Barbara Wickham, at four years of age, was placed in an orphanage for approximately four years. Id.

207. Dr. Bradley documented the history of physical abuse, sexual abuse, and violence on both sides of Mr. Castillo's family. Dr. Bradley referred to records which demonstrated that Mr. Castillo's mother was physically abused by Mr. Castillo's biological father, William Thorpe, Sr., and by her mother, Allegria Thieret. Mr. Castillo's mother and aunt, Yolanda Norris, were sexually abused by one of their stepfathers. Mr. Castillo's uncle, Max Becker, was physically abused by Allegria Thieret and one of his stepfathers.

208. Dr. Bradley noted that Mr. Castillo's biological father, William Thorpe, Sr., physically abused his second wife, Cecilia Boyles. Dr. Bradley documented violence in the life of Mr. Castillo's father, William Thorpe, Sr., which he witnessed between his own parents as a child. Moreover, Dr. Bradley documented that Mr. Castillo's adoptive father, Joe Castillo, experienced a strict upbringing in his childhood, which likely had an impact on the manner in which he parented Mr. Castillo.

209. Dr. Bradley documented Mr. Castillo's extensive family history of mental illnesses, illicit drug use, and violence. Mr. Castillo's grandfather, Robert Becker,

suffered from mental illness. His grandmother, Allegria Thieret was hospitalized for mental illness and was addicted to "nerve pills." Mr. Castillo's mother, Barbara Wickham, was treated for multiple mental disorders and had a history of substance abuse. Barbara Wickham attempted suicide on multiple occasions, was hospitalized for her mental illness, and treated with electro-shock therapy on many occasions. Mr. Castillo's aunt, Yolanda Norris, suffered from a number of mental illnesses, including depression, bipolar disorder, posttraumatic stress disorder, and other anxiety disorders. Finally, Mr. Castillo's uncle, Michael Thorpe, suffered from posttraumatic stress disorder.

210. With respect to the family history of violence and drugs, Dr. Bradley noted that Mr. Castillo's father, William Thorpe, Sr., historically abused many different drugs. Id. at 13. Mr. Castillo's mother, Barbara Wickham, engaged in multiple criminal activities, including prostitution, drug use, theft, and robbery. Id. Mr. Castillo's uncle, Michael Thorpe, had a long history of both violent and non-violent conduct. Id. Finally, Mr. Castillo's biological father, William Thorpe, Sr., and his uncle, Michael Thorpe, were members of a notorious gang which engaged in criminal activity. Id. at 14.

211. Dr. Bradley concluded that Mr. Castillo's "family has a multigenerational pattern of criminal behavior, mental illness, and use and abuse of alcohol and drugs in both his maternal and paternal family histories." Id. at 13. She explained that it is important to understand Mr. Castillo's family history because "family members with mental illnesses and substance use related problems increases an individual's risk for developing these types of problems." Id.

212. During her review of Mr. Castillo's records, Dr. Bradley noted that Mr. Castillo was diagnosed with "conduct disorder" and displayed features of antisocial personality at a young age. This was inappropriate. Dr. Bradley explained that the

> Diagnostic and Statistical Manual of Mental Disorders (DSM-IV; the guidelines for psychiatric diagnosis most commonly used in the United States of America) caution against using these diagnostic categories without taking into account the extent to which the behaviors constituting these disorders may reflect predictable responses to environments which the person has been exposed.

Id. at 6. It was " not appropriate to diagnose these disorders without taking into account [the] other possible psychiatric diagnoses or symptoms" which Mr. Castillo suffered. Id.

213. Based on her review of extensive documentation and knowledge of bio-psycho-social functioning of Mr. Castillo over his life, Dr. Bradley concluded it is "likely that at the time of the criminal events in question, Mr. Castillo was experiencing extreme emotional distress." Id. at 16. Had trial counsel investigated, prepared, and presented this mitigating evidence, at least one juror would have returned a verdict of less than death. See Exs. 40;41.

B. Trial Counsel Failed to Object to Improper Vouching of a Third Party Witness

214. The prosecutor offered the testimony of Michael Eylar, a detective with the Las Vegas Metropolitan Police Department, relating to an attempted burglary which Mr. Castillo committed at the age of seventeen. TT, 9/20/96 (morning session), at 41-45, Ex. 169 at 41-45. Eylar investigated the offense. Id. at 41.

215. Michael Eylar testified to the victim's description of the incident:

> [The victim] said that initially the two white males had come up to the front door, had knocked on the door. [The victim] looked out the peep hole. [The victim] would not respond because she just doesn't do that. [The victim] won't go to open the door to anybody she doesn't know. The individuals continued to pound on the door. [The victim] backed off a little bit because she was not sure exactly what they were going to do.

Id. Eylar provided the jury with a detailed recount based on what the victim told him about the offense.

216. Trial counsel failed to object to Michael Eylar's testimony. Eylar did not observe the actions that took place, and the victim did not testify at Mr. Castillo's trial.

217. Prosecutors also presented the testimony of Paul Ehlers, a police officer with the Las Vegas Metropolitan Police Department, concerning his investigation of a robbery for which Mr. Castillo was convicted. TT, 9/20/96 (morning session), at 49-62, Ex. 169 at 49-62. Ehlers testified to the information he was provided by the victim:

> [The victim] had related that she and a friend of hers, Mrs. Tulner, were in town visiting Las Vegas and that they were walking on Riviera Drive from up on the boulevard eastbound where they were staying at the Hilton and that while they were walking on the sidewalk that leads into the Hilton area, that she had her purse draped over her left shoulder and that she was holding onto her purse and she was walking along the sidewalk and that she heard a vehicle coming up slowly behind her, a small compact, light blue vehicle.

Id. at 56. Trial counsel did not object to Ehler's testimony regarding the information provided to him by the victim. The victim did not testify.

218. The testimony presented through Michael Eylar and Paul Ehlers was inappropriate and also "vouched" for the statements of a third party. The jury was encouraged to accept such testimony as "true" even though it had no independent basis upon which to judge that evidence.

219. The jury never made its own determination of the victims' veracity. Trial counsel erred in failing to object to Michael Eylar's and Paul Ehlers' testimony, and such error was prejudicial.

C. Trial Counsel Failed to Adequately Prepare Mr. Castillo's Witnesses for Cross-Examination

220. Trial counsel presented testimony from Dr. Lewis Etcoff, Jerry Harring, Sonny Carlman, Tammy Jo Bryant, and Barbara Wickham. Each witness testified about their familiarity with Mr. Castillo's life. Trial counsel failed to prepare Dr. Etcoff, Harring, Carlman, or Bryant for cross-examination.

221. On direct examination, Jerry Harring testified that Mr. Castillo was committed to the Nevada Youth Training Center, came from a "dysfunctional family," and wrote him an unsolicited letter. TT, 9/20/96 (afternoon session), at 107-125, Ex. 170 at 107-125. Harring noted the abuse Mr. Castillo suffered from his adopted father, Joe Castillo and his mother's emotional problems. Id. at 116. The prosecutor attacked Harring's testimony:

> Prosecutor: You have alluded to the information you have about the defendant's relationship at home?
>
> Jerry Harring: Yes

Prosecutor: Have you met his mother, Barbara Castillo?

Jerry Harring: No, I have not. But I have had–like I say, I've had extensive– a lot of time talking to [Mr. Castillo] over the years.

Prosecutor: Well, a lot of time talking with [Mr. Castillo] but you've never talked with his mother to find out what--

...

Prosecutor: Have you ever had a direct discussion with Joe Castillo, the stepfather?

Jerry Harring: No, I didn't. I have not.

***

Prosecutor: Mr. Harring, do you have any idea what amount of effort these parents, including the stepfather, had put into managing and controlling and raising and training the young man who is the defendant in this case?

Jerry Harring: No, sir, I don't. I don't have that information on any of the children.

TT, 9/20/96 (afternoon session), at 118-120, Ex. 170 at 118-120.

222. The prosecutor further attacked Harring's use of Mr. Castillo's unsolicited letter in counseling other juveniles, in light of the offenses Mr. Castillo committed after he wrote the letter:

Prosecutor: He supposedly wrote the letter while he was incarcerated at Indian Springs?

Jerry Harring: Yes.

Prosecutor: He has just been convicted, having been certified to stand trial as an adult for his first felony conviction?

Jerry Harring: Yes, sir. To my understanding he was.

Prosecutor: Do you understand what the conviction was?

Jerry Harring: I don't know. I think it was probably grand theft auto. I'm not certain. Most of his crimes were property crimes.

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Prosecutor: Were you aware that he was arrested on a robbery case about six months later... .

Jerry Harring: No, sir; no, sir.

Prosecutor: Do you know in fact that he has acknowledged to a number of people, a clinical psychologist, Dr. Etcoff, who has just testified in these proceedings, a corrections officer at Northern Nevada Correctional Center in Carson City, Mark Berg, that during the time frame between his release in June 1992 and his rearrest in December 1992 that he and his friend committed robberies all the time in Las Vegas? Did you know that?

Jerry Harring: No, sir. I am not aware of any of [Mr. Castillo's] history since he left our jurisdiction in Elko in July–I think it's January of 1990 or '91.

Id. at 120-123.

223. The evidence which the prosecutor used in cross-examination was known to trial counsel and counsel should have anticipated the prosecutor's cross-examination. Competent trial counsel would have informed Jerry Harring of the questions which were anticipated during cross-examination, and provided him evidence related to Mr. Castillo's conduct after he wrote the letter to Harring, in order to determine whether such evidence had any impact on Harring's opinion or testimony. Instead, the credibility of Harring's testimony, and any opinions he held regarding Mr. Castillo were questionable in the jury's eyes because neither was based upon an accurate understanding of Mr. Castillo and his life.

224. Sonny Carlman testified to Mr. Castillo's behavior while incarcerated in the Clark County Detention Center awaiting trial. Mr. Castillo was allowed to work in the facility and Carlman had no problems with Mr. Castillo's behavior. TT, 9/24/96 (morning session), at 7-13, Ex. 171 at 7-13. Prosecutors attacked Carlman's lack of knowledge regarding Mr. Castillo's criminal history:

Prosecutor: Are you familiar with the incarceration history of William Castillo?

Sonny Carlman: Of the defendant personally, no, sir, I'm not.

Id. at 11. The prosecutor emphasized Mr. Castillo's criminal history, and asked Carlman whether "[b]ased upon your experience of somebody with this type of criminal history,

has he got the drill pretty well down packed? Carlman responded: "I would say so, yes." Id. at 12.

225. Trial counsel should have anticipated the cross-examination of Sonny Carlman, provided him with evidence of Mr. Castillo's criminal background, and determined whether such evidence affected his testimony. Trial counsels' failure to do so allowed the impeachment of his testimony and opinions.

226. Tammy Jo Bryant testified to her relationship with Mr. Castillo, and his attempts to change his life. TT, 9/24/96 (morning session), at 14- 21, Ex. 171 at 14-21. On cross-examination Bryant stated that she believed Mr. Castillo did not want to live his life committing criminal offenses. Id. at 19.

227. Once again prosecutors undermined Bryant's testimony, based upon evidence she was not aware of– that Mr. Castillo committed crimes during the time he vowed to change his life:

Prosecutor:	... Now, to your knowledge, did Mr. Castillo commit any crimes between September, when you moved in together, and the night of [the offense]?
Tamy Jo Bryant:	No
Prosecutor:	Well, did he use drugs in your presence?
Tammy Jo Bryant:	He smoked pot
Prosecutor:	That's a felony in this state, is it not?
Tammy Jo Bryant:	Yes, it is.
Prosecutor:	So although he was professing to change his life, he was committing felonies in your presence on a regular basis; is that true?
Tammy Jo Bryant:	Yes.

Id. at 19-20. Once again, trial counsel should have easily anticipated the cross-examination. Had trial counsel done so, such information could have been addressed on direct examination. The failure to do so allowed prosecutors to attack Bryant's credibility and undermine her testimony.

228. Trial counsel presented expert testimony from Dr. Lewis Etcoff relating to his limited evaluation of Mr. Castillo, and the effects of Mr. Castillo's background on his life. TT, 9/20/96 (afternoon session), at 53- 107, Ex. 170 at 53-107. The prosecutor undermined Dr. Etcoff's testimony by questioning his reliance upon Mr. Castillo's statements of his life, family background, and juvenile offenses. For example, during cross-examination, the prosecutor and Dr. Etcoff had the following exchange:

Prosecutor:	You got some self-reporting from Mr. Castillo?
Dr. Lewis Etcoff:	Yes, sir.
Prosecutor:	Did you get reporting from any other individual, other than the records you had available?
Dr. Lewis Etcoff:	Everyone who– I had the records of Mr. Castillo. I did not have the opportunity to speak, unfortunately, with Mr. Castillo's mother or anyone else who may have known him. I had the records of Mr. Castillo and my tests.
Prosecutor:	So the answer then is no, the only person I talked to other than what I could glean from the records was that fellow over there?
Dr. Lewis Etcoff:	That's correct.
Prosecutor:	So you didn't talk to Barbara Castillo?
Dr. Lewis Etcoff:	No, sir.
Prosecutor:	Didn't talk to Joe Castillo?
Dr. Lewis Etcoff:	No, sir.

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Prosecutor:	Can we agree that it may have been the case that Mr. Castillo might have been less than candid occasionally with you about what happened?
Dr. Lewis Etcoff:	It is certainly possible.
Prosecutor:	And that Mr. Castillo in his self-reporting about these interrelationships that may not have been in the records may have been justifying his conduct in this case with fantasies or excuses?
Dr. Lewis Etcoff:	That's very possible.

Id. at 82-83. This colloquy illustrated two issues associated with Dr. Etcoff's testimony. First, trial counsel failed to obtain the substantial records which Dr. Mack and Dr. Bradley relied upon. See supra Parts II.A.7.ii, II.A.7.iii. Therefore, Dr. Etcoff was not provided those substantial records which corroborated Mr. Castillo's statements to him. Secondly, trial counsel should have requested that Dr. Etcoff interview not only Mr. Castillo's mother and adoptive father but should have additionally arranged interviews with each of the various family members who provided the declarations attached hereto. If the resources available to trial counsel were insufficient to allow this investigation, counsel could have objected to the denial of resources and preserved this issue for appeal. Moreover, even if the resources were not available for Dr. Etcoff to conduct these interviews, trial counsel could have retained an investigator, or conducted the investigation themselves, and provided Dr. Etcoff the corroborating records and interview results. An adequate investigation would have provided Dr. Etcoff with sufficient evidence to rebut the prosecutors' attempts to minimize or limit his professional opinion.

229. Dr. Etcoff was unfamiliar with Mr. Castillo's prison records. These records were easily obtained and should have been provided to a defense mental health expert. The prosecutor cross-examined Dr. Etcoff:

> Prosecutor: Okay. Now, when he was in prison, did you get some of those records?
>
> Dr. Lewis Etcoff: I believe–you know, I don't remember if I have his prison records at this point.

Id. at 96-97. The prosecutor questioned Dr. Etcoff about Mr. Castillo's experiences in prison. If an adequate investigation had been conducted, and the results of that investigation provided to Dr. Etcoff, the defense expert would have incorporated this evidence into his evaluation of Mr. Castillo and could have provided a well-reasoned response to cross-examination based on governmental sources of information. Instead, Dr. Etcoff's credibility and familiarity with Mr. Castillo's life history was questioned before the jury.

230. Trial counsel failed to adequately prepare Mr. Castillo's witnesses to testify in the penalty trial. Adequate investigation, and adequate preparation, would have prevented prosecutors from undermining the credibility of Mr. Castillo's witnesses, and the jury's reliance on their testimony.

III. Conclusion

231. Trial counsel failed to challenge a jury selection process which denied Mr. Castillo an adequate record for appeal. Counsel failed to obtain substantial records, which could have been easily obtained, and failed to conduct an adequate investigation into Mr. Castillo, his life, and the historical issues peculiar to his family. Without an adequate investigation, counsel was unable to present overwhelming mitigating evidence detailing a profoundly disadvantaged childhood, multi-generational evidence of mental illness, drug abuse, criminality, abuse and neglect. Without such an investigation, counsel was unable to present effective expert testimony which demonstrated an accurate picture of Mr. Castillo's moral blameworthiness for this offense, including evidence which explained how the circumstances of his childhood, and the mental illnesses and cognitive disorders affected his actions relating to this offense.[31] The jury never learned

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[31] Indeed, two jurors from Mr. Castillo's trial were interviewed at the direction of undersigned counsel and both jurors explained that no such evidence was presented. Juror Kelly Lynn Lea stated:

> I don't ever recall ever hearing evidence that Mr. Castillo suffered any brain damage; and I don't recall hearing that he was physically abused by his family members during his childhood. I believe these items, if validated, could have played a role in how we voted had they been presented.

Ex. 40, at 3. Juror Dale Eric Murrell explained that:

> I never heard evidence that Mr. Castillo suffered from brain damage during the trial, and I believe it could have played an important role in the outcome of our verdict, during the penalty phase. If it was shown that Mr. Castillo had brain damage that adversely affected his thinking process and functioning, I am confidant that this would have been a significant factor in the deliberation. In fact, I know that I could not have brought myself to vote for death if Mr. Castillo was proven to have brain damage, even if that meant hanging the jury.

Ex. 41, at 2.

of Mr. Castillo's extensive exposure to and family history of mental illness, drug abuse, neglect, physical abuse, sexual abuse, and violence. Had counsel investigated, prepared, and presented this mitigating evidence, at least one juror would have returned a verdict of less than death. See supra note 30.

232. Trial counsel failed to prepare Mr. Castillo's witnesses for their testimony and failed to challenge prosecution witnesses who vouched for the testimony of absent witnesses. Counsel failed to seek a comprehensive neuropsychological evaluation of Mr. Castillo, and failed to provide their expert with substantial evidence regarding Mr. Castillo's social history and criminal behavior.

233. Trial counsel's failures in this case ultimately questioned the fundamental fairness of Mr. Castillo's trial and violated his state and federal constitutional rights to the effective assistance of counsel, a fair trial, and a reliable sentencing proceeding.

234. The failure of Mr. Castillo's appointed counsel in the state post-conviction habeas proceedings to conduct an adequate investigation and present the same evidence demonstrated herein, the failures to seek expert assistance, and the failure to effectively demonstrate the violation of Mr. Castillo's state and federal constitutional rights to the effective assistance of trial counsel, a fair trial, and a reliable sentencing proceeding, further prejudiced Mr. Castillo and denied him a fair adjudication in those proceedings.

235. Mr. Castillo is entitled to relief.

CLAIM TWO

Mr. Castillo's death sentence violated his state and federal constitutional guarantees of due process, equal protection, the prohibition against double jeopardy, and a reliable sentencing determination because the prosecutors used the same acts to support a conviction for first-degree murder and to support one or more of the aggravating circumstances. U.S. Const. amends. V, VI, VIII and XIV; Nevada Const. art. I §§ 1, 3, 6 & 8.

SUPPORTING FACTS

I. Pre-Trial

1. The Clark County Grand Jury accused Mr. Castillo and Michelle C. Platou of: (1) Conspiracy to commit burglary and robbery, NRS 199.480, 205.060, 200.380; (2) Burglary, NRS 205.060; (3) Robbery, Victim Sixty-Five Years of Age or Older, NRS 200.380, 193.167; (4) Murder With Use of a Deadly Weapon, NRS 200.010, 200.030, 193.165; (5) Conspiracy to Commit Burglary and Arson, NRS 199.480, 205.060, 205.010; and (6) First-Degree Arson, NRS 205.010.[32] Under NRS 200.030, prosecutors could secure a first-degree murder conviction if the murder was "[c]ommitted in the perpetration or attempted perpetration of ... robbery, [or] burglary... ." Prosecutors' filed an indictment on January 19, 1996.

2. On January 23, 1996, the prosecutors filed their notice of intent to seek the death penalty. In this notice, the prosecutors identified five aggravating circumstances which they intended to prove: (1) the murder was committed by a person who was previously convicted of a felony involving the use or threat of violence to the person of another pursuant to NRS 200.033(2); (2) the murder was committed by William Castillo while he was engaged, alone or with others, in the commission of or an attempt to commit or flight after committing or attempting to commit any Robbery pursuant to NRS 200.033(4); (3) the murder was committed by William Patrick Castillo while he was

[32] On January 8, 1996, the State filed its Notice of Intent to Seek Indictment. Ex. 21. On May 29, 1996, the State filed an amended indictment. Ex. 4.

engaged, alone or with others, in the commission of or an attempt to commit or flight after committing or attempting to commit any Burglary pursuant to NRS 200.033(4); (4) the murder was committed to avoid or prevent a lawful arrest pursuant to NRS 200.033(5); and, (5) the murder was committed by William Patrick Castillo, for himself or another, to receive money or any other thing of monetary value pursuant to NRS 200.033(6). Ex. 22.

II. Guilt/Innocence Trial

3. Mr. Castillo was convicted of murder with the use of a deadly weapon, burglary, robbery, conspiracy to commit robbery and burglary, arson, and conspiracy to commit arson and burglary. Ex. 24. He was prosecuted for first-degree murder under theories of felony murder and premeditated murder. Exs. 2 & 4. The jury was instructed on both theories of culpability: premeditated murder and felony murder. Ex. 23, Instructions #3, #13, #16 - 19; TT, 9/4/96, at 31-33, Ex. 166 at 31-33. The prosecution argued both felony murder and premeditated murder. Id. at 46, 53-56, 76-78. The jury returned only a general verdict, which failed to identify the theory under which Mr. Castillo was convicted. Ex. 23, Count IV. The jury relied on the underlying acts of burglary and robbery in order to convict Mr. Castillo of first-degree murder.

III. Penalty Trial

4. The prosecutor argued to the jury that this murder was committed while Mr. Castillo was engaged in a burglary and robbery, and that these factors rendered Mr. Castillo eligible for the death penalty. During the opening statements in the penalty trial, the prosecutors stated:

> The second category [of aggravation] relates to the circumstances of the offense. We are alleging that the murder of Mrs. Berndt was committed while the defendant was engaged in the commission of or an attempt to commit or flight after committing a burglary. The jury has already considered evidence on the issue of whether a burglary occurred during the commission of these offenses.
>
> Likewise, category three involves a robbery/murder and it's essentially the same language as that alleged in burglary. The prosecution alleges that this murder was committed while the

> defendant was engaged in the commission of or an attempt to commit or flight after committing a robbery.

TT, 9/19/96 (morning session), at 6-7, Ex. 167 at 6-7.

5. During their closing arguments in the penalty trial, prosecutors made a similar argument:

> The third aggravating circumstance ... is ... that this defendant committed a murder while in the course of or the flight after committing burglary. Now, you yourselves, as jurors in the guilt phase, found beyond a reasonable doubt that Mr. Castillo burglarized ... [and] killed Isabella Berndt. The State submits that there is no question that this aggravating circumstance has been established beyond a reasonable doubt. In fact, beyond all doubt... .
>
> The fourth aggravating circumstance ... is that the murder was committed during the course of the robbery or flight after committing the robbery of Isabella Berndt. Again, you, ladies and gentlemen yourselves, found beyond a reasonable doubt that the defendant was guilty of the robbery of Isabella Berndt and her murder during the course thereof.

TT, 9/24/96 (afternoon session), at 7, Ex. 172 at 7. Prosecutors emphasized this argument:

> Aggravating circumstances three, four, and five ... ought [not] to be treated like one aggravating circumstance. ... Burglary is a crime of entry and our legislature made a policy judgment. Their purpose, in making the judgment, was to try to deter perpetrators from unlawfully entering the houses of other people and when they made entry, they did something which aggravated the murder and it makes a big difference that she was killed in her home and not somewhere else.
>
> Robbery isn't to be equated with burglary because burglary is a crime of entry and robbery is a crime against the person. Even after she was killed, these defendants showed their intent. They didn't leave in panic. They didn't abandon their purpose, which was to take her property. They carried out the Hitachi VCR. They took with them her sets of silverware. They searched her property and came up with rings, with jewelry, with money, and they even took her Christmas booties and these are both factors that aggravate murder in the first degree.

Id. at 55-56.

6. The jury was instructed that, if the instant murder was committed during a burglary and/or a robbery, Mr. Castillo was eligible for the death penalty. Ex. 25,

Instructions #7 and #9. The jury found that Mr. Castillo committed murder during the commission of a burglary and robbery, Ex. 5, and imposed a death sentence. Ex. 7.

7. Because the jury relied on the acts of robbery and burglary to convict Mr. Castillo of murder, and thereafter to render him death eligible, Mr. Castillo's state and federal constitutional rights were violated. The Eighth Amendment required that the Nevada death penalty statute narrow the class of persons eligible for the death penalty, from all persons who commit murder, to those persons whose extreme culpability makes them the most deserving of execution. Whenever a jury relied on the same factual allegations to convict a defendant of murder, and thereafter to impose a death sentence, the narrowing function of the Eighth Amendment was not served.

8. The Nevada Supreme Court recognized constitutional error whenever the jury convicts a defendant under a theory of felony murder and thereafter considers the same conduct in their determination of whether the defendant was eligible for the death penalty. McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004), reh'g denied, 121 Nev. 25, 107 P.3d 1287 (2005). Indeed, the Court held that such constitutional error was so significant that its condemnation of this practice must be retroactive. Bejarano v. State, 122 Nev. 1066, 146 P.3d 265, 271 (2006).

9. Mr. Castillo's jury convicted him of murder based, at least in part, on a theory of felony murder. Stated another way, the jury considered evidence of a burglary and robbery in order to convict him. Thereafter, the prosecutors argued, and the jury found, that Mr. Castillo was eligible for the death penalty based upon the same factual allegations. The narrowing function of the Nevada death penalty statute, demanded by the Eighth Amendment, did not occur. Mr. Castillo is entitled to relief in the form of a new sentencing hearing.

10. To the extent that this issue was never preserved for appeal, never raised on appeal or in state post-conviction proceedings, Mr. Castillo would show that his state and federal constitutional rights to the effective assistance of counsel were violated.

CLAIM THREE

Mr. Castillo's conviction and death sentence violate state and federal constitutional guarantees of due process, equal protection, trial before an impartial jury, and a reliable sentencing proceeding because the trial judge failed to properly instruct the jury regarding the difference between first- and second-degree murder, reasonable doubt, and malice. U.S. Const. amends. V, VI, VIII & XIV; Nevada Const. art. I, §§ 1, 3, 6 & 8.

SUPPORTING FACTS

I. Guilt/Innocence Trial Jury Instructions

1. Mr. Castillo's conviction is unconstitutional because it is premised on infirm jury instructions.

A. Kazalyn Instruction

2. Prosecutors charged Mr. Castillo with first-degree murder, inter alia. Ex. 2. The State of Nevada defined first-degree murder as:

> Murder ... which is:
>
> (a) Perpetrated by ... any other kind of willful, deliberate and premeditated killing;

NRS 200.030(1)(a). An offense is first-degree murder if it involved a killing that was willful, deliberate, and premeditated.

3. The trial judge defined the elements of first-degree murder in the jury instructions as follows:

Instruction 16

> Murder of the First Degree is murder which is (a) perpetrated by any kind of wilful, deliberate and premeditated killing and/or (b) committed during the perpetration of burglary and/or robbery.

Instruction 17

> Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.
>
> Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly

the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

Ex. 23; see also TT, 9/4/96, at 31, Ex. 166 at 31. The prosecutor instructed the jury on the elements of first-degree murder during closing argument:

> That is because the pleading is open murder and that includes two degrees of murder, murder of the first and murder of the second degree.
>
> ***
>
> Murder of the first degree, this is Instruction 16, is murder which is (A), number one, perpetrated by any kind of willful, deliberate, and premeditated killing and/or, they are not linked...Some lay persons who have not had training in the law can come to a criminal courtroom, such as this, and think if its premeditated murder, that this has to be a substantial interval beforehand wherein the perpetrator formed the intent to kill. There is no required space of time and the Court dispels that notion in Instruction 17.
>
> Instruction 17 explains, "Premeditation is a design, a determination to kill. Distinctly formed in the mind at any moment before or at the time of the killing. Premeditation need not be a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind."
>
> As the Court goes on to explain in No. 17, "As long as the intent to kill, the design, the determination to take a human life was formed, it can be at the very moment of the fatal blows or at any moment before that. As long as that requirement is met, it is a deliberate, premeditated murder and, consequently, murder of the first degree."
>
> ***
>
> Now, as Mr. Harmon has very eloquently indicated to you, premeditation does not have to be for a month or a week or an hour or even a minute in advance, just enough in advance of the fatal blow or the fatal action that the intent reposes with the killer and the intent is carried out.
>
> Now what evidence do we have of premeditation in this case? Well, one, Mr. Castillo armed himself with a crow bar, his weapon of choice from Platou's car before he ever went in the house. What possibly for? He wasn't going to use it to break into the house. He had a key. He armed himself so that he was prepared to do exactly what he did. Premeditation.
>
> Number two, there was testimony and evidence that he struck repeated blows to kill Ms. Berndt. He hit her, she sat up, and then he pommeled her repeatedly with the crow bar and his fist. I.D. Tech Adkins said at least three times the crow bar was lifted and the blood spattered back, but I think if you look at the pictures of the victim and recall the testimony of Dr. Bucklin, you will be satisfied that there is no question many more than three blows were struck. Now each striking requires a successive thought of the mind that I'm going to continue striking this person until I have effectuated death. Premeditation.

> Finally, even after he had pommeled Mrs. Berndt into submission, a status which Dr. Bucklin had clearly told us would have caused her death, but noticed that she was still alive gurgling in her own blood, he took a pillow and he put it over her face and he smothered her out. A conscious act, an act after the beating, an act clearly designed to terminate any possibility that she could survive this ordeal. Premeditation.

TT, 9/4/96, at 46, 53-54, 77-78, Ex. 166 at 46, 53-54, 77-78. Any jury instruction which explained the elements of premeditation, wilfulness, and deliberation as a single concept, encompassed by premeditation, is error.[33]

4. In Byford v State, 116 Nev. 215, 994 P.2d 700 (2000), the Nevada Supreme Court reviewed the Kazalyn instruction and held the instruction failed to define all three elements of first-degree murder. Under NRS 200.030(1)(a), the elements of first degree murder include willfulness, deliberation, and premeditation. The Nevada Supreme Court held that the Kazalyn instruction "blur[red] the distinction between first- and second-degree murder." Although the Court adopted new jury instructions for first degree murder, which defined each element, the Court held that they would only be provided in the future. Byford, 994 P.2d at 714. The Court held that the Kazalyn instructions did not require the reversal of a murder conviction, stating:

> We conclude that the evidence in this case is clearly sufficient to establish deliberation and premeditation on Byford's part ... This evidence was sufficient for the jurors to reasonably find that before acting to kill the victim Byford weighed the reasons for and against his action, considered its consequences, distinctly formed a design to kill, and did not act simply from a rash, unconsidered impulse.

Byford, 994 P.3d at 712-713.

5. The Ninth Circuit Court of Appeals considered a similar claim in Polk v. Sandoval, 503 F. 3d 903 (9th Cir. 2007). The Court of Appeals held that a premeditation instruction, such as that given in Mr. Castillo's case, unconstitutionally relieved the prosecution "of its burden of proving every element of first-degree murder beyond a reasonable doubt." Id. at 909; see Sandstrom v. Montana, 442 U.S. 510, 521 (1979); Francis v. Franklin, 471 U.S. 307, 326 (1985) (reaffirming "the rule of Sandstrom and the

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[33] The jury's verdict did not identify which legal theory they relied upon to convict Mr. Castillo.

wellspring due process principle from which it was drawn."); see also In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068 (1970) ("the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). The Court of Appeals held that the Nevada Supreme Court's denial of this claim "ignored the law the Supreme Court clearly established ... that an instruction omitting an element of the crime and relieving the State of its burden of proof violates the federal Constitution." Polk, 503 F.3d at 911.

6. When the jury is erroneously instructed, a conviction will be reversed unless the record is clear, beyond a reasonable doubt, that the jury would have found the defendant guilty absent the instruction. Santana v. State, 148 P.3d 741 (2006). Mr. Castillo's jury was instructed in writing by the trial judge, and in argument by the prosecutor, that wilfulness or deliberation were proven with evidence of premeditation. Therefore, Mr. Castillo's jury was instructed to ignore any evidence that his actions were not wilful or deliberate.

7. There was evidence upon which the jury could have held that Mr. Castillo's actions were not wilful or deliberate. The victim's house was dark. All of the evidence before the jury suggested that Mr. Castillo struck the victim after he was surprised–he believed the house was unoccupied. Therefore, the evidence before the jury was that Mr. Castillo panicked, and acted out of reflex–with no deliberation.[34] TT, 9/3/96 (morning session), at 58, 71 - 74, Ex. 164. He appeared to be "freaked out" shortly after the offense. TT, 9/3/96 (morning session), at 72, Ex.164. This Court should reverse Mr. Castillo's conviction.

8. In the alternative, the trial judge's instructions relating to a theory of "instantaneous premeditation" were unconstitutional. The trial judge's instructions created a reasonable likelihood that the jury convicted Mr. Castillo of first-degree murder, without any rational basis to distinguish between first- and second-degree murder. The

[34] Kirk Rasmussen testified, at the time of the offense, that Mr. Castillo did not know the gender of the victim. TT, 9/3/96 (morning session), at 119- 121, Ex. 164.

trial judge's "instantaneous" definition of premeditation was indistinguishable from the express malice aforethought doctrine in second-degree murder cases. See infra Part C. The absence of a rational distinction between first-and second-degree murder violated Mr. Castillo's state and federal constitutional rights to equal protection because it prevented an evenhanded and consistent application of either the first or second-degree murder statutes. The instruction was also unconstitutional under clearly established state and federal law because it failed to narrow the class of defendants eligible for the death penalty.

9. The "premeditation and deliberation" instruction in this case was unconstitutionally vague. It has been directly disapproved: not only does it not require any sort of premeditation, its vagueness allowed prosecutors unlimited discretion to charge a defendant with first-degree murder. The instruction failed to adequately instruct the jury on how to accurately assess either premeditation or deliberation. Moreover, it made a defense against the first-degree murder charges virtually impossible because trial counsel had no way to discern what elements the prosecutors must prove to establish "premeditation and deliberation." The Court should reverse Mr. Castillo's conviction.

B. Reasonable Doubt Instruction

10. The trial judge instructed the jury on reasonable doubt:

> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

Ex. 23, Instruction # 34.

11. There are two defects in this instruction which inflated the constitutional standard of doubt necessary for acquittal. The second sentence provided that reasonable doubt "is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life." Id. This language provided an inappropriate characterization of the degree of certainty required to find proof beyond a reasonable

doubt. It offered an explanation of reasonable doubt itself, not a standard by which reasonable doubt can be determined. This language has proven to be a historical anomaly. As far as can be discerned, no other state currently uses this language in its reasonable doubt instruction, and the few states which previously used it have since disapproved it.

12. The final sentence of the trial judge's instruction was also constitutionally infirm. The trial judge instructed for "[d]oubt to be reasonable" it "must be actual, not mere possibility or speculation." Id. This language was similar to language condemned by the United States Supreme Court,[35] and when read in conjunction with the "govern or control" language, created a reasonable likelihood that the jury would convict based upon a lesser degree of proof than the Constitution required. The "actual, not mere possibility or speculation" language elevated the threshold for determining reasonable doubt. As a result, the jurors in Mr. Castillo's case received instructions that made identifying reasonable doubt unconstitutionally difficult to recognize while determining the lack of reasonable doubt was more easily determinable.

13. The characterization of standard of proof as an "abiding conviction of the truth of the charge," did not cure the defects in this instruction. That statement cannot be linked to any proper definition of the reasonable doubt standard. In conjunction with the language which immediately preceded this statement, it provided the prosecutors with an impermissibly low standard of proof. Mr. Castillo is entitled to relief.

C. Malice Aforethought Instruction

14. "Malice aforethought" is an essential element of murder under Nevada law. NRS 200.010(1). The jury was provided the following "malice aforethought" instruction, pursuant to NRS 200.020(2):

> Malice aforethought means the intentional doing of a wrongful act without legal cause or excuse or what the law considers adequate provocation.

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[35] E.g., Francis v. Franklin, 471 U.S. 307 (1985); Sandstrom v. Montana, 442 U.S. 510 (1979); Yates v. Aiken, 484 U.S. 211 (1988); Cage v. Louisiana, 498 U.S. 39 (1990); Sullivan v. Louisiana, 508 U.S. 275 (1993).

...

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

Ex. 23, Instructions #14 and #15. This instruction violated clearly established state and federal constitutional law and substantially prejudiced Mr. Castillo. The "implied malice" component relieved the prosecutor of his burden to prove each element beyond a reasonable doubt, subverted the presumption of innocence, and invaded the jury's fact-finding province. The "implied malice" component created a mandatory presumption that malice shall be implied both in the absence of provocation and when the circumstances of the killing demonstrated an "abandoned or malignant heart." This explicit and unqualified command foreclosed any independent jury consideration of whether the facts established "malice aforethought"– an essential element of second-degree murder.

15. This instruction was also unconstitutional because it created a reasonable likelihood that the jury convicted Mr. Castillo of first-degree murder without any rational basis for distinguishing between first-degree and second-degree murder. The definition of premeditation as instantaneous was indistinguishable from the express malice aforethought doctrine in second-degree murder cases. The absence of a rational distinction prevented an evenhanded and consistent application of either the first-degree or second-degree murder statutes. The inability to adequately distinguish between first-degree or second-degree murder also failed to narrow the class of death-eligible defendants.

16. Moreover, the instruction was unconstitutionally vague because it failed to identify the facts from which malice shall be implied. This instruction prevented Mr. Castillo from adequately identifying and arguing to the jury those facts which supported a second-degree murder rather than first-degree murder conviction.

17. Appellate and state post-conviction counsel were ineffective for failing to raise these issues in prior proceedings, and there can be no legitimate strategic reason for not including these issues. Mr. Castillo is entitled to a new trial.

II. Penalty Trial Jury Instructions

18. Mr. Castillo's death sentence is unconstitutional because it was premised on infirm jury instructions.

A. Failure to Give the Presumption of Life Instruction

19. At the close of the guilt/innocence trial, the trial judge provided the following instruction:

> The defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the defendant is the person who committed the offense.

Ex. 23, Instruction # 34. The trial judge failed to give a similar presumption of life instruction prior to the jury's penalty trial deliberations. The trial judge failed to instruct the jury to presume Mr. Castillo innocent of the death penalty until prosecutors proved a single aggravating circumstance or set of aggravating circumstances beyond a reasonable doubt. The jury should have been instructed to consider Mr. Castillo innocent of the death penalty until the jury determined beyond a reasonable doubt that the aggravating circumstances(s) outweighed Mr. Castillo's mitigating evidence.

20. The trial judge's failure to offer a presumption of innocence instruction prior to the penalty trial deliberation violated clearly established state and federal constitutional law and substantially prejudiced Mr. Castillo. Under Nevada law, Mr. Castillo could only receive a death sentence if the jury found at least one aggravating circumstance beyond a reasonable doubt. Under clearly established state and federal law, "murder plus one or more aggravating circumstances" is a separate form of "murder" simpliciter (i.e., the offense for which Mr. Castillo was convicted during the guilt/innocence trial of his proceedings, first-degree murder, is properly understood to be a lesser included offense of "first-degree murder plus aggravating circumstance(s))." In

effect, the aggravating circumstances constitute a new "element" which must be found beyond a reasonable doubt.

21. Because "first-degree murder plus (at least) one aggravating circumstance" constituted an entirely new and separate offense for which Mr. Castillo had to be "convicted" of during the penalty trial, he had a state and federal constitutional right to be presumed innocent of the new offense, capital murder. A presumption of innocence during a capital penalty trial constituted a presumption of life because jurors must presume Mr. Castillo innocent of the death penalty until prosecutors proved every element of capital murder beyond a reasonable doubt.

22. The trial judge failed to inform the jury of Mr. Castillo's presumption of innocence of the death penalty.[36] The trial judge's failure to offer this instruction rendered Mr. Castillo's penalty trial fundamentally unfair because it forced Mr. Castillo to present evidence of his "innocence" or "life-worthiness."[37] Mr. Castillo is entitled to relief.

B. Reasonable Doubt Instruction

23. The penalty trial reasonable doubt jury instruction is infirm for the same reasons as outlined, see discussion supra Part I.B. Ex. 25, Instruction #20.

24. The failure of trial and post-conviction counsel to identify and argue these issues fell below the constitutionally mandated standard for effective assistance of counsel.

25. Mr. Castillo is entitled to relief.

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[36] In Kansas v. Marsh, 548 U.S. 163 (2006), the Supreme Court upheld a statute requiring imposition of the death penalty when the jury finds that the aggravating and mitigating factors in equipoise. Nevada does not have such a statute. NRS 200.030(4)(a) provides that a defendant is eligible for death if "any mitigating circumstance or circumstances which are not found do not outweigh the aggravating circumstance or circumstances." Rippo v. State, 146 P.3d 279 (2006).

[37] The jury was instructed that "it is not necessary for the Defendant to present any mitigating circumstances," but this instruction was ineffective when there is no presumption that the defendant is innocent of death until an aggravator is proved. Ex. 25, Instruction #8. When the prosecution puts forth any shred of evidence without a presumption for life, a defendant is required to contradict that proof.

CLAIM FOUR

Mr. Castillo's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, the effective assistance of counsel, and a reliable sentencing determination because the prosecutors' non-statutory aggravating evidence included juvenile offenses and juvenile misconduct in violation of Roper v. Simmons, 543 U.S. 551 (2005) and Thompson v. Oklahoma, 487 U.S. 815 (1987). U.S. Const. amends. V, VI, VIII & XIV; Nevada Const. art. I, §§ 1, 3, 6 & 8.

SUPPORTING FACTS

I. Introduction

1. Prosecutors violated Mr. Castillo's clearly established state and federal constitutional rights when they proffered, as non-statutory aggravating evidence, juvenile convictions and misconduct which occurred before Mr. Castillo's 18th birthday, and in many instances, well before his 16th birthday. Mr. Castillo is entitled to relief.

II. Pre-Trial

2. In their "Notice of Intent To Seek Death Penalty," prosecutors identified five statutory aggravating circumstances which they intended to prove at the penalty trial: (1) the murder was committed by a person who was previously convicted of a felony involving the use or threat of violence to the person of another; (2) the murder was committed while the person was engaged, alone or with others, in the commission of or an attempt to commit or flight after committing or attempting to commit any robbery; (3) the murder was committed while the person was engaged, alone or with others, in the commission of or an attempt to commit or flight after committing or attempting to commit any burglary; (4) the murder was committed to avoid or prevent a lawful arrest; and (5) the murder was committed to receive money or any other thing of monetary value. Ex. 22.

III. Penalty Trial

3. Mr. Castillo's jury was required to find at least one statutory aggravating circumstance, beyond a reasonable doubt, before it could sentence Mr. Castillo to death.

NRS 175.554(3); 200.033. At Mr. Castillo's penalty trial, prosecutors presented evidence which, according to them, established the existence of at least one, if not all five, statutory aggravating circumstances.[38] Nevada law permitted prosecutors to bolster their case in aggravation with non-statutory aggravating evidence (e.g., uncharged conduct, etc.). NRS 175.552; Sonner v. State, 112 Nev. 1328, 1345, 930 P.2d 707 (1996). Prosecutors introduced a substantial amount of non-statutory aggravating evidence. The majority of this evidence consisted of convictions and misconduct which occurred when Mr. Castillo was under the age of eighteen, and in many instances, under the age of sixteen. Indeed, some of the prosecutors' evidence consisted of misconduct which occurred when Mr. Castillo was only five, six, or seven-years-old.

4. During opening statements, prosecutors exhaustively discussed Mr. Castillo's juvenile misconduct and convictions, using such evidence as a legitimate reason to sentence Mr. Castillo to death:

> . . . age five, the defendant drowned his grandmother's dog to get even with her. Age six, defendant killed several birds in anger smashing their skulls with rocks. Age seven, the defendant destroyed a house in Los Angeles. When the family lived in Lake Tahoe, Mr. Castillo was kicked off the school bus on the first day of school for knocking a girl off the bus causing a concussion. In Las Vegas, while at school, the defendant ran a piece of glass down a youth's back requiring three stitches. Prior to the family coming to Las Vegas, the defendant had previously been classified as a juvenile delinquent in Los Angeles County, California and Douglas County, Nevada ... His [juvenile] problems were a chronic runaway, arson, fighting, noncompliance, lying, swearing, and misbehavior in school. He was diagnosed and the Court reported by the State Welfare Division as, "Conduct disorder: under-socialized and ineggressive [sic]."
>
> ***
>
> On January the 1st, 1983, the defendant was arrested for runaway and arson... On October the 1st, 1983, he was arrested for runaway and vagrancy prowling and while a resident at the youth hospital of CBS, the defendant ran away. He was apprehended by the California Highway Patrol in Baker, California.
>
> ***
>
> In mid May of [1985], he was charged in St. Louis with property damage. Early in June, 1985, charged with burglary, a felony, when he stole a bicycle valued over $150 and he was taken from his grandmother

[38] See e.g., TT, 9/20/96 (morning session), at 5-39, Ex. 170 at 5-39. (evidence regarding prior attempted burglary conviction); 49-63 (evidence regarding prior robbery conviction).

and placed in the St. Louis Detention Facility. This defendant was involved, as a youth, in setting fires. Early in July, 1982, when nine years of age, he started a fire near the family home and the house burned to the ground...

***

On January the 1st, 1983, New Year's Day, about 7:00 in the morning, the defendant... [was] involved in setting fires on four separate floors inside the Circus Circus Hotel... Still another fire was set at the back door of the Ah's [sic] Chinese Restaurant on the same day ... [Mr. Castillo was] charged in juvenile court with ... six counts of arson and attempted murder.

***

In 1988, he was arrested for carrying a concealed weapon, a knife, and was recommitted to the Nevada Youth Training Center [NYTC]. His parole was revoked and he was recommitted to NYTC in July, 1989. The reasons, in April, possession of a switch blade knife. In July 1989, the grand larceny of the family residence... On July the 7th, 1989, the defendant stole a 1987 Ford Tempo from Las Vegas Honda at 1700 East Sahara... He was arrested. On July the 12th, 1989, for grand larceny, grand larceny auto, and being a runaway. He was again paroled from NYTC in February 1990. However, [he] was arrested in April of that year for grand larceny of a motorcycle and recommitted to the [NYTC] on April the 24th, 1990.

[Mr. Castillo] had a history or either escaping or trying to escape. At 13 years of age, in early 1986, the defendant plotted to escape from NYTC. He tried to solicit money from some of his peers and he was observed stealing money from a residence room to finance his getaway. ...

***

I have mentioned already the two prior felony convictions to explain very briefly the circumstances of the attempted burglary. It was on December the 19th, 1990, while the defendant was still at large as an escapee from Elko. He had an accomplice ... also a seventeen year old juvenile.

TT, 9/19/96 (morning session), at 9-16, Ex. 167 at 9-16.

5. The prosecutor's opening statement laid the foundation and briefly described the evidence of Mr. Castillo's juvenile convictions and misdeeds which would be presented. During the penalty trial, prosecutors presented testimony from Bruce Kennedy, a youth parole officer with the Nevada Youth Parole Bureau. Kennedy testified, in great detail, about Mr. Castillo's entire juvenile record or "rap sheet." Prosecutors even introduced the juvenile "rap sheet." TT, 9/19/96 (morning session), at 47-48, Ex. 167 at 47-48.

6. Prosecutors requested Bruce Kennedy to methodically review Mr. Castillo's juvenile "rap sheet" and identify every misdeed or criminal offense for the jury. Id. at 48. Kennedy did so:

Bruce Kennedy: The first time ... William was brought in for some type of delinquent behavior is January 20th, 1982, when he was brought in for a runaway. ...

***

Bruce Kennedy: Again, on April 26th, 1982, he was brought in again for runaway and again that was handled informally.

On May 12th, 1982, he was brought back to Juvenile Court ... he was ... booked for runaway.

He was again booked for runaway on May 20th, 1982. Again for runaway on May 30th, 1982 ... and another runaway charge shows January 1st, 1983. He was also booked at that time for attempted murder. That charge was denied and one, two, three, four, five, six counts of arson and one count of petty larceny.

On March 3rd, 1984, he was charged with a threat to life. That charge was not filed. Destruction of property. That charge was also not filed...

***

Bruce Kennedy: I left off about October 1st, 19[85] with the vagrancy prowling charge.

***

Bruce Kennedy: ... On May 22nd, 1986 William was charged with violation of parole...

On December 3rd, 1985 there's another violation of parole charge. For that charge William was recommitted to the Nevada Youth Training Center.

On June 27th, 1988 William was charged with carrying a concealed weapon ... He was also charged with possession of a dangerous weapon which is probably the same as the carrying a concealed weapon.

On April 12th, 1989 there was a petty larceny charge.

On April 27th, 1989 there's a curfew charge, a carrying a concealed weapons charge and a violation of parole charge.

On June 3rd, 1989 there's a curfew violation charge...

> On July 12th, 1989 there's a run–away charge. On July 12th there's a grand larceny auto charge and a grand larceny charge. For those charges he was again committed to the Nevada Youth Training Center.
>
> On April 7th, 1990 William was charged with grand larceny motorcycle and again the record indicates that he was recommitted for that charge. Along with an auto burglary that happened on April 22nd, 1990...
>
> August 5, 1990 petty larceny charge which was referred to parole. On August 5th, 1990 there is an escape charge from the Nevada Youth Training Center.
>
> On December 19th, 1990 there's attempted burglary charge along with a possession of an unregistered handgun, carrying [a] concealed weapon and escape from Nevada Youth Training Center. For the attempted burglary charge William was certified to adult status and that's where his juvenile record ends.

TT, 9/19/96 (morning session), at 47-48, 49-50, Ex. 167 at 47-48; 49-50; and TT, 9/19/96 (afternoon session), at 5-6, Ex. 168 at 5-6.

7. After Bruce Kennedy identified every offense on Mr. Castillo's juvenile "rap sheet," prosecutors asked him to provide more (aggravating) details about each juvenile offense:

> Bruce Kennedy: On July 1st, 1982 Billy set fire to the family home which burnt to the ground. After setting fire to the home Billy ran away from the scene without telling his mother who was inside the house with his infant sister about the fire.[39]
>
> ***
>
> Bruce Kennedy: ... [Mr. Castillo] has been classified as a juvenile delinquent in Los Angeles in Douglas County. Child first ran away from home at age seven... when the family was living in Lake Tahoe the child was kicked off the school bus the first day of school for knocking a girl off the bus and giving her a concussion. Three days ago the child went out and broke a window on a car and has a long history of destructive behaviors.
>
> At age five the child drowned his grandmother's dog to get even with her and at age six killed several birds by smashing the skulls with rocks.[40]

[39] Id. at 8.

[40] Id. at 11-12.

***

Bruce Kennedy: On January 1st, 1983 William was booked ... in detention at juvenile court services ... This was after William and another boy ran away from Children's Behavioral Services. Both boys were picked up by authorities and booked after investigation proved they were responsible for setting fires in Circus Circus Hotel and Castillo in a separate fire at the Oz Chinese Restaurant...

***

Bruce Kennedy: ... These juveniles attempted to use the lighter fluid to accelerate a fire at 800 Circus Circus Drive ... the two juveniles became angry with two women at 800 Circus Circus Drive and wanted to burn it down to repay them.[41]

***

Bruce Kennedy: On February 1st, 1984 William was booked at the Clark County Juvenile Court Services on the charge of battery against a school teacher Mr. Pat Mahoney of CBS... William reported that he had engaged in these deviant behaviors in an attempt to be placed at Spring Mountain Youth Camp.[42]

***

Bruce Kennedy: [O]n or about March 3rd, 1984 at and within the County of Clark, State of Nevada did [William Castillo] then and there willfully and unlawfully mingle a poison or other harmless substance in food, drink or medicine intended or prepared for the use of the human being, to wit: By placing industrial detergent in a large vat of mashed potatoes being prepared for use of persons at Clark County Juvenile Services.[43]

***

Bruce Kennedy: On June 4th, 1985 William ... stole a bicycle valued over a hundred fifty dollars. At that time William was removed from his grandmother's home and placed in a detention facility.[44]

***

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[41] Id. at 15-16.

[42] Id. at 21.

[43] Id. at 24.

[44] Id. at 31.

Bruce Kennedy: William did work in the community. He was working at Burger King and was doing well until such time as he started to have problems with his stepfather. He then met up with another parolee from NYTC and [the] two of them stole some money, a couple of guns, an automobile and left the Las Vegas community and went to Los Angeles.[45]

***

Prosecutor: What is a certification report for the ladies and gentlemen of the jury?

Bruce Kennedy: When a juvenile has committed sufficient number of crimes, felonies in nature, that the court no longer feels that the Juveniles Services can provide proper controls over that individual, they petition the court for a certification hearing ... for the judge to find whether or not the individual should be certified to adult status and stand trial as an adult rather than a juvenile.[46]

***

Bruce Kennedy: Both offenses for which William has been charged are felonious in nature and constitute a serious criminal behavior which puts the community at risk. On October 21, 1990 at 1:10 am William ran away from the Nevada Youth Training Center, successfully escaping the facility. He alluded apprehension until December 19th, 1990 when he was arrested and charged with attempted burglary. The burglary occurred at approximately 1:15 in the afternoon. According to the police report William and another suspect knocked at a door at the residence and then kicked the door in when they got no response. An occupant was in the house at the time of the attempted burglary. The resident of the house had heard the doorbell ring and the door being kicked. She picked up a can of Mace and confronted the subjects with the Mace after the door had flown open. According to the police reports both suspects fled the scene at that time driving off in a car... It should be noted that when William was arrested he had a handgun concealed in the waistband of his pants. The weapon was loaded.[47]

***

[45] Id. at 36.

[46] Id. at 38-39.

[47] Id. at 39-40.

Bruce Kennedy: [Reading from State's Ex. 120] Fires at Circus Circus Hotel, while on parole status William continued to have problems. He was arrested on April 11th, 1985 for violation of parole in that he continued to run away, failed to maintain school program and destroyed private property.

On December 3rd, 1985 William was again found in violation of his parole by the fact that he was involved in a burglary when he was placed in St. Louis.

In April of 1989 William was charged with violation of parole in that he again was not following the laws and had in his possession a concealed weapon, switch blade knife... .

***

On July 12th, 1989 William was arrested and admitted to grand larceny and grand larceny auto.

On April 7th, 1990 William was arrested for grand larceny motorcycle. He was found to have committed these offenses.[48]

8. Prosecutors presented the testimony of Charmaine Smith, a Nevada Parole and Probation Officer, to support one of its statutory aggravating circumstances –i.e., an attempted burglary which Mr. Castillo committed when he was seventeen years old. TT, 9/20/96 (morning session), at 5-39, Ex. 169 at 5-39. Prosecutors elicited Smith's conclusion that Mr. Castillo had an "extensive juvenile history for theft related and destructive offenses." Id. at 16. Smith testified that Mr. Castillo failed one probationary term and four parole terms as a juvenile. Id.

9. Prosecutors presented the testimony of Michael Eylar, a detective with the Las Vegas Metropolitan Police Department, concerning the attempted burglary Mr. Castillo committed when he was seventeen years old. Id. at 40.

10. The prosecutor's closing argument continued to focus upon Mr. Castillo's juvenile misconduct and convictions:

> William Castillo, and his accomplice, kicked in the door of Marilyn Mills while he had in his hands a loaded semi automatic handgun and, by his own admission, they were there to rob, that the State has met its burden that we have proven to you that he has been convicted of a felony in which

[48] Id. at 43.

violence or the threat of violence was involved. The judgement of conviction has been introduced.

***

Now all of those of us that have been in this courtroom off and on for the last several weeks know that William Castillo has been in the justice system for years and years.

***

...the State would submit that it is virtually impossible to conceive of a prior criminal history of a person who has been on the earth the number of years that Mr. Castillo has that is either more length or more severe.

***

This defendant was 23 years in chronological age at the time of this horrible, horrible crime, but his level of criminal sophistication was that of persons time and a half or twice his age. He's been involved in the criminal justice system for the majority of his life. He has failed seven paroles and probations. He's been to the Elko reformatory five times. His last time he escaped.

***

Castillo intended to burn this entire house to the ground, something he had done on more than one previous occasion.

***

When one looks in the dictionary under crimes against persons, they will find William Castillo's picture there. He's done burglaries, he's done robberies, he's committed arsons, he's assaulted people with guns.

TT, 9/24/96 (afternoon session), at 5, 8, 10, 12, 16, and 19, Ex. 172 at 5, 8, 10, 12, 16 and 19.

11. The prosecutor's rebuttal argument again emphasized Mr. Castillo's juvenile history, arguing he was incapable of rehabilitation and the jury should impose a death sentence:

This is the second phase of these proceedings. We call it a penalty hearing. It's not called a rehabilitation hearing. This defendant has had a long history of criminal conduct. He came up through the juvenile system. He graduated through each successive step and he ended up at the Nevada Youth Correction Center.

***

Well, it's a tragedy while still in the juvenile system this defendant was given vocational training, he had various things that he could do.

***

> His significant prior criminal history reflects the character of this defendant. His juvenile history was filled with arson, with escape, with theft, with violence.

Id. at 51, 60-61.

12. On September 25, 1996, the jury sentenced Mr. Castillo to death. TT, 9/25/96, at 5-10, Ex. 173 at 5-10. The jury found four statutory aggravating circumstances: (1) Mr. Castillo committed the murder after he was previously convicted of a violent felony, to wit: the robbery he committed on December 14, 1992; (2) Mr. Castillo committed the murder while engaged in a burglary; (3) Mr. Castillo committed the murder while engaged in a robbery; and (4) Mr. Castillo committed the murder to avoid or prevent his lawful arrest. Id. at 5-6; Ex. 5. The jury further found three mitigating circumstances: (1) Mr. Castillo's youth at the time of the offense; (2) Mr. Castillo committed the murder while he was under the influence of extreme mental or emotional disturbance; and (3) any other mitigating circumstances. Id. at 7; Ex. 6. The jury sentenced Mr. Castillo to death after it determined that the aggravating circumstances (statutory and non-statutory) outweighed the mitigating circumstances. Id.; Ex. 7.

IV. Constitutional Violations

13. Prosecutors violated Mr. Castillo's clearly established state and federal constitutional rights when they premised their case for death substantially on juvenile offenses and misdeeds. States are prohibited from executing individuals who committed a capital offense when they were under the age of eighteen. The Supreme Court prohibited the execution of juveniles under the age of eighteen in part because of their immaturity. See Roper v. Simmons, 543 U.S. 551, 569 (2005); Thompson v. Oklahoma, 487 U.S. 815, 835 (1987) ("Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct... ."); id. at 853 (O'Connor, J., dissenting) ("Legislatures recognize the relative immaturity of adolescents, and we have often permitted them to define age-based classes that take account of this qualitative difference between juveniles and adults."); see also Johnson v. Texas, 509

U.S. 350, 367 (1993) ("A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."); Graham v. Collins, 506 U.S. 461, 518 (1993) (Souter, J., dissenting) ("A young person may perfectly well commit a crime 'intentionally,' but our prior cases hold that his youth may nonetheless be treated as limiting his moral culpability because he 'lack[s] the experience, perspective, and judgment' expected of adults.") (citation omitted); Eddings v. Oklahoma, 455 U.S. 104, 115-116 (1982) ("Even the normal 16-year-old customarily lacks the maturity of an adult"). Juveniles are susceptible to negative influences. See Roper, 543 U.S. at 669 ("juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."); Thompson, 487 U.S. at 835 (juveniles are "much more apt to be motivated by mere emotion or peer pressure than is an adult'); see also Stanford v. Kentucky, 492 U.S. 361, 395 (Brennan, J., dissenting); Eddings, 455 U.S. at 115 ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage."). Moreover, juvenile misdeeds often reflect only a transitory nature of their character. Roper, 543 U.S. at 570 ("The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed."); see also Graham v. Collins, 506 U.S. 461, 518 (1993) (Souter, J., dissenting). In light of these considerations, the Supreme Court held that a juvenile offender was sufficiently distinguished from an adult offender that they cannot be reliably classified among the worst offenders. Roper, 543 U.S. at 570 ("These differences render suspect any conclusion that a juvenile falls among the worst offenders"); Thompson, 487 U.S. at 835 ("The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult."); see also Graham, 506 U.S. at 518 (Souter, J., dissenting) ("Youth may be understood to mitigate by reducing a defendant's moral culpability for the crime, for

which emotional and cognitive immaturity and inexperience with life render him less responsible, and youthfulness may also be seen as mitigating just because it is transitory, indicating that the defendant is less likely to be dangerous in the future."). Executing juveniles under the age of eighteen did not "measurably contribute" to capital punishment's two primary social purposes–i.e., retribution and deterrence. Roper, 543 U.S. at 571 ("Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."); Id. ("As for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles, as counsel for the petitioner acknowledged at oral argument. Here, however, the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence."); Thompson, 487 U.S. at 837-837 ("Given the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children, this conclusion is simply inapplicable to the execution of a 15-year-old offender."); Id. at 837 ("For such a young offender, the deterrence rationale is equally unacceptable."). The Court's treatment of juveniles in capital sentencing, parallels its treatment of juveniles in other areas of law as well. E.g. Eddings, 455 U.S. at 115-116 ("Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults."); Bellotti v. Baird, 443 U.S. 622, 634 (1979) ("We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."); In re Winship, 397 U.S. 358 (1970).

14. If prosecutors are prohibited from seeking the death penalty for defendants under the age of eighteen, because their immaturity, susceptibility, and transitory character render them less morally culpable, and hence non-deathworthy, prosecutors must further be prohibited from relying, almost entirely, upon criminal offenses or misconduct which occurred before the defendant was eighteen years of age. The prosecutors' evidence in Mr. Castillo's penalty trial substantially relied upon offenses and misconduct which occurred well before adulthood. Indeed, some of the evidence upon which the prosecutors relied in their pursuit of Mr. Castillo's death sentence occurred when he was between the ages of five and twelve.[49]

15. Prosecutors presented overwhelming evidence of Mr. Castillo's misconduct and convictions, which occurred before Mr. Castillo reached eighteen years old. Prosecutors alerted the jury in their opening statement to Mr. Castillo's juvenile record, presented three witnesses to discuss Mr. Castillo's juvenile misconduct and convictions, and emphasized his juvenile record in closing arguments. The use of Mr. Castillo's juvenile record, much of which occurred in his early childhood, in order to persuade the jury to impose the death sentence, violated Mr. Castillo's state and federal constitutional rights to due process, equal protection, effective assistance of counsel, and a reliable sentencing determination.

V. Ineffective Assistance of Counsel

16. To the extent that this claim may later be held to be un-preserved, Mr. Castillo's state and federal constitutional rights to the effective assistance of trial counsel were violated by counsels failure to object and completely litigate this claim. To the extent that appellate counsel, or appointed counsel during Mr. Castillo's state post-

[49] For instance, in United States. v. Naylor, 359 F.Supp.2d 521 (W.D. Va. 2005), the District Court refused to classify Naylor as a career offender because he secured various convictions between the ages of sixteen and seventeen. Looking to Roper for guidance, the District Court felt that "a due regard for the 'history and characteristics' of the defendant" required taking into account his age at the time the predicate offenses were committed before enhancing his sentence to career offender status. Id. at 524. Based on Naylor's age, the District Court found there was reduced culpability with respect to his juvenile convictions. Therefore, the inclusion of those offenses as grounds to raise his sentence to "career offender" status was contrary to the intent of the statute. Id. at 525.

conviction habeas proceedings, failed to identify, preserve and litigate this claim, their representation fell below an objectively reasonable standard, violating Mr. Castillo's state and federal constitutional right to their assistance.

17. Mr. Castillo is entitled to relief.

CLAIM FIVE

The presentation of criminal juvenile records, that were not written by the witness, violated Mr. Castillo's state and federal constitutional rights to confront adverse witnesses, due process, equal protection, the effective assistance of counsel, and a reliable sentencing determination. U.S. Const. amends. V, VI, VIII & XIV; Nevada Const. art. I, §§ 1, 3, 6 & 8

SUPPORTING FACTS

I. Introduction

1. During Mr. Castillo's trial, prosecutors presented the testimony of Bruce Kennedy–a counselor with the Nevada Youth Parole Board–in order to introduce Mr. Castillo's juvenile record. TT, 9/19/96 (morning session), at 30-51. Ex. 167 at 30-51; TT, 9/19/96 (afternoon session), at 4-72, Ex. 168 at 4-72. As discussed, see supra Claim Four, Kennedy identified and related various juvenile offenses which were reflected in Mr. Castillo's juvenile records. Prosecutors asked Kennedy to read, to the jury, excerpts from specific juvenile reports relating to Mr. Castillo. The reports included statements by mental health experts who expressed their opinions of Mr. Castillo's capacity and intent related to the various juvenile offenses alleged. The reports trivialized his neglected and abusive upbringing (which in turn strengthened the prosecutors' case in aggravation).[50] Kennedy was not a mental health expert, nor did he draft the reports from which he read. Instead, the reports were drafted by various criminal justice professionals (e.g., correctional counselors, psychiatrists, neurologists, and probation officers). Moreover, the reports were created under circumstances which would lead an objective witness to reasonably conclude they were to be used in later (juvenile or adult) criminal proceedings.

2. The prosecutors failed to establish that the persons who prepared these records were unavailable to testify, or that the underlying records were reliable. Trial counsel failed to object to Kennedy's testimony; failed to request the trial judge to order

[50] Even more important, the juvenile records did not reflect that any comprehensive, or even adequate, investigation occurred relating to Mr. Castillo's childhood and social history.

the prosecutors to prove the unavailability of the persons who prepared the reports; and failed to litigate the reliability of the reports under Ohio v. Roberts, 448 U.S. 56 (1980) (confrontation violation) or Barefoot v. Estelle, 463 U.S. 880 (1983) (due process violation). As a result, the prosecutors deprived Mr. Castillo of his clearly established state and federal constitutional rights. Given the opportunity to confront and cross-examine the individuals who drafted these reports, trial counsel could have minimized the aggravating nature of these reports, demonstrated the inadequacy of the underlying investigation, and exposed the true nature of Mr. Castillo's chaotic and dysfunctional childhood.

II. Penalty Trial

3. Bruce Kennedy introduced excerpts from several "testimonial" reports, within Mr. Castillo's juvenile record during the penalty trial.

A. State's Exhibit #108

1. Dispositional Report

4. Kennedy testified concerning a "dispositional report," dated July 29, 1982, which he did not draft:[51]

> Extensive conversations with Mr. Castillo [adoptive father] led this officer to believe that Mr. Castillo [adoptive father] has made every effort to give Billy a good home and to be a good father to him. Mr. Castillo has been involved with youth baseball and other activities in order to spend more time with Billy and help him socialize with other boys his age...
>
> ...
>
> ... Mr. and Mrs. Castillo have repeatedly attempted to work with Billy on an out-patient basis without success. At this time they both feel totally incapable of helping their son overcome his behavioral problems.
>
> Further, Mr. and Mrs. Castillo strongly feel that they and their infant daughter are not safe in their home while Billy is residing there.

[51] A "dispositional report" is a "report that is given to a judge when a judge has to make a decision about what to do with the juvenile who has been found to be delinquent[.]" TT, 9/19/96 (afternoon session), at 7, Ex. 168 at 7.

Id. at 9-10. Neither the author of this report or Mr. Castillo's father testified during the penalty trial.[52] In the manner in which such evidence was presented, Mr. Castillo was faced with the beliefs held by the author of the report and the author's conclusions regarding the "feelings" held by Mr. Castillo's parents. However, Mr. Castillo was unable to confront the author regarding his conclusions and to demonstrate that their underlying basis was an inadequate and incomplete investigation of his circumstances. Mr. Castillo was denied the right of confrontation, the right to explain or deny the evidence against him, and due process.

2. Clark County Juvenile Detention Services (CCJDS) Behavioral Report

5. Bruce Kennedy read from a "behavioral report," dated June 14, 1982, which he did not draft:[53]

> ... William will always profess innocence. Lying does not seem wrong to him, even though there are witnesses, even the reporting counselor. William will deny any wrongdoing. William does not seem to believe that his actions have any affect on people around him so he does what he pleases no matter what the consequences.
>
> In summary William in this officer's opinion needs a very structured environment. He has to be constantly under safe supervision. If not, problems almost always occur.

Id. at 10-11. Once again, Mr. Castillo was faced with a juvenile detention worker's conclusion regarding his own feelings– "lying doesn't seem wrong to him." Additionally, the author concluded that Mr. Castillo needed a "structured environment" and must be "constantly under safe supervision." Yet Mr. Castillo was unable to confront the author regarding his biases, or demonstrate that these conclusions, and their basis, were unsupported–or even explain that such behaviors resulted from the unique circumstances

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[52] Joe Castillo, Mr. Castillo's adoptive father, provided a written declaration which is attached hereto as Ex. 28. Comparison of this declaration with Kennedy's excerpt reveals that the excerpt failed to fully demonstrate Joe Castillo's opinion.

[53] "Behavioral reports" are written reports about CCJDS detainees' "behavior that is exhibited in detention." Id. at 10 ("So this is a written report about Billy's behavior while he was in custody as a juvenile down at juvenile services.").

within Mr. Castillo's life. Mr. Castillo was denied the right of confrontation, the right to explain or deny the evidence against him, and due process.

3. Las Vegas Mental Health Center (LVMHC) Report

6. Bruce Kennedy read a LVMHC report, dated June 9, 1981, and drafted by the Medical Director, Dr. Barbara Hatcher:

> Billy's reported to fight a lot at school, not to pay attention to work assigned and to do whatever he wants. A school note has been attempted but Billy is reported to be immune to punishment.

Id. at 12. Mr. Castillo was confronted with a conclusion, by a medical doctor, that he was "immune to punishment." Morever, the excerpt read by Kennedy failed to demonstrate the source or basis for this conclusion–which was based upon hearsay information. Mr. Castillo was prevented from exploring the medical doctor's education, experience, her opportunity to observe Mr. Castillo and her qualifications to make such a conclusion. Mr. Castillo was also prevented from exploring the original source of the report, a school note, to determine who wrote the note, their biases or experience, and how the medical doctor came into possession of the note. Mr. Castillo was denied the right of confrontation, the right to explain or deny the evidence against him, and due process.

4. Psychiatric Evaluation

7. Bruce Kennedy testified about an "undated" psychiatric evaluation, by an "unnamed" psychiatrist, whose evaluation was the basis for a pre-sentence report. Id. at 13 ("This is a document that is supportive of the presentence report and it was a mental status exam and report."). Kennedy did not conduct the evaluation or draft the report. The report described Mr. Castillo as a "schizo" and suggested that Mr. Castillo "should be locked up." Id. at 14. Kennedy also read the following: "Billy told us about burning the house as if it were an accident and showed no emotional response." Id. at 13.

8. Mr. Castillo was denied the opportunity to ascertain what a "schizo" diagnosis entailed and upon what criterion the psychiatrist labeled him a "schizo." Mr. Castillo was prevented from determining whether the psychiatrist administered a battery of psychiatric, neurological, or psychiatric tests before his diagnosis, and whether the

results of any such tests supported this diagnosis. Finally, Mr. Castillo was unable to determine the qualifications and experience of this psychiatrist, how many children the psychiatrist saw each day; the psychiatrist's relationship to juvenile courts, and the underlying basis for the psychiatrist's subjective conclusions. Mr. Castillo was denied the right of confrontation, the right to explain or deny the evidence against him, and due process.

B. State's Exhibit #109

1. Dispositional Report

9. Bruce Kennedy read from a dispositional report, dated January 25, 1983, which he did not draft:[54]

> On January 1st, 1983 William was booked ... in detention at juvenile court services... This was after William and another boy ran away from Children's Behavioral Services. Both boys were picked up by authorities and book after investigation proved they were responsible for setting fires in Circus Circus Hotel and Castillo in a separate fire at the Oz Chinese Restaurant. William's attitude has been one of nonchalant, seeming uncaring about his detainment or the seriousness of the charges. He seems more concerned about impressing his peers and attention with the possible commitment to Elko or Spring Mountain Youth Camp. He feels it would be a lot of fun to be there.
>
> ...
>
> Both juveniles are using arson as a vehicle for attention and a way to strike back at other people. I believe this problem is extremely dangerous and should be dealt with as quickly as possible.

Id. at 16, 17. Mr. Castillo was confronted with the author's beliefs regarding his attitude toward the offense for which he was charged and placement at a rehabilitation center. Mr. Castillo was unable to determine the basis for such beliefs, the author's background, experience, or ability to work with children. It could not be established whether Mr. Castillo's "attitude" resulted from his relationship with the author, from the setting in which he was observed, or was innate. Mr. Castillo was denied the right of confrontation, the right to explain or deny the evidence against him, and due process of law.

[54] Kennedy opined that "somebody from the fire department" wrote the report. Id. at 16 ("So this is a report by a law enforcement officer as to what they found?").

2. Neurological Report

10. Bruce Kennedy testified about an undated report written by a Dr. Kirby Reed. Kennedy did not know Dr. Reed. Kennedy testified the "report indicates" Dr. Reed is "a neurologist." Id. at 17. Kennedy read the following excerpts from Dr. Reed's report into the record:

> [T]his ten year old male who demonstrates normal growth and early development presently neurological examination reveals neither hard nor soft findings. I do not feel that there is a neurological basis for the patient's ongoing behavioral difficulties. I consider him to have a personality disorder. I feel that ... he does need to be in at least a 24 hour residential placement for the safety not only of himself but for the general public.

Id. at 18.

11. Mr. Castillo was confronted with medical opinion from an unknown neurologist of unknown qualifications who presumed to make a psychological diagnosis.[55] He was confronted by the opinion of a medical doctor regarding socially appropriate treatment for Mr. Castillo while being denied the opportunity to explore the qualifications of the medical doctor to offer such an opinion. Further trial counsel could not ascertain what psychiatric or neurological tests Dr. Reed employed on Mr. Castillo, and whether his testing met normal professional standards necessary to support valid results. Mr. Castillo was denied the right of confrontation, the right to explain or deny, and due process.

C. State's Exhibit #110

1. Dispositional Report

12. Kennedy testified about a February 21, 1984 dispositional report. Kennedy did not write the report. Kennedy read the following to the jury:

> William continues to reside at the youth hospital since January 25th, 1983. Since his stay there he has undergone

[55] A Neurologist is a medical doctor specializing in the diagnosis and treatment of nervous system disorders, including diseases of the brain, spinal cord, nerves, and muscles. See http://www.neurologychannel.com/aneurologist.shtml (12/09/08). Medical doctors are not qualified, by medical training, to make psychological diagnosis.

> numerous tests including formal psychological testing, psychoeducational testing and psychiatric interviews and the like ... While no evidence of mental disorder or thought disorder was detected, William scored high in the area of delinquent behavior and hostility.

Id. at 20.

13. Mr. Castillo and trial counsel were confronted with a summary of mental health data that was prepared by an unknown author. Trial counsel could not test the author's capacity to assemble data, whether or not the author was exposed to all the data available or whether the author was competent to summarize mental health data. Trial counsel could not ascertain whether the tests were administered to create a valid result, or how these test results supported the author's summary. Mr. Castillo was denied the right of confrontation and due process.

2. Psychological Report

14. Bruce Kennedy testified about an undated psychological report attached to the February 21, 1984 dispositional report. Kennedy did not administer the neurological or psychiatric tests, nor did he write the report. Kennedy read the following to the jury:

> Billy was assessed using ... the Quay-Peterson Behavior Checklist, a Multiple Affect Checklist, MAACL, and the California Personality Inventory CPI. No evidence of mental disorder or thought disorder were evident, although on all three tests Billy scored high in the area of delinquent behavior and hostility... .
>
> ***
>
> ... There is no evidence of any disturbance in thought processes that would be based for his acting out in the school setting or his refusal to be cooperative in the classroom.
>
> ***
>
> There is no evidence to suggest that Billy has a thought disorder, mental disturbance or is psychotic. He is of above average intelligence and has no learning disabilities that interfere with his understanding. Billy is fully aware of what he is doing concerned only about what he wants and unconcerned about what he has to do to get his own way.

Id. at 23.

15. Mr. Castillo and trial counsel were confronted with specific psychological data (i.e., Quay-Peterson Behavior Checklist, a Multiple Affect Checklist, MAACL, and the California Personality Inventory CPI) without the opportunity to question the presenting witness about the validity of the data.[56] Trial counsel could not question the professional who evaluated Mr. Castillo about why Mr. Castillo scored high on delinquency and hostility, about whether this was a temporary effect relating to his placement or if the scores were a product of his background. Trial counsel could not contest how the evaluating official came to the conclusion that Mr. Castillo was aware of what he was doing and was unconcerned. Trial counsel was denied the opportunity to question how the mental health professional, who wrote the report, defined "mental disorder," "thought disorder," or "mental disturbance." Mr. Castillo was denied the right of confrontation, the right to explain or deny, and due process.

D. State's Exhibit #112

1. Nevada Youth Training Center (NYTC) Treatment Plan

16. Kennedy testified about a NYTC treatment plan filed with a juvenile court on May 22, 1984. Kennedy did not write the report. Id. at 25 ("I am the one that filed the document with the court; however, I'm not the writer of the actual document."). Kennedy read the following to the jury:

> Billy has had extensive testing done to determine the reason for his delinquent behavior. It was concluded that he has no thought disorder or mental disturbance. Billy is just unwilling to comply with accepted behaviors and is unwilling to accept responsibilities for his actions. His only concern seems to be self-gratification and shifting blame when confronted about his negative behavior... .

Id. at 26.

17. Mr. Castillo was confronted with conclusions about his mental states and attitudes. Trial counsel was deprived of the opportunity to question the person that formed

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[56] For example, the Quay-Peterson checklist is supposed to be administered to a care-giver. Mr. Castillo's status as a resident of either detention or a hospital suggested that the test might not have been administered to a long-term caregiver. http://vinst.umdnj.edu/VAID/TestReport.asp?Code=RBPC (December 10, 2008).

these conclusions. "Unwilling to comply" and "unwilling to accept responsibility" are not factual descriptions that can be measured or weighed; they are conclusions that describe a mental callousness or dangerousness to society. It was important for trial counsel to be able, at the very least, to examine the data supporting these conclusions. It was important for trial counsel to demonstrate that these mental states developed after Mr. Castillo was neglected and physically abused as a child. Trial counsel was prevented from examining the person who formed these conclusions and subsequently prevented from exposing the data which the conclusions relied upon. See Ex. 36, ¶26. Mr. Castillo was denied the right of confrontation and due process.

E. State's Exhibit #113

1. Juvenile Court Review Report

18. Kennedy testified about a December 19, 1985 juvenile court review report.[57] Kennedy did not write the report. Kennedy read the following to the jury:

> This counselor is of the opinion that William Castillo, although only 12 years of age, is a very sophisticated young man. He has learned that due to his age and his charm that he can make people feel sorry for him. It is this counselor's opinion that although William has had an abusive upbringing for the first few years, his present home situation and continued delinquent behaviors are of his own making. William knows the difference between right and wrong, however tends to live an immoral lifestyle. It seems that William feels that the world revolves around him and his needs must be met before anyone else's.
>
> ***
>
> This counselor is of the opinion that the Castillo family offered William a decent home with many opportunities to succeed.

Id. at 29, 30.

19. Mr. Castillo and trial counsel were confronted once again with opinion from an evaluator about Mr. Castillo's mental state, background, and current home-life. In addition, Mr. Castillo and trial counsel were confronted with a prediction about his

[57] According to Kennedy, "This is a court document given to the judge at a time of a court review." Id. at 27.

behavior. Trial counsel could not question the bias implied by the evaluator's comment that Mr. Castillo "can make people feel sorry for him," in contrast with the comment that he "had an abusive upbringing the first few years." Trial counsel could not ask if "people" should be justified in feeling sorry for him in light of his background or if he benefitted from "people" feeling sorry for him. Trial counsel was denied the opportunity to determine whether the evaluator (who wrote the report) was cognizant of Mr. Castillo's entire social history–including his mother's social history; whether he interviewed Mr. and Mrs. Castillo; and whether he interviewed Mrs. Castillo's family members. Trial counsel could not determine what Mr. Castillo's "immoral" lifestyle consisted of and whether he had any control over that "lifestyle" given his background and circumstances. Further trial counsel could not test how the evaluator determined what Mr. Castillo feels or how it was determined he "feels the world revolves around him." Mr. Castillo was denied the right of confrontation, the right to explain or deny such testimony, and due process.

F. State's Exhibit #119

1. Certification Report

20. Kennedy testified about an undated certification report written for a certification hearing.[58] Kennedy did not write the report. Kennedy read the following to the jurors:

> William's parents have tried for years to provide William with a proper home and controls. However, William has rejected any and all efforts by his parents to assist him. This counsel is of the opinion that William expects his parents to give him what he wants without regard to their own feelings or concerns. William wants no help from authority figures where William would have to give something in return. William always wants to wheel and deal and refuses to take any responsibilities for his actions.

Id. at 40-41.

[58] At a certification hearing, the issue before the judge is whether a juvenile should be tried (or "certified") as an adult. Id. at 38.

21. Mr. Castillo and trial counsel were confronted by a report, obviously written by either a prosecutor or some other person that was adverse to him. Trial counsel was denied the opportunity to expose the author's role in litigation against Mr. Castillo. Trial counsel was denied the opportunity to explore how much of Mr. Castillo's background the author understood prior to making the comments. The author, presumably could have relied only on a court file or a prior detention report to determine that Mr. Castillo rejected any and all efforts by his parents to assist him. The author presumably did not interview Mr. Castillo's father prior to forming his conclusions.[59] Trial counsel was denied the opportunity to expose the lack of adequate support for this author's opinion. Mr. Castillo was denied the right of confrontation, the right to explain or deny the information, and due process.

22. The prosecutor presented, through Kennedy, voluminous amounts of unsupported allegations regarding Mr. Castillo's attitudes when he was a child, unsupported medical opinion, and unsupported psychological opinion. Mr. Castillo and trial counsel were denied any opportunity to contest and explain or deny the damaging opinion, violating due process, the confrontation clause, and fundamental fairness.

23. To the extent that Mr. Castillo's counsel failed to identify and preserve this claim, Mr. Castillo's state and federal constitutional rights to the effective assistance of counsel were violated.

24. Mr. Castillo is entitled to relief.

[59] Mr. Castillo's adoptive father stated: "I actually believed that I could beat Billy's bad behavior out of him. The more he misbehaved, the more severe my beatings became. I recall a few occasions when I would beat Billy so badly that Barbara intervened out of fear that I might injure Billy." Ex. 28. Beating the bad behavior out of a child cannot objectively be equated with giving a child a chance and the child rejecting that chance.

CLAIM SIX

Mr. Castillo's death sentence is invalid under the state and federal constitutional guarantees of freedom of association, due process, equal protection, the effective assistance of counsel, fundamental fairness, and a reliable sentencing determination because prosecutors introduced evidence at the penalty trial that Mr. Castillo held racist "white supremacist" beliefs in violation of Dawson v. Delaware, 503 U.S. 159 (1992). U.S. Const. amends. I, V, VI, VIII & XIV; Nevada Const. art. I, §§ 1, 3, 4, 6 & 8

SUPPORTING FACTS

I. Introduction

1. Prosecutors violated Mr. Castillo's state and federal constitutional rights when they introduced evidence, during the penalty trial, that Mr. Castillo held beliefs associated with a "white supremacy" group which advocated "Pure Hate" and "White Power." Evidence of Mr. Castillo's personal or political views had no relevance to the penalty trial. Prosecutors introduced this evidence solely because they knew the jury would find these beliefs morally reprehensible. Mr. Castillo is entitled to relief.

II. Penalty Trial

2. During the penalty trial, Mr. Castillo presented testimony from Dr. Lewis Etcoff, a neuropsychologist. TT, 9/20/96 (afternoon session), at 53-107, Ex. 168 at 53-107. During his cross-examination, the prosecutor questioned Dr. Etcoff concerning Mr. Castillo's numerous tattoos and their significance:

Mr. Bell: Mr. Castillo has a vast amount of tattoos on his body, does he not?

Dr. Etcoff: Yes, he does.

Mr. Bell: And those have some significance to him; it that true?

Dr. Etcoff: Yes, it's true.

Mr. Bell: And I assume that when you asked him and he explained that they had some significance to you in reaching your overall conclusion; true?

Dr. Etcoff: Yes.

Id. at 102. The prosecutor further questioned Dr. Etcoff concerning specific tattoos and Mr. Castillo's alleged affiliation with a "white supremacy" group:

> Mr. Bell: "He states that he is a white supremacist, and he has tattoos stating 'Pure Hate' and 'White Power' on his body in addition to 36 swastikas all over his body with one prominent swastika just beneath his throat. He told me that the swastikas, quote, 'give me something to hate. In the joint it's a racial issue. It's a slap in their fucking face," true?
>
> Mr. Schieck: Without the fucking.
>
> Mr. Bell: Oh, I'm sorry.
>
> "It's a slap in their face." That's the next line.
>
> True?
>
> Dr. Etcoff: True.

Id. at 103.[60]

3. During closing arguments, the prosecutor again focused on Mr. Castillo's tattoos and the beliefs Dr. Etcoff thought were associated with such tattoos:

> The tattoos which apparently cover his body probably, as accurately as anything else, convey the personality, the attitude, the anger of this defendant. He has a tattoo which says pure hate, a tattoo which says white power, 36 swastikas all over his body, and on his lower back, he had someone inscribe 100 percent hostile.

TT, 9/24/96 (afternoon session), at 63-64, Ex 172 at 63- 64. The jury sentenced Mr. Castillo to death. TT, 9/25/96, at 5-10, Ex. 173 at 5-10.

III. Constitutional Violations

4. Prosecutors violated Mr. Castillo's state and federal constitutional rights when they introduced evidence which suggested that Mr. Castillo held the beliefs of a "white supremacist" advocating "Pure Hate" and "White Power." This evidence was irrelevant to any issue before the jury in the penalty trial because (1) Isabella Berndt's murder was not racially motivated; (2) such evidence did not support or assist in proving any aggravating circumstance; and, (3) such evidence did not, and could not, rebut Mr. Castillo's "good character" mitigation evidence. In short, the evidence alleged nothing

[60] Dr. Etcoff addressed Mr. Castillo's tattoos in a written report he provided trial counsel. Ex. 26. The prosecutor read from Dr. Etcoff's report.

more than to suggest that Mr. Castillo held beliefs which were generally condemned, yet Constitutionally protected.

A. The Offense Was Not Racially Motivated

5. Prosecutors argued that Mr. Castillo murdered Isabella Berndt for financial reasons, or to avoid identification. Prosecutors claimed that Mr. Castillo committed the murder during the course of a robbery or burglary– offenses which are financially motived. TT, 9/4/96, at 54-55, 56-57, 75, Ex. 166 at 54-55, 56-57, 75; TT, 9/19/96(morning session), at 6-7, Ex. 167 at 6-7; TT, 9/24/96 (afternoon session), at 7, Ex. 172 at 7. Prosecutors alleged five statutory aggravating circumstances–the fifth of which was "the murder was committed to receive money or any other thing of monetary value." Ex. 22 (citing NRS 200.033(6)). Prosecutors argued:

> In late November and early December ... Mr. Castillo needed money. He needed money to pay some legal fees for a matter that is not related and not at issue. He tried to borrow the money. At least Harry Kumma will come in and say that he tried to borrow it from me for legal fees and I was unwilling or unable to lend him the money. So by December 16th, Mr. Castillo had generated a plan to burglarize the home of Ms. Berndt... to get the money that he needed for another purpose.

TT, 8/29/96 (morning session), at 10, Ex. 162 at 10. Prosecutors further argued Mr. Castillo killed Mrs. Berndt in order to avoid arrest and prosecution:

> And ... the fifth legal aggravator ... is that the murder was committed to avoid lawful arrest. Now all of ... us that have been in this courtroom ... for the last several weeks know that William Castillo has been in the justice system for years and years and years. He understands arrests, jails, trials, prison, and we know that he said to his acquaintances and in his confession, "I was worried about the person seeing my face," referring to Isabella Berndt. He killed Mrs. Berndt in part because he didn't want her to see his face and identify him so that he might be lawfully arrested... . The State submits that at least, in part, the reason for killing Ms. Berndt was to avoid lawful arrest.

TT, 9/24/96 (afternoon session), at 8, Ex. 72 at 8.

6. Prosecutors never attempted to connect Mr. Castillo's abstract beliefs of "White Power" and "White Supremacy" to his actions or Mrs. Berndt's murder.

B. Mr. Castillo's Personal Beliefs Did Not Support Any Aggravating Circumstances

7. At the penalty trial, prosecutors sought to prove five statutory aggravating circumstances, which were identified in their "Notice of Intent to Seek Death Penalty": (1) Mr. Castillo was previously convicted of a felony involving the use of threat of violence to the person of another; (2) Mr. Castillo committed the murder during the commission of a robbery; (3) Mr. Castillo committed the murder during the commission of a burglary; (4) the murder was committed to avoid or prevent lawful arrest; and, (5) the murder was committed to receive money or another other thing of monetary value. Mr. Castillo's alleged beliefs relating to "White Power" and "White Supremacy" were not related to any statutory aggravating circumstance.

8. Prosecutors argued that Mr. Castillo was a future or continuing danger, which required the imposition of a death sentence. TT, 9/24/96 (afternoon session), at 17, 18, 24, 63, 65-66, Ex. 172 at 17, 18, 24, 63, 65-66. However, the prosecutors were prohibited from buttressing their argument with Mr. Castillo's abstract beliefs–unless they produced evidence, or proved in some other manner, that Mr. Castillo's beliefs played a role in his commission of violent or criminal acts. No such evidence was produced.

C. Mr. Castillo's Beliefs Did Not, and Could Not, Rebut his "Good Character" Mitigation Evidence

9. The limited and incomplete mitigation evidence presented on Mr. Castillo's behalf consisted in part on "good character" evidence. Mr. Castillo's former girlfriend, Tammy Jo Bryant, offered "good character" testimony, as did his mother, Barbara Wickham. See TT, 9/24/96 (morning session), at 14-50, Ex. 171 at 14-50. Although prosecutors were entitled to rebut allegations of "good character," they could not do so with the evidence of tattoos and alleged abstract beliefs. The prosecutors nakedly asserted Mr. Castillo held beliefs involving "White Power" or "White Supremacy," but failed to connect such beliefs to any act. Evidence of an abstract belief alone was not relevant to Mr. Castillo's penalty trial. The prosecutor erred in using Mr. Castillo's

abstract beliefs at his penalty trial, when there was no evidence those beliefs were related to any issue before the jury.

D. Prejudice

10. Presentation of the evidence of Mr. Castillo's tattoos, and the inferences that he held white supremacist beliefs, substantially prejudiced Mr. Castillo because it created an unacceptable risk that the jury premised its verdict on constitutionally protected–yet morally reprehensible–abstract beliefs involving race. Moreover, because prosecutors incorporated this evidence into its future dangerousness argument, the State cannot demonstrate the admission of this evidence was harmless beyond a reasonable doubt.

IV. Ineffective Assistance of Counsel

11. To the extent that this claim may later be held to be un-preserved, Mr. Castillo's state and federal constitutional rights to the effective assistance of trial counsel were violated by counsels failure to object and completely litigate this claim. To the extent that appellate counsel, or appointed counsel during Mr. Castillo's state post-conviction habeas proceedings, failed to identify, preserve and litigate this claim, their representation fell below an objectively reasonable standard, violating Mr. Castillo's state and federal constitutional right to their assistance.

12. Mr. Castillo is entitled to relief.

CLAIM SEVEN

Mr. Castillo's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, and a reliable sentence due to substantial and injurious effect of prosecutorial misconduct and overreaching, which distorted the fact finding process and rendered the penalty trial fundamentally unfair. U.S. Const. amends. V, VIII & XIV; Nevada Const. art. I, §§ 1, 3, 6 & 8.

SUPPORTING FACTS

I. Introduction

1. The prosecutors' closing arguments at the penalty trial violated Mr. Castillo's clearly established state and federal constitutional rights. These arguments unfairly infected the penalty trial and rendered the jury's verdict inherently unreliable. Mr. Castillo is entitled to relief.

II. Constitutional Violations

A. Mitigating Circumstances Which Were Not Raised By Mr. Castillo

2. The prosecutor, over Mr. Castillo's objection, identified mitigating circumstances which Mr. Castillo did not raise or introduce evidence to support:

> Mr. Bell: Just like aggravating circumstances, mitigating circumstances is a term of art. The legislature in the law specifically lists certain things that can be urged upon you as mitigating circumstances ...There are six things on that list in the statute and, quite frankly, the defense has conceded that four cannot and do not possibly apply to William Castillo.
>
> Let me go through the kind of things the legislature talks about as being mitigating so you can get a flavor for the kind of balancing that is expected.
>
> Number one, the defendant has no prior significant criminal history.
>
> Mr. Schieck: Your Honor, I'm going to object to arguing mitigating circumstances that don't apply to this case. It's improper argument.
>
> ***
>
> Mr. Bell: My response is ... that they are entitled to know what the legislature says is mitigating and realize that many of these

don't apply to consider the limited area of mitigation that does apply to this defendant at best.

Mr. Schieck: That's not the statutory scheme, your Honor. You don't weigh the mitigators that don't apply in deciding to give the weight to the mitigators that do apply. It is an improper factor into the weighing process to argue the other mitigators don't apply, therefore, this is a death penalty case.

The Court: Well, I don't think he is arguing that. So I will overrule the objection.

Mr. Bell: The State is not arguing that somehow this aggravates the circumstances more, it's just trying to educate you on what the legislature considers as mitigation.

The defendant has conceded ... that Mr. Castillo doesn't have any lack of significant prior criminal history... .

***

Number three, the victim was a participant in the defendant's criminal conduct. Obviously not applicable. Mrs. Berndt had nothing to do with her own death.

Number four, the defendant was an accomplice in a murder committed by another. Now this might be an argument that Ms. Platou might advance to her jury, but it is clear in this case who is the person that repeatedly and consistently viciously pummeled a crow bar into the face of Isabella Berndt and then smothered her out with a pillow and that person is sitting right there, Mr. Castillo.

Number five, that the defendant acted under the duress of another. Again, William Castillo was not a follower in some criminal enterprise of some other master mind. In fact, William Castillo was the prime mover in this incident.

TT, 9/24/96 (afternoon session), at 9-11, Ex. 172 at 9-11.

3. The prosecutor's comments violated Mr. Castillo's state and federal constitutional rights. If a prosecutor is allowed to argue the absence of mitigating circumstances, with the implication that absence of a mitigating circumstance is aggravating, then every murder will be aggravated unless the defendant presents some evidence of each statutory mitigating circumstance. In short, when the absence of a statutory mitigating circumstance becomes aggravating, the class of those defendants eligible for the death penalty is no longer narrow. Such circumstances violated Mr.

Castillo's state and federal constitutional rights to due process, fundamental fairness, and to be free from cruel and unusual punishment. Mr. Castillo is entitled to relief.

B. Arguing that Mr. Castillo is an Improbable Candidate for Rehabilitation

4. The prosecutor improperly expressed his personal opinion regarding Mr. Castillo's inability to be rehabilitated:

> This is the second phase of these proceedings. We call it the penalty hearing. It's not called a rehabilitation hearing. This defendant has had a long history of criminal conduct. He came up through the juvenile system. He graduated through each successive step and he ended up at the Nevada Youth Correction Center. He's had adult offenses for which he has been convicted and now he's committed a murder.
>
> So when we look to the purpose of a penalty hearing, I submit this defendant is past notions of rehabilitation.

Id. at 51.

5. The prosecutor's comments violated Mr. Castillo's state and federal constitutional rights. Prosecutors may not express their personal opinion regarding a capital defendant's guilt or death-worthiness (i.e., Mr. Castillo's inability to be rehabilitated) for at least two reasons. First, such comments conveyed the impression that evidence existed, which was not presented to the jury, to support the prosecutor's claim that Mr. Castillo cannot be rehabilitated. This argument created a constitutionally intolerable risk that Mr. Castillo's sentence was not based solely on the evidence before the jury. Second, the prosecutor's opinion carried with it the imprimatur of the Government, an attempt to induce the jury to trust the prosecutor's judgment rather than its own evaluation of the evidence.

C. Forcing Jurors to Choose Between Executing Mr. Castillo or an Innocent Person

6. The prosecutor improperly forced, over trial counsel's objection, jurors to choose between executing Mr. Castillo or a future injury to an innocent person:

> Mr. Harmon: ... whatever the decision is, you will be imposing a judgment of death and it's just a question of whether it will be an execution sentence for the killer of Mrs. Berndt or for a future victim of this defendant.

Mr. Schieck: I'm going to object, your honor, to the argument of future victims.

The Court: Sustained. The jury is admonished to disregard that argument.

Mr. Harmon: Your Honor, I am simply making the argument proved in Redmon v. State, future dangerousness. Future dangerousness to whom? It has to be not to dogs, cats, it has to be to individuals. The cases say that we may argue theories of penology and deterrence, reasons for punishment. The Pelagrini... case, the Jimenez case, the Snow case –

The Court: Yes, I understand, Mr. Harmon. I'll reverse the ruling. You are correct.

Id. at 65-66.

7. The prosecutor's argument violated Mr. Castillo's right to a reliable sentencing determination. Jurors were led to believe that they bear responsibility for an innocent future victim's death; this argument created a constitutionally unacceptable risk that Mr. Castillo's death sentence was based upon something other than the evidence before the jury, (i.e. emotion, fear of bearing responsibility for a death which could have been prevented). Mr. Castillo's jury was to render a verdict which was a morally reasoned response to the evidence before them. The prosecutor's argument improperly evoked the emotions and fears of the jury and encouraged them to ignore the trial judge's instructions.

D. Prejudice

8. The prosecutors' improper and prejudicial arguments substantially prejudiced Mr. Castillo. The argument increased the likelihood that (1) the jury premised its death sentence on emotion (i.e., fear) rather than moral reasoning; (2) the jury premised its death sentence on evidence which was not before them; (3) the jury penalized Mr. Castillo because his mitigating evidence did not include every statutory mitigating circumstance; and, (4) the jury failed to afford Mr. Castillo an individualized sentencing determination. The comments, as a whole, rendered the penalty trial fundamentally unfair.

9. Mr. Castillo is entitled to relief.

CLAIM EIGHT

Mr. Castillo's conviction and death sentence are invalid under the state and federal constitutional guarantees of due process, equal protection, the effective assistance of counsel, and a reliable sentencing determination because prosecutors introduced victim impact testimony which was so unduly prejudicial it rendered Mr. Castillo's trial fundamentally unfair. U.S. Const. amends. V, VI, VIII & XIV; Nevada Const. art. I, §§ 1, 3, 6 & 8.

SUPPORTING FACTS

I. Introduction

1. Prosecutors and the trial judge violated Mr. Castillo's state and federal constitutional rights when the prosecutors offered, and the trial judge admitted, unduly prejudicial victim impact evidence during both the guilt/innocence and penalty trials. The improper victim impact evidence rendered Mr. Castillo's guilt/innocence and penalty trials fundamentally unfair and his death sentence inherently unreliable. Mr. Castillo is entitled to relief.

II. Guilt/Innocence Trial

2. Prosecutors solicited irrelevant and prejudicial victim impact testimony during Mr. Castillo's guilt/innocence trial.

A. Jean Marie Hosking's Victim Impact Comments

3. Jean Marie Hosking, the victim's daughter, testified. On direct-examination, the prosecutor repeatedly elicited improper, irrelevant, and prejudicial victim impact statements from Ms. Hosking. The prosecutor repeatedly inquired into the victim's health and state of mind during the course of direct examination:

Harmon: As far as you know, was she in reasonably good heath for an 86 year old woman?

Hosking: Yes, sir.

***

Harmon: When you visited with her that Thanksgiving holiday and into the weekend, did she seem to be her normal self?

Hosking: Yes.

Harmon: Did she seem to be in reasonably good health at that time?

Hosking: Yes.

***

Harmon: Did she seem to be in good spirits?

Hosking: Yes, she did. She was very happy. She told me that she had just been to her doctor that week and had been given a clean bill of health.

TT, 8/29/96 (morning session), at 26, 29, and 30, Ex. 162 at 26, 29 and 30.

4. Information related to the victim's health or mental state at the time of the crime is irrelevant and unrelated to the elements of the charged offenses. Discussions of the victim's "clean bill of health" and the fact that she was "very happy" should not have been allowed because such statements were offered to evoke the jury's sympathies and impermissibly increased the risk that the jury considered Mr. Castillo's guilt in light of the evidence relating to the victim.

5. Ms. Hosking further produced a photograph of the victim and her granddaughter at the granddaughter's graduation. TT, 8/29/96 (morning session), at 45-46, Ex. 162 at 45-46.[61] While the admission of a photograph of the victim was proper, the admission of this photograph, portraying the victim celebrating with her granddaughter, was, once again, a blatant attempt to evoke the sympathies of the jury.

III. Constitutional Violations: Guilt/Innocence Trial

6. Ms. Hosking's testimony violated Mr. Castillo's state and federal constitutional rights because it presented irrelevant and prejudicial victim impact evidence in a stage of the proceedings where such testimony is inappropriate. Mr. Castillo's guilt was the only issue before the jury. In Nevada, NRS 200.030 required the prosecutor to prove, beyond a reasonable doubt, an unlawful, premeditated, willful, and

[61] Mr. Castillo filed motions in limine prior to the trial in an attempt to prevent such prejudicial photographs from being admitted before the jury. Trial counsel renewed these objections upon the introduction of the photograph. TT, 8/29/96 (morning session), at 46, Ex. 162 at 46.

deliberate killing. The testimony elicited from Ms. Hosking failed to directly, or circumstantially, prove any element of the offense. Evidence which failed to directly or circumstantially corroborate the prosecutors' theory of guilt should be excluded. This victim impact testimony did not directly or circumstantially bolster the prosecutor's case; the testimony was highly prejudicial and was presented only to evoke sympathy. The testimony diverted the jury's attention from the only issue before it and rendered Mr. Castillo's trial fundamentally unfair.

IV. Penalty Trial

7. Prosecutors presented the testimony of three victim impact witnesses during the penalty trial. Jean Marie Hosking, the victim's daughter, and Lisa Keimach and Ronda LaLicata, the victim's granddaughters, described the victim's life and the impact of her death on them individually and as a family. They testified to the impact of the victim's death on the greater community. Victim impact testimony is permissible only so long as such testimony does not introduce a legally impermissible level of emotion to the trial and encourage a verdict based on emotion, rather than reason.

A. Lisa Keimach

8. During Lisa Keimach's testimony, the prosecutor asked why she did not travel to Las Vegas immediately upon hearing of the victim's death. Keimach responded that she had "had a miscarriage the day before, and actually I was probably the last one to talk to my grandmother on the telephone, because I talked to her Saturday night and had a long conversation with her about that event. And I - - you know, I was supposed to be on bed rest for quite sometime." TT, 9/20/96 (afternoon session), at 11, Ex. 170 at 11. These circumstances, surrounding Keimach's ability to travel to Las Vegas, bore no direct relation to the effect of this offense on Keimach, or her family, and invited the jury to base its verdict on sentiment.

B. Jean Marie Hosking

9. During Jean Marie Hosking's testimony, she identified unique aspects of the victim's personality and character, and explained the impact of her death on the

family and greater community. Ms. Hosking relayed the following story:

> ... when she came home that night, she opened up her door and went in, had her dinner, watched a little t.v., and went to bed. And she always had a book beside her bed. She was always reading and I assumed had finished reading her story and took her glasses off, turned her light off, and went to sleep. And when she called and relayed this to me, it just scared me half to death. She felt this bump on her chest, and she came to, and it was a cat in her house that apparently had hidden in the closet or in a corner someplace until after she was asleep. And so she was awaken with quite a start. And I said at that time, if she had a weak heart, I don't know if she would have made it through that scare. It was quite scary.

Such testimony was not constitutionally permissible. Hosking's story, describing a time when the victim was awoken with "quite a start" was sufficiently similar to the circumstances of this offense and essentially encouraged Mr. Castillo's jury to infer the emotions which the victim experienced. TT, 9/20/96 (afternoon session), at 43-44, Ex. 170 at 43-44.

10. Jean Marie Hosking requested permission to "quote a few things that people wrote to me in the sympathy cards that I received after my mom was killed." TT, 9/20/96 (afternoon session), at 45-46, Ex. 170 at 45-46. Mr. Castillo's trial counsel failed to review the contents of the cards, failed to request the trial judge to review the contents of the cards before he made his ruling, and failed to object to Hosking's request. Hosking stated that she "got so many beautiful cards, at least a hundred or a hundred and fifty cards, from all walks of our life." Id. at 46.

11. Hosking read from several of the sympathy cards she received:

> From one of my mom's cousins: I sometimes wonder what Isabelle would have said had it been one of her dear friends or neighbors. She never said bad things about anybody and was so proud of her homes, the gifts of health, mental and physical, that allowed her independence.
>
> From some of her teacher friends: Bell, as she was called by her friends, was my mentor, my teacher, my friend and a later dear friend to my whole family.
>
> And from another one: She was a wonderful role model.
>
> From one of mom's neighbors: The best neighbor and good friend I could have had for the past 35 years.
>
> One of mom's students that was in one of her first classes, and she

was 18 years old, and he was in eighth grade and bigger than she, he passed away a year or so ago.

And his wife wrote to me, and she said: Isabelle was a very special lady, and her guidance and teaching to a mischievous little boy in Avon, South Dakota stayed with John through his lifetime.

And this student ... was mom's 50 years ago. And every year on her birthday and at Christmas, John would call her and wish her glad tidings.

Those are just a very few.

Id. at 46-47. Through Ms. Hosking's testimony, prosecutors illustrated the emotional statements of some one hundred fifty persons--with no understanding of their connection to the victim. The testimony related to the sympathy cards, and the contents of those cards, was offered solely to evoke the jury's emotions and sympathy, and invited the jury to sentence Mr. Castillo to death based upon the character of the victim.

V. Constitutional Violations: Penalty Trial

12. Victim impact evidence is not per se inadmissable. However, such evidence may rise to the level where it becomes so inflammatory or unduly prejudicial as to render a trial fundamentally unfair. Death sentences must be premised on a morally reasoned response to the evidence before the jury--the aggravating and mitigating circumstances contemplated by statute. Evidence which creates an unreasonable risk that the jury's verdict will be premised upon passion or emotion must be excluded. If not, that sentence is inherently unreliable.

13. Keimach and Hosking's victim impact testimony created an unacceptable risk that the jury's verdict was their emotional response to such evidence and made Mr. Castillo' penalty trial fundamentally unfair and his sentence unreliable.

14. Mr. Castillo is entitled to relief.

CLAIM NINE

Mr. Castillo's conviction and death sentence violated his state and federal constitutional guarantees of due process, equal protection, effective assistance of counsel, and a reliable sentencing determination because the trial judge allowed the prosecutor to elicit testimony of Mr. Castillo's other criminal acts despite a pretrial ruling which excluded such evidence. U.S. Const. amends. VI, VIII & XIV; Nevada Const. art. I, §§ 1, 3, 6 & 8.

SUPPORTING FACTS

1. Mr. Castillo filed a pre-trial motion to exclude evidence that Mr. Castillo sought money in order to retain an attorney for a separate and previous criminal charge. Ex. 81. The trial judge granted Mr. Castillo's motion in part. TT, 8/12/96, Ex. 155. The trial judge allowed the prosecutor to offer evidence that Mr. Castillo sought financial assistance to pay his attorney. The prosecutor was precluded from introducing evidence related to the nature of the legal services. Id.

2. Prosecutors offered the testimony of Harry Kumma, Jr. TT, 8/29/96 (morning session), at 68-80, Ex. 162 at 68-80. Kumma was a roofer who worked at Dean Roofing Company with Mr. Castillo. Kumma arranged for Mr. Castillo to assist him on a "side" roofing job at the victim's house, weeks before this offense. Kumma testified concerning his relationship with Mr. Castillo and Mr. Castillo's financial issues:

Prosecutor:	Were you aware, in the latter part of November or December, of anything about Mr. Castillo's financial circumstances?
Trial Counsel:	Objection, your honor, relevance.
Prosecutor:	Let me–
Trial Judge:	Overruled.
Prosecutor:	Let me be more blunt. Did he ever ask you to borrow money?
Harry Kumma, Jr.:	Yes, sir, on one occasion.
Prosecutor:	And without saying specifically what for, how much did he ask for?

Prosecutor: Did he get the money from you?

Harry Kumma, Jr.: I believe he needed to borrow $350, I believe, and --

Prosecutor: What did you tell Mr. Castillo?

Harry Kumma, Jr.: I really wasn't in a financial position to be lending any money to anybody.

Prosecutor: And that's what you told him?

Harry Kumma, Jr.: Yes, sir.

(Off the record discussion not reported)

Prosecutor: Did you understand that the money was to pay a lawyer?

Trial counsel: Objection, your honor, relevance.

Trial Judge: Overruled.

Harry Kumma, Jr.: I can't remember the exact conversation, but I was under the impression it was for another case that he had ongoing.

TT, 8/29/96 (morning session), at 77-79, Ex. 162 at 77-79. Through Kumma's testimony, the jury learned that Mr. Castillo had "another case," which implied Mr. Castillo engaged in previous criminal conduct. Id. at 79 (emphasis added).

3. Trial counsel moved for a mistrial based on Kumma's improper testimony. TT, 8/29/96 (morning session), at 93-95, Ex. 162 at 93-95. The trial judge denied the motion. Id. at 95.

4. During his closing argument, the prosecutor emphasized Harry Kumma, Jr.'s testimony:

> Connecting point number two, a motive to steal. By his conversation about the key, Mr. Castillo apparently had a motive to enter. The only reason for entering would be to take property. He told his girlfriend, Tammy Jo Bryant, he told Kirk Rasmussen on that fateful Monday, December the 18th, after this happened, and he told the police, "It was Christmas time. I was broke. I couldn't even get family members a tape or other things and I needed $350 to pay attorney's fees and the seed of the idea was put in my mind by my old lady," by Tammy Bryant, "because we were short of money and she didn't get a check, a little care package from friends like she had hoped to get," and you may remember, Harry Kumma testified that the defendant asked him for a three hundred fifty dollar loan to pay his attorney fees and Kumma didn't have it.

TT, 9/4/96, at 61, Ex. 166 at 61 (emphasis added).

5. Harry Kumma Jr.'s reference to Mr. Castillo's other "case," and the prosecutor's emphasis on his testimony, improperly suggested to the jury that Mr. Castillo committed previous criminal offenses. Such testimony and argument violated Mr. Castillo's state and federal constitutional rights to a fair trial.

6. The jury could have inferred from Harry Kumma Jr.'s testimony that Mr. Castillo was a person of disreputable or bad character, inclined to commit criminal offenses. The jury was erroneously allowed to consider Mr. Castillo's previous bad acts in their consideration of his guilt. The trial judge should have granted Mr. Castillo's motion for a mistrial.

7. Mr. Castillo's state and federal constitutional rights were violated. Mr. Castillo is entitled to relief.

CLAIM TEN

Mr. Castillo's conviction and death sentence are invalid under the state and federal constitutional guarantees of due process, equal protection, a public trial, freedom of the press, a reliable sentence, effective assistance of counsel, and adequate review of the sentence of death due to the trial judge's failure to record critical proceedings. U.S. Const. art. VI; amends. I, V, VI, VIII & XIV; International Covenant on Civil and Political Rights, art. XIV; Nevada Const. art. I, §§ 1, 3, 4, 6 & 8.

SUPPORTING FACTS

1. Numerous portions of Mr. Castillo's trial were closed to the public and no record was preserved of these off-the-record bench conferences.[62]

2. The off-the-record bench conferences and conversations, were never transcribed. The trial judge failed to take any measures to effectuate the public's interest in observing and commenting on these judicial proceedings. Mr. Castillo is informed and believes, and therefore alleges, that during these unrecorded conferences, the trial judge took material, substantial actions, including ruling on evidentiary matters, ruling on juror excuses, and establishing courtroom procedure and scheduling. Such proceedings are integral parts of a criminal case in general, and of Mr. Castillo's capital murder case in particular.

3. The trial judge provided no explanation, and failed to articulate any reason, for the failure to record critical proceedings in Mr. Castillo's trial, and no such reasons exist.

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[62] Off-the-record bench conferences in the guilt/innocence phase of Mr. Castillo's trial can be located on the following pages: TT, 8/26/96 at 11, 26, and 31, Ex. 157 at 11, 26 and 31; TT, 8/27/96 (afternoon session, 2:10pm) at 3, 14, 19, 34, 38, 52, and 54, Ex. 158 at 3, 14, 19, 34, 38, 52 and 54; TT, 8/27/96 (afternoon session, 4:40pm) at 66, Ex. 159 at 66; TT, 8/28/1996 (morning session) at 71, Ex. 160 at 71; TT, 8/28/1996 (afternoon session) at 94, Ex. 161 at 94; TT, 8/29/96 (morning session) at 62, 68, 78, 79, and 88, Ex. 162 at 62, 68, 78, 79, and 88; TT, 8/29/96 (afternoon session) at 7, and 76, Ex. 163 at 7, and 79; TT, 9/3/96 (morning session) at 15, 31, 32, 52, 70,77, and139, Ex. 164 at 15, 31, 32, 52, 70, 77, and 139; TT, 9/3/96 (afternoon session) at 84, 88, Ex. 165 at 84, and 88; TT, 9/4/96 at 8, 9, 13, 21, and 83, Ex. 166 at 8, 9, 13, 21, and 83. Off-the-record bench conferences in the penalty phase of Mr. Castillo's trial can be found on the following pages: TT, 9/19/96 (morning session) at 66, 77, 87, 89, and 115, Ex. 169 at 66, 77, 87, 89, and 115; TT, 9/24/96 (morning session) at 6, 21, and 45, Ex. 171 at 66, 67, 87, 89; TT, 9/24/96 (afternoon session) at 3, 42, 66, and 67, Ex. 172 at 3, 42, 66, and 67.

4. The failure of the trial judge to secure an adequate record of these capital proceedings violated Mr. Castillo's constitutional rights, as well as those of the general public to free and open proceedings. The trial judge's failure to secure an adequate record violated Mr. Castillo's rights under international law, which guaranteed every person a fair and public hearing by a competent, independent, and impartial tribunal.[63]

5. The failure of trial counsel to request the transcription of these proceedings, or to object to the failure to transcribe the proceedings, violated Mr. Castillo's constitutional rights which guaranteed him the right to effective assistance of counsel in securing a fair and open trial as well as an adequate record of the proceedings against him.

6. These constitutional violations were prejudicial per se; no showing of specific prejudice is required in order to obtain relief for a violation of the public trial guarantee. The trial judge's failure to secure an adequate record substantially and adversely affected Mr. Castillo's state and federal constitutional rights. Prosecutors cannot show, beyond a reasonable doubt, that the courtroom closures, or failure to record significant events in Mr. Castillo's trial, did not affect Mr. Castillo's conviction and sentence. Mr. Castillo is entitled to relief.

[63] International Covenant on Civil and Political Rights, Article XIV.

CLAIM ELEVEN

Mr. Castillo's conviction and sentence are invalid under the state and federal constitutional guarantees of due process, equal protection, and a reliable sentence due to the application, in this case, of NRS 193.165, Nevada's deadly weapon enhancement statute. U.S. Const. amends. V, VIII & XIV; Nevada Const. art. I, §§ 1, 3, 6 & 8.

SUPPORTING FACTS

1. Mr. Castillo was convicted of Robbery, where the victim was Sixty-Five Years or Older, and First-Degree Murder. Mr. Castillo was sentenced to death for the First Degree Murder conviction and the trial judge sentenced Mr. Castillo to One Hundred Eighty Months incarceration for the Robbery, with an equal and consecutive term of One Hundred and Eighty Months, for the use of a deadly weapon during the robbery.[64] TT, 11/04/96, at 9, Ex. 174 at 9; Ex. 1, at 3.

2. The statute creating an equal and consecutive term for the use of a deadly weapon in the commission of a felony, see NRS 193.165, was unconstitutionally vague and overbroad, violating due process, equal protection, and the right to a reliable sentence.

3. A statute is void for vagueness, and violates due process, if it fails to sufficiently define a criminal offense such that a person of ordinary intelligence would understand what conduct is prohibited, or if it allows arbitrary or discriminatory enforcement. Phelps v. Budge, 188 Fed.Appx. 616 (9th Cir. 2006); State v. Colosimo 122 Nev. 950, 142 P.3d 352 (2006). Because the Nevada deadly weapon enhancement statute, NRS 193.165, invited authorities to enforce it in an arbitrary or discriminatory manner, it was unconstitutional.

4. In 1996, at the time of Mr. Castillo's trial, NRS 193.165 applied a statutory definition of "deadly weapon," which considered the manner in which an instrument is

[64] The jury's verdict made no reference to any finding of the use of a deadly weapon in association with the robbery. Ex. 24. Mr. Castillo's indictment did not include an allegation that Mr. Castillo used a deadly weapon in association with a Robbery. Ex. 4 (Amended Indictment).

used (the "functional test"), and whether the instrument was likely to cause serious injury or death (the "inherently dangerous test"). Clem v. State 119 Nev. 615, 619, 81 P.3d 521, 524 (2003). The "functional test" defined a deadly weapon as:

> Any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.

NRS 193.165(6)(b). These considerations allowed a deadly weapon finding in every case involving serious bodily injury or death–it made no difference if the instrument used was a hard cover book, or a bazooka.

5. Allowing a deadly weapon finding, based solely upon the consequences of the offense, invited the arbitrary or discriminatory application of the enhancement. A sentencing enhancement should prevent or prohibit a potential defendant from using a deadly instrument in their criminal offense. However, with its focus only on the consequences of an offense, Nevada failed to accomplish this goal. At the prosecutor's discretion, the Nevada deadly weapon enhancement simply increases the sentence of any defendant whose crime caused serious bodily injury or death. The enhancement made no distinction how the injury or death occurred–whether it was by the defendant's hands or involved a weapon of mass destruction.

6. Under the Nevada statute, prosecutors have discretion to enhance any defendant's sentence whenever serious bodily injury or death occurred. In other words, it falls to the prosecutor to interpret the statutory language, "under the circumstances in which it is used," and determine whether a deadly weapon enhancement should be sought. Nevada's statute, by allowing the prosecutor open and unfettered discretion to seek a deadly weapon enhancement, is subject to arbitrary and discriminatory enforcement. A deadly weapon enhancement was not imposed upon a defendant who sought to commit a crime with an instrument which was intended for that purpose, or which was dangerous. Under the Nevada statute, the intent of the defendant was irrelevant.

7. Because the Nevada statute imposing a sentencing enhancement for the use of a deadly weapon was so vague as to allow its application at the discretion of the

prosecutor, it was subject to arbitrary and discriminatory enforcement and violated due process.

8. This claim is of obvious merit. To the extent this claim was never preserved or raised by Mr. Castillo's previous counsel at any stage of these proceedings, Mr. Castillo's state and federal constitutional rights were violated.

9. Mr. Castillo is entitled to relief.

CLAIM TWELVE

Mr. Castillo's sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, and a reliable sentence because the trial judge enhanced Mr. Castillo's sentence in accord with NRS 193.165, Nevada's deadly weapon enhancement statute when neither the jury verdict nor the indictment supported that enhancement. U.S. Const. amends. V, VIII & XIV; Nevada Const. art I, §§ 1, 3, 6 & 8.

SUPPORTING FACTS

1. Mr. Castillo was convicted of Robbery, where the victim was Sixty-Five Years or Older. The trial judge sentenced Mr. Castillo to incarceration for One Hundred Eighty Months for the Robbery, and an equal and consecutive term of One Hundred and Eighty Months for the use of a deadly weapon during the Robbery. TT, 11/04/96, at 9, Ex. 174 at 9; and Ex. 1, at 3. The jury's verdict did not include a finding that a deadly weapon was used during the commission of the robbery. Ex. 24. The indictment did not allege that Mr. Castillo used a deadly weapon to commit robbery. Ex. 4. The enhancement for the use of a deadly weapon was invalid because it was not supported by an indictment, or the jury's verdict.

2. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). This requirement recognizes longstanding precedent and preserves a defendant's constitutional rights to a jury trial. As such, the requirement that all matters which enhance a sentence must be found by a jury is no mere procedural formality. It is the fundamental reservation of power for the jury within our constitutional structure. A trial judge's authority to impose a sentence on a defendant arises wholly from the jury's verdict. Id. at 306, 2539.

3. Specifically, at the time of Mr. Castillo's trial, Nevada's statute regarding an enhancement for a deadly weapon, NRS 193.165(1), provided that a crime committed with the use of a deadly weapon shall be enhanced by imprisonment for a term equal to

and in addition to the term of imprisonment prescribed by statute for the crime. However, NRS 193.165(2), recognized that the enhancement "does not create any separate offense but provides an additional penalty for the primary offense, whose imposition is contingent upon the finding of the prescribed fact." Id.; Stroup v. State, 110 Nev. 525, 874 P.2d 769, 771 (1994).

4. The Nevada Supreme Court held:

> If it is not clear whether the weapon is deadly, the jury must then determine that issue in addition to whether the weapon was used to commit the crime. [citing] Zgombic v. State, 106 Nev. 571, 577, 798 P.2d 548, 551 - 552. Regardless of whether the weapon is deadly or not, the jury *must* determine whether that weapon was indeed used to commit the crime before NRS 193.165 may be utilized to enhance a defendant's sentence.

Id. at 528, 874 P.2d at 771 (emphasis in original). Mr. Castillo's jury never found, and were never asked to find, that the crow bar allegedly used in this offense was a deadly weapon used in the robbery. The absence of jury fact findings, in accord with Stroup and Apprendi, rendered the imposition of a deadly weapon enhancement to Mr. Castillo's robbery conviction invalid. Mr. Castillo is entitled relief.

5. This claim is of obvious merit and, to the extent that this claim was never preserved or argued by any of Mr. Castillo's previous counsel, at any stage of the proceedings, Mr. Castillo's state and federal constitutional rights to the effective assistance of counsel were denied.

6. Mr. Castillo is entitled to relief.

CLAIM THIRTEEN

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

SUPPORTING FACTS

A. Lethal Injection Constitutes Cruel and Unusual Punishment

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

2. The Nevada Department of Corrections did not release a redacted copy of its "Confidential Execution Manual," until April 2006. Ex. 142. The manual was amended at least twice. Ex. 142 & 142-A. The Nevada execution protocol requires that execution by lethal injection will be carried out using 5 grams of sodium thiopental, a barbiturate typically used by anesthesiologists to induce temporary anesthesia; 20 milligrams of Pavulon, a paralytic agent; and 160 milliequivalents of potassium chloride, a salt solution that induces cardiac arrest. Id.; see Ex. 144, at 3. Sodium Pentothal is a brand name for the generic drug sodium thiopental. Pavulon is a brand name for the generic drug pancuronium bromide.

3. Competent, ethical physicians cannot administer lethal injection because the ethical standards of the American Medical Association prohibit physicians from participating in an execution other than to certify that a death has occurred.[65] American Medical Association, House of Delegates, Resolution 5 (1992); American Medical Association, Judicial Counsel, Current Opinion 2.06 (1980). Thus, lethal injection is not administered by competent medical personnel.

[65] In spite of the American Medical Association's position, the Nevada execution protocol contemplates that a physician, in conjunction with a "staff pharmacist" determine the correct dosage of lethal substances to be used in an execution. Ex. 142-A at 8.

4. Lethal injection conducted by untrained personnel using the three "lethal substances" specified by Nevada's execution protocol creates an unnecessary risk of undue pain and suffering because Nevada's procedures for inducing and maintaining anesthesia fall below the medical standard of care for the use of anesthesia prior to conducting painful procedures. See Ex. 146 at ¶14-15, 18. The humaneness of execution by lethal injection is dependent upon the proper administration of the anesthetic agent, sodium thiopental. In the surgical arena, general anesthesia can be administered only by physicians trained in anesthesiology or nurses who completed the necessary training to be Certified Registered Nurse Anesthetists (CRNAs). Id. at ¶ 23. Nevada's execution manual does not specify what, if any, training in anesthesiology the person(s) administering the lethal injection must have. If the untrained executioner fails to successfully deliver a quantity of sodium thiopental sufficient to achieve adequate anesthetic depth, the inmate will feel the excruciating pain of the subsequent injections of pancuronium bromide and potassium chloride. Id. at ¶ 17; Leonidas G. Koniaris et al., Inadequate Anaesthesia in Lethal Injection for Execution, The Lancet, Vol. 365, April 16, 2005, at 1412-14, see Ex. 145. According to Dr. Mark Heath, a board-certified anaesthesiologist who reviewed the Nevada Department of Corrections' previous Execution Manual,

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

See Ex. 146. Moreover, according to Dr. Heath,

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

Id.

5. Nevada's execution procedures are vulnerable to many potential errors in administration that would result in a failure to administer a quantity of sodium thiopental sufficient to induce the necessary anesthetic depth. The risk of error is compounded by Nevada's use of inadequately trained personnel. Id. at ¶ 21-22. The potential errors include: errors in preparing the sodium thiopental solution because sodium thiopental has a relatively short shelf-life in liquid form, it is distributed as a powder and must be mixed into a liquid solution prior to the execution, Id. at ¶ 19, errors in labeling the syringes, errors in selecting the syringes during the execution, errors in correctly injecting the drugs into the IV, leaks in the IV line, incorrect insertion of the catheter, migration of the catheter, perforation, rupture, or leakage of the vein, excessive pressure on the syringe plunger, errors in securing the catheter, and failure to properly flush the IV line between drugs. Id. at ¶ 22.

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

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

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

7. Nevada's lethal injection protocol fails to account for the foreseeable circumstance that the executioner(s) will be unable to obtain intravenous access by a needle piercing the skin and entering a superficial vein suitable for the reliable delivery of drugs. See Ex. 146 at ¶ 33. Inability to access a suitable vein is often associated with past intravenous drug use by the inmate. However, medical conditions such as diabetes or obesity, individual characteristics such as heavily pigmented skin or muscularity, and the nervousness caused by impending death can impede peripheral IV access. See Deborah W. Denno, When Legislatures Delegate Death: the Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What it Says About Us, 63 Ohio St. L.J. 63, 109-10 (2002). Typically, when the executioner is unable to find a suitable vein, the executioner resorts to a "cut down," a surgical procedure used to gain access to a functioning vein. When performed by a non-physician, the risks are great. When deep incisions are made there is a risk of rupturing large blood vessels causing a hemorrhage, and if the procedure is performed on the neck, there is a risk of cardiac dysrhythmia (irregular electrical activity in the heart) and pneumothorax (which induces the sensation of suffocation). In addition, the cut down procedure causes severe physical pain and obvious emotional stress. This procedure should occur only in a hospital or other appropriate medical setting and should be performed only by a qualified physician with specialized training. See Ex. 143 (Amicus Brief of Drs. Dill, Gogan, Kalkut, Mitchell, Mobley, and Winternitz on Writ of Certiorari to the United States Supreme Court, Nelson v. Campbell, No. 03-6821, dated Feb. 4, 2004). Nevada's execution manual recognizes that a "sterile cut-down tray" may be required equipment "if necessary," see Ex. 142 at 7, but does not specify who determines when a cut down is necessary, how that determination is made, or the training or qualifications of the personnel who perform a cut down.

B. Nevada's Execution Protocol Is Cruel and Unusual

8. The United States Supreme Court considered the constitutionality of the Kentucky execution protocol in Baze v. Rees, 128 S.Ct. 1520 (2008). The plurality holding in Baze, which upheld the constitutionality of a lethal injection execution

protocol, specifically relied upon the detailed and codified guidelines for execution adopted by Kentucky. Id. (Roberts, C.J., plurality opinion). To the extent that the Kentucky execution protocol was constitutional, it was because the extensive guidelines adopted by Kentucky ensured that a lethal injection execution did not inflict unnecessary pain and suffering. Id.

9. No Nevada court has ever reviewed the Nevada execution protocol, in light of Baze, to ensure that a lethal injection execution did not inflict unnecessary pain and suffering. To the extent that any previous holding of this Court is in conflict with Baze, see McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004), Baze will control. U.S. Const. art. VI (Supremacy Clause).[66]

10. A constitutional challenge to the lethal injection protocol will prevail upon proof that the protocol created a demonstrated risk of severe pain and that the risk is objectively intolerable. Baze, 128 S.Ct at 1531. The plurality stated:

> Our cases recognize that subjecting individuals to a risk of future harm—not simply actually inflicting pain—can qualify as cruel and unusual punishment. To establish that such exposure violates the Eighth Amendment, however, the conditions presenting the risk must be "sure or very likely to cause serious illness and needless suffering," and give rise to "sufficiently imminent dangers." [citing] Helling v. McKinney, 509 U. S. 25, 33, 34–35 (1993) (emphasis added). We have explained that to prevail on such a claim there must be a "substantial risk of serious harm," an"objectively intolerable risk of harm" that prevents prison officials from pleading that they were "subjectively blameless for purposes of the Eighth Amendment."

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[66] U.S. Const. art. VI provides in part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id. at 1530-1531.[67] No court ever considered whether the Nevada execution protocol satisfied this standard.

11. Nevada's execution protocol does not specify what, if any, training in anesthesiology the person(s) administering the lethal injection must have. If an untrained or unskilled executioner failed to deliver sufficient sodium thiopental to ensure adequate anesthetic depth, the inmate will feel the excruciating pain of the subsequent injections of pancuronium bromide and potassium chloride.[68] The failure to ensure that a person properly trained and practiced in the institution of intravenous lines, and the administration of anesthetic drugs through such lines, creates a subjective risk of serious harm and is objectively intolerable. Moreover, the failure to adopt and practice appropriate execution procedures to assess and ensure the appropriate anesthetic depth creates a substantial risk of serious harm that is objectively intolerable.

12. In Baze, the Supreme Court noted the dangers associated with the inadequate administration of sodium thiopental in a state sponsored execution:

> ... failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride.

Id. at 1533. The plurality noted that this danger, under the Kentucky execution protocol, was not substantial:

> ... If, as determined by the warden and deputy warden through visual inspection, the prisoner is not unconscious within 60 seconds following the delivery of the sodium thiopental... .

***

[67] Justice Thomas, in his concurring opinion, reiterated this standard; "As I understand it, that opinion would hold that a method of execution violates the Eighth Amendment if it poses a substantial risk of severe pain that could be significantly reduced by adopting readily available alternative procedures." Baze, 128 S.Ct. at 1556 (Thomas, J., Concurring).

[68] A majority of the Supreme Court appeared to agree that an injection of pancuronium bromide or potassium chloride after no, or insufficient, sodium thiopental was cruel and unusual punishment. See and compare Baze, 128 S.Ct. at 1525 (Roberts, C.J–plurality); Id. 128 S.Ct. at 1563 (Breyer, J., concurring); Id. at 1542 (Stevens, J., concurring); Id. at 1567 (Ginsburg, J., dissenting).

> ... Kentucky has put in place several important safeguards to ensure that an adequate dose of sodium thiopental is delivered to the condemned prisoner. The most significant of these is the written protocol's requirement that members of the IV team must have at least one year of professional experience as a certified medical assistant, phlebotomist, EMT, paramedic, or military corpsman. ... Kentucky currently uses a phlebotomist and an EMT, personnel who have daily experience establishing IV catheters for inmates in Kentucky's prison population. ... Moreover, these IV team members, along with the rest of the execution team, participate in at least 10 practice sessions per year. ... These sessions, required by the written protocol, encompass a complete walk-through of the execution procedures, including the siting of IV catheters into volunteers.
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> In addition, the presence of the warden and deputy warden in the execution chamber with the prisoner allows them to watch for signs of IV problems, including infiltration. Three of the Commonwealth's medical experts testified that identifying signs of infiltration would be "very obvious," even to the average person, because of the swelling that would result. ... Kentucky's protocol specifically requires the warden to redirect the flow of chemicals to the backup IV site if the prisoner does not lose consciousness within 60 seconds. ... In light of these safeguards, we cannot say that the risks identified by petitioners are so substantial or imminent as to amount to an Eighth Amendment violation.

Id. at 1528, 1533-1534. It was the safeguards instituted by Kentucky to ensure that sodium thiopental rendered the inmate unconscious which ultimately satisfied the constitutional requirements.

13. The safeguards in the Kentucky execution protocol, relied upon by the plurality in Baze, are absent from the Nevada execution protocol. Nevada's execution protocol only required that "appropriate medical services personnel" perform a venipuncture.[69] After the venipuncture, the "medical services personnel will then leave the execution chamber." Ex. 142-A. The protocol does not designate who will administer the lethal substances, who will determine whether the lethal substances were appropriately administered, or who is responsible to determine when a condemned inmate requires further sedation. The Nevada execution protocol does not designate the training for any of the execution team members. Finally, the Nevada execution protocol does not

[69] The "execution checklist" attached to a previous execution protocol suggested Nevada contracted with the Carson City Fire department to provide emergency services personnel to assist in an execution. However, the Nevada execution protocol did not designate the training and experience of those personnel and never designated what responsibilities these personnel have in an execution.

require a regular or routine "walk through of the execution procedures, including the siting of IV catheters into volunteers." Nevada's protocol offers little or no safeguards to eliminate the substantial or imminent risks an inmate will suffer excruciating pain of an injection of pancuronium bromide and potassium chloride.

14. The Nevada execution protocol provides that, after the lethal substances are administered, "the attending physician or designee and coroner shall then determine whether it was sufficient to cause death. If the injections are determined to be insufficient to cause death, the third set of lethal injections shall be administered." Ex 142-A. Therefore, under the Nevada execution protocol, an inmate who was never appropriately rendered unconscious, suffering the painful effects of the lethal chemicals, will be evaluated by a physician or coroner after an undesignated amount of time, and will possibly suffer further painful lethal injections. Such a protocol unquestionably poses a substantial risk of serious harm. See Ex. 142-A (demonstrating botched lethal injection executions and risk of such a result in Nevada).

15. If terror, pain, or disgrace are "superadded" to punishment, such punishment violates the Eighth Amendment. Baze, 128 S.Ct. at 1530 (citing Wilkerson v. Utah, 99 U. S. 130 (1879)). Under the Nevada execution protocol, an inmate must be administered a strong sedative four hours before his scheduled execution and again one hour prior to execution. The medication is not voluntary–it is mandatory for all inmates scheduled to be executed. Such a requirement adds only disgrace and insult to an otherwise extreme punishment, and is cruel and unusual. The mandatory sedation clouds the inmate's senses, muddle his thoughts, and interferes with his ability to communicate with the warden or execution team. The forced sedation strips from the condemned inmate his last opportunity to acknowledge family or friends, to express remorse to the victims, and denies the inmate any dignity in death. The forced sedation only serves to inflict further terror, pain and/or disgrace and is constitutionally intolerable.

16. The Baze plurality suggested that alternative methods of execution will support an argument that an execution protocol is unconstitutional:

> Instead, the proffered alternatives must effectively address a "substantial risk of serious harm." ... To qualify, the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. If a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State's refusal to change its method can be viewed as "cruel and unusual" under the Eighth Amendment.

Id. at 1532. Mr. Castillo proffers alternative procedures in requiring sufficient training, expertise or certification of execution team members, dispensing with the use of pancuronium bromide, and requiring reliable safeguards.

17. These alternatives are feasible, readily implemented, and significantly reduce the risk of severe pain. The adoption of training, expertise or certification requirements similar to that in the Kentucky protocol is feasible and readily implemented. Nevada should require those who practice venipuncture in Nevada executions to be qualified and experienced. Nevada should ensure that persons within the execution chamber be trained and experienced in the determination and maintenance of consciousness. If technical procedures or equipment are available to ensure an inmate is unconscious before the administration of pancuronium bromide or potassium chloride, Nevada should use or adopt these resources. Nevada execution team members should regularly walk through the execution procedures, including venipuncture. Finally, Nevada can discontinue the use of pancuronium bromide or potassium chloride in the execution protocol, causing death solely with the use of sodium thiopental. See Ex. 142-A (arguing that pancuronium bromide is torturous and unnecessary to the process). The adoption of such safeguards will easily and significantly reduce the risk of severe pain.

18. If the inmate is not adequately anesthetized by the successful administration of sodium thiopental, he will suffer the pain of the remaining two injections. The choice of "potassium chloride to cause cardiac arrest needlessly increases the risk that a prisoner will experience excruciating pain prior to execution" because the "[i]ntravenous injection of concentrated potassium chloride solution causes excruciating pain." See Ex. 146 at ¶

12. The inmate would be consciously aware and feel the pain of the potassium-induced fatal heart attack. Id.

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

20. Pancuronium bromide is "unnecessary" and "serves no legitimate purpose" in the execution process because both sodium thiopental and potassium chloride, if properly administered in the doses specified in the execution manual, are adequate to cause death. Id. at ¶ 37, 44. Pancuronium bromide "compounds the risk that an inmate may suffer excruciating pain during his execution" because it masks any physical manifestations of pain that an inadequately anesthetized inmate would feel during pancuronium-induced suffocation and potassium-induced cardiac arrest. Id. at ¶ 37, 42. "[U]sing barbiturates [such as sodium thiopental] and paralytics [such as pancuronium] to execute human beings poses a serious risk of cruel, protracted death" because "[e]ven a slight error in dosage or administration can leave a prisoner conscious but paralyzed while dying, a sentient witness of his or her own slow, lingering asphyxiation." Chaney v. Heckler, 718 F.2d 1174, 1191 (D.C. Cir. 1984), reversed on other grounds, 470 U.S. 84 (1985) (citing Royal Commission on Capital on Capital Punishment, 1949-1953 Report (1953)). By paralyzing the inmate and preventing physical manifestations of pain, pancuronium places a "chemical veil" on the lethal injection process that precludes observers from knowing whether the prisoner is experiencing great pain. See Ex. 146 at ¶ 44; Adam Liptak, "Critics Say Execution Drug May Hide Suffering," N.Y. Times (October 7, 2003).

21. Nevada's execution protocol falls below the standard of care for euthanizing animals. The American Veterinary Medical Association ("AVMA") allows euthanasia by potassium chloride, but mandates that animals be under a surgical plane of anesthesia prior to the administration of potassium. See Ex. 146, Attachment B [American Veterinary Medical Association, 2000 Report of the American Veterinary Medical Association Panel on Euthanasia] at 680-81. "It is of utmost importance that personnel performing this technique are trained and knowledgeable in anesthetic techniques, and are competent in assessing anesthetic depth appropriate for administration of potassium chloride intravenously." Id. at 681. "A combination of phenobarbital [a barbiturate similar to, but longer acting than, sodium thiopental] with a neuromuscular blocking agent is not an acceptable euthanasia agent." Id. at 680. Nevada is one of at least 30 states that prohibit the use of neuromuscular blocking agents in euthanizing animals, either expressly or by mandating the use of a specific euthanasia agent such as phenobarbital. See, Ala. Code § 34-29-131; Alaska Stat. § 08.02.050; Ariz. Rev. Stat. Ann. § 11-1021; Cal. Bus. & Prof. Code § 4827; Colo. Rev. Stat. § 18-9-201; Conn. Gen. Stat. § 22-344a; Del. Code Ann. tit. 3, § 8001; Fla. Stat. § 828.058; Ga. Code Ann. § 4-11-5.1; 510 Ill. Comp. Stat. 70/2.09; Kan. Stat. Ann. § 47-1718(a); La. Rev. Stat. Ann. § 3:2465; Me. Rev. Stat. Ann. tit. 17, § 1044; Md. Code Ann., Crim. Law, § 10-611; Mass. Gen. Laws ch. 140, § 151A; Mich. Comp. laws § 333.7333; Mo. Rev. Stat. § 578.005(7); Neb. Rev. Stat. § 54-2503; NRS 638.005; N.J. Stat. Ann. § 4:22-19.3; N.Y. Agric. & Mkts. Law § 374; Ohio Rev. Code Ann. § 4729.532; Okla. Stat. tit. 4, § 501; Ore. Rev. Stat. § 686.040(6); R.I. Gen. Laws § 4-1-34; S.C. Code Ann. § 47-3-420; Tenn. Code Ann. § 44-17-303; Tex. Health & Safety Code Ann. § 821.052(a); W. Va. Code § 30-10A-8; Wyo. Stat. Ann. § 33-30-216. Nevada's execution protocol would violate state law if applied to a dog. The consistent trend in professional norms and statutory regulation of animal euthanasia, places the method currently practiced by Nevada outside the bounds of evolving standards of decency.

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

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

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

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

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

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

Elliot Johnson (June 24, 1987, Texas): Johnson's execution was plagued by repetitive needle punctures and took executioners thirty-five minutes to find a vein. See Denno-1 at 431; Denno-2 at 139; Radelet; "Addict Is Executed in Texas For Slaying of 2 in Robbery," N.Y. Times, June 25, 1987, at A24.

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

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

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

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

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

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

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

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

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

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

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

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

Emmitt Foster (May 3, 1995, Missouri): Seven minutes after the lethal chemicals began to flow into Foster's arm, the execution was halted when the chemicals stopped circulating. With Foster gasping and convulsing, blinds were drawn so

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

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

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

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

Luis Mata (August 22, 1996, Arizona): Mata remained strapped to a gurney with the needle in his arm for one hour and ten minutes while his attorneys argued his case. When injected, his head jerked, his face contorted, and his chest and stomach sharply heaved. See Denno-1 at 438; Denno-2 at 140.

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

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

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

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

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

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

Bennie Demps (June 8, 2000, Florida): It took the execution team thirty-three minutes to find suitable veins for the execution. "They butchered me back there," said Demps in his final statement. "I was in a lot of pain. They cut me in the groin; they cut me in the leg. I was bleeding profusely. This is not an execution, it is murder." The executioners had no unusual problems finding one vein, but because the Florida protocol requires a second alternate intravenous drip, they continued to work to insert another needle, finally abandoning the effort after their prolonged failures. See Denno-2 at 141; Radelet; Rick Bragg, "Florida Inmate Claims Abuse in Execution," N.Y. Times, June 9, 2000, at A14; Phil Long & Steve Brousquet, "Execution of Slayer Goes Wrong; Delay, Bitter Tirade Precede His Death," Miami Herald, June 8, 2000.

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

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

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

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

Joeseph L. Clark (May 2, 2006, Ohio): It initially took executioners 22 minutes to find a suitable vein in Mr. Clark's left arm for insertion of the catheter. As the injection began, the vein collapsed. After an additional 30 minutes, the execution team succeeded in placing a catheter in Mr. Clark's right arm. However, the team again tried to inject the drugs into the left arm, where the vein had already collapsed. These difficulties prompted Mr. Clark to sit up, tell the executioners that

"It don't work," and to ask "Can you just give me something by mouth to end this?" Mr. Clark was finally pronounced dead 90 minutes after the execution began. See Radelet; Andrew Walsh-Huggins, "IV Fiasco Led Killer to Ask for Plan B," AP (May 12, 2006).

23. Nevada's execution protocol is similar to the lethal injection protocol employed in California prior to the litigation in Morales v. Hickman, 415 F. Supp. 2d 1037 (N.D. Cal. February 14, 2006), aff'd, 438 F.3d 926 (9th Cir. 2006), cert denied, 546 U.S. 1163 (2006). See Ex.146 at ¶ 7. The use of sodium thiopental, pancuronium bromide, and potassium chloride without the protections imposed in Morales to ensure adequate administration of anesthesia poses an unreasonable risk of inflicting unnecessary suffering.

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

25. The application of the Nevada execution protocol will further violate Mr. Castillo's state and federal constitutional rights to due process, and equal protection, as well as his right to avoid cruel and unusual punishment. Pursuant to NRS 176.355(2)(b), "The director of the department of prisons shall: [s]elect the drug or combination of drugs to be used for the execution after consulting with the state health officer." This statutory requirement was acknowledged in Section I of the "Confidential Execution Manual" provided to undersigned counsel. Ex. 142. In Section III of the Confidential Execution Manual, the Director of the Nevada Department of Corrections ("NDOC") selected the lethal substances, and dosages, which are used in the Nevada execution protocol:

1. Sodium Thiopental 5 grams.
2. Pavulon 20 milligrams.
3. Potassium Chloride 160 milliequivalents.

Ex. 142.

26. In accordance with NRS 176.355(2)(b), the NDOC Director failed to consult with the Nevada State Health Officer. Mary Guinan, the Acting Nevada State

Health Officer on May 11, 2008, indicated she had no knowledge regarding the lethal substances used in a Nevada execution:

> The State Health Division does not have jurisdiction over inmates in the penal system. Thus, I am unable to provide any information regarding procedures and chemicals utilized by the State of Nevada to execute a prisoner condemned to die under the death penalty statues of the State of Nevada.
>
> I suggest that you contact the Department of Prisons for the information.[70]

Ex. 75. NDOC and the State Health Officer are not in compliance with NRS 176.355(2)(b), and are unaware of their statutorily mandated responsibilities.

27. The Nevada execution protocol further allows the dosages of the lethal substances to be altered without consultation with the State Health Officer:

> Personal differences exist. At times dosages have to be increased for certain individuals, although the above doses are lethal for most individuals. It will be the responsibility of the physician, working in conjunction with the staff pharmacist, to ensure that the above is sufficient to cause death.

Ex. 142. Because the statutory authority of NDOC to perform an execution specifically requires the Director to consult with the State Health Officer concerning the lethal substances, and presumably their dosages, the Nevada execution protocol itself violates NRS 176.355(2)(b).

28. The current execution protocol adopted by the Director of NDOC violates Mr. Castillo's state and federal constitutional rights to due process and equal protection because Nevada failed to follow its own statute regarding the implementation of the death penalty.

29. The refusal of the Nevada Department of Corrections to release information on the process of execution prevented Mr. Castillo from raising this issue in previous proceedings. See, e.g., Banks v. Dretke, 540 U.S. 668, 695-698 (2004). Moreover, the scientific evidence showing that the lethal substances used in the execution process are likely to cause unnecessary pain was not published until well into Mr. Castillo's post-

[70] Attached hereto as Ex.75, is a letter from the State Health Officer to undersigned counsel. This letter is incorporated by reference as if fully copied and set forth at length.

conviction proceedings. See Ex. 145 [Leonidas G. Koniaris et al., Inadequate anaesthesia in lethal injection for execution, The Lancet, Vol. 365, April 16, 2005, at 1412-14].

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

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

32. Mr. Castillo's allegations herein demonstrate at least the risk that Nevada's methods and protocols in conducting lethal injections violates the Eighth and Fourteenth Amendments. Similarly, the Nevada Department of Corrections's policy of withholding its current, complete manual and materials regarding the implementation of the death penalty violate Mr. Castillo's state and federal constitutional rights as defined by the First, Fifth, Sixth, Eighth and Fourteenth Amendments.

33. Mr. Castillo is entitled to relief.

CLAIM FOURTEEN

Mr. Castillo's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, and a punishment which is not cruel or unusual, due to the restrictive conditions on Nevada's death row. U.S. Const. amends. VIII & XIV; Nevada Const. art. I, §§ 1, 3, 6 & 8.

SUPPORTING FACTS

1. Mr. Castillo has been incarcerated in single-occupancy confinement on the Nevada Department of Corrections' death row since 1996. For more than 13 years, he was allowed only two hours of recreation and social contact for every 36 hour period.

2. The principal social purposes of retribution and deterrence sought through the death penalty have lost their compelling purpose by the passage of time. The acceptable state interest of retribution was satisfied by the severe punishment already inflicted by forcing Mr. Castillo to live in isolated circumstances, cut off from normal social interaction. The United States Supreme Court recognized the "painful character" in holding a prisoner in solitary confinement for only four weeks, awaiting execution. In re Medley, 134 U.S. 160, 171-72 (1890). This is due, not only to the isolating nature of solitary confinement, but also to the "horrible feeling" the prisoner must feel due to the knowledge he is to be executed and the "uncertainty" as to when. Id. Since his conviction and sentence, Mr. Castillo suffered those four weeks' agony more than 150 times over.

3. The deterrent value of any punishment is directly related to the promptness with which it is inflicted. The deterrent value of carrying out an execution more than thirteen (13) years after conviction is minimal, at best. See Jeffrey Fagan, Columbia Law School, "Deterrence and the Death Penalty: A Critical Review of New Evidence." Ex. 78. Carrying out an execution at such a removed date will have little deterrent value, over and above the deterrent value in simply incarcerating the defendant for the years between conviction and execution.

4. Any delay from Mr. Castillo's conviction to present was attributable to the ineffective assistance of Mr. Castillo's trial, appellate, and post-conviction counsel. As demonstrated throughout this petition, Mr. Castillo's trial, appellate, and post-conviction counsel failed to adequately investigate his social history, and failed to raise many legitimate claims in the appropriate courts. Mr. Castillo cannot be held responsible for delays caused by his previous counsels' ineffective assistance.

5. Inflicting the punishment of death upon Mr. Castillo, after the State inflicted the torturous punishment of holding him in near-solitary confinement for more than thirteen (13) years, would push his total punishment beyond what evolving standards of decency can tolerate. Accordingly, Mr. Castillo's death sentence must be vacated.

6. This claim is of obvious merit. Competent appellate counsel would have raised and litigated this meritorious issue on direct appeal and in state post-conviction habeas proceedings. There was no reasonable appellate strategy, reasonably designed to effectuate Mr. Castillo's best interest, that would justify appellate counsel's failure in this regard. Mr. Castillo is entitled to relief.

CLAIM FIFTEEN

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

SUPPORTING FACTS

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

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

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

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

5. Nevada law does not include any mechanism to insulate state judges and justices from majoritarian pressures which would affect the impartiality of an average person as a judge in a capital case. Making unpopular rulings favorable to a capital

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

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

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

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

CLAIM SIXTEEN

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

SUPPORTING FACTS

1. Mr. Castillo would incorporate by reference, as if fully copied and set forth at length, each of the claims presented in this petition. Such evidence demonstrates that the administration of the Nevada death penalty resulted in irrational, arbitrary and capricious imposition and non-imposition of sentences of death.

2. As a result of plea bargaining practices, and imposition of sentences by juries and three-judge panels, sentences of less than death were imposed for offenses which are more aggravated than the one for which Mr. Castillo was convicted, and in situations where the mitigating evidence was less persuasive than that which existed in Mr. Castillo's case.

3. The arbitrariness of the capital sentencing scheme in Nevada is prejudicial per se and requires vacation of Mr. Castillo's death sentence.

CLAIM SEVENTEEN

Mr. Castillo death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, the effective assistance of counsel, and the right to be free from cruel and unusual punishment because executing a mentally ill, cognitively distressed individual–like Mr. Castillo–constituted cruel and unusual punishment. U.S. Const. amends. V, VI, VIII & XIV; Nevada Const. art. I, §§ 1, 3, 6 & 8.

SUPPORTING FACTS

I. Introduction

1. In Atkins v. Virginia, 536 U.S. 304 (2002), the Supreme Court held that the United States Constitution's ban on excessive and cruel and unusual punishments prohibited the execution of a mentally retarded defendant. The rationale of the Supreme Court, that mentally retarded persons do not have judgment or weigh behavior in ways similar to persons who are not mentally retarded, and therefore are not as culpable, applies with equal force to persons who suffer from a chronic mental illness–like Mr. Castillo. As is demonstrated in Mr. Castillo's first claim, he suffered, and continues to suffer, from a severe mental disorder which significantly impaired his capacity: (a) to appreciate the nature of stimuli and the consequence, or wrongfulness of his reactive conduct; (b) to exercise rational judgment in relation to his conduct; and, (c) to conform his conduct to the requirements of the law.

2. Nearly every major mental health association in the United States published a policy statement which addressed the execution of mentally ill offenders. Every such organization advocated either an outright ban on the execution of mentally ill offenders, or a moratorium until a more comprehensive evaluation system can be implemented.[71]

[71] See American Psychiatric Association, Moratorium on Capital Punishment in the United States (approved October 2000), APA Document Reference No. 200006; American Psychological Association, Resolution on the Death Penalty in the United States; National Alliance for the Mentally Ill, The Criminalization of People with Mental Illness; National Mental Health Association, Death Penalty and People with Mental Illness (approved March 10, 2001). Specifically, the National Mental Health Association (NMHA) found that the fact-finding portion of capital trials "fails to identify who among those convicted and sentenced to death actually has a mental illness." NMHA, Death Penalty and People with Mental Illness. Similarly, the American Psychological Association (APA) argued that too many "[p]rocedural problems, such as assessing competency,"

The American Bar Association House of Delegates unanimously passed American Bar Resolution 122A, on August 8, 2006, which urged every death penalty jurisdiction to ban the execution of persons with severe mental disorders.[72] Finally, international law and opinion forbids the execution of mentally retarded and mentally ill persons.[73]

II. Constitutional Violations

A. Mr. Castillo's Mental Illness Renders His Death Sentence Disproportional

3. Mr. Castillo is mentally ill; he does not have, and never had, normal, adaptive cognitive processes.[74] He cannot think the way that other people think; he cannot experience and interact with the world the same way other people do. Mr. Castillo, as a result of his illness, cannot conform his behavior to the norms of society or the requirements of the law in the same way which other people can. Not only can he not act in his own best interest, or in a rational manner–he cannot change these circumstances. Specifically, at the time of this offense, Mr. Castillo was under extreme emotional duress due to activation of his Posttraumatic Stress Disorder by the specific circumstances in which he found himself. At that moment, due to Posttraumatic Stress

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render capital punishment unfair to the mentally ill. APA, Resolution on the Death Penalty in the United States. Such procedural inadequacies fall far short of the "basic requirements of due process," according to the American Psychiatric Association (AMPA). AMPA, Moratorium on Capital Punishment in the United States. Therefore, in the eyes of the major mental health organizations the criminal justice system routinely executes many mentally ill individuals whose mental illness was never identified–denying the jury of relevant mitigation evidence. The National Alliance for the Mentally Ill (NAMI) advocates an outright ban on death sentences for individuals with any type of brain disorder. NAMI, The Criminalization of People with Mental Illness.

[72] The American Psychological Association and the American Psychiatric Association adopted similar policies.

[73] The International Covenant on Civil and Political Rights (ICCPR) specifically forbids the use of the death penalty in an arbitrary manner, International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966), art. 6, and the Human Rights Committee of the United Nations interpreted the treaty to forbid the execution of persons with severe mental illness. See William Schabas, International Norms on Execution of the Insane and the Mentally Retarded, 4 Criminal Law Forum 95, 100 (1993). Although the United States issued a reservation to article six, the Human Rights Committee concluded this reservation was invalid. Moreover, customary international law prohibits the execution of Mr. Castillo. Id.

[74] Exs. 36; 38.

Disorder and his Cognitive Disorder, Mr. Castillo was incapable of conforming his behavior to the requirements of the law. Ex. 38.

4. The Supreme Court's rationale in Atkins compels the conclusion that Mr. Castillo's death sentence violated clearly established state and federal constitutional law. Mr. Castillo's inability to conform his behavior, through no fault of his own, rendered his death sentence disproportional to his moral culpability.

5. Determining whether a death sentence is constitutionally proportional cannot be based solely upon the magnitude of the resulting harm. For "purposes of imposing the death penalty ... punishment must be tailored to [a defendant's] personal responsibility and moral guilt." Enmund v. Florida, 458 U.S. 782 , 801 (1982). In Atkins, the Supreme Court noted the cognitive limitations of mentally retarded persons, focusing on their "diminished capacities... to control impulses," and the "abundant evidence that they often act on impulse rather than pursuant to a premeditated plan." Atkins, 536 U.S. at 318. These characteristics have even greater applicability to those persons who suffer from mental illnesses, particularly Mr. Castillo. If, as the Supreme Court determined, mentally retarded persons and juveniles are less able to control their inappropriate conduct, and are therefore less culpable, so are those persons who are mentally ill and suffer from the same attributes. See Roper v. Simmons, 543 U.S. 551, 569 (2005); Thompson v. Oklahoma, 487 U.S. 815, 835 (1987) ("Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct... ."); Id. at 853 (O'Connor, J., dissenting) ("Legislatures recognize the relative immaturity of adolescents, and we have often permitted them to define age-based classes that take account of this qualitative difference between juveniles and adults."); Johnson v. Texas, 509 U.S. 350, 367 (1993) ("A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."); Graham v. Collins, 506 U.S. 461, 518 (1993) (Souter, J., dissenting) ("A young person may perfectly well commit a crime

'intentionally,' but our prior cases hold that his youth may nonetheless be treated as limiting his moral culpability because he 'lack[s] the experience, perspective, and judgment' expected of adults.'") (citation omitted); Eddings v. Oklahoma, 455 U.S. 104, 115-116 (1982) ("Even the normal 16-year-old customarily lacks the maturity of an adult").

B. Executing the Mentally Ill Does Not "Measurably Contribute" to Capital Punishment's Social Purposes of Retribution and Deterrence

6. A death sentence must "measurably contribute" to capital punishment's two social purposes of deterrence and retribution. Enmund v. Florida, 458 U.S. 782, 797 (1982); see also Roper, 543 U.S. at 571; Atkins, 536 U.S. at 319; Thompson, 487 U.S. at 833. If it does not, it is "nothing more than the purposeless and needless infliction of pain and suffering," and therefore unconstitutional. Enmund, 458 U.S. at 798. Neither retribution nor deterrence are served by executing a mentally ill person. See Atkins, 536 U.S. at 318 ("[The] deficiencies [of mentally retarded offenders] do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability").

7. Executing the mentally ill does not "measurably contribute to the retributive end of ensuring that the criminal gets his just deserts," Enmund, 458 U.S. at 801, and amounts to nothing more than the "exacting of mindless vengeance." Ford v. Wainwright, 477 U.S. 399, 410 (1986). Just as with mentally retarded offenders, the "cold calculus" of cost and benefit for society in the execution of an individual is "at the opposite end of the spectrum of behavior" for those who suffer from major mental disability and illness. Atkins, 536 U.S. at 319-320. Society will not benefit from Mr. Castillo's execution.

C. Mr. Castillo's Mental Illness Created a Constitutionally Unacceptable Risk that the Jury Arbitrarily Sentenced Mr. Castillo to Death

8. In Atkins, the Supreme Court considered the enhanced risk faced by defendants who suffered from mental retardation "that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Id. at 320. This risk

contemplated that the mentally retarded defendant is less able to effectively defend himself and more easily convicted of a capital crime and sentenced to death. Severe mental illness, like significant cognitive limitations, sharply limits a defendant's insight, judgment, and his ability "to give meaningful assistance to ... counsel." Atkins, 536 U.S. at 320.

9. Mr. Castillo suffered from serious cognitive defects and serious mental illnesses, a conflation of mental circumstances which rendered him less able to conform his conduct than even a mentally retarded person. Ex. 38. A person who is unable to accurately process the information before him is limited in his ability to confront criminal charges, or to meaningfully assist his trial, appellate, or post-conviction attorneys. Persons who must encounter life with a dysfunctional brain, face obstacles in "mak[ing] a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors." Id. Whether the question is the accuracy of aggravating circumstances or the existence of mitigating circumstances, a mentally disabled defendant is less able to assist his attorneys in presenting "factors which may call for a less severe penalty." Id. Mentally ill persons are frequently unable to conform their conduct to courtroom decorum and procedure. Consequently, they "are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." Id. at 321.

10. Finally, mental illness which impacts a defendant's ability to control his own conduct "can be a two-edged sword that may enhance the likelihood that the aggravating [fact] of future dangerousness will be found by the jury." Id. Indeed, it is hard to imagine another circumstance which represents the limited moral culpability of the defendant, but engenders a substantial fear of future violence in the jury's eyes.

D. The Inability to Meaningfully Distinguish Between the Mentally Retarded and the Mentally Ill–in Terms of Atkins Protection–Renders Mr. Castillo's Death Sentence Arbitrary and Capricious

11. A capital sentencing scheme must provide a "meaningful basis for

distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not." Gregg v. Georgia, 428 U.S. 153, 188 (1976) (quoting Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring)); Godfrey v. Georgia, 446 U.S. 420, 427-428 (1980). There is no meaningful distinction between the mentally retarded persons protected in Atkins, and those persons who suffer similar but other mental disabilities. Indeed, the Supreme Court described Mr. Castillo when they considered a defendant who had "the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses." Id. Mr. Castillo's execution would violate state and federal constitutional law.

12. For these and other reasons, the American Bar Association House of Delegates unanimously passed American Bar Resolution 122A, on August 8, 2006, which urged every death penalty jurisdiction to ban the execution of persons with severe mental disorders or diseases that significantly impair their capacity: (1) to appreciate the nature, consequence or wrongfulness of their conduct; (2) to exercise rational judgment in relation to conduct; or (3) to conform their conduct to the requirements of the law.

13. Mr. Castillo is entitled to relief.

CLAIM EIGHTEEN

Mr. Castillo's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, fundamental fairness, effective assistance of counsel, and a reliable sentence because the trial judge, in his instructions, and the prosecutor's arguments limited the jury's consideration of Mr. Castillo's theory of mitigating circumstances. U.S. Const. amends. V, VIII, & XIV; Nevada Const. art. I, §§ 1, 3 & 6.

SUPPORTING FACTS

1. At the penalty trial, the trial judge granted trial counsels' request to instruct the jury as to three statutory mitigating circumstances: (1) the youth of the defendant at the time of the offense; (2) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance; and, (3) any other mitigating circumstances. TT, 9/24/96 (morning session), at 54-55, Ex. 171 at 54-55.

2. The trial judge denied trial counsels' request to separately instruct the jury on five non-statutory mitigating circumstances, namely, that Mr. Castillo: (1) admitted his guilt of the offense charged; (2) demonstrated remorse for the commission of the offense; (3) cooperated with police after he was identified as a suspect; (4) did not plan to commit the murder; and, (5) had a difficult childhood. See Ex. 15, at 14; TT, 9/24/96 (morning session), at 56-57, Ex. 171 at 56-57.

3. During closing argument, the prosecutor outlined all six statutory mitigating circumstances provided by the Nevada legislature. TT, 9/24/96 (afternoon session), at 9-12, Ex. 172 at 9-12 . The prosecutor informed the jury that four of the six statutory mitigating circumstances did not apply to Mr. Castillo's trial. Id. at 9. Trial counsel objected and the prosecutor replied:

> My response is, Judge, that they are entitled to know what the legislature says is mitigating and realize that many of these don't apply to consider the limited area of mitigation that does apply to this defendant at best.

Id.

The prosecutor stated:

> Let me go through the kind of things the legislature talks about as being mitigating so you can get a flavor for the kind of balancing that is expected.

TT, 9/24/96 (afternoon session), at 9, Ex. 172 at 9. The trial judge's refusal to include jury instructions of non-statutory mitigating circumstances, and the prosecutors' argument which sought to minimize the circumstances which were included in the instructions, prevented the jury from adequately considering all of the mitigating evidence before them.

4. As a result of the trial judge's failure to include non-statutory mitigating circumstances in his jury instructions, the jury was never instructed that Mr. Castillo admitted his guilt and was remorseful. Although the trial judge included an instruction which allowed the jury to find "any other mitigating circumstance," this was insufficient. Ex. 25 (Penalty Trial Jury Instructions).

5. After the trial judge read the instructions to the jury, the prosecutor informed the jury of all the statutory mitigating circumstances available under Nevada law. The prosecutor explained that he informed the jury of these circumstances, so that they would have a "flavor for the kind of balancing that is expected." TT, 9/24/96 (afternoon session), at 9, Ex. 172 at 9. In reality, this prosecution strategy minimized Mr. Castillo's arguments regarding mitigating circumstances, and minimized the "any other mitigating circumstances" instruction. The prosecutor discussed each statutory mitigating circumstance, which was not within the jury instructions, and argued why they were inapplicable. Id. at 10-11.

6. The prosecutor was allowed to provide the jury "a flavor" of the kinds of evidence the Legislature contemplated was relevant to a death penalty trial. However, those statutory mitigating circumstances were not before the jury and could not have been "weighed" in Mr. Castillo's case. Moreover, this argument encouraged the jury to ignore evidence which was offered to satisfy the "any other mitigating circumstances" and, in

the end, lessened the weight of such evidence in their deliberations. The prosecutors' argument exacerbated the trial judge's error.

7. Mr. Castillo is entitled to relief.

CLAIM NINETEEN

Mr. Castillo's state and federal constitutional rights to due process, equal protection, effective assistance of counsel, a fair tribunal, an impartial jury, and a reliable sentence were violated due to the cumulative errors in his trial, appeal and state post-conviction proceedings and the systematic deprivation of Mr. Castillo's right to the effective assistance of counsel. U.S. Const. amends. V, VI, VIII & XIV; Nevada Const. art. I, §§ 1, 3, 6 & 8.

SUPPORTING FACTS

1. Each of the claims raised herein requires Mr. Castillo's conviction be vacated. Mr. Castillo incorporates each and every factual allegation contained in this petition as if fully set forth herein.

2. The cumulative effect of the errors demonstrated in this petition deprived Mr. Castillo of fundamentally fair proceedings and resulted in a constitutionally unreliable guilt determination. Whether or not any individual error requires the vacation of his conviction, the totality of these errors and omissions resulted in substantial prejudice to Mr. Castillo.

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

PRAYER FOR RELIEF

Mr. Castillo has demonstrated he is entitled to relief. For the reasons stated above, Mr. Castillo prays this Court:

1) issue a Writ of Habeas Corpus;

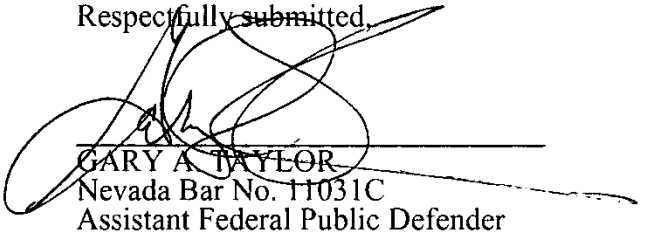
2) grant an evidentiary hearing;

3) vacate Mr. Castillo's conviction; and

5) enter an order granting Mr. Castillo a new trial on all issues.

DATED this 18th day of September, 2009.

Respectfully submitted,



GARY A. TAYLOR
Nevada Bar No. 11031C
Assistant Federal Public Defender

NISHA N. BROOKS
Nevada Bar No. 11032C
Assistant Federal Public Defender

Attorneys for Petitioner

VERIFICATION

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

DATED this 18th day of September, 2009.

GARY A. TAYLOR
Assistant Federal Public Defender
Nevada Bar No. 11031C

CERTIFICATE OF MAILING

In accordance with Rule 5(b)(2)(B) of the Nevada Rules of Civil Procedure, the undersigned hereby certifies that on the 18th day of September, 2009, a true and correct copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)** was deposited in the United States mail, first class postage fully prepaid thereon, addressed to:

Catherine Cortez Masto, Attorney General
Heather D. Procter, Deputy Attorney General
Attorney General's Office
Bureau of Criminal Justice
100 North Carson Street
Carson City, Nevada 89701-4717

An employee of the Federal Public Defender

RECEIPT OF COPY

Pursuant to NRCP 5(b)(2)(A), receipt of a copy of the above and foregoing **PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)**, is hereby acknowledged this 18th day of September, 2009.

STEVEN S. OWENS
Deputy District Attorney

By Eileen Davis
200 Lewis Avenue
Las Vegas, NV 89155

APPENDIX E

APPENDIX E

INST

FILED IN OPEN COURT
SEP 25 1996 19 4:47pm
LORETTA BOWMAN, CLERK
BY [signature] Deputy

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM PATRICK CASTILLO

Defendant.

Case No. C133336
Dept. No. VII
Docket P

INSTRUCTIONS TO THE JURY

(INSTRUCTION NO. 1)

MEMBERS OF THE JURY:

It is now my duty as judge to instruct you in the law that applies to this penalty hearing. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.

You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the Court.

CE31 [redacted]

2074

INSTRUCTION NO. 7

The State has alleged that aggravating circumstances are present in this case.

The defendants have alleged that certain mitigating circumstances are present in this case.

It shall be your duty to determine:

(a) Whether an aggravating circumstance or circumstances are found to exist; and

(b) Whether a mitigating circumstance or circumstances are found to exist; and

(c) Based upon these findings, whether a defendant should be sentenced to a definite term of 50 years imprisonment, life imprisonment or death.

The jury may impose a sentence of death only if (1) the jurors unanimously find at least one aggravating circumstance has been established beyond a reasonable doubt and (2) the jurors unanimously find that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.

A mitigating circumstance need not be agreed to unanimously; that is, any one juror can find a mitigating circumstance without the agreement of any other juror or jurors. The entire jury must agree unanimously, however, as to whether the aggravating circumstances outweigh the mitigating circumstances or whether the mitigating circumstances outweigh the aggravating circumstances.

Otherwise, the punishment shall be imprisonment in the State Prison for a definite term of 50 years imprisonment, with eligibility for parole beginning when a minimum of 20 years has served or life with or without the possibility of parole.

2080 [redacted]

APPENDIX F

APPENDIX F

VER

FILED IN OPEN COURT
SEP 25 1996 19 4:47pm
LORETTA BOWMAN, CLERK
BY [signature] Deputy

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM PATRICK CASTILLO

Defendant.

Case No. C133336
Dept. No. VII
Docket P

SPECIAL

VERDICT

We, the Jury in the above entitled case, having found the Defendant, WILLIAM PATRICK CASTILLO, Guilty of COUNT IV - MURDER OF THE FIRST DEGREE, designate that the mitigating circumstance or circumstances which have been checked below have been established.

✓ The youth of the defendant at the time of the crime.

✓ The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

✓ Any other mitigating circumstances.

____ No mitigating circumstances are found to exist.

DATED at Las Vegas, Nevada, this 25 day of September, 1996.

FOREPERSON JOHN R. RUHLMANN

2106

CE31

CASTILLO

VER

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

WILLIAM PATRICK CASTILLO

Defendant.

Case No. C133336
Dept. No. VII
Docket P

SPECIAL

VERDICT

We, the Jury in the above entitled case, having found the Defendant, WILLIAM PATRICK CASTILLO, Guilty of COUNT IV - MURDER OF THE FIRST DEGREE, designate that the aggravating circumstance or circumstances which have been checked below have been established beyond a reasonable doubt.

____ The murder was committed by a person who was previously convicted of a felony involving the use or threat of violence to the person of another, to-wit: Attempted Residential Burglary committed on 12-19-90, victim Marilyn Mills. Judgment of Conviction filed 6-7-91, Case No. C99212X, Clark County, Nevada.

✓ The murder was committed by a person who was previously convicted of a felony involving the use or threat of violence to the person of another, to-wit: Robbery committed on 12-14-92, Victim Patricia Rizzo. Judgment of Conviction filed 5-28-93, Case No. C111011, Clark County, Nevada.

2103

✓ The murder was committed by WILLIAM PATRICK CASTILLO while he was engaged, alone or with another, in the commission of or an attempt to commit or flight after committing or attempting to commit any Burglary and the Defendant:

(a) Killed the person murdered.

(b) Knew or had reason to know that life would be taken or lethal force used.

✓ The murder was committed by WILLIAM CASTILLO while he was engaged, alone or with another, in the commission of or an attempt to commit or flight after committing or attempting to commit any Robbery and the Defendant:

(a) Killed the person murdered.

(b) Knew or had reason to know that life would be taken or lethal force used.

✓ The murder was committed to avoid or prevent a lawful arrest.

DATED at Las Vegas, Nevada, this 25 day of September, 1996.

FOREPERSON

JOHN R. RUHLMANN

2104

APPENDIX G

APPENDIX G

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTONIO LAVON DOYLE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74600

FILED

NOV 07 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

_____, C.J.
Gibbons

_____, J.
Pickering

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Stiglich

_____, J.
Cadish

_____, J.
Silver

cc: Chief Judge, The Eighth Judicial District Court
Hon. Nancy M. Saitta, Senior Justice
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

SUPREME COURT
OF
NEVADA

(O) 1947A

19-45868

APPENDIX H

APPENDIX H

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTONIO LAVON DOYLE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74600

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Nancy M. Saitta, Senior Judge.

Appellant filed his petition on January 11, 2017, more than one year after the remittitur issued on appeal from the judgment of conviction. *See Doyle v. State*, 112 Nev. 879, 921 P.2d 901 (1996). The petition was therefore untimely filed. *See* NRS 34.726(1). Moreover, appellant acknowledges that he previously sought postconviction relief. The petition was therefore successive to the extent it raised claims that were previously litigated and resolved on their merits, and it constituted an abuse of the writ to the extent it raised new claims. *See* NRS 34.810(2). Finally, because the State pleaded laches, appellant had to overcome the presumption of prejudice to the State. *See* NRS 34.800(2). Accordingly, the petition was procedurally barred absent a demonstration of good cause and actual prejudice, NRS 34.726(1); NRS 34.810(3), or a showing that the procedural bars should be excused to prevent a fundamental miscarriage of justice, *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

Appellant argues that he demonstrated good cause and prejudice sufficient to excuse the procedural bars, and that a fundamental miscarriage of justice would result if his petition was not considered,

because *Hurst v. Florida*, 136 S. Ct. 616 (2016), set forth new retroactive rules that: (1) require trial courts to instruct jurors that the State must prove that the aggravating circumstances are not outweighed by the mitigating circumstances beyond a reasonable doubt, and (2) prohibit the reweighing of aggravating and mitigating circumstances when an aggravating circumstance is stricken by a reviewing court. We disagree. *See Castillo v. State*, 135 Nev., Adv. Op. 16, 442 P.3d 558 (2019) (discussing death-eligibility in Nevada and rejecting the arguments that *Hurst* announced new law relevant to the weighing component of Nevada's death penalty procedures or to appellate reweighing); *Jeremias v. State*, 134 Nev. 46, 57-59, 412 P.3d 43, 53-54 (rejecting the argument that *Hurst* announced new law relevant to the weighing component of Nevada's death penalty procedures), *cert. denied*, 139 S. Ct. 415 (2018). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Pickering

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Stiglich

_____, J.
Cadish

_____, J.
Silver

cc: Chief Judge, The Eighth Judicial District Court
Hon. Nancy M. Saitta, Senior Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

APPENDIX I

APPENDIX I

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- ANTHONY LAVON DOYLE, #0929609 Defendant.	CASE NO. C120438 DEPT. NO. XI DOCKET NO. S

INSTRUCTIONS TO THE JURY

(INSTRUCTION NO. 1)

MEMBERS OF THE JURY:

It is now my duty as judge to instruct you in the law that applies to this penalty hearing. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.

You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the Court.

INSTRUCTION NO. 6

The State has alleged that aggravating circumstances are present in this case.

The defendant has alleged that certain mitigating circumstances are present in this case.

It shall be your duty to determine:

(a) Whether an aggravating circumstance or circumstances are found to exist; and

(b) Whether a mitigating circumstance or circumstances are found to exist; and

(c) Based upon these findings, whether a defendant should be sentenced to life imprisonment or death.

The jury may impose a sentence of death only if (1) the jurors unanimously find at least one aggravating circumstance has been established beyond a reasonable doubt and (2) the jurors unanimously find that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.

A mitigating circumstance itself need not be agreed to unanimously; that is, any one juror can find a mitigating circumstance without the agreement of any other juror or jurors. The entire jury must agree unanimously, however, as to whether the aggravating circumstances outweigh the mitigating circumstances or whether the mitigating circumstances outweigh the aggravating circumstances.

Otherwise, the punishment imposed shall be imprisonment in the State Prison for life with or without the possibility of parole.

APPENDIX J

APPENDIX J

DISTRICT COURT

CLARK COUNTY, NEVADA

FILED IN OPEN COURT
FEB 09 1995 19 3:28 pm
LORETTA BOWMAN, CLERK
By Tina Hurd Deputy

* * * *

THE STATE OF NEVADA,

Plaintiffs,

vs.

ANTHONY LAVON DOYLE,
#09296909

Defendant.

CASE NO. C120438
DEPT. XI
DOCKET S

SPECIAL VERDICT

We, the Jury in the above-entitled case, having found the Defendant, ANTHONY LAVON DOYLE, Guilty of COUNT I - MURDER OF THE FIRST DEGREE, designate the mitigating circumstance or circumstances.

____ The defendant has no significant history of prior criminal activity.

____ The defendant was an accomplice in a murder committed by another person and his participation in the murder was relatively minor.

____ The youth of the defendant at the time of the crime.

____ Any other mitigating circumstances.

____ These mitigating circumstances outweigh the aggravating circumstances.

FOREPERSON

381

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- ANTHONY LAVON DOYLE, #0929609 Defendant.	CASE NO. C120438 DEPT. NO. XI DOCKET NO. S

SPECIAL VERDICT

We, the Jury in the above entitled case, having found the Defendant, ANTHONY LAVON DOYLE, Guilty of COUNT I - MURDER OF THE FIRST DEGREE, designate that the aggravating circumstance which has been checked below has been established beyond a reasonable doubt and further find that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance found.

✓ The murder was committed by a person under sentence of imprisonment.

___ The murder was committed while the person was engaged in the commission of or an attempt to commit any Sexual Assault.

✓ The murder was committed while the person was engaged in the commission of or an attempt to commit any First Degree Kidnapping.

✓ The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody.

379

CE14 R3

____ The murder involved torture, depravity of mind or the mutilation of the victim.

DATED at Las Vegas, Nevada, this 7 day of February, 1995.

FOREPERSON