

No.

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OCTOBER TERM, 2021

*In the Supreme Court of the United States*

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THOMAS RICHARDSON, Petitioner,

v.

THE STATE OF NEVADA, Respondent.

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

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED (CAPITAL CASE)

In this case, the prosecution entered evidence of a prior felony conviction to qualify Mr. Richardson for death penalty eligibility and convince the jury to impose the ultimate punishment. This prior felony conviction resulted from a fully reported court-martial proceeding involving sexual misconduct. The Nevada Supreme Court was previously split on direct appeal as to the sufficiency of evidence and due process afforded Mr. Richardson in securing his underlying conviction.

During the penalty hearing, the prosecution called the victim of the prior offense to testify. That victim testified as to facts markedly different and exponentially more emotionally impactful than any testimony offered at the court-martial proceeding. Testimony was also explicitly and provably false compared to the medical records and interviews produced contemporaneous to the incident itself. The record reveals the emotional impact on the jury. It is undisputed that defense counsel at trial did not seek any of the over 1,000 pages of court-martial proceedings or investigation discovery regarding the prior incident.

On appeal of denial of State court post-conviction relief, the Nevada Supreme Court conflated ineffective assistance of counsel standards for failure to present evidence with failure to investigate, and did not address the failure to investigate

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claims raised despite opportunity on the initial brief and the subsequent Motion for Rehearing.

The question presented here is whether the Nevada Supreme Court misapplied the law by failing to examine or analyze the failure of counsel to investigate readily available information regarding an aggravating circumstance in contravention of *Rompilla v. Beard*, 545 U.S. 374 (2005)?

## LIST OF PARTIES

Petitioner Thomas Richardson is an inmate at Ely State Prison. Respondent Steven Wolfson is the Clark County District Attorney. Respondent Aaron Ford is the Attorney General of the State of Nevada.

## TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
LIST OF PARTIES.....	iii
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES .....	v
PETITION FOR WRIT OF CERTIORARI .....	1
OPINIONS BELOW.....	3
JURISDICTION.....	4
CONSTITUTIONAL PROVISIONS .....	4
STATEMENT OF THE CASE.....	5
REASONS FOR GRANTING THE WRIT.....	12
CONCLUSION.....	18

## INDEX TO APPENDICES

APPENDIX A: Order of Affirmance (unpublished) (Nevada Supreme Court) .....	1a-31a
APPENDIX B: Order of Affirmance (unpublished) (Nevada Supreme Court) .....	1b-19b
APPENDIX C: Order Denying Rehearing (unpublished) (Nevada Supreme Court) .....	1c

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## TABLE OF AUTHORITIES

### Cases

<i>Burger v. Kemp</i> , 483 U.S. 776 (1987) .....	18
<i>Jordan v. Mississippi</i> , 138 S. Ct. 2567 (2018) .....	18
<i>Kyles v. Whitley</i> , 514 U.S. 419 (1995) .....	18
<i>Magwood v. Patterson</i> , 561 U.S. 320 (2010) .....	19
<i>Porter v. McCollum</i> , 558 U.S. 30 (2009) .....	12, 14
<i>Rompilla v. Beard</i> , 545 U.S. 374 (2005) .....	<i>passim</i>
<i>Silva v. Woodford</i> , 279 F.3d 825 (9th Cir. 2002) .....	8
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984) .....	<i>passim</i>
<i>United States v. Levinson</i> , 543 F.3d 190 (3d Cir. 2008) .....	11
<i>Wearry v. Cain</i> , 136 S. Ct. 1002 (2016) .....	12
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003) .....	12, 14-15
<i>Williams v. Taylor</i> , 529 U.S. 362 (2000) .....	12, 14

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**Constitutions**

U.S. CONST. amend. VI ..... 4  
U.S. CONST. amend. XIV ..... 5

**Statutes**

28 U.S.C. § 1257 ..... 4

**Rules**

Criminal Procedure § 11.10 ..... 13

**Other**

*Sentencing,*  
50 B.C. L. REV. 1069 (2009)..... 13  
*Stephen F. Smith, Taking Strickland Claims Seriously,*  
93 MARQ. L. REV. 515 (2009)..... 13

## PETITION FOR WRIT OF CERTIORARI

Petitioner Thomas Richardson requests that this Court grant his petition for writ of certiorari and vacate the death sentence in a capital matter involving a blatant misapplication of settled law and refusal by the Nevada Supreme Court to consider the undisputed failure to investigate the primary aggravating circumstance.

While the possible innocence of Mr. Richardson is a strong matter of contention previous splitting the Nevada Supreme Court on direct appeal not part of this petition, the focus here is the legally significant deficiency of trial counsel at the penalty hearing. Mr. Richardson had been convicted via an amended court-martial finding issued on September 27, 1994 of a sexual offense alleged to occurred on February 9, 1992. (IX AA 2004, 2053<sup>1</sup>). In that same proceeding which concluded on October 29, 1992, Mr. Richardson was acquitted of attempt anal sodomy. *Id.* At the penalty hearing in his capital case on August 31, 2009, the prosecution called the victim to the stand to testify under oath as to the facts and circumstances of the underlying aggravating circumstances qualifying Mr. Richardson, in part, for death

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<sup>1</sup> Citations to the record in the format \_\_\_ AA \_\_\_ refer to the Appellant's Appendix which is lodged with the Clerk of the Nevada Supreme Court. The first number references the volume and the second numbers reference the page(s). Thus, IX AA 2004, 2053 refers to pages 2004 and 2053, which are found in Volume IX of the Appellant's Appendix on file with the Nevada Supreme Court.



penalty eligibility. (IV AA 813). It is undisputed that trial counsel did not seek any records or transcripts (both readily available through discovery processes) concerning the prior charge and/or conviction.

On direct appeal, the Nevada Supreme Court noted that the emotional, offering of support by a juror after the victim's testimony was not sufficient to overturn the proceeding, but did note its occurrence.

During State court proceedings on post-conviction relief, a record was made that there were volumes of materials related to the court-martial proceeding that contradicted the emotional testimony of the victim in that case, and that trial counsel never sought those records. All of those documents were made part of the record on appeal. The responsible district court did not allow evidentiary hearing of counsel regarding the failure to investigate.

On appeal of the denial of post-conviction relief in a capital matter, the dual issues of failure to investigate and failure to adequately present evidence pursuant to *Strickland*<sup>2</sup> and its progeny were presented. The Nevada Supreme Court ruled that the failure to adequately present evidence did not rise to the level of a *Strickland* violation, suggested the difference in testimony could be attributed to the age of the prior incident, and most importantly, that it was a sound strategic decision to not

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<sup>2</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

prolong the examination of a sympathetic witness. The Nevada Supreme Court made no comment or any analysis regarding the failure of trial counsel to even seek the records to make a strategic decision.

To clarify whether this was oversight or intention by the Nevada Supreme Court, a Petition for Rehearing on this specific issue was submitted. The Petition was denied without comment.

This Court has previously indicated the need to delineate the issues when examining ineffective assistance of counsel claims in *Rompilla v. Beard*, 545 U.S. 374 (2005). This is foremost in a capital matter and should be a matter of straightforward application of precedent mandating the Nevada Supreme Court to not only apply more robust scrutiny in capital cases, but that the misapplication of law and intentional avoidance of potentially dispositive analysis is not consistent with Constitutional mandates and due process of law. Mr. Richardson requests that this Court grant his petition for certiorari to correct this fundamental miscarriage of justice.

### **OPINIONS BELOW**

The decision of the Nevada Supreme Court, affirming the denial of Richardson's first state post-conviction petition for habeas corpus is unpublished and appears at App. 1a-31a. The Nevada Supreme Court's order denying the petition for rehearing is unpublished and appears at App. 1c. The Nevada Supreme Court's

opinion affirming the judgment of conviction on direct appeal is unpublished and appears at App. 1b-19b.

## **JURISDICTION**

The Nevada Supreme Court's order of affirmance at issue in the instant matter was filed on February 24, 2021, and a timely petition for rehearing was denied on March 29, 2021. This Court has statutory jurisdiction under 28 U.S.C. § 1257(a)<sup>3</sup>.

## **CONSTITUTIONAL PROVISIONS**

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

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<sup>3</sup> In light of the COVID-19 pandemic, this Court instituted a number of changes to its ordinary procedures. In pertinent part, the Court issued an order on March 19, 2020, extending the deadline to file petitions for writs of certiorari in all cases to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. Pursuant to the Court's July 19, 2021 order rescinding that extension, for cases in which the relevant lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing was issued before July 19, 2021, the deadline remains extended to 150 days from that judgment or order.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

### **STATEMENT OF THE CASE**

Petitioner Thomas Richardson was convicted of two counts of first degree murder with use of a deadly weapon and was sentenced to death on each count. His conviction was primarily based upon the testimony of his co-defendant, Robert Dehnart. No forensic evidence (fingerprints, DNA, etc.) or eyewitnesses placed Mr. Richardson at any time in the trailer home where the murders occurred. Indeed, the only piece of evidence linking Mr. Richardson to the crime scene was the testimony of detectives that they may have seen a hat which may have belonged to Mr. Richardson at some point during their investigation in the trailer home after the bodies were discovered; that alleged hat was not taken into evidence, nor photographed, nor was there anything more than a single, blurry photograph of a hat far in the background of one out of hundreds of photographs taken at the crime scene over two days time. Only Mr. Dehnart knew and/or had a dispute with the victim(s), and even though only his fingerprints were found at the scene, and he both admitted to purchasing the sole weapon and confessed to the killings, prosecutors allowed

him to enter a plea to one count of first-degree murder and one count of robbery with use of a deadly weapon in exchange for his testimony against Richardson. The agreement resulted in the dismissal of the State's notice of intent to seek the death penalty against Dehnart, and an agreement that the sentence would not exceed 20 to 50 years for first degree murder (the lowest of four possible punishments for this offense in Nevada) and two consecutive terms of 2 to 15 years for robbery with use of a deadly weapon.

At the penalty hearing for Mr. Richardson, the prosecution produced a witness in support of the aggravating circumstance involving a prior felony conviction for attempt sodomy that Mr. Richardson sustained while a member of the armed forces. That witness testified under oath as to the facts and circumstances of the event but was only cursorily cross-examined by defense counsel, who had not sought any records concerning the event or the court-martial that followed. It is undisputed that such records were available and were, in fact, made part of the record in Mr. Richardson's case by post-conviction counsel. It is also undisputed that trial counsel did not seek or receive these records or transcripts.

On direct appeal of his conviction, trial counsel asserted that multiple errors occurred through the admission of the aforementioned victim's testimony, most notably that it exceeded allowable testimony, was highly prejudicial and affected at

least one juror to the extent that the juror made audible, sympathetic remarks to the victim while leaving the witness stand. The Nevada Supreme Court found any errors, including a unanimous finding of abuse of discretion, associated with these claims to either have no legal import or that they were harmless.

At the post-conviction proceedings in the lower court, Mr. Richardson raised the issue of his trial counsel's failure to investigate the record regarding this testimony and the underlying court-martial conviction, and further failing to properly present impeachment evidence concerning the testimony in support of the aggravating circumstance. The lower court refused the request for evidentiary hearing on the matter, however, the entirety of the large file not previously sought, was admitted on the record.

On direct appeal of the denial of post-conviction relief, the Nevada Supreme Court considered the failure to cross-examine the victim-witness as such:

Richardson argues that trial counsel should have impeached penalty phase testimony supporting the aggravating circumstance based on his prior conviction for sexual assault. In particular, he points to inconsistencies between the sexual assault victim's testimony during the court-martial proceeding that resulted in the prior conviction and her testimony during the penalty phase.

We conclude that Richardson did not show deficient performance. At the penalty hearing, the victim testified about a sexual assault Richardson committed over 17 years before. Given the passage of time, inconsistencies

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were to be expected. Nevertheless, the accounts were largely consistent and Richardson did not demonstrate that any inconsistencies were so serious as to affect the outcome of the penalty hearing. And because the State met its burden of proof solely by introducing the prior convictions, no amount of cross-examination with the sexual assault victim's prior inconsistent testimony would have had a reasonable probability of changing the jury's finding of the aggravating circumstance. Even if counsel had successfully impeached the victim's testimony that Richardson later threatened her, it would have only given a slightly less egregious impression of his actions. And additional cross-examination would have resulted in the jury spending more time hearing from a credible, sympathetic witness. *See Silva v. Woodford*, 279 F.3d 825, 852 (9th Cir. 2002) (recognizing that limited cross-examination may be reasonable where more extensive examination could have rendered a witness more sympathetic). Therefore, the district court did not err in denying this claim.

App. 15b. The Nevada Supreme Court refused, however, to address the claim that trial counsel was ineffective because of the failure to even investigate the prior event to be able to make the strategic decision to not further cross-examine and/or impeach the witness. Further, while the Nevada Supreme Court found the "inconsistencies" to be "expected," the record belies such a cursory evaluation, but more importantly, this lack of analysis side-steps the duty of trial counsel to seek the records and make that determination. Indeed, these "inconsistencies" were not merely lack of memory but, according to the record, provable falsehoods.

In fact, although set forth in argument, and of course, in the approximately thousand pages of transcripts which subsequently became part of the record, the grave differences remain stark. Indeed, an unwanted sexual encounter between acquaintances after a night of dancing without any outward physical injuries of threats morphed into a brutal, hyper-violent, weapon-oriented break-in and *anal* rape with threats and involvement to and with the victim's family and sworn testimony about provably false facial injuries that were never incurred.

In essence, at the penalty hearing in the instant matter, the victim-witness testified that on the evening in question, Mr. Richardson had attempted to inject himself into a setting in a bar where she was socializing but was completely rebuked (IV AA 823), that he appeared in her home before she arrived but was removed before she got home (IV AA 826), that he forcibly entered her home likely by "slicing" a screen (implying Mr. Richardson had a weapon)(IV AA 833), that Mr. Richardson vaginally *and* anally raped her (IV AA 832), that he brutalized her face with violence so hard that she "had a split lip and a black eye" (IV AA 831), that during the course of the rape Mr. Richardson threatened to kill her children (IV AA 831), and that once Mr. Richardson left he unexpectedly came back with a gun until he was convinced to leave. (IV AA 835-837.)

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At the court-martial proceeding, however, there were days of live testimony from many witnesses. And while as in any earlier proceeding there might be inconsistencies (especially given different witnesses), the following would appear undisputed, significantly different representations from the sworn testimony at the time of the victim-witness and neutral witnesses, to wit:

The victim-witness and Mr. Richardson were dancing together at the first bar (X AA 2349), and after Mr. Richardson left, he did show up at her home, was let in and had passed out on the couch. The victim-witness arrived at home and Mr. Richardson was still passed out on the couch. (X AA 2361). He was roused by his roommate who came over upon the victim-witness' call and he left her apartment. (Id.). There were no signs of forced entry into the home facilitating Mr. Richardson's return. (X AA 2410). According to a medical examination that was done contemporaneous to the incident, none of the injuries the victim-witness testified to at Mr. Richardson's capital trial, were reported. Notably, the records related to the medical examination did not indicate the victim-witness sustained *any* injuries to her face whatsoever even though the victim-witness testified in the capital trial that she was beaten so harshly about the face during the sexual encounter that she could not leave her house. (XI AA 2555). Additionally, the victim-witness denied there was *any* anal intercourse or penetration. (X AA 2371). There was no testimony in the

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court-martial proceeding at any time of any threat to her children allegedly uttered by Mr. Richardson. The victim-witness also admitted calling Mr. Richardson's home after the alleged incident and discussing the matter with him to which he indicated he was coming back over to discuss it further. (X AA 2375).

Indeed, there was no mention whatsoever in any of the hundreds of pages of testimony by Mr. Richardson's roommate (who also testified at the court-martial) or anyone else that Mr. Richardson was returning with a gun, or even that he was in possession of a gun—a fact that was especially prejudicial given the undisputed testimony that Mr. Richardson interacted with the victim-witness's child upon his return.

In sum, there were not trivial differences between what was found during the court-martial investigation and formal trial and what the capital jury heard from the victim-witness at the penalty hearing at issue.

Mr. Richardson argued to the Nevada Supreme Court that trial counsel was specifically deficient in contravention of *Strickland v. Washington*, 466 U.S. 668(1984) and its progeny by failing to investigate, and that he did not receive a fair sentence or hearing in contravention of *United States v. Levinson*, 543 F.3d 190, 195 (3d Cir. 2008).

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When the Nevada Supreme Court failed to analyze this claim in the stead of seemingly conflating it with standards for failure to present evidence, Mr. Richardson submitted a petition for rehearing on this issue. The petition was denied without comment or further receipt of evidence or argument.

This Petition for Writ of Certiorari follows.

### **REASONS FOR GRANTING THE WRIT**

This Court will review a capital habeas case arising from a state court judgment when the “lower courts have egregiously misapplied settled law.” *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016) (citing cases).

In *Williams v. Taylor*<sup>4</sup>, *Wiggins v. Smith*<sup>5</sup>, *Rompilla v. Beard*<sup>6</sup>, and *Porter v. McCollum*<sup>7</sup>, this Court held that trial counsel performed deficiently by failing to conduct an adequate investigation before a capital sentencing hearing. To be sure, these holdings do not articulate a rule that such failures to investigate are *per se* deficient. But they seem to recognize a rebuttable presumption of deficient performance. Much of the Court’s language in these cases seems to ignore the *Strickland* presumption that defense counsel’s decisions are strategic. In fact, these cases seem to flip that presumption, suggesting that the failure to investigate will

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<sup>4</sup> *Williams v. Taylor*, 529 U.S. 362, 395 (2000).

<sup>5</sup> *Wiggins v. Smith*, 539 U.S. 510 (2003).

<sup>6</sup> *Rompilla v. Beard*, 545 U.S. 374 (2005).

<sup>7</sup> *Porter v. McCollum*, 558 U.S. 30 (2009).

result in a finding of deficient performance absent the government’s ability to make a strong showing of strategic reasons for the failure—at least in capital cases<sup>8</sup>.

For example, in *Rompilla*, the Court explained various ways that defense counsel could have pursued a mitigation investigation and then noted that “trial counsel and the Commonwealth respond to these unexplored possibilities by emphasizing this Court’s recognition that the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up.” *Rompilla*, 545 U.S. at 382-83. This presentation seems to put the onus on the government to explain the failure to investigate. The Court then faulted the defense attorney more specifically for failing to examine the court file containing information about the defendant’s prior convictions, knowing that the State would rely on those convictions as an aggravating factor in favor of death. *Id.* at 383-86. The Court emphasized that investigating to obtain the information that the State has and will use against the defendant is more than just “common sense.” *Id.* at 387.

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<sup>8</sup> Carissa Byrne Hessick, *Ineffective Assistance at Sentencing*, 50 B.C. L. REV. 1069, 1077-78 (2009) (noting that “the Court has aggressively reviewed counsel performance . . . when counsel has failed to conduct an adequate investigation”); Stephen F. Smith, *Taking Strickland Claims Seriously*, 93 MARQ. L. REV. 515, 517 (2009) (“Defense attorneys must, on pains of being faulted for ineffective assistance, diligently investigate and defend their clients’ cases—in capital cases, at least.”); *see also* 3 Wayne R. LaFave et al., *Criminal Procedure* § 11.10(c) n.209 (collecting lower court cases where courts deem the failure to investigate deficient performance).

Indeed, the Court noted, “the American Bar Association Standards for Criminal Justice in circulation at the time of *Rompilla*’s trial describes the obligation in terms no one could misunderstand in the circumstances of a case like this one.” *Id.* After quoting the standard, the Court then noted that “the Commonwealth has come up with no reason to think the quoted standard impertinent here.” *Id.* The implicit premise of this analysis is that a failure to investigate is deficient performance absent some showing to the contrary.

*Rompilla* is not the only case where this Court has apparently adopted a rebuttable presumption that the failure to investigate possible mitigation is deficient performance in a capital case. In *Williams v. Taylor*, the Court stated that counsel representing a client in a capital case has an “obligation to conduct a thorough investigation of the defendant’s background” and held that the failure to fulfill that obligation was deficient unless “justified by a tactical decision.” 529 U.S. 362, 396 (2000). And in *Porter v. McCollum*, the Court reiterated that “[i]t is unquestioned that under the prevailing professional norms . . . , counsel had an ‘obligation to conduct a thorough investigation of the defendant’s background.’” 558 U.S. 30, 39 (2009) (per curiam) (quoting *Williams*, 529 U.S. at 396); see also *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (noting that despite “well-defined norms . . . counsel abandoned their investigation of [defendant’s] background after having acquired

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only rudimentary knowledge of his history from a narrow set of sources”).

In the case *sub judice* not only was the Nevada Supreme Court factually wrong in setting forth that there was only “expected” “inconsistencies” in testimony, that the testimony was “largely” consistent and that there was no showing of impact on the penalty hearing, but in failing to analyze the failure to investigate, the Nevada Supreme Court simultaneously misapplied the law and attempted to justify the same by misapprehending the clear and undisputable facts.

In sum, at trial, the jury heard provably false testimony that Mr. Richardson clearly broke into her home, was equipped with a knife, beat her brutally about the face causing visible and sustained injuries, threatened her child with death (who was sleeping in the next room), anally raped her, and then left, but returned unexpectedly with a gun. Regardless of whether trial counsel’s failure to correct the record was the product of a strategic decision, and regardless of the jury’s impression of Mr. Richardson during the penalty hearing, the fact that defense counsel did not even do basic research to determine the veracity of these highly inflammatory and prejudicial assertions against their own client is the potentially dispositive issue sidestepped by the Nevada Supreme Court.

In other words, irrespective of the Nevada Supreme Court’s speculation as to best practices with a victim witness who had suffered some unwanted sexual

conduct, the failure to even examine the veracity of claims in and of itself is the analysis that this Court's precedent required the Nevada Supreme Court to conduct. Inasmuch as if it is a rebuttable presumption of deficient performance to fail to investigate readily available materials, the record here is clear that the Nevada Supreme Court is disinterested in applying these or any standards.

Sexual conduct against the will of a person is in and of itself a significant offense, but with additional clearly falsified (and easily disproved) details of a physical beating, threats to children, possession of a gun, forced entry, and the even further abhorrence of anal rape, it is understandable that at least one of the jurors was compelled to audibly give the victim-witness a "blessing" as she exited the stand. (IV AA 850).

Thus, the Nevada Supreme Court mistakenly mischaracterized the differences in the victim-witness's accounts to Mr. Richardson's deep prejudice (he did after all receive the death penalty) and failed to protect the rights of Mr. Richardson by failing to analyze the duty to investigate. When such a failure of analysis was presented in this same detail to the Nevada Supreme Court upon a petition for rehearing, the court again sidestepped analysis by denying relief without comment.

Understanding that "[j]udicial scrutiny of counsel's performance must be highly deferential" and courts should "indulge a strong presumption that counsel's

conduct falls within the wide range of reasonable professional assistance,” that was not intended by this Court to be the final analysis. *Strickland*, 466 U.S. at 689. Prevailing norms of practice in professional standards may be guides for determining what is reasonable, but they “are only guides.” *Id.* at 688. The “performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.” *Id.*

Mr. Richardson now petitions this Court for a writ of certiorari based upon the Nevada Supreme Court’s failure to conduct required analysis on the deficiency of counsel’s investigation into readily accessible records which would have definitively made the testimony of the victim-witness far less prejudicially compelling in a capital matter. Further, that the Nevada Supreme Court’s apparent conflating of standards regarding investigation and presentation is not an anomaly in this case but a seemingly intentional approach in circumvention of both precedent and due process. As such, the death penalty imposed in the instant matter should have been vacated.

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## CONCLUSION

For the foregoing reasons, Mr. Richardson respectfully requests that this Court grant his petition for writ of certiorari and reverse the judgment of the Nevada Supreme Court. In the alternative, Mr. Richardson requests that this Court grant certiorari, vacate the decision of the Nevada Supreme Court, and remand for further proceedings in light of *Rompilla v. Beard*, 545 U.S. 374 (2005).

This case presents an important constitutional issue concerning the effectiveness of counsel overlooked by the State of Nevada but ever-present in many of its capital cases. Nevada's notoriety, and especially that connected to the Clark County prosecutor's office as one of the outliers in seeking over-seeking the death penalty<sup>9</sup> demands basic scrutiny in a constitutionally acceptable manner. This Court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (quoting *Burger v. Kemp*, 483 U.S. 776, 785 (1987)). Given the need for heightened reliability where a capital sentence is at stake, and the corresponding basis for

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<sup>9</sup> Fair Punishment Project, *Too Broken To Fix: Part I: An In-Depth Look at America's Outlier Death Penalty Counties 2* (2016) (citing data indicating there were 16 counties, including Clark County, Nevada, in which five or more death sentences were imposed from 2010 to 2015) (cited by *Jordan v. Mississippi*, 138 S. Ct. 2567, 2570 (2018) (Breyer, J., dissenting)); see also *id.* at 20-25 (discussing death penalty statistics pertinent to Clark County).

heightened scrutiny, this Court has not hesitated to grant review to correct significant errors arising in capital cases. *See Magwood v. Patterson*, 561 U.S. 320 (2010).

Review here is warranted.

DATED this 26<sup>th</sup> day of August, 2021.

Respectfully submitted,

  
DAYVID FIGLER