

No. 21-5525

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**IN THE SUPREME COURT OF THE UNITED STATES**

September 2, 2021

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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  
SUPREME COURT OF THE STATE OF NEVADA*

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**RESPONDENT'S BRIEF IN OPPOSITION**

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**QUESTION PRESENTED**

**CAPITAL CASE**

Whether the Nevada Supreme Court did not misapply this Court's precedents in addressing Petitioner's failure to investigate court martial proceedings allegation.

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....iii  
STATEMENT OF THE CASE ..... 1  
STATEMENT OF FACTS..... 2  
ARGUMENT ..... 20  
CONCLUSION ..... 29

**TABLE OF AUTHORITIES**

Page Number:

**Cases**

Harrington v. Richter,  
562 U.S. 86, 131 S.Ct. 770 (2011) ..... 23

Porter v. McCollum,  
558 U.S. 30, 38-39, 130 S.Ct. 447, 452 (2009)..... 23

Rice v. Sioux City Memorial Park Cemetery, Inc.,  
349 U.S. 70, 79, 75 S. Ct. 614, 620 (1955) ..... 21

Richardson v. State,  
Nevada Supreme Court Case Number 77176..... 1, 20, 25

Rompilla v. Beard,  
545 U.S. 374, 380-81, 125 S.Ct. 2456, 2462 (2005)..... 23

Ross v. Moffit,  
417 U.S. 600, 616-17, 94 S. Ct. 2437, 2447 (1974)..... 21

Smith v. Phillips,  
455 U.S. 209, 221, 102 S. Ct. 940, 948 (1982) ..... 22

State v. Richardson,  
Eighth Judicial District Court of Nevada, Case Number 07C232316-2 ..... 26

Strickland v. Washington,  
466 U.S. 668, 104 S. Ct. 2052 (1984) ..... 21

Wiggins v. Smith,  
529 U.S. 510, 521, 123 S.Ct. 2527, 2535 (2003) ..... 23

Williams v. Taylor,  
529 U.S. 362, 390, 120 S.Ct. 1495, 1511, 1512 (2000) ..... 23

**Other Authorities**

3 Wayne R. Lafave et al., Criminal Procedure § 11. 10(a)..... 23

36 C.J.S. Federal Courts §295 (2012)..... 21

Carissa Byrne Bessick, Ineffective Assistance at Sentencing,  
50 B.C. L. REV. 1069, 1 073-74 (2009) ..... 23

Stephen F. Smith, Taking Strickland Claims Seriously,  
93 MARQ. L. REV. 515, 515 (2009)..... 23

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**STATEMENT OF THE CASE**

The Nevada Supreme Court summarized the procedural history of this case on appeal from the denial of habeas relief:

This is an appeal from a district court order denying appellant Thomas Richardson's postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Richardson and his girlfriend's 18-year-old son, Robert Dehnart, robbed and beat to death Steve Folker and Estelle Feldman at Feldman's home in Las Vegas. They had agreed to murder the victims in a scheme to rob Folker. A jury convicted Richardson of conspiracy to commit murder, two counts of first-degree murder with the use of a deadly weapon, burglary while in possession of a deadly weapon, conspiracy to commit robbery, and robbery with the use of a deadly weapon and sentenced him to death for each murder. Richardson's convictions and sentences were affirmed on appeal. Richardson v. State, Docket No. 54951 (Order of Affirmance, November 9, 2012). Richardson filed a timely postconviction petition for a writ of habeas

corpus, which the district court denied after conducting an evidentiary hearing. In this appeal, Richardson contends that the district court judge should have been disqualified from the postconviction proceeding and that the district court erred in denying his claims of ineffective assistance of trial and appellate counsel and trial error. We affirm.

Petitioner's Appendix (PA), p. 1b.

### **STATEMENT OF FACTS**

Respondent offered the following factual summary to the Nevada Supreme Court on appeal from the denial of habeas relief:

#### **A. Guilt Phase**

Steven Folker ("Steven") was visiting his grandmother Estelle Feldman ("Estelle") in Las Vegas, Nevada, over Labor Day weekend in September of 2005. (Transcript of August 20, 2009, Trial by Jury – Day 4, filed September 3, 2009, p. 82). Estelle was ninety-one (91) at the time and lived in a mobile home by herself. *Id.* Steven had just sold a home in Lake Arrowhead, California, and was waiting to close escrow on a different home at the time of his visit. *Id.* at 83.

Dehnart knew Steven through Daniel James (James). (Transcript of August 25, 2009, Trial by Jury – Day 7, filed August 26, 2009, p. 44; Transcript of August 26, 2009, Trial by Jury – Day 8, filed August 27, 2009, p. 10). James helped Steven with roofing and various household repairs. (Transcript of August 26, 2009, Trial by Jury – Day 8, filed August 27, 2009, p. 9-10, 100-01). During the two years prior to Steven's murder, Dehnart and James occasionally supplied Steven with marijuana. *Id.* at 11-12. About a month before Steven's murder, James went to prison. (Transcript of August 21, 2009, Trial by Jury – Day 5, filed August 24, 2009, p. 58; Transcript of August 26, 2009, Trial by Jury – Day 8, filed August 27, 2009, p. 16; Transcript of August 27, 2009, Trial by Jury – Day 9, filed August 28, 2009, p. 41-42, 80-71 (admission of State's Exhibit 316)). Steven asked Dehnart to do repairs in James' absence. (Transcript of August 26, 2009, Trial by Jury – Day 8, filed August 27, 2009, p. 16-17). Dehnart was eighteen (18) at the time of the murders. *Id.* at 4.

Petitioner was Kimberly Ross's (Ross) boyfriend and lived with her in Riverside, California. (Transcript of August 25, 2009, Jury Trial

– Day 7, filed August 26, 2009, p. 5. Ross is also Dehnart’s mother. Id. Ross and Petitioner shared one vehicle, a green Ford Taurus wagon. Id. at 7. Dehnart was also living with them as were several of Dehnart’s sisters. Id. at 8. Petitioner knew Folker though Dehnart. (Transcript of August 24, 2009, Jury Trial – Day 6, filed August 25, 2009, p. 136; Transcript of August 27, 2009, Jury Trial – Day 9, filed August 28, 2009, p. 41 (admission of State’s Exhibit 306D)). Petitioner was thirty-eight (38) years of age at the time of the murders. (Transcript of September 1, 2009, Jury Trial – Day 12, filed September 2, 2009, p. 21 (State’s Exhibit 341 admitted)).

Petitioner and Dehnart believed Steven had considerable cash from the sale of his home and that he kept it in a safe in his truck. (Transcript of August 26, 2009, Trial by Jury – Day 8, filed August 27, 2009, p. 21-22. Steven always had a lot of cash in his pockets as well. Id. at 22. They planned the robbery of Steven in August of 2005. Id. at 20. Dehnart believed the money they would get was worth more than continuing to do odd jobs for Steven. Id. at 20-21. Petitioner and Dehnart were initially going to rob Steven in California over the Labor Day weekend, however when Dehnart contacted Steven, they learned he was out of town. Id. at 22. Steven told Dehnart to join him in Las Vegas and stay with his grandmother so they could “party” and he would give Dehnart a ride back to Las Vegas. Id. at 23, 25. Steven also told Dehnart that Steven had one hundred dollars (\$100.00) for him as a bonus for the last work Dehnart did regarding the house sale. Id. at 35.

After learning that Steven was in Las Vegas, Dehnart and Petitioner revised their plan and decided to rob Steven in Las Vegas. Id. at 25. Dehnart and Petitioner left Riverside, California between 11 a.m. and 11:30 a.m. on September 7, 2005, and drove to Las Vegas in Petitioner’s green Ford Taurus. Id. at 25-26. Petitioner was the driver. Id. Petitioner and Dehnart brought a change of clothes and gloves. Id. Petitioner was wearing a t-shirt, shorts, and his Auto Club 500 baseball cap. (Id. at 26; Transcript of August 27, 2009, Trial by Jury – Day 9, filed August 28, 2009, p. 51). On the way to Las Vegas, they realized that Steven knew them and could identify them, so they decided to kill Steven and leave his body in Las Vegas. (Transcript of August 26, 2009, Trial by Jury – Day 8, filed August 27, 2009, p. 27). Petitioner and Dehnart believed it was safer to kill Steven in Las Vegas since no one knew they were going to be in Las Vegas. Id. They also decided to kill Estelle since she “had lived a full life” and would be a witness to



their murder of Steven. Id. at 137. Petitioner was to kill Steven and Dehnart was to kill Estelle. Id. at 29.

Dehnart and Petitioner arrived in Las Vegas before 4 p.m. on September 7, 2005, almost five hours after they had left Riverside. Id. at 32. Dehnart called Steven and got directions to Estelle's home. Id. at 31. Dehnart and Petitioner arrived at Estelle's home and subsequently went with Steven to a nearby Bank of America, a local Taco Bell, and a local Home Depot. Id. at 34.

While at the Home Depot, Petitioner distracted Steven while Dehnart purchased the murder weapon, a hammer. Id. at 37. It was a small hammer with a claw and a flat head. Id. at 38. Dehnart also used Steven's telephone to contact Lori Ramirez (Ramirez). Id. at 39, 41. After stashing the murder weapon in the car, Petitioner, Steven, and Dehnart went back to Estelle's mobile home to rest. Id. at 42. While Steven lay down in the Southwest bedroom, Dehnart and Petitioner watched television with Estelle in the living room. Id. at 44.

Petitioner subsequently went into the other guest bedroom and changed his clothes. Id. at 45. He was wearing jeans, a t-shirt, and work boots. Id. Dehnart gave Petitioner the hammer and Petitioner placed it in his waistband. Id. at 46. Together, they walked into the room where Steven was laying down. Id. Steven was partially awake watching television and spoke to both of them. Id. at 46. Petitioner sat down in a folding chair next to the closet in the room and waited for Steven to close his eyes. Id.

As Steven closed his eyes, Petitioner took the hammer out of his waistband and attacked Steven. Id. Dehnart closed the door as Petitioner struck Steven repeatedly on the head with the hammer. Id. Steven tried to fend off the assault and rolled off the bed towards the wall away from Petitioner. Id. at 48. He landed on the ground against the back wall. Id. While Petitioner continued to hit Steven on the head with a hammer, Dehnart punched and kicked Steven, trying to get him to the ground. Id. Steven began screaming for help. Id. At first, he was screaming loudly, but then his cries became more garbled as the blood from his wounds began to get into his mouth. Id. at 49.

When Steven screamed for help, Dehnart moved towards the doorway to intercept Estelle. Id. Estelle had reached the room by this time and asked Dehnart what was going on. Id. Dehnart grabbed Estelle by the neck and threw her to the ground. Id. He stepped on her neck to keep her down. Id. at 50. In the meantime, Steven had managed to make it almost to the door before collapsing under multiple blows

rendered by Petitioner. Id. Once Steven lay motionless on the ground, Petitioner approached Estelle and hit her with the hammer on her head a few times. Id.

After Petitioner was finished hitting Steven and Estelle with the hammer, he handed the hammer to Dehnart and told him to “finish it.” Id. at 51. Dehnart noticed that neither Estelle nor Steven were moving so he did not hit them with the hammer. Id. Petitioner went into the hallway bathroom to wash off the victims’ blood. Id. at 52. Petitioner told Dehnart to get Steven and Estelle’s money while he wiped down the area for fingerprints and collected the cigarette butts. Id. at 52-53. Dehnart rolled Steven over onto his stomach and took approximately \$300 from his wallet. Id. at 53. He also took \$100 from Estelle’s purse. Id. While he was getting the money, Dehnart did not see what Petitioner was doing about eliminating fingerprints. Id. at 52.

They changed clothes and Petitioner collected the towels used to clean up the blood, the ashtray they used during the visit, Steven’s cell phone, and both his and Dehnart’s bloody clothing, and placed them into a bag. Id. at 53. After checking the mobile home for remnants of their visit, they left to return to Riverside. Id. at 56. A small portable safe was also missing from Steven’s truck. (Transcript of August 20, 2009, Trial by Jury – Day 4, filed August 21, 2009, p. 57; Transcript of August 26, 2009, Trial by Jury – Day 8, filed August 27, 2009, p. 193).

Dehnart disposed of Steven’s cell phone and the hammer on the way home to Riverside. (Transcript of August 26, 2009, Trial by Jury – Day 8, filed August 27, 2009, p. 58-59). He disposed of the bloody clothes in Riverside. Id. at 60. These items were never recovered. On the drive home, Petitioner asked Dehnart how he was feeling but told him not to saying anything to anyone. Id. at 61. Dehnart indicated that there was no fight or any violent action on the part of Steven to provoke his murder, they just wanted Steven’s money and Estelle was just there. Id. at 46.

Steven and Estelle’s bodies were discovered on September 10, 2005 as the result of actions by Steven’s mother and Estelle’s daughter, Marcia LaFrance (“LaFrance”). LaFrance frequently called and visited her mother. (Transcript of August 20, 2009, Trial by Jury – Day 4, filed August 21, 2009, p. 50). Although Estelle was very independent and often went out during the day, she would be home before dark to watch television, do crossword puzzles, or crochet. Id. at 52.

LaFrance spoke to her son on Thursday, September 1, 2005, and learned that Steven was planning on visiting Estelle over the Labor Day

weekend and staying for several days. Id. at 67-69. LaFrance spoke to her mother on Saturday, September 3, 2005, and Estelle confirmed Steven was coming. Id. at 69.

LaFrance was vacationing in Boston and attempted to contact Estelle by phone on the evening of Thursday, September 7, 2005. Id. at 70-71. There was no answer. Id. LaFrance thought that this was unusual because her mother typically stayed home at night. Id. at 53-54. LaFrance called several more times. Id. There was still no answer. Id. at 71-72. LaFrance then tried to call her mother again on September 8, 2005, with no success. Id. LaFrance also attempted to reach her son, Steven. Id. at 72. She called Steven's cellular telephone several times, but it went straight to voicemail. Id.

LaFrance's daughter, Vicki Chappell, also attempted to call Estelle and Steven. Id. at 73. She too failed to reach either Steven or Estelle. Id. LaFrance became concerned and contacted her friend, Susan Lovelace. Id. LaFrance asked Mrs. Lovelace to go to Estelle's mobile home to check on her well-being. Id. at 74. Mrs. Lovelace agreed that she and her husband, Richard Lovelace, would go to Estelle's home the next morning. Id.

The Lovelaces arrived at Estelle's mobile home around 9:00 a.m. on September 10, 2005. Id. at 111-12. Mrs. Lovelace noticed that both Estelle and Steven's automobiles were present. Id. at 112. The Lovelaces knocked on the door a few times and received no answer. Id. Mrs. Lovelace then tried the door and found it unlocked. Id. They opened the door and went inside. Id. at 113. The air-conditioning was running and the mobile home was dimly lit. Id. Mrs. Lovelace also noticed "an odor [she had] never smelled before" inside the residence as she walked down the hallway towards Estelle's room calling Estelle's name. Id.

Mrs. Lovelace found Estelle laying face down on the hallway floor. Id. at 114. She touched Estelle's arm and noticed that it was "ice cold." Id. She looked up to her husband and told him that Estelle was "gone" then stood up. Id. When Mrs. Lovelace stood up, she could see into the southwest bedroom and observed Steven on the ground with his arm outstretched. Id. Mrs. Lovelace called his name, but he too did not answer. Id. She told Mr. Lovelace they needed to get out of the trailer and call the police. Id. at 115.

Mrs. Lovelace called LaFrance and let her know that both Steven and Estelle were deceased. Id. at 75. She then called the police. Id. at 115. The Lovelaces waited outside of the mobile home until police

arrived. Id. at 115-17. No one went inside the home again until police arrived and neither of the Lovelaces brought anything with them into the home. Id. at 117-18.

LVMPD detectives, including Detectives James Vaccaro and Michael McGrath, subsequently arrived at the scene. (Transcript of August 21, 2009, Trial by Jury – Day 5, filed August 24, 2009, p. 105). Detective Vaccaro noticed newspapers piled outside of Estelle’s front door from September 7, 2005, until September 9, 2005. Id. at 119-20. This was unusual because one of Estelle’s neighbors would bring over a newspaper every morning when she was finished with it so Estelle could read it. (Transcript of August 20, 2009, Trial by Jury – Day 4, filed August 21, 2009, p. 64). Estelle brought the paper in promptly every morning. Id. Detective Vaccaro also noted that there were no signs of forced entry into the residence. (Transcript of August 21, 2009, Trial by Jury – Day 5, filed August 24, 2009, p. 118).

When Detective Vaccaro entered the home, he noticed that there was a TV Guide opened to the date of September 7, 2005. (Transcript of August 21, 2009, Trial by Jury – Day 5, filed August 24, 2009, p. 125). Detective McGrath located and impounded a Walgreen’s and Taco Bell receipt from September 7, 2005. (Transcript of August 24, 2009, Trial by Jury – Day 6, filed August 25, 2009, p. 105). Detective Vaccaro also noted a cell phone charger in the living room, but was unable to find Steven’s cell phone. (Transcript of August 21, 2009, Trial by Jury – Day 5, filed August 24, 2009, p. 124). He walked towards the bedrooms in the back of the mobile home and found Estelle’s body in the hallway just outside the southwest bedroom. Id. at 137-39. Estelle’s skin was turning black from decomposition. Id. at 135-37. She looked as if she had been attacked at the doorway of the southwest bedroom. Id. at 139. She had blood on the front of her face, there was a pool of blood near her wounds, and there were “impressive blood spatter” patterns on the wall near her head. Id. at 137-40. Detective Vaccaro noted that Estelle had serious head trauma caused by a blunt object. Id. at 141.

Steven was lying dead on the floor of the southwest guest bedroom. Id. at 153. His body was pointed away from the bed towards the door. Id. at 153-54. Detective Vaccaro took a survey of the scene and noted blood in the following areas: on a broken fan, white bags full of clothing, on the door inside the closet, on Steven’s feet, at the base of the box spring on the bed, on the mattress that was askew from the box spring, on a medicine vial with Steven’s name on it, on the socks

lying on the bed, on the blanket on the bed, on the corner of the mattress, on the corner of the end table, at the base of a north-facing wall, on a dresser and dresser drawers, on a television in the room, in open suitcases on the floor of the room with saturation type blood on the clothing inside the suitcases. Id. at 155-64. Detective Vaccaro also noted a crescent shaped defect in the dresser that he associated with a blow from the object used to kill Estelle and Steven. Id. at 166. From this, Detective Vaccaro determined that a hammer was likely the weapon used in the murders. Id.

The murder scene was also processed by LVMPD crime scene analysts. The analysts were unable to complete their tasks on September 10, 2005, so the scene was sealed. Id. at 167-68. Detectives and analysts returned to the scene of September 14, 2005. Id. at 169-71. The premises was in the same sealed condition and nothing had been altered. Id. at 171, 209. Before arriving at the crime scene, Detectives Vaccaro and McGrath used the receipts found in the residence to develop a timeline for Estelle and Steven's murder. (Transcript of August 24, 2009, Trial by Jury – Day 6, filed August 25, 2009, p. 105-12). They collected video evidence from a local Walgreen's where Steven and Estelle had shopped around 11:09 a.m. Id. at 108. They also briefly viewed a video of Steven and two unidentified males at a Taco Bell located a short distance from the mobile home around 4:09 p.m. Id. at 112. One of the males with Steven was wearing a baseball cap with sunglasses hiding the logo area. Id. at 114.

While processing the scene on September 14, 2005, Detective Vaccaro located a white hat with a red bill and an "Auto Club 500" logo with crossed checkered flags on the front. (Transcript of August 21, 2009, Trial by Jury – Day 5, filed August 24, 2009, p. 176). The hat was underneath the far corner of the bed near the wall in the southwest bedroom where Steven was found. Id. at 182. Detectives Vaccaro, McGrath, and Wildeman joked a little about the size of the head of the person who owned the hat since they all had large heads. Id. at 176. The hat looked like it was for a person with a smaller head. Id. They believed the hat belonged to the victim given the location under the bed and the lack of blood on it. Id. at 176, 178-79, 215. For this reason, it was not considered evidence and was left at the scene. Id. at 176, 215. At the time, Detective Vaccaro did not associate the hat with the man wearing a baseball cap in the Taco Bell video. Id. at 180-81, 215. After

the police concluded the processing of the mobile home, it was released to the family late on September 14, 2005. *Id.* at 179-80.

Detectives researched Steven's cell-phone records and noted that the last telephone call was at 6:25 p.m. on September 7, 2005. *Id.* at 27. They talked to Keith Chappell who confirmed he had spoken to Steven at that time. *Id.* at 31-32. The detectives discovered that Dehnart had used Steven's cell phone to call Ramirez at around 4:00 p.m. on September 7, 2005. (Transcript of August 26, 2009, Trial by Jury – Day 8, filed August 27, 2009, p. 148). Another call from the phone was made to Dehnart's residence in Riverside. (Transcript of August 24, 2009, Trial by Jury – Day 6, filed August 25, 2009, p. 123, 127). However, at the time, the detectives were not aware of how Dehnart connected to the case.

Meanwhile, Analysts had found several fingerprints at the scene and ran them through their Automated Fingerprint Identification System ("AFIS"). (Transcript of August 26, 2009, Trial by Jury – Day 8, filed August 27, 2009, p. 226). Dehnart's fingerprints came up as a match to some of the latent prints found at the scene. *Id.* at 229. Given this information, and the phone calls, Detectives McGrath, Vaccaro, Kyger, and Long, Sergeant Gaylon Hammick, and crime scene analyst Dan Holstein traveled to Riverside, California, to speak with Dehnart. (Transcript of August 24, 2009, Trial by Jury – Day 6, filed August 25, 2009, p. 129). They obtained and executed a search warrant on Ross, Dehnart, and Petitioner's home on September 27, 2005. *Id.*

While in Riverside, Detective's McGrath and Vaccaro discovered that Petitioner and Dehnart were in a Riverside jail as a result of an armed robbery at a local Kmart. (Transcript of September 1, 2009, Trial by Jury – Day 12, filed September 2, 2009, p. 5-8).<sup>1</sup> Detectives McGrath and Vaccaro went to the jail to speak with Dehnart while the remaining officers went to the Ross/Dehnart/Richardson residence. (Transcript of August 24, 2009, Trial by Jury – Day 6, filed August 25, 2009, p. 130). Riverside detectives told Detectives McGrath and Vaccaro that Petitioner was someone who knew Dehnart well and they might want to interview him as well as Dehnart. *Id.* at 132. When Petitioner was brought into the room he stared directly at Detective McGrath's "Las Vegas Metro Homicide" polo shirt with the

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<sup>1</sup> The jury did not hear evidence of the Kmart robbery in the Guilt Phase. The Kmart robbery was introduced in the Penalty Phase. They only heard evidence of the interview.

Metro badge logo and then said, “I know why you’re here.” Id. at 132-33.

Petitioner stated, “[t]his is about Steve the Jew?” Id. at 136. Petitioner acknowledged that he knew Steven and that Dehnart referred to him as “Steve the Jew” because Steven owed Dehnart money. Id. Petitioner told the detectives that he knew what happened in Las Vegas since Dehnart had told him. Id. The detectives asked Petitioner what he knew, but he requested to speak to Ross first. Id. Petitioner was allowed to speak to Ross, who told him to tell the detectives everything he knew about the murders. Id. at 137.

Rather than indicate what he knew, Petitioner requested to speak to certain Riverside detectives and asked to smoke inside the facility. Id. at 137-38. Detectives McGrath and Vaccaro realized they were not going to get any information out of Petitioner so they discontinued the interview. Id. at 138. Petitioner was subsequently moved to a different holding cell but could still see the walkway leading to the interview room. Id. As Dehnart was being conducted to the interview area, Petitioner yelled, “[d]on’t say anything, Robbie. Keep your mouth shut.” Id. Dehnart did not respond. Id. at 138-39.

Dehnart was brought into the room to speak with detectives and they informed him that they were investigating a homicide in Las Vegas. (Transcript of August 26, 2009, Trial by Jury – Day 8, filed August 27, 2009, p. 62; Transcript of August 27, 2009, Trial by Jury – Day 9, filed August 28, 2009, p. 19). He asked to speak to his mother and, as she had done with Petitioner, Ross told Dehnart to tell the truth. (Transcript of August 26, 2009, Trial by Jury – Day 8, filed August 27, 2009, p. 63; Transcript of August 27, 2009, Trial by Jury – Day 9, filed August 28, 2009, p. 47). After initially denying that he had ever been in Las Vegas, Dehnart told the detectives Petitioner killed Steve and Estelle, but he was not involved. (Transcript of August 26, 2009, Trial by Jury – Day 8, filed August 27, 2009, p. 64). When confronted with additional information, Dehnart explained fully his, as well as Petitioner’s, participation in the murders. Id. Dehnart was unaware of the Taco Bell video when he gave the statement, yet he mentioned going to the Taco Bell and his description of Petitioner’s clothing matched the video exactly. (Transcript of August 27, 2009, Trial by Jury – Day 9, filed August 28, 2009, p. 51).

After providing his statement to the detectives, Dehnart told the detectives to play his confession to Petitioner. Id. at 52. They did and Petitioner became upset and told the detectives, “[y]ou’re not pinning

this on me.” Id. at 53. At all times, Petitioner asserted he had never been to Las Vegas. Id. at 66, 73, 66-67, 73-74, 77-78.

Ross indicated that she had not seen Petitioner or Dehnart on September 7, 2005. (Transcript of August 25, 2009, Trial by Jury – Day 7, filed August 26, 2009, p. 14, 42; Transcript of August 27, 2009, Trial by Jury – Day 9, filed August 28, 2009, p. 54). Her daughter had a dental appointment that day, but Petitioner had taken the car and she had no way to get her daughter to the appointment. (Transcript of August 27, 2009, Trial by Jury – Day 9, filed August 28, 2009, p. 55). Petitioner knew about the appointment as it was listed on the household common calendar. (Transcript of August 25, 2009, Trial by Jury – Day 7, filed August 26, 2009, p. 9-14). When Ross found the car was missing, she assumed that Petitioner had gone to work. Id. at 14. She did not see Petitioner or Dehnart until the early morning hours of September 8, 2005.<sup>2</sup> Id. at 20-21. However, when she checked the family calendar where Petitioner recorded his work hours, there was no entry for that date. Id. at 23. The calendar was entered into evidence as Exhibit 305A. Id. at 11.

Ross gave the detectives permission to return her home on September 28, 2005, to get the calendar and look for Petitioner’s work records. (Transcript of August 27, 2009, Trial by Jury – Day 9, filed August 28, 2009, p. 57). While waiting for assistance from one of Dehnart’s sisters, Detective Vaccaro noticed a photograph of Petitioner wearing an Auto Club 500 hat, the same hat detectives found at the murder scene. Id. at 57-58. Detectives questioned Ross about the hat and learned that Petitioner had gotten the hat in April of 2005 and “from that point on it was always on his head.” Id. at 17. Ross indicated that he wore the hat to work every day and he did not share the hat with anyone, including Dehnart. (Transcript of April 3, 2007, Preliminary Hearing, filed June 5, 2007, p. 94-95; Transcript of April 12, 2007, Grand Jury Proceeding, filed April 25, 2007, p. 58-59; Transcript of August 25, 2009, Trial by Jury – Day 7, filed August 26, 2009, p. 17). Moreover, Dehnart “had an extremely big head and normal baseball hats did not fit him.” (Transcript of August 25, 2009, Trial by Jury –

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<sup>2</sup> At the Grand Jury proceeding, Ross testified that Petitioner returned home between 2 and 3 a.m. on September 8, 2005. (Reporter’s Transcript of April 12, 2007, Grand Jury Proceedings, filed April 25, 2007, p. 55). Ross also explained that Dehnart returned home prior to Petitioner at around midnight. Id. at 56. Dehnart indicated he returned home around 1 a.m. and Petitioner followed him later. (Transcript of August 26, 2009, Trial by Jury – Day 8, filed August 27, 2009, p. 60).



Day 7, filed August 26, 2009, p. 17). Ross had washed the hat on multiple occasions and the bill of the hat had faded. In addition, the cap had multiple sweat rings on it. Id. at 19. Ross was shown photographs of the crime scene which depicted the baseball cap the detectives had seen on September 14, 2005. Id. at 20, 39-40. Ross identified the hat in the photograph as belonging to Petitioner. Id. at 20-21, 38-39. She testified that Petitioner hadn't worn the hat since September 7, 2005. Id. at 20.

Detectives McGrath and Vaccaro rushed back to Las Vegas in hopes of collecting the hat from the crime scene. (Transcript of August 27, 2009, Trial by Jury – Day 9, filed August 28, 2009, p. 62). The mobile home had been released to the family on September 14, 2005, however, and everything related to the murders as well as the entire contents of the southwest bedroom had been removed. Id. This occurred on September 16, 2005, when the LaFrance's hired a crime scene cleanup crew and they came and cleaned the mobile home. (Transcript of August 20, 2009, Trial by Jury – Day 4, filed August 21, 2009, p. 78-79). The detectives also asked LaFrance about the hat and she indicated Steven did not own the hat in question. Id. at 84. Detectives contacted the cleaning company to locate the hat, but learned it was destroyed between September 16, 2005, and September 23, 2005, when the items were picked up by the garbage company for incineration. (Transcript of August 21, 2009, Trial by Jury – Day 5, filed August 22, 2009, p. 212, 224; Transcript of August 24, 2009, Trial by Jury – Day 6, filed August 25, 2009, p. 6). On September 14, 2005, while the crime scene analysts and detectives were processing the scene, the CSAs captured a photograph of the hat in the southwest bedroom. (Transcript of August 21, 2009, Trial by Jury – Day 5, filed August 22, 2009, p. 177-78). Photographs depicting the hat at the crime scene were admitted into evidence as Exhibits 140 and 141. Id.

Ross identified Petitioner and Dehnart as the two individuals in the Taco Bell video with Steven at 4:00 p.m. on September 7, 2005. (Transcript of August 25, 2009, Trial by Jury – Day 7, filed August 26, 2009, p. 39). Ross also reviewed still photo blow-ups produced from the video and identified the hat in the video as Petitioner's Auto Club 500 hat from the unique sweat lines visible in the enlargement. Id. at 39-40.

Ross also explained that on the morning of September 8, 2005, she received \$275 from Petitioner, although he was not working at the time. Id. at 20-23. She deposited the money and her bank records

reflected the deposit. Id. at 21. The day prior to the murders, on September 6, 2005, Ross and Petitioner purchased a pair of work boots at the Big 5 Sporting Goods store in Riverside, California. Id. at 24-25. Ross never saw these boots again after the murders. Id. When Ross asked Petitioner about the boots, he told her the eyelets and laces broke on September 6, 2005, and they were defective so he threw them and the receipt away. Id. at 35. Ross asked him why he did not return them for a refund, but never received an answer.<sup>3</sup> Id. at 35.

While in custody in Riverside, Petitioner called Ross and his Uncle Wes on numerous occasions. (Transcript of August 27, 2009, Trial by Jury – Day 9, filed August 28, 2009, p. 66). Audio recordings of the conversations were played and admitted into evidence as Exhibit 306. (Transcript of August 25, 2009, Trial by Jury – Day 7, filed August 26, 2009, p. 41). Petitioner repeatedly told Ross and his Uncle Wes that he had nothing to do with the murders in Las Vegas and that he had never even been to Las Vegas. (Transcript of August 27, 2009, Trial by Jury – Day 9, filed August 28, 2009, p. 65-67, 74-78). He told Ross that he had an alibi and in fact tried to get his Uncle Wes to say that Appellant had been watching the U.S. Open with him during the timeframe of the murders. Id. at 76. In one of the telephone conversations with his Uncle Wes, Petitioner told his Uncle that “anybody could sneak off in a 15 hour time period over five days.” Id. at 76; State’s Exhibit 306E. This comment was in the same context and conversation where Petitioner tried to create his alibi, an alibi that would cover the fifteen (15) hour time frame. Id. Petitioner also asserted several theories as to how Dehnart got to Vegas and even stated that he had lent Dehnart his car at one point. (Transcript of August 27, 2009, Trial by Jury – Day 9, filed August 28, 2009, p. 74).

In conversations with Ross, Petitioner inquired into the progress of the investigation. During one of the phone calls, Petitioner learned Steven was seen in a surveillance video at a Taco Bell at approximately 4:00 p.m. on the afternoon of the murder. (Transcript of April 12, 2007, Grand Jury Proceedings, filed April 25, 2007, p. 152; State’s Exhibit 306F). Petitioner nervously asked Ross whether anyone else had been seen on the tape with Steven. Id. When she stated that she did not know, Petitioner indicated that he knew who committed the murders with

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<sup>3</sup> At the Grand Jury, Ross stated that prior to September 7, 2005, Petitioner and her son never spent any time together. (Reporter’s Transcript of April 12, 2007, Grand Jury Proceedings, filed April 25, 2007, p. 63). However, after September 7, 2005, Ross noted that Petitioner and Dehnart were “almost constantly” together. Id.

Dehnart but that he was not going to share that information with Ross. (Transcript of August 27, 2009, Trial by Jury – Day 9, filed August 28, 2009, p. 78).

Doctor Lary Simms conducted the autopsies of both victims. (Transcript of August 20, 2009, Trial by Jury – Day 4, filed August 21, 2009, p. 149). Steven's body was somewhat decomposed, consistent with Steven having been murdered on September 7, 2005. *Id.* at 155. Steven suffered multiple blunt force injuries, mostly concentrated on his head, and a single sharp force injury to his face. *Id.* Dr. Simms noted the following blunt force injuries: (1) a curvilinear laceration in the left occipital area of Steven's head with a fracture underneath; (2) a laceration with a fracture underneath on the left side of Steven's head above his ear; (3) a laceration in the left parietal area with a skull fracture underneath; (4) a laceration with a skull fracture underneath in the front of his ear; (5) another laceration in the left frontal area of Steven's head which descended to almost his forehead with a fracture underneath; (6) a laceration in the right occipital area with a skull fracture underneath; (7) two lacerations close together in the right parietal area of Steven's head with fractures underneath; (8) five lacerations with skull fractures underneath in the right front parietal area; (9) seven lacerations on Steven's right cheek associated with multiple fractures underneath, including the skull and facial bone; and (10) a laceration on the right side in front of Steven's lower lip. *Id.* at 158-64. Steven suffered multiple internal injuries coordinated to the lacerations observed externally. Specifically, Steven had several punched out fractures on his skull, a depressed skull fracture caused by something with a moon-shape, other square punched out fractures near his ear with multiple radiating fractures, moon-shaped curvilinear fractures on the side of his head, and several punched out fractures on his skull. *Id.* at 174-78. Dr. Simms indicated that these injuries were consistent with the claw end and front end of a hammer. *Id.* at 176.

In addition to the external injuries to his head, Steven also suffered external injuries on the remainder of his body. Steven suffered a contusion on his back, another abrasion in the left mid back, and defensive wounds on his arms and hands including a curvilinear scratch on his left forearm, a small punctate abrasion on Steven's left wrist, a scratch with some bruising on Steven's left upper arm, several small abrasions on the third knuckle of Steven's left hand, a superficial laceration on the same finger, a punctate abrasion on Steven's left thumb, and a small laceration on Steven's left foot. *Id.* at 165-68.

Steven had a large bruise on his left thigh area and an abrasion on his left flank area. Id. at 168. There was also sharp force injury on the left side of Steven's nose with extension into his left cheek. Id. at 169.

Besides the external injuries, Steven also showed signs of asphyxiation. Id. at 170. He had multiple hemorrhages in the soft structures of his neck, his hyoid bone was fractured, the right side of his voice box cartilage was fractured, and there was cartilage in his neck that was also fractured. Id. at 171. Furthermore, Steven's neck showed signs that some significant compression or pressure had been applied to it. Id. Dr. Simms opined that this type of compression could have been applied by manual strangulation, an arm bar, a knee, or a host of other objects. Id. at 172.

Dr. Simms concluded that Steven had been alive while the injuries were inflicted upon his skull and body. Id. at 179. In total, Steven suffered at least nineteen (19) blows to his skull. Id. at 180. The injuries matched both the claw and disk-shaped side of a hammer. Id. Dr. Simms also found a low-level amount of methamphetamine in Steven's blood. Id. at 181. Dr. Simms ultimately concluded that Steven died as a result of multiple blunt force trauma with asphyxiation as a significant contributing condition. Id. at 182. The manner of death was homicide. Id.

Dr. Simms noted that Estelle's injuries were similar to Stevens's. Id. at 182-83. She suffered: (1) two lacerations in the back occipital area; (2) a laceration in the left occipital area behind the ear with a skull fracture underneath; (3) two lacerations in the left parietal scalp area with a curvilinear type of pattern; (4) two lacerations to the left ear; (5) a small abrasion near Estelle's ear; (6) blood in the ear canal indicating a ruptured ear drum consistent with a skull fracture at the base of the skull; (7) an abrasion and contusion on the right ear; (8) two lacerations from the claw of a hammer on the left parietal scalp; (9) a small skin evulsion in the central forehead area; (10) Estelle's lip had been pulled down; (11) a complex laceration on her right ear with a skull fracture underneath; (12) a laceration and bleeding by her left eye; (13) an injury to her upper lip; and (14) a laceration on her nose. Id. at 184-85. In addition to the external injuries to her head, Estelle also suffered an injury to her left shoulder. Id. at 189. She did not have many defensive wounds, but did suffer a bruise on the left hand and several bruises on the second and third fingers of her right hand. Id. Finally, Estelle had two stab wounds in front of her right ear. Id. at 193.

Estelle also showed signs of asphyxiation. Id. at 189. Estelle had a number of hemorrhages in the soft tissue of her neck, a hemorrhage in the back right part of her neck in front of her spinal column, a hemorrhage in her voice box, a hemorrhage at the base of her tongue, a hemorrhage over the left side of her thyroid gland, a fracture through the soft tissues near her trachea, and petechiae hemorrhages in both of her eyes. Id. at 190-93. Furthermore, Estelle had several fractures in her head that were consistent with both the claw side of a hammer and the disk-shaped front side of a hammer. Id. at 194-95.

Dr. Simms concluded that Estelle died as a result of multiple blunt force injuries with multiple sharp force injuries and asphyxiation being significant contributing factors. Id. at 196. Her body was similarly decomposed as Steven's. Id. at 195. The manner of death was homicide. Id. at 196.

Petitioner's theory of the case, presented through cross-examination of witnesses, was that he drove Dehnart to Las Vegas and never entered the mobile home after he, Dehnart and Steven returned from the Taco Bell, even though he told detectives that he had never been to Las Vegas. Id. at 35-36; Transcript of August 26, 2009, Trial by Jury – Day 8, filed August 27, 2009, p. 290; Transcript of August 28, 2009, Trial by Jury – Day 10, filed August 31, 2009, p. 126-27. Either Dehnart committed the murders alone or he had some other unknown accomplice. (Transcript of August 20, 2009, Trial by Jury – Day 4, filed August 21, 2009, p. 35, 39, 41; Transcript of August 24, 2009, Trial by Jury – Day 6, filed August 25, 2009, p. 175, 178-79; Transcript of August 25, 2009, Trial by Jury – Day 7, filed August 26, 2009, p. 167-69; Transcript of August 26, 2009, Trial by Jury – Day 8, filed August 27, 2009, p. 290; Transcript of August 28, 2009, Trial by Jury – Day 10, filed August 31, 2009, p. 126-27). This was indicated by the lack of physical evidence linking Petitioner to the crime scene as well as the presence of unidentified latent prints and unidentified weak male DNA found on an unused towel in the hall bathroom.<sup>4</sup> (Transcript of August 20, 2009, Trial by Jury – Day 4, filed August 21, 2009, p. 41; Transcript of August 21, 2009, Trial by Jury – Day 5, filed August 24, 2009, p. 197; Transcript of August 24, 2009, Trial by Jury – Day 6, filed August 25, 2009, p. 175-77; Transcript of August 25, 2009, Trial by Jury – Day 7, filed August 26, 2009, p. 167-68). Petitioner claimed

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<sup>4</sup> The evidence indicated the profile was weak and could have been deposited months before the murders. (Transcript of August 26, 2009, Trial by Jury – Day 8, filed August 27, 2009, p. 271).

the murders were the result of a dispute between Dehnart and Steven over money or stemmed from Steven's methamphetamine use and that something went horribly wrong while Dehnart was visiting. (Transcript of August 28, 2009, Trial by Jury – Day 10, filed August 31, 2009, p. 122-23, 124-26). Petitioner only knew about the murders after the fact from what Dehnart told him and that Dehnart's testimony was not credible and the result of a favorable plea deal. Id. at 124-27.

#### **B. Penalty Phase**

During the penalty hearing, the State introduced evidence relating to Petitioner's prior violent felonies, including his robbery conviction from the Riverside Kmart and his 1992 convictions for rape and attempt sodomy.

Shortly after Steven and Estelle were murdered in Las Vegas, Petitioner and Dehnart hid in the rafters of a local Kmart in Riverside, California and waited until the store closed. (Transcript of September 1, 2009, Trial by Jury – Day 12, filed September 2, 2009, p. 7). When the two-person cleaning crew arrived, Petitioner and Dehnart, who were carrying a knife and a gun, tied up the cleaning crew and put them into a storage facility in the back of the store. Id. Petitioner and Dehnart then ransacked the store for electronic equipment and jewelry. Id. Petitioner and Dehnart were in the store for a few hours and the two-person cleaning crew was tied up the entire time. Id. at 11. Riverside Detectives found Petitioner's green Ford Taurus with property taken from the Kmart. Id. at 8. A search of Petitioner's, Ross' and Dehnart's residence and shed led to the discovery of a pillowcase full of coins and numerous other items taken from the Kmart. Id. at 8-9. Petitioner had the key to the storage shed. Id. at 9. Petitioner and Dehnart had initially attempted to rob this Kmart on a prior occasion, but were unsuccessful. Id. at 12. Petitioner was convicted of two counts of robbery. Id. at 19-21.

In 1992, Petitioner was in the Army and was stationed at Fort Hood, in Killeen, Texas. (Transcript of August 31, 2009, Trial by Jury – Day 11, filed September 1, 2009, p. 26-30). He was friends with Staci Sokol (Sokol), the victim, and her husband. Id. at 29. On February 9, 1992, Sokol and her friend Teresa were sitting at a club talking when Petitioner approached them. Id. at 34. Petitioner was very intoxicated; Sokol could smell the alcohol on his breath and he was having a hard time standing straight up. Id. Petitioner told Sokol that he was going to come over to her house, despite her reminder that her husband did not like it when Petitioner visited when he was not home. Id. at 35.

Petitioner insisted that he was still coming over to her house. Id. at 38. Teresa told him to leave Sokol alone. Id.

Sokol and Teresa left the club and stopped on the way home to call Teresa's husband, Robert. Id. at 39. Sokol told Robert not to let Petitioner into her house, but Robert said that Petitioner was already in the house sleeping on the couch. Id. Sokol asked Robert to get Petitioner out of her house, so Robert woke Petitioner up and told him to leave. Id. When Sokol and Teresa arrived at Sokol's home, Petitioner had left. Id. at 40. Sokol pleaded Robert and Teresa to stay with her, but they left anyway. Id. Sokol locked up her house and went to sleep around 4 a.m. with a gun tucked by her bed. Id.

Sokol woke up a little while later to Petitioner on top of her trying to "rape" her. Id. at 41. Petitioner had straddled her, had his knees on her biceps, and sat on her stomach. Id. at 42. She asked him what he was doing and he told her it was "none of her business." Id. She fought with Petitioner and he continued to "rape" her. Id. She tried to push him off and told him he needed to go but he continued to force his penis into her vagina "time and time again." Id. at 43. Sokol kept fighting Petitioner but he just rolled her over, pushed her head down, and sexually assaulted her from behind. Id. She begged him to stop but he told her to quit fighting since "this is what she wanted." Id.

Sokol continued to scream, and Petitioner told her that if she did not shut up he would kill her children. Id. at 44. He then repeatedly punched her in the face. Id. He also forced his penis into her mouth several times. Id. at 45. When Petitioner finished his assault, he went into her kitchen to get a drink and smoke a cigarette. Id. Left alone, Sokol was finally able to grab her gun, but Petitioner just said goodbye and left so she did not shoot him. Id. at 46. Sokol checked on her children and noticed that her son was awake. Id. The screen in his window was cut, indicating this was how Appellant entered the house. Id.

Sokol called Petitioner's roommate and asked him why he let Petitioner come over to her house. Id. at 47. Petitioner's roommate told her that he did not know what she was talking about, but indicated that Petitioner had just come back, jumped in the shower, then grabbed a gun and said he was going to his girlfriend's house. Id. at 48. Petitioner did not have a girlfriend, so Sokol realized he was probably heading back to her home. Id. at 48-49. She gathered her children and attempted to get out of her apartment. Id. at 48. As she was about to leave, Petitioner came back and asked her what she was doing. Id. He

had a gun and picked her son up. Id. He asked her if she was going to tell anyone. Id. Sokol was able to convince Petitioner that she was not planning on telling anyone so he put her son in her car. Id. at 51. Sokol got in, locked the doors and drove away. Id.

Sokol called the police and was subjected to an invasive sexual assault examination. Id. at 52-53. She had a black eye and a split lip. Id. at 44. Petitioner was convicted through a United States Army court-martial proceeding of attempt sodomy and rape. Id. at 67. He served eleven (11) years in Fort Leavenworth prison. Id. He was subsequently sent to a different prison in Florence, Colorado, and ultimately finished his sentence in Oregon. (Transcript of September 1, 2009, Trial by Jury – Day 12, filed September 2, 2009, p. 83). Petitioner was released from prison in 2003. Id. at 84.

Petitioner called four witnesses. Investigator Michelle Blackwell testified about Petitioner's background. Id. at 42-46. Petitioner was played sports during high school and graduated. Id. at 46. A taped interview with Petitioner's high school baseball coach was played for the jury. Id. at 47-48. Robert Christopherson, a retired Seattle police officer, knew Petitioner's family and testified about the living conditions in the Richardson home when Petitioner was growing up. Id. at 50-55. Petitioner was raised in a small town in rural Washington. Id. at 54. Petitioner's father worked as a law enforcement officer with the highway patrol. Id. The family lived in a primitive house without a television or radio. Id. Over the years, Petitioner's parents constructed additions to the home and updated it. Id. at 55. Petitioner's family was close-knit and he was respectful towards his parents. Id. at 56. Petitioner's father died a few months prior to trial. Id. at 60.

Petitioner's mother, Ellouise Richardson (Ellouise), testified for him. Id. at 65. Petitioner has one brother and one sister. Id. at 67. Petitioner was heavily involved in sports during high school. Id. at 71-74. Petitioner also played baseball for his college. Id. at 75-76. Petitioner joined the Army after leaving college. Id. at 76. Ellouise told the jury about Petitioner's daughter and his contact with her. Id. at 79-81. Ellouise let the jury know that she wanted to maintain a relationship with her son if he was sentenced to life in prison instead of death. Id. at 86.

Dr. Louis Mortillaro also testified on Petitioner's behalf. Id. at 87. Doctor Mortillaro is a licensed psychologist and was brought into the case to investigate personal traits of Petitioner relevant to



sentencing. Id. at 87, 91-92. Dr. Mortillaro opined that Petitioner was institutionalized during his prior prison term. Id. at 96-97. As a result, Petitioner “couldn’t handle being outside in society. Id. at 97. Dr. Mortillaro told the jury that people like Petitioner normally adjust well to prison life. Id. at 98. Dr. Mortillaro also educated the jury about Petitioner’s mental health problems. Petitioner had been diagnosed with Attention Deficit Hyperactivity Disorder when he was a child. Id. at 113. Dr. Mortillaro diagnosed Petitioner as suffering from anti-social personality disorder. Id. at 102-03. Petitioner displayed glib personality traits. Id. at 106-07. Petitioner had an elevated need to be around other individuals, was gregarious and enjoyed attention, even negative attention. Id. at 106-07, 110. Petitioner was also the victim of alcohol and marijuana dependence. Id. at 113. These addictions negatively impacted Petitioner’s life. Id. at 112-13. On cross-examination, Doctor Mortillaro agreed that Petitioner had nice parents, a good home and no birth defects or brain injuries. Id. at 117. The last mitigating circumstance presented to the jury was Petitioner’s statement in allocution, where he accepted responsibility and apologized to the victims’ family. Id. at 145.

Respondent’s Answering Brief, p. 10-28, filed July 3, 2019, Richardson v. State, Nevada Supreme Court Case Number 77176.<sup>5</sup>

### ARGUMENT

Petitioner’s request for extraordinary relief does not present a conflict between inferior courts or an important federal question. This Court should reject Petitioner’s attempt to entice it into reviewing the Nevada Supreme Court’s correct

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<sup>5</sup> Petitioner neglected to include the briefing provided to the Nevada Supreme Court on appeal from the denial of his habeas petition in his appendix. Unfortunately, the rules of this Court do not appear to allow a party responding to a petition for writ of certiorari to submit an appendix. See, RSCUS Rule 15. The cited brief is available on the Nevada Supreme Court’s website and Respondent will provide a copy of it to this Court if directed to do so.

review of the habeas court's application of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984).

Rule 10(b)-(c) of the Rules of the Supreme Court of the United States (RSCUS) precludes discretionary intervention in this matter.<sup>6</sup> Certiorari is only warranted where there is a substantial conflict between decisions of lower state and/or federal courts, or where an important question of federal law needs to be settled. Id. It is generally accepted that “[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.” 36 C.J.S. Federal Courts §295 (2012). As explained in Ross v. Moffit, 417 U.S. 600, 616-17, 94 S. Ct. 2437, 2447 (1974), “[t]his Court’s review ... is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review.”

A conflict between lower courts must be substantial to warrant intervention by this Court. Indeed, “[i]t is very important that [this Court] be consistent in not granting the writ of certiorari except . . . in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.” Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 79, 75 S. Ct. 614, 620 (1955).

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<sup>6</sup> This Court’s plenary supervisor authority over inferior federal courts found at RSCUS 10(a) is not relevant.

An important question of federal law is one that goes beyond whether the alleged error complained of “is undesirable, erroneous or even ‘universally condemned.’” Smith v. Phillips, 455 U.S. 209, 221, 102 S. Ct. 940, 948 (1982). In order to amount to an important federal question the issue must be one of broad scope that actually needs to be settled:

A federal question raised by a petitioner may be ‘of substance’ in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. ... ‘Special and important reasons’ imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court’s duty to avoid decisions of constitutional issues unless avoidance becomes evasion.

Rice, 349 U.S. at 74, 75 S. Ct. at 616-17 (citations omitted).

Petitioner does not allege a substantial conflict or an important federal question. Instead, he complains that the Nevada Supreme Court failed to apply a presumption of ineffectiveness that only he perceives. Petition, p. 12. Specifically, Petitioner contends that this Court’s precedents “recognize a rebuttable presumption of deficient performance” in failure to investigate allegations. Id. Petitioner does not cite this Court’s attention to any instance of any court adopting his presumption of deficient performance standard. The cases Petitioner cites as allegedly supporting his novel theory clearly state they are applying the traditional Strickland analysis in adjudicating failure to investigate claims and say nothing about a rebuttal

presumption. Porter v. McCollum, 558 U.S. 30, 38-39, 130 S.Ct. 447, 452 (2009); Rompilla v. Beard, 545 U.S. 374, 380-81, 125 S.Ct. 2456, 2462 (2005); Wiggins v. Smith, 529 U.S. 510, 521, 123 S.Ct. 2527, 2535 (2003); Williams v. Taylor, 529 U.S. 362, 390, 120 S.Ct. 1495, 1511, 1512 (2000). The three secondary sources Petitioner offers as support for his odd contention say nothing about a presumption of deficient performance in failure to investigate allegations. Instead, they too address failure to investigate claims with the traditional Strickland analysis. Carissa Byrne Bessick, Ineffective Assistance at Sentencing, 50 B.C. L. REV. 1069, 1073-74 (2009); Stephen F. Smith, Taking Strickland Claims Seriously, 93 MARQ. L. REV. 515, 515 (2009); 3 Wayne R. LaFare et al., Criminal Procedure § 11.10(a).

Indeed, Petitioner's bizarre presumption conflicts with precedent. In Harrington v. Richter, 562 U.S. 86, 131 S.Ct. 770 (2011), this Court reviewed a habeas claim that trial counsel failed to consult with a blood spatter expert. Harrington held that a court considering a claim of ineffective assistance of counsel *must* apply a "strong presumption" that counsel's representation was within a "wide range" of reasonable professional assistance. Id. at 104, 131 S.Ct. at 787 (citing, Strickland, 466 U.S. at 689, 104 S.Ct. at 2052).

The Nevada Supreme Court invoked Strickland when addressing Petitioner's ineffectiveness complaints. PA 4b-5b. Indeed, Nevada Supreme Court scrupulously applied Strickland to Petitioner's complaints regarding his court martial:

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 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.

PA 15b.

Petitioner complains that the Nevada Supreme Court failed to address his claims regarding his court martial as a failure to investigate claim. Petitioner notes that he raised the failure to investigate his court martial proceedings claim in a petition for rehearing. Petition, p. 12. What Petitioner fails to divulge is that his opening brief collectively raised every issue related to his court martial proceedings in a single argument section and did not bother to subdivide or parse out his

particular complaints. Appellant's Opening Brief, p. 51-53, filed May 23, 2019, Richardson v. State, Nevada Supreme Court Case Number 77176.<sup>7</sup> In that context, it is unremarkable that the Nevada Supreme Court collectively addressed his complaints and that the Court focused on what it believed to be the crux of Petitioner's claims. Regardless, every statement made by the Nevada Supreme Court in the above quoted text applies equally to a failure to investigate claim. Petitioner is taking unfair advantage of the Nevada Supreme Court's attempt at clarity in the face of a poorly drafted opening brief.

Even if this Court is willing to ignore Petitioner's failure to demonstrate the requisite conflict between inferior courts and/or an important federal question or indulge his attempt to take advantage of his poorly drafted opening brief, the factual contention animating his claim is a misrepresentation of the record. Petitioner argues an entitlement to a rebuttal presumption of deficient performance because "[i]t is undisputed that trial counsel did not seek any records or transcripts (both readily available through the discovery processes) concerning the prior charge and/or conviction" arising from the court martial proceedings. Petition, 2. What the record shows is markedly different. During Sokol's testimony at the penalty hearing

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<sup>7</sup> Petitioner neglected to include the briefing provided to the Nevada Supreme Court on appeal from the denial of his habeas petition in his appendix. Unfortunately, the rules of this Court do not appear to allow a party responding to a petition for writ of certiorari to submit an appendix. See, RSCUS Rule 15. The cited brief is available on the Nevada Supreme Court's website and Respondent will provide a copy of it to this Court if directed to do so.

a bench conference was held where trial counsel indicated that both the State and defense tried to get the transcripts of the court martial proceedings but were unable to do so:

We were unable to – and the State tried also. We could not get any trial transcripts from this, because it was a court martial. We did not contact this witness for obvious reasons. Some people we don't have much success talking to beforehand, given the circumstances surrounding the events.

Transcript of August 31, 2009, Trial by Jury – Day 11, filed September 1, 2009, p. 59, State v. Richardson, Eighth Judicial District Court of Nevada, Case Number 07C232316-2.<sup>8</sup> Even Petitioner does not demand a right to a rebuttable presumption where counsel tried to investigate but was not successful.

Ultimately, even if Petitioner was not misstating the record and was entitled to his novel presumption, relief would still be unwarranted as any deficient performance was unlikely to provide the high degree of prejudice necessary to substantiate a Strickland claim. Petitioner must demonstrate that but for the incompetence of trial counsel the results of the proceeding would have been different:

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, Strickland asks

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<sup>8</sup> Petitioner neglected to include this trial transcript in his appendix. Unfortunately, the rules of this Court do not appear to allow a party responding to a petition for writ of certiorari to submit an appendix. See, RSCUS Rule 15. Respondent will provide a copy of it to this Court if directed to do so.

whether it is reasonably likely the results would have been different. This does not require a showing that counsel's actions more likely than not altered the outcome, but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case. The likelihood of a different result must be substantial, not just conceivable.

Harrington, 562 U.S. at 111-12, 131 S.Ct. at 791-92 (internal quotation marks and citations omitted).

In affirming the habeas court's decision to deny relief, the Nevada Supreme Court correctly observed:

*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.*

PA 15b (emphasis added).

Petitioner cannot demonstrate prejudice because at best he is arguing that jurors might have perceived his sexual assault and victimization of Sokol as less bad. Considering the facts of this case, such hairsplitting would be irrelevant. But even if trial counsel worked a miracle and convinced the jury to reject the aggravating circumstance related to Petitioner's court martial, the outcome of the penalty hearing would have remained unchanged since jurors found two other aggravating circumstances unrelated to Petitioner's rape of Sokol. Special Verdict, filed September 2, 2009, State v. Richardson, Eighth Judicial District Court of Nevada,



Case Number 07C232316-2.<sup>9</sup> This is particularly so since jurors declined to find *any* mitigating circumstances. Special Verdict, filed September 2, 2009, State v. Richardson, Eighth Judicial District Court of Nevada, Case Number 07C232316-2.<sup>10</sup> Accord, PA 16a-17a (direct appeal adjudication of claim challenging failure to find mitigation).

Certiorari in this matter is unwarranted. Petitioner fails to demonstrate a conflict between inferior courts and/or an important federal question. This Court has never endorsed a rebuttal presumption of deficient performance in failure to investigate claims. Nor is this the case to do so. Petitioner's misrepresentations aside, trial counsel did try to acquire the transcripts from Petitioner's court martial but was unable to do so. That this was not deficient performance is substantiated by the fact that the State tried and failed as well. Regardless, Petitioner was not prejudiced because making his rape of Sokol slightly less bad would not have made

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<sup>9</sup> Petitioner neglected to include the Special Verdict form addressing aggravating circumstances in his appendix. Unfortunately, the rules of this Court do not appear to allow a party responding to a petition for writ of certiorari to submit an appendix. See, RSCUS Rule 15. Respondent will provide a copy of it to this Court if directed to do so.

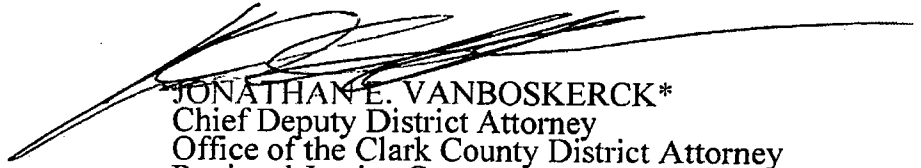
<sup>10</sup> Petitioner neglected to include the Special Verdict form addressing mitigating circumstances in his appendix. Unfortunately, the rules of this Court do not appear to allow a party responding to a petition for writ of certiorari to submit an appendix. See, RSCUS Rule 15. Respondent will provide a copy of it to this Court if directed to do so.

a difference. Even if trial counsel convinced jurors to reject this aggravating circumstance, there were two others and jurors found no mitigating circumstances.

**CONCLUSION**

The Writ fails to establish that exercise of discretionary jurisdiction is warranted. There is no important federal issue or conflict in authority presented and as such this Court should deny certiorari.

Respectfully submitted.



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