No._____

IN THE SUPREME COURT OF THE UNITED STATES

RALPH LEROY MENZIES, Petitioner,

vs.

ROBERT POWELL, Warden, Utah State Correctional Facility, Respondent.

****CAPITAL CASE****

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

VOLUME 4 OF 6

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CLAIM 37

Appellate counsel's failure to raise meritorious claims on direct appeal violated Mr. Menzies's rights to the effective assistance of counsel and due process under the Sixth and Fourteenth Amendments.

This claim was not raised in state court.[29] The ineffective assistance of Mr. Menzies's state post-conviction counsel in failing to raise this claim constitutes cause for the default and resulted in prejudice to Mr. Menzies. *See Martinez*, 132 S. Ct. at 1315; *Ha Van Nguyen*, 736 F.3d at 1293; *see also infra* Claim 38. Mr. Menzies will demonstrate at an evidentiary hearing that post-conviction counsel fell below the standards of a minimally competent capital post-conviction attorney when he failed to raise this meritorious claim. *See infra* Claim 38. If this Court finds that Mr. Menzies must first exhaust this claim in state court, then it should stay these proceedings and allow him to present the claim in a successive post-conviction petition. *See Rhines*, 544 U.S. 269.

The effective assistance of appellate counsel is guaranteed by the Due Process Clause of the Fourteenth Amendment. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985) ("A first

[29] Post-conviction counsel did raise several claims related to appellate counsel's alleged ineffectiveness. (*See* 5th Am. Pet. at 7-8, 34-40, 41-45, 51.) However, the claims identified by post-conviction counsel related almost entirely to post-conviction counsel's failure to raise ineffective assistance of counsel claims and failure to investigate issues outside the record. (*See id.*) The only record based claim that post-conviction criticized appellate counsel for failing to raise was related to the reasonable doubt instruction. (*See id.*at 7-8.) However, appellate counsel did challenge the reasonable doubt instruction. (*See* 09/14/1992 Br. of Appellant at 83-85.) In Utah, ineffective assistance of counsel claims may only be raised on direct appeal under narrow circumstances. *See* Utah R. App. P. 23B. In addition, given that Mr. Menzies was represented by attorneys from the Salt Lake Legal Defenders Association at trial and on direct appeal, state law directs that the ineffective assistance of trial counsel claims should have been raised in post-conviction, rather than on direct appeal. *See Parsons v. Barnes*, 871 P.2d 516, 521 (Utah 1994).

appeal as of right . . . is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney."); *see id.* at 395 ("Because the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits."). As such, "nominal representation" during an appeal "does not suffice to render the proceedings constitutionally adequate." *Id.* at 396. Ineffective assistance of appellate counsel claims are governed by the standard of review set forth in *Strickland*. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000).

Here, Mr. Menzies was represented on direct appeal by counsel from LDA, the same organization that represented him during trial. Upon Mr. Menzies's information and belief, his appellate counsel failed to raise meritorious claims on direct appeal. These claims include, but are not limited to, failing to assert a claim that Mr. Menzies's right to due process was violated when he was forcibly shackled in front of the jurors (Claim 9; *see also* Claim 14.G); failing to assert a claim that Mr. Menzies's right to due process, to an adequate and effective appeal, and to a public trial were violated by the court's failure to record significant proceedings in Mr. Menzies's case (Claim 33; *see also* Claim 14.H); failint to assert that Mr. Menzies's rights were violated when he was convicted by a biased jury (Claim 38.E.2; Claim 14.C).

Counsel rendered prejudicially deficient performance during Mr. Menzies's direct appeal proceedings. Appellate counsel passed up the opportunity to litigate significant issues. Moreover, counsel raised 52 issues in the Utah Supreme Court demonstrating that winnowing was not counsel's primary consideration. Even if counsel made a strategic

decision not to raise these claims, it was unreasonable, resulting in deficient performance, which prejudiced Mr. Menzies. *See Strickland*, 466 U.S. at 686 ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."). Appellate counsel was deficient to Mr. Menzies's prejudice, violating his due process rights, an adequate and effective appeal, and the effective assistance of appellate counsel. Accordingly, Mr. Meznies is entitled to relief.

CLAIM 38

Mr. Menzies was denied his Fifth, Sixth, Eighth, and Fourteenth Amendment rights by the ineffective assistance of counsel during state post-conviction proceedings.

To the extent any claims were not fully or adequately presented to the state courts, Mr. Menzies can establish cause and prejudice to overcome any procedural default of those claims based on the ineffective assistance of post-conviction counsel. *See Martinez v. Ryan*, 132 S. Ct. 1309 (2012). In *Martinez v. Ryan*, the United States Supreme Court held that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim." *Id.* at 1315. Under the rule announced in *Martinez*, "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Id.* at 1320. The *Martinez* Court reasoned that "if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural

default in a federal habeas proceeding, no court will review the prisoner's claims." *Id.* at 1316.

The rule articulated by the United States Supreme Court in *Martinez* applies in Utah. Although *Martinez* addressed a state statutory scheme that required all ineffective assistance of trial counsel claims to be raised in post-conviction proceedings, *id.* at 1320, a subsequent decision expanded the applicability of *Martinez*. In *Trevino*, the Supreme Court acknowledged that *Martinez* should apply in any state where the "procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." 133 S. Ct. at 1921.

This unquestionably allows *Martinez* to apply in Utah. Although Utah has a rule that allows an ineffective assistance claim to be raised on direct appeal under narrow circumstances, *see* Utah R. App. P. Rule 23B, the Utah Supreme Court has stated this "rule was clearly not intended to provide for remand in the typical ineffective assistance case where the parties dispute whether trial counsel's actions reflected some strategy, given the facts as established by the record." *State v. Tennyson*, 850 P.2d 461, 468 n.5 (Utah Ct. App. 1993); *see also State v. Johnston*, 13 P.3d 175, 179 (Utah Ct. App. 2000).

In addition, given that Mr. Menzies's trial and appellate counsel were the same because Mr. Menzies continued to be represented by attorneys from the Salt Lake Legal Defenders Association, state law directs that the ineffective assistance of trial counsel claims should have been raised in post-conviction, rather than on direct appeal. *See Parsons v. Barnes*, 871 P.2d 516, 521 (Utah 1994). The failure to raise claims of

ineffective assistance of trial or appellate counsel in post-conviction, or to raise them ineffectively, was the result of deficient, prejudicial performance by Mr. Menzies's post-conviction counsel.

For the following discussion of the deficient performance of post-conviction counsel, Mr. Menzies relies on the law discussed in Claims 14 and 31, and incorporates it here by reference.

A. Mr. Menzies's post-conviction counsel was ineffective for failing to re-raise claims from his defaulted amended state post-conviction relief petition, as instructed by the Utah Supreme Court.

Mr. Menzies had a protracted post-conviction relief proceeding. In a 2006 ruling, the Utah Supreme Court summarized the case history as follows:

> In this case, Ralph Leroy Menzies, a death row inmate, appeals from the district court's dismissal of his petition for post-conviction relief. Menzies filed a claim for post-conviction relief in 1995, after having previously exhausted his grounds for direct appeal. On March 3, 1998, attorney Edward K. Brass was appointed by the district court to represent Menzies. From that date until his withdrawal on September 9, 2003, Brass willfully disregarded nearly every aspect of Menzies' case. As a result, the court imposed discovery sanctions, granted summary judgment in favor of the State, and ultimately dismissed Menzies' petition for post-conviction relief.
>
> Following the dismissal of Menzies' case, Brass withdrew and new counsel was appointed. Menzies then moved to set aside the district court's dismissal of his petition for post-conviction relief pursuant to rule 60(b) of the Utah Rules of Civil Procedure. Menzies' 60(b) motion was primarily based on claims that Brass' actions were grossly negligent and amounted to ineffective assistance of counsel. The district court denied Menzies' motion (the 60(b) ruling).

Menzies III, 150 P.3d 489. The Utah Supreme Court found that Brass had defaulted Mr.

Menzies's case in an error not attributable to Mr. Menzies and remanded his case for renewed post-conviction proceedings. *Id*. at 520. The court's instruction was "to set aside the proceedings that took place during the time that Brass was representing Menzies." *Id.* at 518.

At the time Brass was appointed to Mr. Menzies's case, Mr. Menzies had an amended petition pending in the state court. (PCR ROA 44-82; PCR ROA 1215-1216) This amended petition contained 26 claims for relief. (PCR ROA 44-82.) The claims in this petition, and a subsequent amendment adding a claim based on the right to a fair jury trial (PCR ROA 1231-32), were the ones defaulted.

Therefore, Mr. Menzies's post-remand post-conviction proceedings should have commenced with the reinstitution of the amended petition, including all of the original 26 claims. This is not what happened. First, it took over two years for the Post-conviction court to appoint counsel willing to take the case. (01/22/2009 Order Appointing Counsel.) The prior two years were occupied with extensive litigation over the applicability of the Post-Conviction Relief Act ("PCRA"), which became effective in 1996 and was amended in 2008, and whether the court could appoint unwilling counsel to take the case. (01/22/2009 Order Granting Unwilling Counsel's Motion to Withdraw.) In Mr. Menzies's case, the Utah Supreme Court concluded that the substantive parts of the PCRA—including limitations on relief which conflicted with the law in effect at the time Mr. Menzies initiated his post-conviction proceedings—did not apply to Mr. Menzies's case, the procedural aspects, including requirements for the appointment and funding of counsel, did apply. *See Menzies III*, 150 P.3d at 492-93. It was under these

new requirements that Brass was appointed to Mr. Menzies's case. *Id.* at 494.[30]

Second, counsel who ultimately worked up the case, Ted Weckel, filed a third amended petition in October 2010. (10/12/2010 3rd Am. Pet.) This petition included 28 claims, consisting mostly of ineffective-assistance of trial and appellate counsel claims, but included only two claims from the defaulted amended petition (the trial court's error in admitting the testimony of Britton (*id*. at 31), and the trial court's misapplication of the heinousness aggravator (*id*. at 33)). Therefore, Weckel—counsel ultimately appointed to cure the defect in Mr. Menzies's post-conviction proceedings, caused by his prior counsel's default of the entire case—defaulted the other 24 claims from the amended petition that was pending at the time Brass was appointed. The first amended petition should have been the starting point for the post-remand case. *See Menzies III*, 150 P.3d 518. But, due to the ineffective assistance of post-conviction counsel, all of the defaulted claims from the pre-remand post-conviction proceedings were never presented for post-conviction review. Given the directive of the Utah Supreme Court, this was objectively unreasonable.

Many of these defaulted claims have been included in this petition. If this Court finds that any have not been properly presented to the state court, Mr. Menzies may overcome the default due to the ineffectiveness of his post-conviction counsel. *See Martinez*, 132 S. Ct. at 1315-16; *see also Trevino*, 133 S. Ct. at 1921. Alternatively, if the Court finds these claims must first be exhausted in state court, at the appropriate time

[30] In later proceedings, the Post-conviction court found that the 2008 funding amendments also applied to Mr. Menzies's post-remand case. (2008 Memorandum Decision and Notice of Hearing at 13-15.)

Mr. Menzies will seek a stay of these proceedings pursuant to *Rhines*, 544 U.S. 269, to properly exhaust those claims.

B. Mr. Menzies's post-conviction counsel had an actual conflict of interest that resulted in essential mitigation work not being performed.

At the time the Post-conviction court dismissed Mr. Menzies's post-remand Fifth Amended Petition on summary judgment, the court noted that Weckel had been paid $194,000 in legal fees for his time. (02/23/2012 Ruling and Order at 6.) At that point, Weckel had been appointed to the case for two years and four-and-a-half months. (*Id*.) During that period, Weckel was paid, on average, just under $7,000 each month, or over $83,000 a year on Mr. Menzies's case alone. Needless to say, this was a lucrative appointment for Weckel. There is evidence that Weckel operated under a conflict of interest in which his decisions regarding the case were motivated by what course of action would result in him earning the most money, rather than by the needs of the case were, or what was in Mr. Menzies's best interest.

According to Marissa Sandall-Barrus, the mitigation investigator on Mr. Menzies's post-remand post-conviction case, she heard from others that "Mr. Weckel was telling people he was going to get rich and retire off his work on Mr. Menzies's case." (Ex. 63, Declaration of Marissa Sandall-Barrus ¶ 7.) It appears that once Weckel determined the amount of money he could be paid for work on Mr. Menzies's case, he sought to maximize it. One way he did this was by repeating previously completed tasks in order to churn up fees. "Weckel repeatedly asked . . . me to locate and repeat interviews with the same witnesses about the same topics, and request the same records,

it became abundantly clear that Mr. Weckel didn't review the work we had provided him, and that he was creating tasks for himself in order to bill the courts." (*Id*. ¶ 8.) The fact investigator on the case, Ted Cilwick, levied a similar accusation in a memo he sent to Weckel when he resigned from the case in frustration, "[w]hat I am not going to make time for is your continued requests to re-interview people, to repeat searching for people from 1986 — including those who I have previously reported to you are deceased." (*Id*., Attachment A at 2.)

Weckel's focus on making money impacted his decisions on where to expend resources on the case to Mr. Menzies's detriment. He would frequently question his investigators' decision-making and argue with them about the necessity of tasks that would cost money, telling them that the court would not pay for certain things. "Any information I received regarding funding approval or denial for mitigation work was filtered through Mr. Weckel. I do not recall receiving copies of funding orders from the court. When I made suggestions about the direction the mitigation investigation should go, Mr. Weckel often argued and questioned me." (*Id*. ¶ 5.) This is significant because it does not appear that the Post-conviction court denied requests for investigation funding.

In fact, Weckel appears to have lied to his team about whether funding was available. For instance, Sandall-Barrus requested to be able to travel to Ely, Nevada, to interview Mr. Menzies's half-sister and his ex-step mother, who may have sexually abused him. (*Id*. 11.) The Post-conviction court approved a request for Sandall-Barrus to make this trip. (12/13/2010 Order re: Motion to Extend Funding for Investigations at 2 (Sealed).) Instead of sending Sandall-Barrus to interview these critical mitigation

witnesses, Weckel told her that the Post-conviction court had denied funding for the travel. (Ex. 63, Declaration of Marissa Sandall-Barrus ¶ 11.) In addition to lying to his investigators about the availability of funds, Weckel also appears to have lied to the court as well. He wrote to the court saying that "[f]or your information, Ms. Sandall-Barrus and I decided that a trip to Ely, Nevada, to interview family members in person vis a vis conducting telephone interviews was unnecessary. Therefore, we have saved the State that expense." (01/14/2011 Letter to J. Lubeck from Weckel at 1 (Sealed).)

In addition to misrepresenting Sandall-Barrus's opinion to the court, Weckel's dishonesty about the availability of funding prejudiced Mr. Menzies. As Sandall-Barrus explained,

> The stepmother was a potentially crucial mitigation witness who needed to be interviewed. Initially, Mr. Weckel insisted on accompanying me to Ely, Nevada to interview the stepmother despite the sensitive nature of the interview, but Mr. Weckel told me the court said that there would be no funding for out of state travel. I suggested to Mr. Weckel that I should travel alone to Ely, Nevada, to save on expenses, but according to Mr. Weckel, the judge denied that as well. I was left with no other viable option other than to interview [] Sherry and Margaret "Jeanette" by telephone. I believe conducting these sensitive interviews by telephone directly affected my ability to build rapport with the witnesses, and their willingness to be forthcoming with information. I do not recall Mr. Weckel informing me at any time that the judge had granted our request or changed his mind about me traveling to Ely, Nevada to interview mitigation witnesses in person.

(Ex. 63, Declaration of Marissa Sandall-Barrus ¶ 11.) Both of these witnesses are now deceased, having each passed away during the pendency of the state post-conviction proceedings. (Ex. 61, Obituary of Sherry Lynn Gonzales; Ex. 64, Obituary of Margaret

Menzies Barela.) Due to Weckel's dishonesty and short-sightedness, these important mitigation witnesses were never properly interviewed. Evidence which may have been essential to Mr. Menzies's penalty phase claims, including about the report of his sexual abuse by his ex-stepmother, may never be produced.

Before oral argument in the appeal from the Post-conviction court's grant of summary judgment, the Utah Supreme Court asked the parties to be prepared to address whether the PCRA applied to Mr. Menzies's case. (01/31/2014 Letter from Weckel to Utah Supreme Court.) In response, Weckel took the position that the effective date for the beginning of Mr. Menzies's case should be the date of the filing of the second amended petition, rather than the first. (*Id*.) This would guarantee the application of the PCRA and, importantly, it's funding provisions. (*Id*.)

This position was both incorrect and unnecessary. It was incorrect because the post-conviction case began, obviously, with the filing of the initial petition, which pre-dated the PCRA. (PCR ROA 1.) And it was unnecessary because the issue the court was concerned about was not whether or not Weckel could get paid—that was an issue resolved by *Menzies III* and the Post-conviction court, and not an issue before the state supreme court on this appeal—but was, rather, how to analyze Mr. Menzies's claims.

The PCRA, especially as amended in 2008—like AEDPA—places strict restrictions on a petitioner's ability to plead claims and obtain relief. *See* Utah Code Ann. §§ 78B-9-101 *et seq*. Therefore, whether the PCRA applied would determine how the Utah Supreme Court would rule on whether Mr. Menzies could obtain relief or not. And on that question, it was clearly in Mr. Menzies's interest to make the argument

opposite of the position taken by Weckel, giving Mr. Menzies the benefit of the court's common law remedies. *See Hurst v. Cook*, 777 P.2d 1029, 1037 (Utah 1989); *see also Tillman v. State*, 128 P.3d 1123, 1130-31 (Utah 2005); *Gardner v. Galetka*, 94 P.3d 263, 267 (Utah 2004); *Candelario v. Cook*, 789P.2d 710, 712 (Utah 1990); *see also* Utah Code Ann. § 78B-9-102(1) (2008) ("This chapter establishes the sole remedy for any person who challenges a conviction or sentence for a criminal offense" and "[t]his chapter replaces all prior remedies for review, including extraordinary or common law writs").

Weckel's concerns about the amount of money he could make appears to have driven his decision-making on the case, placing his own interests before Mr. Menzies's. While the federal courts have not yet recognized a right to post-conviction counsel, *see Coleman v. Thompson*, 501 U.S. 722, 752 (1991), this Court should be concerned about Weckel's conflict because it undermines the reliability of the state court's determination of claims in the post-conviction appeal. Given that Weckel did not have Mr. Menzies's interest as his primary concern, there can be no assumption that Weckel's work was reasonable, either in the Post-conviction court or on appeal.

C. Post-conviction counsel conducted a deficient mitigation investigation and failed to adequately plead the ineffective assistance of sentencing counsel claim.

As shown, Weckel unreasonably limited the mitigation investigation into critical witnesses, including failing to conduct in person interviews with Mr. Menzies's ex-step mother and half-sister, some of his few-remaining living relatives. Despite the fact that he had no capital trial or post-conviction experience, "Weckel believed he knew more than his team members," who did have capital experience. (Ex. 63, Declaration of

Marissa Sandall-Barrus ¶¶ 2, 4, 5, 8.) He argued with his team members about their suggestions and questioned the necessity of choices, creating a "very frustrating experience." (*Id*. ¶¶ 5, 8.)

Weckel was difficult personally, which created problems with his team, with Mr. Menzies, and with witnesses.

> The way Mr. Weckel handled Mr. Menzies's case caused many problems with my mitigation investigation. Mr. Menzies did not like or trust Mr. Weckel. Mr. Weckel never listened to Mr. Menzies's concerns, which caused problems for the rest of the team. Mr. Weckel's inability to manage the client and listen to him eventually affected my relationship with some of the mitigation witnesses, such as Mr. Menzies's sister, Jackie. It became clear to me that Mr. Menzies's only surviving sibling didn't trust Mr. Weckel either. It reached the point that Jackie refused to meet with us without her husband if Mr. Weckel was going to be present. Sometime during the case, Mr. Weckel attended a death penalty conference. When he returned from the conference, he demanded to be present at every mitigation and fact witness interview. From my experience, it is not always beneficial for the mitigation specialist to bring additional team members to an interview, especially when sensitive information may be discussed. Witnesses are often less forthcoming if their audience is large.

(*Id*. ¶ 10.)

Weckel had time and money at his disposal to develop the case, but his methods prevented his team from doing so. Despite evidence of substantial childhood trauma in Mr. Menzies's history, the "mitigation investigation stopped with Mr. Menzies." (*Id*. 14.) Mr. Menzies's parents and step-parents were not investigated, nor were his siblings, outside of some unproductive meetings with his sister Jackie, who refused to sign a declaration, probably because she did not trust Mr. Menzies's attorney. (*Id*.) Weckel did

not obtain releases for records, and he generally did not request records that would document Mr. Menzies's life. (*Id*.) The few records that he did request, he failed to use. (*See generally* Ex. 12, USH Records Obtained by PCR Counsel.)

Weckel prohibited his mitigation investigator from creating a social history for Mr. Menzies. (Ex. 63, Declaration of Marissa Sandall-Barrus ¶ 15.) A social history document is indispensable to defense teams as it provide a map of their client's life. Weckel insisted it was unnecessary because "all information needed to come in through the form of witness affidavits." (*Id*.) This clearly demonstrates Weckel's lack of understanding about what a mitigation investigation is and how the record evidence and affidavits can be used. (*See*, *e.g.*, *infra*, Section IX, Mr. Menzies's Personal History.) And, despite his belief in the importance of affidavits, Weckel failed to obtain a single affidavit from any mitigation witness, producing only one from his mitigation investigator. (Ex. 63, Declaration of Marissa Sandall-Barrus ¶ 15; *see also* 5th Am. Pet. at 30-33.)

Had Weckel used the records available to him, and allowed his mitigation investigator to do her job, he could have established that: Mr. Menzies's family had a history of mental illness (Ex. 12, USH Records Obtained by PCR Counsel at 50); Mr. Menzies had a recurrent problem with bedwetting, which is a typical indicator of trauma or abuse (*id*. at 17; Ex. 62, Declaration of Dr. Victoria Reynolds ¶ D.13); Mr. Menzies's mother was documented as being an "ineffective person with limited parenting skills, limited communicative skills and multiple physical complaints who handled disciplinary matters by screaming and yelling" and her emotional and physical inadequacies rendered

unable to parent her children (Ex. 12, USH Records Obtained by PCR Counsel at 78, 136); when Mr. Menzies lived with his father, he was permitted to "run wild" (*id.* at 16). These records, along with those Weckel failed to collect, paint a detailed picture of the pervasive pattern of trauma and dysfunction that characterized Mr. Menzies's life as a child and adolescent.

The records Weckel did have could have also provided evidence of how the outcome of Mr. Menzies's life was not certain, but that Mr. Menzies's family circumstances prevented any effort for meaningful change. Mr. Menzies was intelligent as a child, with a full-scale I.Q. tested at 114, nearly one standard deviation above the average. (*Id*. at 14.) One of his evaluators believed that structure and a well-organized probationary program with direct services from the Community Mental Health Service would be of benefit to him. (*Id*. at 34-35.) Unfortunately, Mr. Menzies's home life was the exact opposite of the structured and well-organized environment that he needed. His step-father used, unsuccessfully, threats and violence to attempt to control the children. (*Id*. at 36.) Mr. Menzies's mother and step-father were "immature themselves and socially deprived and are generally unable to be consistent examples to their children." (*Id*. at 37.) And when Mr. Menzies's mother died, he was sent to live with his father, despite his caseworker determining that it was "very poor judgment to allow [Ralph] to be placed in that home." (*Id*. at 49.) All of these facts were available in one set records that Weckel had and he did nothing with them.

It cannot be said that Weckel made a tactical decision when he chose to do nothing with these facts, just because he had them. *See Wiggins*, 539 U.S. at 527. As established,

Weckel did not undertake a thorough enough investigation to know what was significant and what was not. He did not request records, he did not allow effective for interviews of family members, and he did not understand the role of mitigation in this case. He may not have even been aware of what the records contained, as it appears Weckel had a tendency to not review the materials provided to him. (*See* Ex. 63, Declaration of Marissa Sandall-Barrus, Attachment A.)

Weckel's faulty investigation turned up one significant fact, that Mr. Menzies may have been sexually abused by his ex-step mother. (5th Am. Pet., Ex. S, Aff. of Marissa Sandall-Barrus ¶ 5.) And he did nothing with it. Any defense attorney of adequate skill and experience would recognize the significance of evidence like this. Weckel, however, failed to develop it at all. As shown above, Weckel lied to his mitigation investigator—who understood the importance of in-person one-on-one interviews to establish trust—and prohibited her from adequately pursuing this area of investigation. Shortly thereafter, the two witnesses who would have been able to provide the best information on Mr. Menzies's sexual abuse and other important mitigation subjects both died.

A measure of reasonable performance in a mitigation investigation is "whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. Evidence that your client has been sexually abused is the quintessential piece of information that "would lead a reasonable attorney to investigate further." *Id*. Weckel, rather than investigating further, put the brakes on a plan for investigation that would have been the most likely route to additional material facts in support of the argument that trial counsel had failed in their mitigation work. This was patently

unreasonable.

Mr. Menzies maintains that the Utah Supreme Court was unreasonable in its determination that his trial counsel were not deficient in their performance during his penalty phase, and he was prejudiced by it. *See* Claim 31. If, however, this Court finds that on the facts pled to twuhe state court, its determination of Claim 31 was not unreasonable, Mr. Menzies asserts that it was Weckel's deficient performance in investigating, alleging material facts, and presenting his ineffective assistance of sentencing counsel claim that resulted in the post-conviction court granting summary judgment on that claim and the state supreme court affirming that judgment.

In denying Mr. Menzies's appeal from summary judgment in Post-conviction court, the Utah Supreme Court specifically noted the paltry showing with regard to whether Mr. Menzies was sexually abused by his ex-step mother, stating

> there was no evidence of sexual molestation provided by any of the mental health professionals or Mr. Menzies's sister or aunt. Although Mr. Menzies claims otherwise in his briefing, his own affidavit does not raise this issue, and an affidavit from a mitigation specialist, Marissa Sandall-Barrus, mentions only that "[d]uring my mitigation investigation there was some information provided that indicated [Mr. Menzies] may have been molested by his step mother." Other than this brief reference, there is nothing to indicate where this "some information" came from or that a reasonable investigation would have uncovered such evidence.

Menzies IV, 344 P.3d at 626. The failure to plead sufficient facts is the fault of post-conviction counsel. If Weckel had not blown the trust of Mr. Menzies's sister, and if he had allowed his mitigation investigator to take the funds authorized by the court and travel to conduct one-on-one, in-person interviews with Mr. Menzies's ex-step mother

and half-sister (before they died), he would have been able to provide the support for the facts that the Utah courts found fatally lacking. Even worse, however, is Weckel did not take the time and money he had for investigation, whereby losing the best sources of information. Mr. Menzies has now, however, established support for this fact. (Ex. 62, Declaration of Dr. Victoria Reynolds ¶¶ D.9-13.) Even this support was available for Weckel to discover, had he conducted a reasonable investigation into mitigation issues, *see* Claim 38.D.

On appeal, Weckel raised several areas where trial counsel had performed a deficient investigation (02/27/2013 Br. of Appellant at 103-04), but they are presented merely as a list, with no facts plead in support, and no argument as to how Mr. Menzies was prejudiced. Weckel presented the state court with no basis on which to find in Mr. Menzies's favor. Mr. Menzies's Fifth Amended Petition was dismissed on summary judgment. This judgment was upheld because of an utter failure by post-conviction counsel to understand mitigation and the law governing effective assistance of counsel, to investigate, to make use of facts he had, to present evidence, and to make rational arguments in support of his claims. In these ways, Mr. Menzies was prejudiced by his post-conviction counsel's deficient performance.

D. Post-conviction counsel was deficient in his use of experts, leaving the courts without an adequate psychological accounting of Mr. Menzies, preventing an individualized assessment of the appropriateness of the death penalty.

Weckel was unreasonable in his use of experts. The only expert he retained was a neuropsychologist, Dr. Tim Kockler. While use of a neuropsychologist is typical, and

certainly reasonable, Weckel did not appear to recognize that Dr. Kockler's findings did not provide an explanation of Mr. Menzies's behavior or functioning. Dr. Kockler's neuropsychological evaluation focused on cognitive and personality testing. It concluded that Mr. Menzies suffers from a mental disease or defect based on test evidence and clinical records pointing to brain damage. (5th Am Pet., Ex. B, Aff. of Dr.Tim Kockler and Neuropsychological Evaluation at 12-13.) However, Dr. Kockler did not address in his assessment Mr. Menzies's documented childhood history of severe maltreatment, and how such childhood maltreatment could be a major causal factor in the mental disease or defect that Dr. Kockler opined that Mr. Menzies suffered from at the time of the murder. This is because that explanation does not appear to lie in neurological dysfunction—that which a neuropsychologist can test, verify, and explain. Rather, it appears to be a factor of Mr. Menzies's emotional, behavioral, and psychological development—which would be the area for a psychologist, and, specifically one with an expertise in trauma.

Dr. Victoria Reynolds, a psychologist and trauma expert, has reviewed Mr. Menzies's records and prior psychological, psychiatric, and neuropsychological evaluations, and determined that "Ralph Menzies's childhood well-exceeded the threshold of adverse and traumatic exposures that would not only predict that he would be further exposed to continued adverse life experiences as he developed, but that the impairment and damage he sustained from these traumatic experiences would have pervasive and devastating effects on his neurobiological, psychosocial and behavioral development." (Ex. 62, Declaration of Dr. Victoria Reynolds ¶ E.A.5) And while the effects of trauma may manifest in a child's neurobiological development (*id*. ¶¶ E.B.1-

10), it does not always manifest as brain damage or the type of brain dysfunction that neuropsychological testing is designed to discover. Therefore, when Weckel had Mr. Menzies tested by Dr. Kockler, and the testing results did not explain the deficits in Mr. Menzies's behavioral, emotional, and psychological functioning, Weckel was unreasonable in not turning to an expert who could properly evaluate and explain those deficits.

This explanation is a major gap in all of Mr. Menzies's cases and records. "The overwhelming impact of such massive losses, caretaker indifference, and abandonment, as well as sexual exploitation, was almost completely unaccounted for in his psychological records." (*Id*. ¶ F.2.) And it is not that the impact of the kind of trauma Mr. Menzies suffered is arcane or difficult to discover, "[t]he health and psychiatric outcomes of prolonged child maltreatment of the kind Mr. Menzies experienced are myriad and well established in both the medical and psychological literature." (*Id*. ¶ F.3.) It is simply a matter of employing the right expert. Weckel did not do this, and it was unreasonable for him to fail to do so.

Mr. Menzies was prejudiced by this deficient performance because, "[t]he overwhelming impact" on Mr. Menzies, by the amount of continuous and pervasive trauma he experienced, was "almost completely unaccounted for." (*Id*. ¶ F.2.) Mr. Menzies was sentenced to death, the sentence was affirmed on appeal, and determined to be without error in the state courts without there ever having been an adequate explanation of who Mr. Menzies is. *See Penry v. Lynaugh*, 492 U.S. at 319; *see also Eddings*, 455 U.S. at 112.

E. Post-conviction counsel conducted a deficient mitigation investigation and failed to adequately plead the ineffective assistance of guilt-phase counsel claims.

Weckel's deficient performance also prejudiced Mr. Menzies because Weckel failed to raise numerous, substantial claims of guilt phase counsel's ineffectiveness. The following claims are illustrative of those Weckel never raised, not comprehensive.

1. George Benitez

As discussed in Claim 14.B.5, Weckel failed to investigate, raise a claim, or plead any fact related to George Benitez and his ability to completely counter the testimony of Walter Britton. Benitez was not effectively interviewed by trial counsel or called as a witness, despite the fact that he could have testified that law enforcement pressured him into making a statement corroborating Walter Britton's claim that Mr. Menzies's confessed to him, and that police fed Benitez the details they wanted him to say. (Ex. 56, Declaration of George Benitez ¶¶ 3, 5.) He also could have testified that it was Britton's intention to fabricate evidence against Mr. Menzies in an attempt to get out of jail. (*Id.* ¶¶ 6-7.) Trial counsel was deficient for not investigating a witness who could have negated Mr. Menzies's alleged confession, and Mr. Menzies was prejudiced by Britton's testimony being presented to the jury unrebutted.

This was an obvious deficiency in trial counsel's case. Britton was a problematic witness. He had a history of mental illness, drug use, and could not be counted on to testify. *See* Claim 14.B.4. If the prosecution had another witness that could have supported Britton's claim that Mr. Menzies's confessed—or whom they could have used in his place, if necessary—the prosecution would certainly have put that witness on. The

fact that there were police reports indicating the existence of a corroborating witness to the alleged confession and the fact that the corroborating witness was not put on the stand indicates that there are problems with that witness—and just as likely, with the story he told the police. Any reasonable attorney would have recognized it and pursued it.

This is a glaring gap in trial counsel's investigation. Mr. Menzies was prejudiced by Weckel's failure to investigate and present evidence about George Benitez because a significant claim against trial counsel was defaulted in the state court, and his post-conviction case was decided without it. Fault for the default lies solely with post-conviction counsel. Therefore, this Court may hear this claim. *See Martinez*, 132 S. Ct. at 1315; *see also Trevino*, 133 S. Ct. at 1921.

2. Biased jurors who should have been removed for cause.

As discussed in Claim 14.C, during voir dire, Juror Rosenkrantz expressed views indicating that she would always impose the death penalty for first-degree murder. (TR 02/17/1988, ROA 1154 at 864-65.) She also indicated that the possibility of release if given a life sentence would be a factor she would consider in deciding whether to impose the death penalty. (*Id.* at 869-70.) Defense counsel moved to strike Juror Rosenkrantz for cause, but the motion was denied. (*Id.* at 871-72.)

Unfortunately, there is no transcript for the portion of the proceedings where the parties exercised their peremptory strikes. (*See* Claim 33.) Review of the juror list however, shows a handwritten list of each potential juror, with names crossed out for those excused for cause or struck by the parties. (ROA 944-48.) The uncrossed names are those who made it on to the jury. When the notes for peremptory strikes run out, the

next names which are not crossed out for cause are Lillian Eaton and Kathy Rosenkrantz. (ROA 947.) It appears that defense counsel ran out of peremptory strikes before they could remove Juror Rosenkrantz.

As discussed in Claim 2, Mr. Menzies raised a claim under the then-operative state court law which granted an automatic reversal where a defendant uses a peremptory strike to remove a juror who should have been removed for cause. *See Crawford*, 542 P.2d at 1093; s*ee also Woolley*, 810 P.2d at 442-443; *Lacey*, 665 P.2d at 1312; *Bishop*, 753 P.2d at 451. In deciding Mr. Menzies's case, the state supreme court abandoned its precedent and adopted the *Ross v. Oklahoma* standard, 487 U.S. at 88, which requires a showing that the jury which sat was biased. *Menzies II*, 889 P.2d at 399-400. The state court also faulted Mr. Menzies for how he pled this claim, as he tailored it to the requirements of *Crawford*, and not *Ross*. *Id*. at 400.

In Claim 2, Mr. Menzies establishes that he used four peremptory challenges to remove jurors for cause. In Claim 14.C, Mr. Menzies establishes that Rosenkrantz was a biased juror, that he moved for her removal for cause, and that the motion was denied. Above, Mr. Menzies has shown that because he was compelled to use his peremptory challenges on the first four biased jurors, he had run out of peremptory strikes by the time it came to Juror Rosenkrantz. Therefore, Mr. Menzies could have shown on direct appeal that a biased juror sat in violation of his right to a fair jury trial. That is, he could have met the *Ross* standard.

Failure to make this argument was prejudicial deficient performance by his appellate counsel. *See* Claim 37. Had appellate counsel raised it, the state court could

not have denied Mr. Menzies's appeal on the basis that it did, regardless of the change in its precedent. Failure to raise both this claim and the related ineffective assistance of counsel claim was deficient performance by post-conviction counsel. The deficiency of the appellate pleading is apparent from the record. The fact that post-conviction counsel failed to raise it indicates that he did not make a complete review of the record. *See* Claim 38.E.4. Mr. Menzies was prejudiced by having this claim defaulted in the state court, and his post-conviction case was decided without it. Fault for the default lies solely with post-conviction counsel. Therefore, this Court may hear this claim. *See Martinez*, 132 S. Ct. at 1315; *see also Trevino*, 133 S. Ct. at 1921.

3. Mr. Menzies was forcibly shackled in front of the jury.

Mr. Menzies was forcibly shackled in front of the jury, one of several prejudicial incidents which should have resulted in a mistrial. *See* Claims 8 and 14.G. This claim has never been presented to the state courts, due to the ineffective assistance of trial and appellate counsel. *See* Claims 14.G and 37. Post-conviction counsel first raised the claim in Mr. Menzies's opposition to the State's motion for summary judgment. (08/01/2011 Pet'r's Mem. in Opp'n to Resp't's Mot. for Summ. J. and Cross-Mot. for Summ. J at 29.) The state court determined that "because the claim was not raised in Mr. Menzies' Fifth Amended Petition, it was procedurally barred" and because "the claim is unpreserved," the state supreme court "decline[d] to reach it on appeal." *Menzies IV*, 344 P.3d at 603.

Post-conviction counsel performed deficiently by failing to recognize the significance of this claim and including it in the PCR petition. Counsel was also deficient

for failing to understand the rules about raising claims and preserving them for appeal, resulting in this claim being procedurally barred in the state court. Mr. Menzies was prejudiced by having this claim defaulted and losing review. Fault for the default lies solely with post-conviction counsel. Therefore, this Court may hear this claim. *See Martinez*, 132 S. Ct. at 1315; *see also Trevino*, 133 S. Ct. at 1921.

4. Failure to record all proceedings.

Claim 33 details the multiple instances in the record where it is clear that conversations and legal proceedings occurred and were not recorded. This claim was not preserved by trial counsel or raised on appeal. *See* Claims 14.H, 33, and 37. Post-conviction counsel raised the claim, but in name only, "Mr. Menzies believes that at least one bench conference during voire dire was not transcribed. Other parts of the transcript may be missing, but because of a lack of time necessary to review the entire record, Mr. Menzies can only preserve this issue at this point, and move to amend his complaint, if other evidence exists to do so." (5th Am. Pet. at 45.)

This was about 18 months into Weckel's appointment, after he had billed for hundreds of hours and tens of thousands of dollars. Review of the transcript should have been one of the first, if not the first thing he should have done upon being appointed to the case. There is no excuse for being 18 months into an active post-conviction case, having filed three amended versions of the petition, and not having fully reviewed the basic part of the record. This is completely unreasonable.

Weckel failed to include this claim in the brief on appeal. It has never been addressed by the Utah Supreme Court. It was dismissed on summary judgment on an

erroneous ruling. The Post-conviction court wrote that this claim was the subject of *Menzies I* and is therefore procedurally barred as having been raised in a prior proceeding. (03/23/2012 Ruling and Order.) This was an unreasonable determination of fact. On direct appeal, appellate counsel identified numerous errors in the trial transcripts, including where the transcripts appeared nonsensical because portions of proceedings appeared to be missing, but did not challenge the failure to record bench conferences and arguments in chambers. (*See* 04/08/1991 Br. of Appellant at 36-38.)

By failing to review the transcript, Weckel was unable to adequately plead this claim. That failure contributed to the Post-conviction court's factual error in dismissing the claim. Because Weckel had not reviewed the record, he could not provide a factual basis for the claim. Fault for this lies solely with post-conviction counsel. Therefore, this Court may hear this claim. *See Martinez*, 132 S. Ct. at 1315; *see also Trevino*, 133 S. Ct. at 1921.

F. There is a practical lack of state corrective process in Utah and its courts' determinations of law or fact should be given no deference.

A combination of unreliability in the standards applied by the Utah Supreme Court and the PCRA's imposition of incompetent counsel on post-conviction petitioners renders Utah's post-conviction processes invalid. This circumstance results in a "lack of state corrective process" generally. It also constitutes "circumstances . . . that render such processes ineffective to protect the rights" of Mr. Menzes. 28 U.S.C. § 2254(b)(1)(B)(i)-(ii). Therefore, this Court may disregard the factual findings and determinations of law made by the Utah state courts and review Mr. Menzies's claims *de novo*.

On appeal from the post-conviction proceedings, the Utah Supreme Court also found that Mr. Menzies failed to establish prejudice on his claim that trial counsel began their penalty phase preparation too late. *Menzies IV*, 344 P.3d at 624-25. Weckel founded this claim on the National Legal Aid & Defender Services and ABA Standards. The Utah Supreme Court determined that the only relevant standard was found in Rule 8. This is ironic given what that court said about Rule 8 in its previous opinion in Mr. Menzies's case. In *Menzies III*, in response to an argument by the State that Rule 8 provides sufficient protection and that, therefore, a finding of a statutory right to the effective assistance of post-conviction counsel is not necessary, the court said:

> This argument drastically oversimplifies the intent and import of rule 8. Consistent with section 78-35a-202(2)(a), rule 8 requires a court to appoint counsel to represent indigent petitioners in post-conviction proceedings challenging a death sentence. Utah R. Crim P. 8(e). The subsections of rule 8(e) contain qualifications that an appointed attorney in such cases must meet. *See* Utah R. Crim P. 8(e)(1)-(5). However, these subsections contain no provisions regarding appointed counsel's *obligations* in post-conviction death penalty proceedings. In fact, rule 8(f) expressly states that "[m]ere noncompliance with this rule . . . shall not of itself be grounds for establishing that appointed counsel ineffectively represented the defendant." Therefore, the rule clearly contemplates that the standards for ineffective assistance of counsel in post-conviction death penalty cases are found elsewhere.

Menzies III, 150 P.3d at 510. Later in that case, when citing to standards by which to judge the effectiveness of post-conviction counsel, the court looks to the ABA Guidelines. *Id*. at 512-13. The Utah Supreme Court appears to rely upon the guidelines when they suit the outcome they desire, and abandon them when convenient. Sometimes

the ABA Guidelines apply, sometimes they do not; sometimes Rule 8 contains the relevant standard for post-conviction counsel, sometimes it is not a standard at all. This wavering as to whether certain guidelines or rules are applicable for determining reasonable performance shows that there are, in fact, no consistent or reliable standards for post-conviction practice in Utah. On this basis, the state court determinations cannot be considered reasonable.

The PCRA allows for the appointment of counsel in capital post-conviction cases, and purports to require minimum standards of competency. Utah Code Ann. § 78B-9-202(2)(a). The PCRA has allowed for appointment in capital cases since its inception in 1996, however, in 2008 it was amended to deny a right to the effective assistance of post-conviction counsel, "[n]othing in this chapter shall be construed as creating the right to the effective assistance of postconviction counsel, and relief may not be granted on any claim that postconviction counsel was ineffective." Utah Code Ann. § 78B-9-202(4). This was in direct response to *Menzies III*, where the Utah Supreme Court held that Mr. Menzies was entitled to relief because his attorney performed deficiently. The reasoning in *Menzies III* was that because the PCRA allowed for appointed counsel, there was a statutory right to the effective assistance of counsel. *Menzies III*, 150 P.3d at 510 ("We refuse merely to pay lip service to this legislatively created protection by holding that a petitioner in a post-conviction death penalty proceeding is only entitled to ineffective assistance of appointed counsel.") The Utah Supreme Court has not resolved the question of whether the legislature can amend out the statutory right to effective assistance of counsel, creating an obvious conflict with the right to due process.

An examination of the minimum practice qualifications purportedly required by the PCRA reveals them to be meaningless. First, there is the blatant conflict noted in *Menzies III* between a statutory guarantee of counsel and a statutory prohibition against a claim that would enforce the effectiveness of that guarantee.

Second, the qualifications required by the PCRA are dependent—on its own terms—on Rule 8 of the Utah Rules of Criminal Procedure. *See* Utah Code Ann. § 78B-9-202(2). After listing the qualifications, Rule 8 says that "[m]ere noncompliance with this rule or failure to follow the guidelines set forth in this rule shall not of itself be grounds for establishing that appointed counsel ineffectively represented the defendant at trial or on appeal." This mirrors the PCRA's empty promise of qualified counsel. Also, nowhere in Rule 8 or the PCRA does it indicate the extent of post-conviction counsel's obligations.

Finally, the PCRA provides that if a court cannot appoint counsel within 60 days, a petitioner must proceed pro se or not at all. Utah Code Ann. § 78B-9-202(5). When taken together, these various provisions reveal that the PCRA's guarantee of counsel is no guarantee at all.

Given these factors, it is a predictable outcome that an attorney like Weckel was appointed to Mr. Menzies's post-conviction case. Weckel was not Rule 8 qualified. He had no capital case experience and no post-conviction case experience. He could only be appointed by associating with Craig Peterson, who had previously been appointed along

with Dee Smith.[31] (*See* 01/23/2009 Order Appointing Counsel; 05/19/2009 Notice of Withdrawal of Counsel for Plaintiff.)

As described above, Weckel was difficult and would not take suggestions from any team members, including his more experienced co-counsel. Peterson sought to withdraw from the case, informing the Post-conviction court that he "has no active role in the prosecution of Mr. Menzies's post-conviction relief claims, and, on July 5, 2010, Ted Weckel, lead counsel in this matter, directed Mr. Peterson not to do any further work on the case." (07/22/2010 Notice of Withdrawal of Counsel.) The Post-conviction court deemed the notice to be not proper and "of no effect." (08/05/2010 Ruling and Order at 1.) Sandall-Barrus observed that "Mr. Weckel believed he was an island and acted as such. He wanted to take command. Even Mr. Peterson grew frustrated and eventually threw his hands in the air and became nonexistent as a team member or leader. Mr. Peterson was still on Mr. Menzies's case, but did not participate or play an active role." (Ex. 63, Declaration of Marissa Sandall-Barrus ¶ 9.) While the Post-conviction court observed that since his appointment "Weckel has carried the burden basically alone" (03/23/2012 Ruling and Order), based on Peterson's notice to withdraw, Sandall-Barrus's affidavit, and Cilwick's memo of resignation, this circumstance seems to be one that Weckel has purposefully created.

The difficult circumstances of post-conviction work are well known in the Utah defense community. This was the reason it took the Post-conviction court years to find

[31] Smith withdrew upon being name as a head of a county prosecuting agency. (05/19/2009 Notice of Withdrawal of Counsel for Plaintiff.)

willing counsel. (*See* 01/23/2009 Order Granting Unwilling Counsel's Motion to Withdraw at 1 ("counsel . . . filed a motion to withdraw on the basis that the State was refusing to provide adequate funding, including a reasonable hourly rate for counsel and sufficient resources for investigation").) Mr. Menzies's post-conviction proceedings lasted for nearly nine years, with much of the time occupied by drawn-out litigation over ancillary issues. This is not atypical for post-conviction cases in Utah. The PCRA sets the cap for attorney fees at $60,000 (480 hours at $125 per hour). Utah Code Ann. 78B-9-202(3)(b). This creates a hardship for the attorneys who are appointed and compelled to work up the cases, and bear the costs of litigation, when the cases can drag on indefinitely.

Weckel won the lottery with a post-conviction court that was generous with the state's purse. Mr. Menzies, however, lost. Within a couple of months of being appointed, Weckel filed a motion for declaratory judgment that he would be paid the full $60,000 dollars, and not have to split that with attorneys who had already worked on the case, or else he threatened to withdraw. (01/19/2010 Pet'r Mot. for Decl. J. at 10.) While the motion was couched in language about "funding to effectively and competently represent their client's statutory rights," this was sadly not borne out by the facts of Weckel's representation. (*Id*. at 1.) As shown above in this claim, Weckel used repetitive tasks to generate extra billing, was stingy with the ample resources allowed by the Post-conviction court, and shut out his co-counsel from doing any work (or, presumably, billing). Despite the thousands of hours of work, and hundreds of thousands of dollars he was paid, Weckel still managed to make it through the end of the

proceedings without apparently having read the transcript. Mr. Menzies has little to show for the all of the money Weckel was paid. This is the predictable result of a statutory grant of an attorney that explicitly denies that the attorney will have to meet any practice requirements or be accountable for their performance.

No other attorney has been paid so generously in any Utah post-conviction case, either before or since. While litigation over billing is typical in Utah post-conviction cases, the general outcome is that the petitioner loses and is compelled to proceed with a resentful attorney and unfunded investigative needs. This has caused qualified counsel to refuse to be appointed to post-conviction cases, as happened here. It has caused petitioners to be left without the resources or ability to pursue meritorious claims. The effect is that either "there is an absence of available State corrective process" in the Utah state courts for death penalty cases or that "circumstances exist that render such process ineffective to protect the rights of the applicant." See 28 U.S.C. § 2254(b)(1)(B)(i)-(ii). On this basis, this Court should review all of Mr. Menzies's claims *de novo* and give no deference to any state court findings of fact or determinations of law.

CLAIM 39

Mr. Menzies was sentenced to death under a death penalty scheme which fails to adequately channel the application of the death penalty in violation of the Eighth Amendment.

This claim is exhausted, having been raised on direct appeal. (09/14/1992 Br. of Appellant at 196.) The Utah Supreme Court did not address this claim directly, rather, it summarily dismissed it along with numerous other claims it declined to address. *Menzies*

II, 889 P.2d at 406. The state court's determination of this claim was an unreasonable application of clearly established federal law. *See* 28 U.S.C. § 2254(d)(1); *see also Richter*, 562 U.S. at 103 (habeas relief is available where the state court's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement").

The Eighth Amendment requires a capital sentencing scheme to "genuinely narrow the class of persons eligible for the death penalty" and to "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Stephens*, 462 U.S. at 877. The United States Supreme Court later elaborated that "[t]he use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion." *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988). Utah's aggravated murder statute fails to serve that function.

A. The Utah death penalty statute allows for unlimited application of aggravators.

The Utah death penalty scheme violates the Eighth Amendment because the unlimited aggravation language of Utah Code Ann. § 76-3-207 (1988) failed to channel the discretion of the sentencer. Mr. Menzies challenges the statute both as applied and as written.

As applied in Mr. Menzies's case, the State argued or the judge relied on the following items which were not part of "the nature and circumstances of the crime" or "the defendant's character, background, history, [or] mental and physical condition."

1. Victim impact testimony and evidence of fear and harm done to the victim's family. (*See* Claim 24.)

2. Claims that the death penalty was appropriate because the Utah State Prison could not effectively incarcerate Mr. Menzies and might parole him. (*See* Claim 28.)

3. The State's reliance on quotes from a book about psychopaths and comparison of Mr. Menzies to Charles Manson and Son of Sam, where there is no evidence that he is a psychopath. (*See* Claim 25.)

If relevant at all, such items fit only as "other facts in aggravation." *See* Utah Code Ann. § 76-3-207(2) (1988). On these bases, the unlimited aggravation provision was applied in this case.

B. The Utah death penalty statute fails to narrow the class of eligibility or guide the discretion of the prosecutor.

The lengthy list of aggravating factors in Utah Code Ann. § 76-5-202 (1988) allowed almost any homicide to result in a death penalty, thereby failing to narrow the class. As written, Utah's statute has been, and continues to be, one of the broadest aggravated murder statues in the nation. At the time of Mr. Menzies's trial, there were 17 different aggravators. *See State v. Young*, 853 P.2d 327, 399 (Utah 1993 (Durham, J. dissenting). There are currently 20 aggravating circumstances, not counting the various subcategories detailing prior convictions which may constitute aggravators (21 different felonies) or the six subcategories relating to crimes specifically against children, under which the attendant homicide need not be knowing and intentional but requires only a reckless indifference to human life (one of which allows attempted misdemeanor child abuse to function as an aggravator). *See* Utah Code Ann. § 76-5-202 (2012). The number and scope of aggravators are so broad as to encompass virtually every criminal

homicide that is committed in the state.

Neither the version in use at the time of Mr. Menzies's trial nor the current version has been reviewed by a federal court to determine its constitutionality. In 1986, the Tenth Circuit Court of Appeals reviewed the 1973 version of the statute, which only had eight possible aggravators. *See Andrews v. Shulsen*, 802 F.2d 1256, 1261 (10th Cir. 1986). The Tenth Circuit found the sentencing scheme to be constitutional, however, it also noted that the then-current version of the statute contained seventeen aggravators, and stated that "[w]e express no opinion on its constitutionality, but confine our attention to the 1973 statutes." *Id.* at 1261 n.1. As noted above, the now current version of the statute contains two-and-a-half times the number of aggravators as the original 1973 statute. The pattern in Utah is not to narrow the class of eligibility, but to ever expand it.

The United States Constitution requires that the class of murderers eligible for the death penalty be significantly narrowed. The statutory scheme allows for the death penalty to be applied in virtually any homicide and allows for the application of unlimited aggravators in any given case. For these reasons, it violates the Eighth Amendment.

CLAIM 40

The Utah death penalty statute violates the Fifth and Fourteenth Amendments because it imposes a burden on the defendant to overcome the evidence of conviction and creates a presumption of death in sentencing.

This claim was not raised in Mr. Menzies's state court proceedings. At the appropriate time Mr. Menzies intends to seek a stay of these proceedings pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), to properly exhaust this claim in state court. To

the extent Mr. Menzies did not raise this claim in prior state court proceedings, that failure was the result of the ineffective assistance of his direct appeal and post-conviction counsel. *See Martinez*, 132 S.Ct. at 1315.

Utah's death penalty statutes allow for the aggravating factors underlying the guilty verdict to be used as aggravating circumstances during the penalty phase. *See* Utah Code § 76-3-207(2) (1988). The state is not required to present any additional evidence beyond the fact of the conviction.

"It is essential that the capital-sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense." *Roberts v. Louisiana*, 431 U.S. 633, 637 (1977) (per curiam). The question is whether a sentencing procedure "'create[d] the risk that the death penalty w[ould] be imposed in spite of factors which may call for a less severe penalty.'" *Sumner v. Shuman*, 483 U.S. 66, 82 (1987) (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)); *see also Peek v. Kemp*, 784 F.2d 1479, 1488 (11th Cir. 1986) (en banc) (criticizing jury instruction in *Spivey v. Zant*, 661 F.2d 464 (5th Cir. 1981), because that instruction "may well have skewed the jury towards death and misled the jury with respect to its absolute discretion to grant mercy regardless of the existence of 'aggravating' evidence"). The Utah death penalty scheme created precisely that risk in Mr. Menzies's case because it impermissibly shifted the burden to him to overcome evidence of his conviction.

After the guilt phase of the trial, the jury was instructed that it could find Mr. Menzies guilty of capital homicide and eligible for death if it found he committed the

murder under one or more of the alleged aggravating circumstances. The jury found two aggravating circumstances in a special verdict form, including robbery and aggravated kidnapping. Therefore, regardless of what Mr. Menzies may have presented in mitigation, the judge could find that he should receive death based solely on the aggravators on which evidence had been presented during the guilt phase. Because the burden impermissibly shifted to Mr. Menzies to prove that his life should be spared, his constitutional rights were violated. *See Jackson v. Dugger*, 837 F.2d 1469, 1474 (11th Cir. 1988)*; cf. Gregg v. Georgia*, 428 U.S. 153, 189 (1976).

CLAIM 41

It would violate Mr. Menzies's Eighth Amendment rights to freedom from cruel and unusual punishment for the State to execute him after he spent twenty-seven years on its death row.

This claim was not raised in Mr. Menzies's state court proceedings. At the appropriate time Mr. Menzies intends to seek a stay of these proceedings pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), to properly exhaust this claim in state court. To the extent Mr. Menzies did not raise this claim in prior state court proceedings, that failure was the result of the ineffective assistance of his post-conviction counsel. *See Martinez*, 132 S.Ct. at 1315.

Even though his execution is not yet imminent, and may in fact be years away, Mr. Menzies is raising this claim for preservation purposes. *See Allen v. Ornoski*, 435 F.3d 946, 958 (9th Cir. 2006). Mr. Menzies was sentenced to death on March 23, 1988, and has been constantly incarcerated since that date. He has spent almost twenty-seven years

on Utah's death row. He lives in a small, solitary cell under constant watch. He may possess only a limited amount of personal property. He is subject to severe limitations to the amount of time he may spend outside his cell, the number of visits he can have, and the amount of personal property he may possess. Virtually every aspect of his existence is controlled by the prison.

Mr. Menzies is not responsible for the delay between his sentencing and the day on which it will be carried out. Over the course of the past twenty-seven years, he has consistently exercised his legitimate right to a review of his convictions and sentences. Executing a prisoner like Mr. Menzies who has spent so many years on death row would not meaningfully advance the goals of retribution or deterrence, the twin aims of the death penalty. The severe punishment inflicted by confinement on Utah's death row adequately satisfies the State's interest in retribution. And executing Mr. Menzies, rather than commuting his sentence to life in prison without the possibility of parole, would serve no meaningful deterrent effect. Accordingly, carrying out Mr. Menzies's death sentence now would constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. *See Lackey v. Texas*, 514 U.S. 1045

CLAIM 42

The death penalty is categorically cruel and unusual punishment, in violation of the Eighth Amendment.

This claim was not raised in Mr. Menzies's state court proceedings. At the appropriate time Mr. Menzies intends to seek a stay of these proceedings pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), to properly exhaust this claim in state court. To

the extent Mr. Menzies did not raise this claim in prior state court proceedings, that failure was the result of the ineffective assistance of his direct appeal and post-conviction counsel. *See Martinez*, 132 S.Ct. at 1315.

Mr. Menzies concedes that the United States Supreme Court has held that "the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). The Court reached this conclusion because it believed that the death penalty could serve the "two principal social purposes" of "retribution and deterrence of capital crimes by prospective offenders." *Id*. at 183.

Empirical evidence has emerged over the last thirty-six years that has eroded these two justifications for the death penalty. *See, e.g.*, Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 Stan. L. Rev. 751 (2005). Mr. Menzies submits that because the death penalty serves neither the goal of retribution nor that of deterrence, it should be abolished in deference to the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Accordingly, Mr. Menzies's sentence is constitutionally infirm under the Eighth Amendment, and he is entitled to relief.

CLAIM 43

Mr. Menzies was denied the right to a fair trial due to the cumulative effect of all errors during his trial, appeal, and post-conviction Proceedings, violating his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

Mr. Menzies has alleged numerous serious violations of his constitutional rights, which on their own merit relief. If, however, this Court does not find these claims individually persuasive, the cumulative effect of these constitutional violations deprived Mr. Menzies of a fair trial, rendered his convictions and death sentence inherently unreliable, and deprived him of meaningful post-conviction review.

XI. Prayer for relief.

Mr. Menzies respectfully prays this Court:

1. Order Respondent to file an Answer or other responsive pleading to this petition after Mr. Menzies files his second amended petition;

2. Order that Mr. Menzies be granted leave to conduct discovery pursuant to Rule 6 of the Rules Governing § 2254 Cases and permit Mr. Menzies to utilize the processes of discovery set forth in Federal Rules of Civil Procedure 26 through 37, to the extent necessary to fully develop and identify the facts supporting his petition, and any defense thereto raised by the Respondent's Answer;

3. Order that upon completion of discovery, Mr. Menzies be granted leave to amend his petition to include any additional claims or allegations not presently known to him or his counsel, which are identified or uncovered in the course of discovery and that Mr. Menzies be granted leave to expand the record pursuant to Rule 7 of the Rules Governing § 2254 Cases to include additional materials related to the petition;

4. Grant an evidentiary hearing pursuant to Rule 8 of the Rules Governing § 2254 Cases at which proof may be offered concerning the allegations of this petition;

5. Issue a writ of habeas corpus to have Mr. Menzies brought before it to the end that he may be discharged from his unconstitutional confinement and restraint;

6. In the alternative, issue a writ of habeas corpus to have Mr. Menzies brought before it to the end that he may be relieved of his unconstitutional convictions and sentences, including his sentence of death;

7. Grant such other relief as may be appropriate and to dispose of the matter as law and justice require.

Respectfully submitted this 31st day of August, 2015.

Jon M. Sands
Federal Public Defender

/s/ David Christensen
David Christensen
Assistant Federal Public Defender
Attorney for Petitioner Menzies

XII. Verification of Petition.

I, David Christensen, declare as follows, under penalty of perjury.

1. I am an attorney admitted to practice law in the State of Utah, admitted to the bar of the United States District Court for the District of Utah, and am an attorney with the Office of the Federal Public Defender for the District of Arizona.

2. I have read the foregoing Second Amended Petition for Writ of Habeas Corpus and declare that the facts alleged are true to the best of my knowledge based upon my reading of what I know to be true copies of documents in this action.

3. I am authorized by Ralph LeRoy Menzies to file this Second Amended Petition for Writ of Habeas Corpus on his behalf.

I declare under penalty of perjury under the laws of the United States of America and the State of Utah that the forgoing is true and correct.

Executed this 31st day of August, 2015, at Salt Lake City, Utah.

/s/ David Christensen
David Christensen
Assistant Federal Public Defender
Attorney for Petitioner Menziez

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 2015, I electronically filed the foregoing document to the Clerk's Office using the CM/ECF system which sent notification of such filing to the following registrants:

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Appendix L

Appendix L

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

RALPH LEROY MENZIES, Petitioner, vs. SCOTT CROWTHER, Warden of the Utah State Prison, Respondent.	No. 2:03-cv-0902-CVE-FHM REPLY TO RESPONSE TO SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254 **Death Penalty Case** Judge Claire V. Eagen

REPLY TO RESPONSE TO SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254

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Petitioner Ralph LeRoy Menzies, through counsel, hereby replies to Respondent's Response to Second Amended Petition for Writ of Habeas Corpus (hereinafter "Response"). (ECF No. 123.) Mr. Menzies incorporates the facts and arguments as presented in his Second Amended Petition for Writ of Habeas Corpus (hereinafter "Petition") (ECF No. 109) into this Reply and addresses the specific issues raised by Respondent in the claims below.

I. Respondent's procedural arguments are based on overly stringent misstatements of law and fall below the standard for demonstrating either a failure to exhaust claim or the procedural default of claims.[1] [2]

A. 28 U.S.C. §§ 2254(d)(1) and (2) allows this Court to grant relief where the state court has made unreasonable determinations of clearly established federal law or fact.

Respondent has argued that application of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") precludes this Court from granting relief. (ECF No. 123 at 22-23.) The statute allows for relief where the state court made either an "unreasonable application of, clearly established Federal law" or a "decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d)(1)-(2). Simply stated, relief is permitted where the state court adjudication of the constitutional claim was unreasonable. S*ee, e.g.*,

[1] Respondent has made arguments about why Mr. Menzies should not be granted a *Rhines* stay. (ECF No. 123 at 29.) Mr. Menzies has not moved for a *Rhines* stay. Rather Mr. Menzies has said that "[a]t the appropriate time Mr. Menzies intends to seek a stay of these proceedings pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), to properly exhaust . . . claim[s] in state court." (ECF No. 109 at 90.) Respondent's arguments are premature and will not be addressed in this reply. If Mr. Menzies moves this Court for a *Rhines* stay, the parties' arguments may be heard then.

[2] Respondent's arguments about the adequacy of the Utah post-conviction procedure (ECF No. 123 at 31-35) in response to Mr. Menzies's Claim 38 will be addressed in this reply with the other matters germane to Claim 38.

Williams v. *Taylor*, 529 U.S. 362, 410 (2000); *Wiggins v. Smith*, 539 U.S. 510, 520 (2003); *Rompilla v. Beard*, 545 U.S. 374, 380 (2005). The determination whether the state court's adjudication of Mr. Menzies's constitutional claims were unreasonable is for this Court to make and is not a foregone conclusion. Mr. Menzies addresses the applicable facts and law in the individual claims, both in his Petition and below.

B. Principles of exhaustion and fair presentment.

Mr. Menzies supplied this Court with a Statement of Exhaustion (ECF No. 109 at 6-8) and addressed whether each claim was exhausted, within the discussion of the individual claims. Respondent has argued that Mr. Menzies has not exhausted claims presented here if the claims are not identical to those presented in state court.[3] (ECF No. 123 at 24-25.) This is too rigid a reading of the principles of exhaustion. *See Granberry v. Greer*, 481 U.S. 129, 136 (1987) (noting that "the general rule of exhaustion 'is not rigid and inflexible'") (quoting *Frisbie v. Collins*, 342 U.S. 519, 521 (1952)). Indeed, Respondent's assertion that Mr. Menzies "must also exhaust the particular arguments in support of each claim" (ECF No. 123 at 24-25), imposes an inflexibility to the rule of exhaustion and the case upon which it relies does not support its proposition.[4] A

[3] Respondent also argues that Mr. Menzies "has the burden to show that he exhausted his claims," citing *Hernandez v. Starbuck*, 69 F.3d 1089, 1092 (10th Cir. 1995). (ECF No. 123 at 25.) *Hernandez* does not stand for this principle. Rather, it allows a district court determine whether it will hear an unexhausted claim even when a respondent has waived its defense. *Hernandez v. Starbuck*, 69 F.3d at 1092-93. Regardless, Mr. Menzies has demonstrated his exhaustion of the claims presented to the state court.

[4] Respondent cites *Smallwood v. Gibson*, 191 F.3d 1257, 1267 (10th Cir. 1999), to support his assertion that a petitioner must present the same argument in state court and federal court. *Smallwood*, however, cannot be read that narrowly. In that case, the Tenth Circuit found that the petitioner's claims were not exhausted where "petitioner raised an ineffective assistance of counsel claim on direct appeal, [but] he based it on different reasons than those expressed in his habeas petition. Indeed, petitioner has not properly

petitioner need only have provided the state courts a "fair opportunity" to address the claim. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999).

"To provide the State with the necessary 'opportunity,' the prisoner must 'fairly present' his claim in [the] appropriate state court . . . thereby alerting that court to the federal nature of the claim." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (quoting *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995)). Federal courts should "avoid hypertechnicality" in applying the fair presentment doctrine. *Williams v. Washington*, 59 F.3d 673, 677-78 (7th Cir. 1995). For example, fair presentment does not require a mechanical recital of the federal constitutional claims in the state court. Federal courts have held that a state prisoner cannot be denied access to federal courts solely because he failed to cite "book and verse on the federal constitution." *Picard v. O'Connor*, 404 U.S. 270, 278 (1971). He must simply "cit[e] in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or . . . simply label[] the claim 'federal.'" *Reese*, 541 U.S. at 32.

Consistent with these principles, a petitioner need not have proffered identical evidence or the exact argument in support of a claim in state court proceedings for purposes of exhaustion in federal habeas proceedings. *See, e.g.*, *Picard*, 404 U.S. at 277-78 ("Obviously there are instances in which the ultimate question for disposition will be the same despite variations in the legal theory or factual allegations urged in its support . . . . We simply hold that the substance of a federal habeas corpus claim must first be

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raised before the state courts *any of the bases* upon which his current ineffective assistance of counsel claims rely." *Id.* (emphasis added). *Smallwood* stands for the proposition that the bases for asserting a Sixth Amendment violation needed to be presented in state court—not that the argument need be identical.

presented to the state courts.") (internal citations and quotation marks omitted); *Vasquez v. Hillery*, 474 U.S. 254, 257-58 (1986) (noting that presentation of additional facts does not evade exhaustion requirement where substance of claim had already been presented in state court); *Hawkins v. Mullin*, 291 F.3d 658, 670 (10th Cir. 2002) (noting that habeas petitioner can present "bits" of new evidence to federal court but must not create a "significantly different legal posture" for the claim) (citation omitted).

C. Principles of procedural default.

Respondent recognizes that claims that have not been properly exhausted will be considered "technically exhausted" but also procedurally defaulted. (ECF No. 123 at 25.) Procedural default is an affirmative defense, which the state bears the burden of proving. *Trest v. Cain*, 522 U.S. 87, 89 (1997) ("[P]rocedural default is normally a 'defense' that the State is 'obligated to raise' and 'preserve' if it is not to 'lose the right to assert the defense thereafter.'" (quoting *Gray v. Netherland*, 518 U.S. 152, 166 (1996)); *Hooks v. Ward*, 184 F.3d 1206, 1216 (10th Cir. 1999). Accordingly, to establish procedural default in this case, Respondent must prove that a procedural rule applicable to the claim exists and that Mr. Menzies failed to comply with that rule. In order to show that an applicable procedural bar exists, Respondent must prove that the procedural rule is based on adequate and independent state law grounds. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) ("This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment."); *see also Dretke v. Haley*, 541 U.S. 386, 392 (2004). For a state procedural forfeiture to constitute an "independent" ground,

the state court decision must not appear to rest primarily upon federal law or to be interwoven with federal law. *See, e.g.*, *Coleman*, 501 U.S. at 730-32. "[T]he state law ground must have been the exclusive basis for the state court's holding." *Moore v. Reynolds*, 153 F.3d 1086, 1096 (10th Cir. 1998) (internal quotation marks omitted).

In addition to alleging that a procedural bar was imposed, Respondent must establish that the state courts have actually enforced the procedural sanction. A valid procedural bar must be both established in advance and strictly and regularly applied. *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991); *Dugger v. Adams*, 489 U.S. 401, 410-11 n.6 (1989); *Johnson v. Mississippi*, 486 U.S. 578, 587-89 (1988). Absent these conditions, there can be no valid procedural bar to federal relief.

D. The Utah state procedural bars are not adequate and independent.

"A state ground will be considered adequate only if it is 'strictly or regularly followed' and applied 'evenhandedly to all similar claims.'" *Fairchild v. Workman*, 579 F.3d 1134, 1141 (10th Cir. 2009) (citations omitted). Respondent must prove that the procedural bar is adequate because it is in the best position to show "the regularity, consistency and efficiency" of the application of its rules. *Id.* (citing *Hooks v. Ward*, 184 F.3d 1206, 1217 (10th Cir. 1999)).

Respondent has failed to meet its burden. Respondent cites to the Utah Post-conviction Remedies Act (PCRA) and recites its language. (ECF No. 123 at 27.) Respondent also cites law as to what may constitute independent and adequate procedural grounds for a state to bar a claim. (ECF No. 123 at 28.) Respondent does not, however, show whether or how Utah has applied the law, consistently or otherwise.

In fact, the Utah state courts have not consistently applied the procedural bar against defaulted claims brought under the PCRA. In Mr. Menzies's case, the Utah Supreme Court has recognized ineffective assistance of post-conviction counsel, raised in a motion to set aside a judgment (Rule 60(b) motion), as a basis to bypass a procedural bar against defaulted claims. *Menzies v. Galetka*, 150 P.3d 480, 503 (Utah 2006). The court supported this holding with the reasoning that a court has "broad discretion," that it "should exercise its discretion in favor of granting relief," and "60(b) motions should be liberally granted because of the equitable nature of the rule." *Id*. at 501-02. It emphasized the "constitutional importance" of the "post-conviction proceeding," and the need to ensure "the reliability of convictions and death sentences, and ensure that a petitioner's fundamental rights are adequately protected." *Id*. at 503. "'[T]he law should not be so blind and unreasoning that where an injustice has resulted the [plaintiff] should be without remedy.'" *Id*. (quoting *Martinez v. Smith*, 602 P.2d 700, 702 (Utah 1979)).

However, the application of the Rule 60(b) as explained in *Menzies*, has not been followed by the Utah Supreme Court. In that case, relief under Rule 60(b) was warranted based on the "ineffective assistance of counsel and gross negligence" of post-conviction counsel. *Menzies*, 150 P.3d at 503. However, in *Archuleta v. Galetka*, the court applied a different rule from that announced in *Menzies*. The court held that relief was not warranted in Archuleta's case because the attorney did not "blatantly disregard [] his or her representative capacity and subvert[] the client's interest." 267 P.3d 232, 274 (Utah 2011) (quoting *Menzies*, 150 P.3d at 508).

Additionally, although the state legislature amended the PCRA in 2008 to be "the sole remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies" (Utah Code Ann. § 78B-9-102(1)) it only did so after the Utah Supreme Court had continued to exercise its quintessential power in state habeas review. *See Tillman v. State*, 128 P.3d 1123, 1131 (Utah 2005). In *Tillman*, the Utah Supreme Court, relying on its own precedent, reiterated the "good cause factors sufficient to justify the filing of a successive claim not raised in a prior post-conviction petition," which may include "a claim overlooked in good faith with no intent to delay or abuse the writ." *Id.* at 1130-31 (quoting *Hurst v. Cook*, 777 P.2d 1029, 1037 (Utah 1989)). These good cause factors are "not exhaustive." *Id.* at 1131. The court also explained that the legislature could not extinguish the courts' power in this area through enactment of a post-conviction remedies act because that power "'quintessentially . . . belongs to the judicial branch of government' and not the legislature." *Id.* (quoting *Gardner v. Galekta*, 94 P.3d 263, 267 (Utah 2004) and *Hurst*, 777 P.2d at 1037). The outcomes in *Tillman* and *Gardner* do not eliminate state courts' quintessential power over the state habeas process. Inherent in that power is the common law authority to allow good faith exceptions to procedural deficiencies in the claims brought before them.

After the 2008 amendment to the PCRA, it is unsettled whether the common law good cause exceptions are still available. The Utah Supreme Court noted shortly afterward that the "amendment appears to have extinguished our common law writ authority for future cases," however the case at hand pre-dated the amendment and did

not afford the court an opportunity to definitively address the question. *Peterson v. Kennard*, 201 P.3d 956, 962 n.8 (Utah 2008). In a more recent case, the Utah Supreme Court refused to address the question on the basis it was not adequately preserved. *Winward v. State*, 293 P.3d 259, 262-63 (Utah 2012). The majority of the state court did not, however, dismiss the question as having been resolved by the statute. *See id*. at 270 (Lee, J., concurring).

Finally, even if a state court, in its authority over the state habeas process, decides to decline to review the case, the fact that the claim was properly raised is sufficient to constitute fair presentation and exhaustion to allow federal review of a claim. *See Dever v. Kansas State Penitentiary*, 36 F.3d 1531, 1534 (10th Cir. 1994).

E. Respondent's arguments about the applicability of *Martinez v. Ryan* in Utah have recently been rejected by this Court in another case.

Respondent's Response part V is premised on its contention that *Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013), do not apply in Utah. (ECF No. 123 at 38-49.) At the time Respondent filed his Response, the applicability of *Martinez* and *Trevino* in Utah was an open question. It has since been resolved. This Court, in another case, recently rejected the same arguments Respondent made here and held "that *Trevino* and *Martinez* do apply in Utah, because although Utah's Rule 23B allows an ineffective assistance claim to be raised on direct appeal under narrow circumstances, the rule does not provide for the scope of evidentiary development that is ordinarily necessary for claims of ineffective assistance of counsel." *Lafferty v. Crowther*, No. 2:07-CV-322, 2016 U.S. Dist. LEXIS 138845, at *5 (D. Utah

Oct. 5, 2016). This Court specifically distinguished between Utah's law and the Oklahoma law that the Tenth Circuit found did not warrant application of *Martinez* and *Trevino* in that state. *Id*. at *4 (citing *Fairchild v. Trammell*, 784 F.3d 702, 721-22 (10th Cir. 2015)). Given that Respondent's arguments are now moot, Mr. Menzies will not address them. The merits of each claim of ineffective assistance will be addressed within the individual claims below.

II. Claims for Relief

CLAIM 1

Mr. Menzies was denied his rights to due process and equal protection under the Fourteenth Amendment, his right to the effective assistance of counsel on appeal under the Fourteenth and Sixth Amendments, and his right to be free from cruel and unusual punishment under the Eighth Amendment because the state court failed to provide him with an adequate transcript of his trial.

Mr. Menzies's appeal was based on an incomplete and error-filled transcript prepared after the fact from a variety of sources after it was discovered the court-reporter, Ms. Tauni Lee, was incompetent to complete her responsibilities, reliably or otherwise. Respondent's argument glosses over the crux of Mr. Menzies's claim, repeating the error of the Utah state courts. The trial court's finding that Ms. Lee, was "'de facto' qualified" does not make her transcript reliable. *Menzies I*, 845 P.2d 220, 224 (Utah 1992).[5] In his Petition, Mr. Menzies demonstrates that the state court record showed Ms. Lee's work was incomplete and unreliable both generally (ECF No. 109 at 53-54, 57) and

[5] Consistent with his Petition, Mr. Menzies will cite to the Utah Supreme Court direct appeal cases as *Menzies I* (*State v. Menzies*, 845 P.2d 220 (Utah 1992)) and *Menzies II* (*State v. Menzies*, 889 P.2d 393 (Utah 1994)), and his state post-conviction cases as *Menzies III* (*Menzies v. Galekta*, 150 P.3d 480 (Utah 2006)) and *Menzies IV* (*Menzies v. State*, 344 P.3d 581 (Utah 2014)). (ECF No. 109 at 2-3.)

specifically in Mr. Menzies's case (ECF No. 109 at 57-59). These examples specific to Mr. Menzies's trial and appeal include the individual areas in which he was prejudiced by use of the unreliable transcript.

Respondent tries to argue that Mr. Menzies does not have a right to a verbatim transcript of his trial for appellate review, citing a handful of federal case and one Utah state case. Review of these cases, however, reveals that they do not stand for the proposition Respondent suggests. The federal cases all deal with the same issue—whether an indigent appellant must be provided with a record for his appeal without cost. The cases consistently affirm that all criminal appellants must have the same access to a reliable appellate record as anyone who is able to pay, and, depending on the issues raised on appeal, that may require a verbatim transcript.

Respondent quotes from *Draper v. Washington*, arguing that appellants are only guaranteed a "record of sufficient completeness," for his proposition that the error-riddled transcript was good enough. (ECF No. 123 at 55 (citing 372 U.S. 487, 499 (1963).) *Draper* does not support such a conclusion. In that case, an indigent appellant was denied any record at all for his appeal, which alleged trial errors that would be apparent from the record. 372 U.S. at 491-92. The Court observed in passing that there may be substitutes for a stenographic transcript, however, it noted that the alternatives must "place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise." *Id*. at 495. These alternatives might include "[a] statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes, or a

bystander's bill of exceptions." *Id*. None of these, or anything analogous, were provided for Mr. Menzies's appeal. His counsel did not stipulate to the completeness or accuracy of the record on appeal, and, as shown in the Petition, the court reporter lacked a complete set of untranscribed notes. (ECF No. 109 at 57-59.) The holding in *Draper* is not that a state can simply substitute something in lieu of a stenographic transcript, but, rather, that there must be a complete and reliable record—of which the stenographic transcript is the standard—for appellate review. 372 U.S. at 496-97.

Similarly, in *Coppedge v. United States*, cited by Respondent, the issue is not whether the record for review was reliable or not, but whether an indigent appellant was provided a record at all. (ECF No. 123 at 55 (citing 369 U.S. 438, 446 (1962).) When the Court in *Coppedge* said that the appellant was to be provided "a record of sufficient completeness," the Court was not opining on what that would be, but, rather, whether the indigent appellate had the right to a copy of the record without having to pay for it himself:

> If . . . the claims made or the issues sought to be raised by the applicant are such that their substance cannot adequately be ascertained from the face of the defendant's application, the Court of Appeals must provide the would-be appellant with both the assistance of counsel and a record of sufficient completeness to enable him to attempt to make a showing that the District Court's certificate of lack of 'good faith' is in error and that leave to proceed with the appeal in forma pauperis should be allowed.

369 U.S. at 446.

The third federal case cited by Respondent follows the same pattern and is likewise not on point to support his argument. The line quoted by Respondent from *Mayer v. Chicago*, is a restatement of the portion of *Draper*, cited above, that lists what

certain alternatives to a verbatim transcript might be, if appropriate for the issues on appeal. (ECF No. 123 at 55 (citing 404 U.S. 189, 194 (1971).) Notably, however, the Court in *Mayer* did not find that what was provided to the appellant, which was nothing, was adequate. Rather, the Court held that "the State must provide a full verbatim record where that is necessary to assure the indigent as effective an appeal as would be available to the defendant with resources to pay his own way." *Mayer*, 404 U.S. at 195.

None of the federal cases cited by Respondent have to do with whether the transcript being used on appeal is reliable or not. Instead, they all address the question of whether an indigent appellant can be compelled to proceed without the benefit of a verbatim transcript. Although the United States Supreme Court has observed that there may be sufficient analogues for certain issues, it has consistently held that a transcript must be provided where review of the verbatim record is necessary to make a reliable determination of the issues presented on appeal. This is precisely what Mr. Menzies was denied.

Even the Utah state case relied on by Respondent does not support his argument. In *State v. Jonas*, a Utah appellate court rejected an appellant's contention that his transcript was not complete by distinguishing that case from another Utah state case,

> The court reporters' transcripts are virtually complete and thus amply adequate for us to review defendant's claims. This transcript is not like the transcript in *State v. Taylor*, 664 P.2d 439 (Utah 1983), where a new trial was ordered. There, a juror's responses to voir dire questions were totally absent from the record and could not be reconstructed. Here, the bailiff's testimony was totally reported, and there was no need to reconstruct the record. We find the transcript before us to be functionally adequate for review. Not all deficiencies or inaccuracies in the record require a new trial.

Jonas, 793 P.2d 902, 910 (Utah Ct. App. 1990). Respondent only quotes the last sentence, ignoring the basis for the finding. (ECF No. 123 at 55.) Mr. Menzies's case is like the *Taylor* case referred to in *Jonas*, where, given that voir dire questions were totally absent from the record. (ECF No. 109 at 57-58, citing TR 12/05/1998, ROA 1931 at 35-40.) It is therefore distinguishable from *Jonas*.

Respondent observes that Mr. Menzies's has made these arguments to the state court, and his appeal was not granted there. (ECF No. 123 at 52.) This is because, as argued in the Petition, the state court made unreasonable determinations. The law cited by Respondent does not show otherwise. To the contrary, it supports Mr. Menzies's position that he was denied a reliable record in violation of his constitutional rights and his Petition should be granted on this claim.

CLAIM 2

Mr. Menzies was denied his right to a fair trial by an impartial jury guaranteed by the Sixth and Fourteenth Amendments when the trial court refused to excuse unqualified jurors for cause.

Mr. Menzies argued in his Petition that the state court made an unreasonable determination of fact when it failed to apply the then-controlling state law on error for failing to excuse an unqualified juror, which was automatic reversal, and then faulting him for inadequate briefing, despite his appellate brief being an accurate statement of the applicable law. (ECF No. 109 at 60-62.) Mr. Menzies then supplied this Court with a detailed account of each of the unqualified jurors and the bases for their disqualification. (ECF No. 109 at 65-69.) In response, Respondent has argued the *Ross v. Oklahoma*

standard. (ECF No. 123 at 57 (citing 487 U.S. 81, 88 (1988).) This would be proper had Mr. Menzies alleged his claim under 28 U.S.C. § 2254(d)(1), that this was an unreasonable error in applying clearly established federal law. But, as Respondent acknowledges, "Menzies does not argue that the Utah Supreme Court decision was contrary to or based on an unreasonable application of clearly established federal law. Instead, Menzies argues that the decision was based on an unreasonable determination of the facts." (ECF No. 123 at 58.)

In response to Mr. Menzies's factual allegations about the jurors and their lack of qualifications, Respondent has only said that "The State does not concede . . . that the trial court erred by not removing jurors for cause." (ECF No. 123 at 57 n.7.) Respondent has offered nothing to rebut Mr. Menzies's specific arguments regarding the individual jurors. Respondent has waived substantive argument in response to Mr. Menzies's factual allegations and this Court should accept them as true and grant relief on this claim.

CLAIMS 3 & 4

The State violated Mr. Menzies's right to due process of law under the Fourteenth Amendment by failing to disclose to the defense material exculpatory evidence irregularities with an eyewitness's identification.

The state court violated Mr. Menzies's right to due process under the Fourteenth Amendment by failing to declare a mistrial after hearing that the State had withheld material exculpatory evidence about the eyewitness identifications.

As described in the Petition (ECF No. 109 at 69-72), during Mr. Menzies's trial, it became apparent that the prosecution had withheld evidence related to the witness, Tim Larrabee, who observed a man and woman in the area where the victim, Maureen Hunsaker, was found. Larrabee had failed to pick Mr. Menzies out of a photo array or lineup, and misidentified the car he said he'd seen at Storm Mountain. However, Larrabee had a conversation with the prosecutor after the lineup in which the prosecutor indicated to Larrabee that Mr. Menzies was the main suspect. This conversation was never disclosed to defense counsel until the prosecutor elicited testimony about it from Larrabee on re-direct examination after defense counsel had cross-examined him about his failure to identify Mr. Menzies. Additionally, Larrabee was only able to pick Mr. Menzies out of a subsequent photo array after additional conversations with law enforcement.

The trial court found that the State had violated the state rules of criminal procedure by failing to disclose the conversation with the prosecutor, which finding was upheld by the Utah Supreme Court. *Menzies II*, 889 P.2d at 401. While this was proper,

Mr. Menzies had raised this issue as both a violation of the state criminal discovery rule and as a federal due process claim. These are two distinct sets of law. *See Parsons v. Galetka*, 57 F. Supp. 2d 1151, 1173-74 (D. Utah 1999) (where there is a violation of the Utah state discovery rule, the standards of *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny also apply). Because the state court believed it had resolved the issue as a matter of state law, it assumed there was no need to address the federal due process issue. *Id*. at 400. This was unreasonable.

Respondent claims that Mr. Menzies has failed to identify what federal law was unreasonably applied by the Utah state court. (ECF No. 123 at 61, 64.[6]) In the Petition, Mr. Menzies cites to and discusses *Brady*, 373 U.S. 83, *Giglio v. United States*, 405 U.S. 150 (1972), *Wardius v. Oregon*, 412 U.S. 470 (1973), *United States v. Agurs*, 427 U.S. 97 (1976), and *United States v. Bagley*, 473 U.S. 667, 676 (1985), all of which establish a due process right to the disclosure of evidence, including impeachment evidence. (ECF No. 109 at 72.) The communications between the prosecutor and other law enforcement personnel and Larrabee impacted his recollection of who and what he saw at Storm Mountain. The failure to disclose these communications was an improper violation of both the state rules of discovery and Mr. Menzies's federal right to due process.

Although the trial court found the state discovery rule had been violated, the Utah Supreme Court found the violation to be harmless because Larrabee was apparently

[6] Respondent makes this assertion about both Claim 3 (ECF No. 123 at 61) and Claim 4, that Mr. Menzies should have been granted a mistrial because of the withheld evidence (ECF No. 123 at 64.) In Claim 4, Mr. Menzies explicitly references "the facts and law discussed above in Claim 3." (ECF No. 109 at 75.)

independently able to describe someone similar to Mr. Menzies and a car similar to the car he had been driving during the time the offense occurred. *Menzies II*, 889 P.2d at 401. There is significant difference, however, between being able to describe a man similar to Mr. Menzies and being able to identify him in a photo array and lineup, neither of which Larrabee was able to do without the undue influence of law enforcement. Similarly, Larrabee was only able to identify the car when he was shown a single car that was similar to the one he observed at Storm Mountain.[7] Finding this error harmless was an unreasonable determination of fact.

This unreasonable determination of fact led the state court to assume it "need not indulge in a separate due-process analysis." *Id*. at 400. This is incorrect given that the federal due process rule is not analogous to the state discovery rule. The only question addressed by the Utah Supreme Court is whether, in light of the totality of the evidence, the verdict would have been different in Mr. Menzies's case.[8] *Id*. at 401. This is not the correct question to ask when evaluating withheld evidence in a due process claim brought under *Brady*.

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[7] Respondent claims this fact is a separate claim that is unexhausted. (ECF No. 123 at 63 n.9). It is not a separate claim, it is a fact alleged in support of the claim that the State withheld evidence regarding Larrabee's ability to give eyewitness testimony. Procedural default is a principle of habeas law that applies to claims, not facts. *See, e.g.*, *Woodford v. Ngo*, 548 U.S. 81, 93 (2006) (explaining that "if the petitioner procedurally defaulted those *claims*, the prisoner generally is barred from asserting those *claims* in a federal habeas proceeding") (emphasis added). Naturally, however, a claim cannot exist without both legal *and* factual support. *Cf. Martinez v. Ryan*, 132 S. Ct. 1309, 1318 (2012) ("Ineffective-assistance claims often depend on evidence outside the trial record."); *Gallow v. Cooper*, 133 S. Ct. 2730, 2731 (June 27, 2013) (mem.) (Statement of Breyer, J.) ("A claim without any evidence to support it might as well be no claim at all."). Therefore, any assertion by Respondent that Mr. Menzies has defaulted facts is inaccurate.

[8] Mr. Menzies is not conceding that the Utah Supreme Court got the answer to this question correct with regard to state law.

The specific question to be resolved on the federal due process issue is "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. To be precise, "[t]his question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). A "reasonable probability" of a different result is established when the suppression of favorable evidence "undermines confidence in the outcome of the trial." *Bagley*, 473 U.S. at 678. This question was what the Utah Supreme Court refused to "indulge." *Menzies II*, 889 P.2d at 400. A criminal defendant's right to due process under the federal constitution is not an indulgence, it is a fundamental right which the Utah courts have failed to protect.

The state court's assumption that the state and federal law issues were sufficiently analogous so as to be interchangeable was an unreasonable application of the clearly established federal law cited above and in the Petition. (ECF No. 109 at 72, 73.) Because Mr. Menzies raised this claim as a federal due process issue and the state court explicitly disregarded it, there has been no determination on the merits, and this Court may review the claim de novo. The same applies to Claim 4, Mr. Menzies claim that this discovery violation merited a mistrial. (ECF No. 109 at 74-76.) Mr. Menzies should be granted relief on these claims.

CLAIM 5

The state court denied Mr. Menzies his right to confrontation as guaranteed by the Sixth Amendment by admitting the preliminary hearing testimony of a jailhouse informant, despite the witness being present in the courtroom.

Jailhouse informant, Walter Britton, claimed that he would refuse to testify. Yet, over two days, he answered nearly every question put to him, including those from defense counsel. Despite this, the trial court found him "unavailable" to testify and admitted his preliminary hearing testimony at Mr. Menzies's trial.

The version of the rule in effect at the time of Mr. Menzies's trial stated that a witness is unavailable if the witness "persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so." Utah R. Evid. 804(a)(2) (1988). At the time of Mr. Menzies's trial, Utah courts had determined that "[t]he operative term in Rule 804(a)(2) is 'persists.'" *State v. Barela*, 779 P.2d 1140, 1144 (Utah Ct. App. 1989).

As established in the Petition, Britton only refused to answer a question about a mental health examination, but answered questions on all other topics. At trial, Britton was questioned outside the presence of the jury. He stated that he would not testify (TR 02/18/1988, ROA 1155 at 960), but he also answered nearly all of the specific questions asked of him (*id.* at 1081). Even after he stated he would refuse to testify, Britton appeared in court the following day and answered questions from defense counsel without any protest. (TR 02/19/1988, ROA 1155 at 1073-80). This proceeded until defense counsel asked whether he had undergone a "court ordered psychological

evaluation." (*Id.* at 1080.) Britton refused to answer that question. (*Id*.) But Britton proceeded to answer other questions from both parties. (*Id*. at 1081-83, 1087-90.) This is not a persistent refusal to testify. *See* Utah R. Evid. 804(a)(2) (1988); *see also Barela*, 779 P.2d at 1144. This is a selective refusal to answer questions that might impinge his credibility.

Additionally, as shown in the Petition, the prosecution was willing to help Britton evade being questioned under oath in front of the jury about matters that would undermine the reliability of his testimony. The prosecutors argued vehemently for Britton's unavailability and pushed the trial court to return Britton to the federal prison before the trial court resolved the matter of his availability. (*Id*. at 1090.) For the State, whether Britton was available or not depended only on the extent to which defense counsel could effectively impeach him.

Respondent has argued that what the trial court did was sufficient, citing some court of appeals cases in support. (ECF No. 123 at 67.) These cases, however, are factually distinguishable from Mr. Menzies's case. In *Jennings v. Maynard*, the witness refused to testify because he and his family had been threatened, presumably by the defendant. 946 F.2d 1502, 1505 (10th Cir. 1991). In upholding the finding of availability, the Tenth Circuit noted that the "threats which most likely came from Jennings . . . made an order to testify inappropriate" and "[m]ost importantly, the trial court did not order Ballew to testify because Ballew would have stated that he had been threatened[,]" which "would have prejudiced the defendant's right to an impartial jury." *Id*. The other case cited by Respondent does not deal with a refusal to testify, but, rather,

the invocation of a privilege by a co-conspirator, which is a separate provision in the rules of evidence and requires different procedure. *See United States v. Adams*, 759 F.2d 1099, 1106-07 (3d Cir. 1985).

The sort of context described in *Jennings* is not comparable to Mr. Menzies's trial. The context in this case was that the witness was present at court, answered nearly every question, including those from defense counsel, and only refused when asked about an area that impacted his credibility—his mental health examination. Had the trial court put Britton on the stand, Britton could have refused to answer questions that impacted his credibility, and the jury could have seen him for what he was—an opportunistic convict who sought to turn the offense Mr. Menzies was being tried for to his advantage.

In his Petition, Mr. Menzies provided this Court with United States Supreme Court precedent as to why preliminary hearing testimony is not an adequate substitute for cross-examination at trial before a jury. (ECF No. 109 at 77.) Also as shown in the Petition (ECF No. 109 at 81), at the preliminary hearing, Britton denied that his testimony in Mr. Menzies's case would be of any benefit to him (TR 05/19/1986, ROA 1150 at 170-71), however, it was later shown that the prosecution had in fact entered into an agreement to provide a favorable affidavit for Britton after he testified, (TR 03/01/1988, ROA 1158 at 2038-39.) This agreement was made prior to Mr. Menzies's preliminary hearing. (TR 03/01/1988, ROA 1158 at 2038 (Britton's attorney testifies he made the arrangement with the prosecution on May 2, 1986, which was about two weeks before Britton testified at the preliminary hearing).) Britton lied about it on the stand and the prosecution failed to correct it.

In addition to Britton's unavailability, the State also needed to prove the reliability of the statement they wanted to put on in lieu of live testimony. It was clear that the State wanted to keep Britton off the stand where he could not be examined about his mental health or about the lies in his preliminary hearing testimony. By only relying on the preliminary hearing testimony, the State was able to keep from the jury the fact that they had made a deal with Britton prior to the preliminary hearing, that Britton had lied about it, and that they had facilitated that lie.

Respondent has not offered any rebuttal to Mr. Menzies's arguments in his Petition other than a brief summary of what the Utah Supreme Court held, citing only to the relevant portion of *Menzies II*. (ECF No. 123 at 67-68 (citing 889 P.2d at 402-03).) The argument that the preliminary hearing was not an adequate substitute for live testimony in front of the jury, where Britton could be confronted on matters that would impeach his credibility, stands unrebutted by Respondent and should be accepted by this Court as true. Mr. Menzies should be granted relief on this claim.

CLAIM 6

The state court denied Mr. Menzies his right to compulsory process guaranteed by the Sixth and Fourteenth Amendments when it quashed the subpoena for the prosecutor who testified on behalf of Walter Britton at a hearing to modify his sentence.

Once it became apparent that Britton would not be testifying at trial, Mr. Menzies sought to put the prosecutor who testified at Britton's federal sentence modification hearing on as a witness so as to have someone testify to the facts of the arrangement between Britton and Mr. Menzies's prosecutors.

Respondent argues that quashing the subpoena was of no harm to Mr. Menzies's because the transcript of Britton's federal sentence modification hearing was admitted at trial. (ECF No. 123 at 69.) Respondent, in an apparent attempt to suggest there was nothing untoward in the prosecution's arrangement with Britton, also cites to Britton's attorney's testimony on the matter. (ECF No. 123 at 69-70). Respondent wrote that Britton's attorney's notes said "'Britton contacted prosecutor, volunteered info. No deal demanded. No attorney demanded. . . . E[rnie]. J[ones]. will sign favorable affidavit after test[imony].'" (ECF No. 123 at 69-70 (citing TR 03/01/1988, ROA 1158 at 2038-39).)

What Respondent fails to note, however, is that Britton's attorney also testified that the date of that phone call with Ernie Jones, Mr. Menzies's prosecutor, was May 2, 1986. (*Id*. at 2038). Britton's testimony at Mr. Menzies's preliminary hearing was on May 19, 1986. (TR 05/19/1986, ROA 1150 at 1, 3, 150.) Therefore, when Britton testified at that hearing that he would receive no benefit from his testimony, he was lying. (*Id*. at 170-71.) Further, the prosecution knew he was lying and made no effort to correct the testimony. In fact, as shown in Claim 5, the prosecution took measures to keep Britton off the stand at the trial.

The trial court erred in not allowing these matters to be presented to the jury. First by making the erroneous findings that Britton was unavailable and his preliminary hearing testimony was reliable, as shown in Claim 5. Next, by refusing to allow Mr. Menzies to call a member of the prosecution, the trial court effectively shut out any evidence being presented to the jury about Britton's inherent lack of credibility, and the State's complicity in his lies. The state supreme court's summary dismissal of this claim

as being one of many that were "without merit," *Menzies II*, 889 P.2d at 406, "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement," *Harrington v. Richter*, 562 U.S. 86, 103 (2011). Mr. Menzies should be granted relief on this claim.

CLAIM 7

The state court denied Mr. Menzies his right to due process of law and to a fair trial guaranteed by the Sixth and Fourteenth Amendments when it failed to declare a mistrial after a law enforcement witness violated a court order prohibiting testimony about Mr. Menzies's parole status.

Mr. Menzies's trial counsel made every effort to exclude all references to his prior crimes and parole status from evidence presented to the jury. Prior to trial, the trial court ruled that evidence of Mr. Menzies's unrelated past criminal history would unfairly prejudice him and taint the jury. (ROA 780.) Despite these efforts, a law enforcement officer testified before the jury that Mr. Menzies had gone to his parole office the day after Ms. Hunsaker disappeared. (TR 02/26/1988, ROA 1157 at 1877.) Defense counsel objected and made several motions for mistrial based on this testimony throughout the remainder of the guilt phase of the trial. (*Id.* at 1877-78; TR 03/01/1988, ROA 1158 at 1904; TR 03/02/1988, ROA 1158 at 2133.) During arguments on one of these motions, the State admitted that the statement was prejudicial to Mr. Menzies. (TR 03/01/1988, ROA 1158 at 1922.) Regardless, the trial court only offered a curative instruction (*id.* at 1950) and the Utah Supreme Court dismissed the claim on appeal summarily along with several others as being without merit, *see Menzies II*, 889 P.2d at 406.

In his Response, Respondent claims that

> Menzies's counsel repeatedly and consistently refused the court's offer to give a curative instruction (TR1158:1936, 1950- 52). Had counsel considered the testimony conspicuous and inflammatory, she would likely have agreed to a curative instruction. That she did not suggests at the least that counsel decided that giving a curative instruction would draw the jury's attention to evidence they otherwise may not have noticed at all.

(ECF No. 123 at 74.) This is a mischaracterization of the record. Respondent is suggesting that by refusing the curative instruction, Mr. Menzies's trial counsel was agreeing that the violation of the trial court's orders to exclude references to Mr. Menzies's parole status was not a significant concern. Review of the portions of the record cited by Respondent makes it clear that Mr. Menzies's counsel was responding to the trial courts error in refusing to grant a mistrial by trying not to make a bad situation worse. In fact, Mr. Menzies's trial counsel stated on the record

> If the court looks at what the alleged damage is, there is no instruction or caution or striking that can cure that. So I don't think that the fact that we decided not to do it is the issue. There is nothing the court could say by way of admonishment that would cure that type of prejudice.

(TR 03/01/1988, ROA 1158 at 1950.) The trial record is clear, and the trial court appeared to understand Mr. Menzies's trial counsel's arguments when it stated on the record that

> Defense has indicated that at the time the statement was made that the objection was immediately made, that it's not curable, neither by the court's admonition or by instruction, that if the defendant were to testify, that he would have to incriminate himself to explain this. If he remains silent, then we would not know how much weight the jury would place on his remaining silent on that issue.

(TR 03/01/1988, ROA 1158 at 1945.) Despite this, the trial court proceeded to err by failing to grant the motion for mistrial. Respondent's misleading argument and mischaracterization of the record should be disregarded and Mr. Menzies should be granted relief on this claim.

CLAIM 8

The state court violated Mr. Menzies's right to a fair trial by an impartial jury guaranteed by the Sixth and Fourteenth Amendments by failing to declare a mistrial after the jury was exposed to a pattern of prejudicial incidents during trial.

During the court of Mr. Menzies's trial, a juror fainted during the medical examiner's testimony (TR 02/25/1988, ROA 1157 at 1621-22; ROA 814-15) and Mr. Menzies was abruptly shackled and forcibly removed from the courtroom in view of the jurors (5th Am. Pet., Ex. A, Aff. of Frances Palacios ¶ 8; 08/01/2011 Pet'r's Mem. In Opp'n to Resp't's Mot. for Summ. J. and Cross-Mot. for Summ. J., Ex. XXX, Declaration of Ralph Menzies ¶ 40). Also during the medical examiner's testimony, the court reporter became distraught in the presence of the jury and was unable to continue transcribing. (TR 02/25/1988, ROA 1157 at 1633-34.) At a later point during trial, a juror was dismissed after receiving an anonymous phone call from a person stating that Mr. Menzies had robbed and killed a cabdriver (TR 03/04/1988, ROA 1159 at 2367) and the rest of the jury was sequestered at an undisclosed location under 24-hour guard (*id*. at 2392, 2394-95). Finally, while the matter of the juror who received the phone call was being resolved, another juror suffered an emotional breakdown in front of the jury (*id*. at

2395-96) and had to be excused to avoid tainting the remaining jurors (*id*. at 2397-98, 2402).

Respondent has disputed some of Mr. Menzies's factual bases for this claim, saying that "Menzies leaves out some crucial facts." (ECF No. 123 at 77.) The facts that Respondent recounts, however, are not in contradiction of what Mr. Menzies has alleged and are not relevant. First, Respondent writes that "[t]he cause of juror Eaton fainting was a combination of hearing the medical examiner's testimony and skipping breakfast." (ECF No. 123 at 77). This does not change the fact that she fainted during the medical examiner's testimony and that hearing the testimony was a contributing factor. Second, Respondent writes that "the court reporter stated that she did not start crying until she went into her room." (ECF No. 123 at 77). Mr. Menzies did not claim that she was crying in front of the jury, rather he said she "became distraught in the presence of the jury." (ECF No. 109 at 87.) One does not need to cry to appear distraught. Third, Respondent writes that the juror who was excused for receiving the anonymous phone call "did not discuss the phone call with any other jurors." (ECF No. 123 at 77.) Mr. Menzies did not suggest the juror did discuss the call with the other jurors. Regardless, it's irrelevant because the point of this incident is not that other jurors were aware of the call. The point is that a juror was abruptly excused and the remaining jurors were immediately placed in sequestration under constant guard. (ECF No. 109 at 87-88). Finally, Respondent writes that the second juror to be excused was excused at the prosecutor's suggestion. (ECF No. 123 at 77.) Mr. Menzies explicitly acknowledged this in his petition, writing that "[t]he prosecution acknowledged that if Gass continued as

a juror, she may taint the others." (ECF No. 109 at 88.) None of these facts add or take away anything from what Mr. Menzies has alleged. Therefore, Respondent has failed to rebut the factual basis for the claim.

Additionally, Respondent has not cited at law to rebut Mr. Menzies's argument that this tainted jury was not a violation of Mr. Menzies's fundamental right to an impartial jury. *See Duncan v. Louisiana*, 391 U.S. 145, 148-50 (1968); *see also Connors v. United States*, 158 U.S. 408, 413 (1895); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); and *Irvin v. Dowd*, 366 U.S. 717 (1961). Respondent's failure to rebut any aspect of Mr. Menzies's claim demonstrates that he should be granted relief.

CLAIM 9

Mr. Menzies was shackled in front of the jury in violation of his due process rights under the Fourteenth Amendment.

During the court of Mr. Menzies's trial, a juror fainted during the during the medical examiner's testimony (TR 02/25/1988, ROA 1157 at 1621-22; ROA 814-15) and Mr. Menzies was abruptly shackled and forcibly removed from the courtroom in view of the jurors (5th Am. Pet., Ex. A, Aff. of Frances Palacios ¶ 8; 08/01/2011 Pet'r's Mem. In Opp'n to Resp't's Mot. for Summ. J. and Cross-Mot. for Summ. J., Ex. XXX, Declaration of Ralph Menzies ¶ 40). As Mr. Menzies's acknowledged in his Petition, this claim was not raised in Mr. Menzies's state court proceedings. (ECF No. 109 at 90.) At the appropriate time, Mr. Menzies intends to seek a stay of these proceedings pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), to properly exhaust this claim in state court. To the extent Mr. Menzies did not raise this claim in prior state court proceedings, that

failure was the result of the ineffective assistance of his direct appeal and post-conviction counsel. *See Martinez*, 132 S. Ct. at 1315. Mr. Menzies otherwise stands on the law and facts argued in his Petition. (ECF No. 109 at 90-91.)

CLAIM 10

The State violated Mr. Menzies's Fourth Amendment rights by conducting an illegal search of his home and he was denied due process and a fair trial under the Sixth and Fourteenth Amendments by admission of evidence seized during the illegal search.

As described in the Petition, Mr. Menzies's conviction was secured in large part through the presentation of numerous items of evidence that were obtained through an illegal search of his apartment. (ECF No. 109 at 92-93.) Law enforcement personnel were aware of the illegality of their search and obtained a warrant after the fact for the items they had already discovered. (ECF No. 109 at 93-94.)

In his Response, Respondent does not dispute the illegality of the search and its fundamental impact on his conviction and sentence. Therefore, this Court may accept Mr. Menzies's arguments of law and fact as standing unrebutted.

Respondent's sole argument is that a federal habeas petitioner may not be granted relief on a Fourth Amendment claim that has been fully and fairly litigated in state court. (ECF No. 123 at 80-81.) Respondent is treating this precedent as prohibiting any Fourth Amendment claim that has been exhausted. This is an overly broad application of the rule, which is dependent upon the state court proceedings having been both "full and fair." *Stone v. Powell*, 428 U.S. 465, 494 (1976).

As established in the Petition, and unrebutted by Respondent, the warrant in Mr. Menzies's case should never have been issued. A valid warrant cannot issue on the basis of a probable cause statement predicated on dishonesty. *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978). A fair hearing on the matter would have precluded the admissibility of the evidence at trial. Additionally, the Utah Supreme Court did not address this claim directly, rather, it summarily dismissed it along with numerous other claims it declined to address. M*enzies II*, 889 P.2d at 406 ("We find Menzies' other claims to be without merit."). This was neither full nor fair. Given that Mr. Menzies has established the legal and factual basis for his claim, and Respondent has not rebutted the illegality of the search and inadmissibility of the evidence in support of Mr. Menzies's conviction and sentence, Mr. Menzies should be granted relief on this claim.

CLAIM 11

Mr. Menzies was denied his right to due process of law under the Fourteenth Amendment by being convicted and sentenced on the basis of inadmissible evidence.

The trial court admitted a number of items of physical evidence, including a gun belonging to witness Troy Denter, three knives, tennis shoes, and a "ten-code" card, all in violation of Mr. Menzies's right to due process. None of this evidence was relevant to any fact in contention that would tend to establish Mr. Menzies's guilt or innocence at trial.

Respondent repeats the mistake made in his response to Claim 10, misstating the holding of *Stone v. Powell* (ECF No. 123 at 83), which requires a "full and fair" opportunity to litigate Fourth Amendment claims. 428 U.S. at 494. Similarly,

Respondent only argues a partial calculus for the admissibility of evidence, omitting that even evidence which may, under a broad argument, appear relevant, must also be more probative than prejudicial, not confuse the issues, mislead the jury, or waste time. The evidence at issue in this claim failed this test as it was more prejudicial than probative, confused the issues, and misled the jury.

No evidence was presented that a gun factored into the offense at all. Respondent can only offer a highly speculative hypothetical in response. (ECF No. 123 at 84.) The same is true of the "ten-code" card. These items were only introduced to show Mr. Menzies had a violent and criminal nature, which itself is a violation of the rule against character evidence to prove conduct in conformance. *See* Utah R. Evid. 404.

Respondent tries to analogize between admitting Mr. Menzies's knives and another state case that used an exemplar knife. (ECF No. 123 at 85, citing *State v. Royball*, 710 P.2d 168, 169 (Utah 1985).) This case is distinguishable. In *Royball*, law enforcement did not recover the knife alleged to have been used in an assault but had a specific description from the victim. *See* 710 P.2d at 169. The State introduced a knife which met that description to show the jury, without claiming it had been the same knife used by the defendant. *See id*. This is a significant difference from Mr. Menzies's case where the medical examiner testified that virtually any knife could have cause the victim's wounds. (TR 02/25/1988, ROA 1157 at 1637-38.) Admitting Mr. Menzies's knives could only prove that he owned knives, as does every person. There was nothing specific about Mr. Menzies's knives that made any fact in contention more or less

probable. Admission of the knives, as with every item discussed in Claim 10, was more prejudicial than probative, confused the issues, and misled the jury.

As will be discussed further in the Reply to Claim 12, every piece of evidence introduced against Mr. Menzies had problems. Respondent claims the evidence against Mr. Menzies was "overwhelming[,]" but there is no piece of evidence that doesn't have something questionable about how it was obtained, what inference can be drawn, or how it contradicts other evidence. (ECF No. 123 at 87.) The case against Mr. Menzies was not clear, and each piece of evidence, when looked at closely, makes it murkier.

CLAIM 12

> **Mr. Menzies was denied his right to due process of law under the Fourteenth Amendment by being convicted and sentenced without having each and every element of the charges against him established beyond a reasonable doubt.**

The record of Mr. Menzies's trial establishes that the State did not sufficiently prove each element of the charges beyond a reasonable doubt. There was insufficient evidence to connect Mr. Menzies to the homicide, or to support the charges of robbery or kidnapping. This is especially so in light of the illegally-obtained evidence (Claim 10) and the irrelevant evidence (Claim 11) improperly introduced against Mr. Menzies.

Respondent claims there was "ample support" for the charges against Mr. Menzies and that the evidence was "overwhelming." (ECF No. 123 at 86-87.) While it is true there was much evidence presented, much of it was illegally-obtained and inadmissible, as shown in Claims 10 and 11. And, as shown in the Petition, the evidence in support of

each charge—murder, robbery, and kidnapping—was questionable as to what it actually showed. (ECF No. 109 at 101-12.)

A. Respondent's arguments fail to demonstrate that sufficient evidence connected Mr. Menzies to the homicide.

Respondent argues that the myriad problems with Larrabee's eyewitness account—picking individuals other that Mr. Menzies out of a photo-array and lineup, only picking Mr. Menzies after interference from law enforcement, picking Troy Denter's car out of an unduly suggestive selection of cars and saying it wasn't the actual car but only resembled it because it was old and beat-up, only being able to describe Mr. Menzies for the police sketch artist after having Mr. Menzies suggested to him by law enforcement, and describing a coat with different colors than Mr. Menzies's—fails to establish that there is reasonable doubt that Mr. Menzies was the person Larrabee witnessed at Storm Mountain. An inability to describe or identify Mr. Menzies, his coat, or his car as being who and what Larrabee observed at the scene is reasonable to create doubt that Mr. Menzies was the person Larrabee saw.

Respondent claims that Mr. Menzies "provides no evidence" that a law enforcement officer's statement that Mr. Menzies had lost weight before the trial was a misstatement (ECF No. 123 at 90), attempting to reconcile Larrabee's statement that the man he observed was overweight and that Mr. Menzies was in "better shape" than that man (TR 02/23/1988, ROA 1156 at 1286). Because this law enforcement officer's

statement that Mr. Menzies had lost weight was demonstrably untrue,[9] it is properly characterized as a misstatement.

Respondent also does not address the chain of custody issues regarding the evidence presented against Mr. Menzies. The prosecution introduced evidence without being able to establish where it came from. The sole fingerprint the State claimed was the victim's, found in Troy Denter's car, was a photograph of the lift of the print but not a photograph of the window on which the State claimed it had been found. (TR 02/26/1988, ROA 1157 at 1783-84.) They could not produce the photograph of the window because, of all of the photographs that had been taken, that one had been conveniently lost.[10] (TR 02/26/1988, ROA 1157 at 1805.) Similarly, as admitted by Respondent, the handcuff box was not found by law enforcement, but by an interested

[9] Det. Thompson, testified that he believed Mr. Menzies had "lost a lot of weight" before the trial. (*Id.* at 1339.) This statement was not supported by any demonstrable evidence and was clearly a deliberate misstatement to bolster the State's weak and circumstantial case against Mr. Menzies. Evidence at trial regarding Mr. Menzies's arrest indicated that at the time of the offense Mr. Menzies was 6-foot, 2-inches and weighed 190 pounds. (TR 02/26/1988, ROA 1157 at 1888-89.) At the time of the lineup, a few months after the offense, Mr. Menzies was 6-foot, 2-inches and weighed 193 pounds. (TR 05/16/1986, ROA 1151 at 7.)

[10] Respondent claims this fact is a separate claim that is unexhausted. (ECF No. 123 at 91 n.13.) It is not a separate claim, it is a fact alleged in support of the claim that the State failed to prove Mr. Menzies's involvement in the charged offenses beyond a reasonable doubt. Procedural default is a principle of habeas law that applies to claims, not facts. *See, e.g.*, *Woodford v. Ngo*, 548 U.S. 81, 93 (2006) (explaining that "if the petitioner procedurally defaulted those *claims*, the prisoner generally is barred from asserting those *claims* in a federal habeas proceeding") (emphasis added). Naturally, however, a claim cannot exist without both legal *and* factual support. *Cf. Martinez v. Ryan*, 132 S. Ct. 1309, 1318 (2012) ("Ineffective-assistance claims often depend on evidence outside the trial record."); *Gallow v. Cooper*, 133 S. Ct. 2730, 2731 (June 27, 2013) (mem.) (Statement of Breyer, J.) ("A claim without any evidence to support it might as well be no claim at all."). Therefore, any assertion by Respondent that Mr. Menzies has defaulted facts is inaccurate.

witness, Troy Denter. (ECF No. 123 at 92.) The handcuffs themselves were the result of an illegal search, which Respondent has not disputed. (*See* Claim 10.)

These items of evidence, along with the others discussed in Claim 12 of the Petition, do not point definitively to Mr. Menzies. Rather, the context in which they were obtained raises questions about their reliability.

B Respondent does not dispute Mr. Menzies's factual allegations that the most significant pieces of evidence used to prove robbery do not actually prove his involvement.

In his Petition, Mr. Menzies showed that Ms. Hunsaker's identification cards were found at the police station before Mr. Menzies arrived there, having been arrested initially on an unrelated matter. (ECF No. 109 at 109-10.) In his Response, Respondent only musters that "[o]f course the victim's identification cards were linked to Menzies" and then alleges a few facts about what happened after Mr. Menzies arrived at the police station. (ECF No. 123 at 96-97.) Respondent does not dispute Mr. Menzies's factual allegation that the cards were found prior to his arriving at the station. This is because the record is indisputably clear.

Also in his Petition, Mr. Menzies points out that, at trial, the prosecution's calculation of how much money Mr. Menzies had in his apartment was incomplete as it did not include what he had on his person, and this allowed the State to incorrectly argue that the amount of money he had exactly matched the amount they claimed was taken from the Gas-A-Mat. (ECF No. 109 at 107-09.) Respondent argues that this omission by the prosecution does not "establish how the jury was 'misled.'" (ECF No. 123 at 94.) Omitting a fact to reach a mathematical conclusion that would be changed by the

inclusion of that fact is misleading. Notably, Respondent does not argue that the prosecution did not omit the fact that Mr. Menzies had money on his person and that this omitted fact changed the total amount of money in his possession.

Finally, regarding Ms. Hunsaker's social security card, Respondent does not dispute Mr. Menzies's factual allegations that the card was found by an interested witness, who claimed to have found it in perfect condition and plain view in an area which had been previously searched by the police, and that the State failed to establish a chain of custody for where the card had been found and was located during the fourteen months prior to trial. (ECF No. 109 at 110-11.)

These undisputed facts, along with the others described in Claim 12 of the Petition, establish reasonable doubt about Mr. Menzies's involvement in a robbery.

C. Kidnapping

The handcuffs and how they were presented is an exemplar of the problems with all the evidence presented in Mr. Menzies's case. As shown in the Petition, handcuffs were not initially considered as part of the crime based on the forensic evidence from the crime scene. (ECF No. 109 at 112.) After the illegal search produced handcuffs, the police reports were revised with a handwritten notation indicating handcuffs may have been used. (ECF No. 109 at 112.) Independently, the evidence did not support the use of handcuffs in the offense, but, after evidence from Mr. Menzies was illegally gathered, the narrative was revised to fit Mr. Menzies.

Respondent argues that the trial demonstration supported the allegation that handcuffs were used. (ECF No. 123 at 98-99.) But Respondent does not dispute Mr.

Menzies's contention that the trial demonstration was faulty because it involved placing handcuffs on a 270-pound man, who was over twice the size of the victim, which would necessarily create different kinds of marks. (TR 02/23/1988, ROA 1156 at 1387-88.) This sort of reverse-engineered selective use of facts characterized all of the evidence against Mr. Menzies, including all of that discussed in Claim 12 of the Petition for the kidnapping charge, along with the robbery and homicide charges.

As stated above in Claim 11, every piece of evidence introduced against Mr. Menzies had problems. The State could only secure a conviction against Mr. Menzies by using illegal and inadmissible evidence, and by being deceptively selective in presenting it. When viewed completely and objectively, while accounting for the illegal searches and admissibility issues, there is certainly reasonable doubt about Mr. Menzies's involvement in any aspect of the offense. Mr. Menzies should be granted relief on this claim.

CLAIM 13

The state courts denied Mr. Menzies his Fourteenth Amendment right to due process of law by giving a jury instruction which allowed the jury to make a finding of guilt based on a degree of proof less than beyond a reasonable doubt.

Mr. Menzies stands on the law and facts as pled in his Petition. (ECF No. 113-14.)

CLAIM 14

Mr. Menzies was denied effective assistance of counsel during the guilt phase of his capital trial in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

In his Petition, Mr. Menzies alleged several specific instances of the ineffectiveness of his counsel during the guilt phase of his trial. (ECF No. 109 at 117-61.) For each of those instances, Mr. Menzies addressed both trial counsel's deficient performance and the resulting prejudice. *See Strickland*, 466 U.S. at 686-88, 695. Also in his Petition, Mr. Menzies alleged the ineffective assistance of his post-conviction counsel, whose deficient performance resulted in the default of several of these instances of trial counsel's ineffectiveness, and the faulty pleading of instances which were exhausted. (ECF No. 109 at 275-82, 291-96.)

Respondent has made his arguments as to which claims he believes are exhausted and which are defaulted. (ECF No. 123 at 103-06.) Respondent has also chosen only to address the merits of those claims which he believes are properly exhausted, namely subparts 14.A, 14.B(3), 14.E(2), 14.E(4), and 14.F. The rules governing 28 U.S.C § 2254 cases direct a respondent to "address the allegations in the petition." *See* Fed. R. § 2254 Cases Rule 5(b). This is separate from the directive to "state whether any claim in the petition is barred by a failure to exhaust state remedies, procedural bar, non- retroactivity, or a statute of limitations." *Id*. By failing to respond to the merits of claims Respondent believes are not properly exhausted, Respondent has waived its arguments on the merits of these claims.

To the extent any part of Mr. Menzies's claim of the ineffective assistance of trial counsel were not fully or adequately presented to the state courts, Mr. Menzies can establish cause and prejudice to overcome any procedural default of those claims based on the ineffective assistance of post-conviction counsel. *See Martinez*, 132 S. Ct. 1309. In *Martinez*, the United States Supreme Court held that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim." *Id.* at 1315. Under this rule, "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Id.* at 1320. As established above in Part I.E., this Court has determined that *Martinez* applies in Utah, through *Trevino*. See *Lafferty v. Crowther*, No. 2:07-CV-322, 2016 U.S. Dist. LEXIS 138845, at *5 (D. Utah Oct. 5, 2016).

Mr. Menzies must show cause and prejudice to overcome the default of any of his ineffective assistance of trial counsel claims. *Martinez* at 1318-19. Cause may be shown "where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland*." *Id.* at 1318. Then, "[t]o overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. *Id.* at 1318-19 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003), analogizing to the certificate of appealability standard). Given that Respondent did not respond on the merits to the claims it believes were

defaulted, this Court may accept Mr. Menzies's arguments in the Petition and in this reply that his claims meet the *Martinez* standard and this Court may review this claim.

A. Mr. Menzies received ineffective assistance of counsel when trial counsel created and performed under a conflict of interest.

As described in the Petition (ECF No. 109 at 117-21), trial counsel had Mr. Menzies sign a blank waiver of liability form after informing him that it would only pertain to Mr. Menzies's demand not to call Nicole Arnold as a witness. (5th Am. Pet., Ex. II at 1; 08/01/2011 Pet'r's Mem. in Opp'n to Resp't's Mot. for Summ. J. and Cross-Mot. for Summ. J., Ex. XXX, Declaration of Ralph Menzies ¶ 2.) Trial counsel later added language to the form, without informing Mr. Menzies. (*Id.*; *see also* 5th Am. Pet., Ex. II at 1.) While the waiver purported to pertain to witnesses not disclosed by Mr. Menzies (5th Am. Pet., Ex. II at 1), no evidence in the record indicates that Mr. Menzies actually withheld the names of any witnesses. Respondent's arguments on this subclaim are limited to restating the findings of the Utah Supreme Court. (ECF No. 123 at 106-09.)

In addressing this claim, the Utah Supreme Court accepted as fact that the original impetus for the waiver was a dispute over whether to call Nicole Arnold as a witness. *Menzies IV*, 344 P.3d at 619 (Utah 2014) ("The parties appear to agree . . . that it was drafted with only one person in mind: Mr. Menzies's girlfriend, Nicole Arnold.") The state court then glosses over the fact, plainly stated, that the waiver was not merely about protecting trial counsel from a later claim regarding Ms. Arnold as a witness at trial, but, rather was a wavier of "any and all claims which [Mr. Menzies] might have . . . as a

result of the failure of such witnesses to be interviewed or presented as witnesses[.]" (5th Am. Pet., Ex. II at 1.)

The Utah Supreme Court found against Mr. Menzies on this claim for two reasons. First, it found the wavier did not violate the Utah Rules of Professional Conduct because "[i]t does not purport to be a blanket waiver of any future malpractice claims" but "[r]ather, it explicitly memorializes the fact that the decision not to interview or present certain witnesses was Mr. Menzies's, not counsel's." *Menzies IV*, 344 P.3d at 620. This is an unreasonable determination of fact because the waiver was much broader than what the state court describes and much broader than what it was initially intended to cover.

While a waiver to protect a public defender from her client in a capital trial on any basis, regardless how narrow, would be questionable at best, this waiver was needlessly broad for its purported purposed. There is no dispute that it was meant to protect Mr. Menzies's trial counsel from a claim regarding their failure to present Nicole Arnold as a witness. Therefore, there was no need to create a waiver which applied to the investigation of Ms. Arnold or any other witness, or to the presentation of any witnesses beyond Ms. Arnold. The broad language of the waiver, including "any and all claims" regarding "such witnesses" (which are unspecified and thus may include all potential witnesses), and encompasses not just the presentation of the witnesses at trial but even interviewing them, is so vast as to encompass virtually any claim of the ineffectiveness of trial counsel. Therefore, once this bad idea was cooked up for a supposedly limited purpose—calling Ms. Arnold as a witness—it ballooned into the kind of blanket wavier

that the Utah Supreme Court is supposedly concerned about (albeit perhaps only in other, non-capital cases.)

The second error by the Utah Supreme Court regards whether the basis for prohibiting blanket waivers existed here. The state court wrote that "malpractice liability waivers are forbidden because 'they are likely to undermine competent and diligent representation.'" *Id*. (quoting the comments to Utah Rules of Prof'l Conduct Rule 1.8.) The state court unreasonably determined this concern was not implicated in Mr. Menzies's case because "[t]he liability waiver here offered counsel no protection from malpractice claims generally, so it in no way undermined counsel's competent representation and created no disincentive for counsel to work any less diligently." *Id*. The state court further stated that, "[i]f anything the waiver created an incentive for counsel to diligently represent Mr. Menzies because they now had to overcome the limitation Mr. Menzies placed on them." *Id*.

This is unreasonable because, as shown above and in the Petition, the waiver was not limited in any practical sense. It protected Mr. Menzies's trial counsel from any claim that they were ineffective for failing to interview or put on any witness. Given that no fact or any other piece of evidence can be presented at trial without a witness to introduce it, this waiver could function to protect his trial counsel from any claim that Mr. Menzies might bring. It protected them from any lapses in their investigation, cross-examination of state witnesses, or deficiencies in presenting a case in defense. This may have been a concern to trial counsel because she repeatedly told Mr. Menzies that as a result of her office's heavy caseload, she could not begin preparing for his case in earnest

until a few weeks before trial, and that the investigator would not begin working on his case until shortly before trial. (08/01/2011 Pet'r's Mem. in Opp'n to Resp't's Mot. for Summ. J. and Cross-Mot. for Summ. J., Ex. XXX, Declaration of Ralph Menzies ¶¶ 5, 7, 9.) Also, the evidence suggests that trial counsel's investigator was generally ineffective, and may not have interviewed material witnesses prior to trial in this case. (*See* 5th Am. Pet. Ex. A, Aff. of Frances Palacios ¶ 11.)

The waiver is wholly unreasonable given the purported purpose of the waiver—to protect simply against Mr. Menzies later claiming his trial counsel should have called Ms. Arnold as a witness. The existence of this broad of a waiver created a conflict by trial counsel and may be presumed prejudicial. *See Strickland*, 466 U.S. at 692 ("One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice . . . . when counsel is burdened by an actual conflict of interest." (citing *Sullivan*, 446 U.S. at 345-50)); *see also Edens v. Hannigan*, 87 F.3d 1109, 1114 (10th Cir. 1996) (noting that prejudice is presumed where counsel operates under an actual conflict of interest). The state court's determination of this issue was an unreasonable determination of fact and Mr. Menzies should be granted relief on this claim.

B. Trial counsel were ineffective in failing to conduct a reasonable and independent investigation of the facts of the crime and present such evidence to the jury.

1. Failure to investigate and present information provided by prospective witness Nicole Arnold.

Respondent chose not to respond to the merits of this subclaim, therefore, its merits arguments are waived. *See* Fed. R. § 2254 Cases 5(b). This Court may accept Mr. Menzies's arguments as uncontroverted.

2. Failure to investigate and present witnesses who saw the victim at a Denny's restaurant.

Respondent chose not to respond to the merits of this subclaim, therefore, its merits arguments are waived. *See* Fed. R. § 2254 Cases 5(b). This Court may accept Mr. Menzies's arguments as uncontroverted.

3. Failure to adequately investigate the accounts of Tim Larrabee and Beth Brown and present inconsistencies at trial.

Mr. Menzies has identified several prejudicial aspects that resulted from trial counsel's unreasonable failure to adequately investigate or interview Tim Larrabee and Beth Brown. (ECF No. 109 at 126-30.) These fall into two categories: the failure to ascertain what they were doing at Storm Mountain and how it would have inhibited their ability to identify the man they saw there, along with the coat he was wearing and car he was driving; and the subsequent failure by the State to disclose problems with Larrabee's pre-trial identifications from the photo-arrays, line-up, and the unduly suggestive showings of the coat and car (discussed further in Claims 3, 4, and 12).

Respondent has only chosen to respond to the allegation that Larrabee and Brown were having sex and that Larrabee would have disclosed this to trial counsel had they

been asked, and generally summarizes the claim and the state court opinion. (ECF No. 123 at 109-11.) Therefore, Respondent has waived any arguments on the merits of any other aspect of this claim and this Court may accept Mr. Menzies's arguments as uncontroverted.

The Utah Supreme Court wrote that "Mr. Larrabee admitted to the jury that his attention was turned towards Ms. Brown during the time he saw the man and woman walking at Storm Mountain" but questions whether "the jury knowing that Mr. Larrabee's attention was directed at Ms. Brown for the purpose of having sexual relations would have changed the outcome in the case." *Menzies IV*, 344 P.3d at 617 (emphasis omitted). The state court seems to regard all levels of attention and distraction as being equal and cannot conceive how one level of attention may create a higher level of distraction than another. This is not a reasonable conclusion.

At trial, Larrabee testified that his attention was turned more toward Brown than whatever else was going on at Storm Mountain. (TR 02/19/1988, ROA 1155 at 1192-93, 1223.) But there was no exploration of what that vague statement means. When it comes to the specifics of an eyewitness account, such details make a tremendous difference. The level of attention one pays to another person even during a simple conversation may vary depending on both who one is talking to and what one is talking about. This is true across the spectrum of human interaction. To reason that paying attention to one's partner in one of the most emotionally intimate and physically intense types of interaction would be equal to the level of distraction in other forms of interaction is not reasonable.

The state court continued this faulty reasoning to speculate that "the jury might have concluded that Mr. Larrabee was so concerned about being caught with Ms. Brown that he was more focused on the man at Storm Mountain than he might otherwise have been." *Id*. This contradicts every other piece of evidence on the subject. At trial, Larrabee testified that the third time they saw the man, he was not even aware that the man had returned until Brown pointed it out. (TR 02/19/1988, ROA 1155 at 1192-93, 1201.) In his affidavit to post-conviction counsel, Larrabee stated that "I was focused on this amorous time I had spent with [Brown]." (5th Am. Pet., Ex. AA, Aff. of Timothy Larrabee ¶ 3.) He does say that "Beth was worried that people might see what we were doing" but does not attribute a similar concern to himself. (*Id*. at ¶ 4.) Larrabee has also said "My focus during the time we were at Storm Mountain was on my girlfriend . . . Regardless of whether we had sex while the other people were at the park, we were certainly engrossed in kissing and caressing each other. We were preoccupied with one another and focused intently on one another." (ECF No. 109 Ex. 54, Declaration of Timothy Larrabee ¶¶ 13-14.) All of the evidence indicates that Larrabee was entirely focused on Brown and not concerned about the other people at Storm Mountain. The Utah Supreme Court's determination on this claim was an unreasonable determination of facts and Mr. Menzies should be granted relief.

4. Failure to investigate and present evidence undermining the account of Walter Britton.

In the Petition, Mr. Menzies presents factual allegations that his trial counsel failed to investigate Walter Britton before the preliminary hearing, which would have revealed

that Britton didn't say anything to law enforcement that could not have been discerned from news reports about the offense, that Britton likely had a mental illness, and that his attorney had struck a deal with the prosecution—a deal that Britton lied about on the stand and the prosecution failed to correct. (ECF No. 109 at 130-34.)

Respondent initially argues that this claim is exhausted (ECF No. 123 at 103) but later indicates that he does not believe that it is exhausted (ECF No. 123 at 111 (indicating that with regard to claims 14.B.4, 14.E.2, and 14.E.4, only the parts relating to 14.E.2 and 14.E.4 are exhausted).) Regardless, Respondent offers no argument regarding the specifics of claim 14.B.4 other than to say "Trial counsel used reasonable efforts to investigate Britton, and to develop and present evidence of bias." (ECF No. 123 at 111-12.) Respondent has waived his merits argument for this claim.

As shown in the Petition, there were several indications that Britton had fabricated his conversation with Mr. Menzies from news coverage of the offense, that there were readily available indications of his mental illness in his publicly-available federal case file, and that contact with Britton's attorney would have revealed the deal he made with the prosecution in advance of the preliminary hearing. (ECF No. 109 at 130-34.) Given that Respondent has not offered an argument in response, the Court may accept Mr. Menzies's factual allegations as uncontroverted. Mr. Menzies should be granted relief on this claim.

5. Failure to investigate and present evidence from George Benitez.

Respondent chose not to respond to the merits of this subclaim, therefore, its merits arguments are waived. *See* Fed. R. § 2254 Cases 5(b). This Court may accept Mr. Menzies's arguments as uncontroverted.

6. Failure to investigate and present additional evidence from witness Randy Butters.

Respondent chose not to respond to the merits of this subclaim, therefore, its merits arguments are waived. *See* Fed. R. § 2254 Cases 5(b). This Court may accept Mr. Menzies's arguments as uncontroverted.

7. Failure to investigate and present facts showing that someone else committed the offense.

Respondent chose not to respond to the merits of this subclaim, therefore, its merits arguments are waived. *See* Fed. R. § 2254 Cases 5(b). This Court may accept Mr. Menzies's arguments as uncontroverted.

C. Trial counsel were ineffective in failing to adequately conduct jury selection.

Respondent chose not to respond to the merits of this subclaim, therefore, its merits arguments are waived. *See* Fed. R. § 2254 Cases 5(b). This Court may accept Mr. Menzies's arguments as uncontroverted.

D. Trial counsel were ineffective in failing to keep Mr. Menzies informed of the development of the case and failing to adequately explain a plea deal to Mr. Menzies.

Respondent chose not to respond to the merits of this subclaim, therefore, its merits arguments are waived. *See* Fed. R. § 2254 Cases 5(b). This Court may accept Mr. Menzies's arguments as uncontroverted.

E. Trial counsel were ineffective in failing to effectively cross-examine and impeach key State witness Walter Britton.

1. Failure to identify and question inconsistencies in Britton's statements.

Respondent chose not to respond to the merits of this subclaim, therefore, its merits arguments are waived. *See* Fed. R. § 2254 Cases 5(b). This Court may accept Mr. Menzies's arguments as uncontroverted.

2. Failure to present to the jury the fact that Britton's testimony and statements to police tracked media reports.

In his Petition, Mr. Menzies demonstrated that his trial counsel failed to present to the jury that Britton did not have any knowledge of the offense independent from news sources, undermining the conclusion that Mr. Menzies said anything to Britton about it. (ECF No. 109 at 146.) Respondent argues that, as the Utah Supreme Court found, Mr. Menzies's elicited testimony from Britton at the preliminary hearing that he watched news coverage of the offense, and put on testimony from jail officers that facts of the offense were discussed among the jail inmates and staff. (ECF No. 123 at 112, citing *Menzies IV*, 344 P.3d at 614.)

Both the state court and Respondent have made the same error. The claim is not simply that no information was put to the jury that Britton may have heard about the case from media sources. Rather the claim is that trial counsel should have explored, at the preliminary hearing, and at trial that every single fact Britton discussed was something in the public domain. There were no details that were exclusive from Britton which could have been solely attributable to Mr. Menzies. This would have significantly undermined

Britton's credibility. Respondent has failed to rebut this and Mr. Menzies should be granted relief on this claim.

3. Failure to elicit testimony about Mr. Menzies's drug use.

Respondent chose not to respond to the merits of this subclaim, therefore, its merits arguments are waived. *See* Fed. R. § 2254 Cases 5(b). This Court may accept Mr. Menzies's arguments as uncontroverted.

4. Failure to demonstrate that Britton was mentally ill.

In his Petition, Mr. Menzies showed that his trial counsel failed to present anything, either during the preliminary hearing or to the jury, indicating that Britton was mentally ill, despite readily available public evidence. (ECF No. 109 at 147-50.) The Utah Supreme Court found that "Mr. Menzies's ineffective assistance claim fails because he does not demonstrate that counsel's failure to obtain [Britton's federal competency evaluation] prejudiced the outcome of his trial." *Menzies IV*, 344 P.3d at 614. Respondent similarly focuses almost entirely on whether the federally ordered competency evaluation would have been available to trial counsel. (ECF No. 123 at 113-15.)

Respondent first argues that the report would have been inadmissible because, he claims, the report did not conclude that Britton suffered from hallucinations or delusions, and, therefore, his condition would not affect his "ability to accurately perceive, recall, and relate events." (ECF No. 123 at 113, quoting *State v. Stewart*, 925 P.2d 598, 600 (Utah App. 1996).) Respondent's argument is undermined by other facts he includes. Respondent notes the evaluator found Britton "exaggerated and/or lied in order to present

himself as a more interesting, valuable person to others and that he had a marked disregard for the truth as indicated by his reported lies" and that Britton's tendency for deceit was indicative of Anti-Social Personality Disorder. (ECF No. 123 at 113-14, quoting 08/01/2011 Pet'r's Mem. in Opp'n to Resp't's Mot. for Summ. J. and Cross-Mot. for Summ. J., Ex. ZZZ at 9.) Therefore, Britton was diagnosed with a mental disorder, a feature of which was his tendency toward deceit, and which would, in fact, impact his "ability to accurately . . . relate events." *Stewart*, 925 P.2d at 600.

Regardless, Respondent and the state court failed to account for all of the other ways trial counsel could have presented evidence of Britton's mental illness and how it impacted his credibility, as recounted in the Petition. (ECF No. 109 at 148-50.) Given that Respondent has offered no merits argument in response to the allegations aside from whether Britton's federal competency evaluation report was available, all of Mr. Menzies's other factual allegations may be accepted by this Court as uncontroverted. Mr. Menzies should be granted relief on this claim.

F. Trial counsel were ineffective in failing to object to the identifications made by Tim Larrabee on due process grounds.

In his Petition, Mr. Menzies wrote that his trial counsel was deficient for failing to seek to suppress the identifications of Mr. Menzies, his coat, and Troy Denter's car on due process grounds. (ECF No. 109 at 151-54.) The significant problems with Larrabee's identifications are discussed in Claims 3 and 4, in both the Petition and above in this reply. The Utah State Supreme Court affirmed dismissal of the claims finding that

"[t]rial counsel's decision to impeach Mr. Larrabee's and Ms. Brown's eyewitness testimony rather than seek suppression was reasonable." *Menzies IV*, 344 P.3d at 617.

Both the state court and Respondent misapprehend the argument. Whether to seek suppression of the identification on due process grounds is not an either/or proposition with regard to impeaching the testimony. Trial counsel could have sought to suppress the testimony, and, failing that, sought to impeach the testimony. That would have been the reasonable course of action rather that to simply roll the dice on an impeachment theory. This question was not addressed by the state court or Respondent. Respondent's arguments on this question have therefore been waived.

Respondent also acknowledges the weakness of the identification testimony, but argues that any error regarding the identifications are harmless because cannot prove prejudice because "the State presented overwhelming evidence of Mr. Menzies's guilt." (ECF No. 123 at 116-17.) As shown throughout the Petition and this reply, all of these pieces of evidence are weak in their own right. (*See* Claims 3, 4, 10, 11, and 12.) They may be overwhelming in aggregate if they weren't individually so questionable. Aggregation does not overcome their unreliability or inadmissibility. Mr. Menzies should be granted relief on this claim.

G. Trial counsel were ineffective for failing to raise a due process claim based on the fact that the jurors saw Mr. Menzies forcibly restrained and placed in handcuffs during the trial.

Respondent chose not to respond to the merits of this subclaim, therefore, its merits arguments are waived. *See* Fed. R. § 2254 Cases 5(b). This Court may accept Mr. Menzies's arguments as uncontroverted.

H. Trial counsel were ineffective in failing to ensure that all proceedings were recorded.

Respondent included a footnote about the underlying claim being addressed on the merits in Claim 33. (ECF No. 123 at 105 n.14.) With regard to the ineffective assistance of counsel aspect of this specific subclaim, Respondent chose not to respond to the merits, therefore, its merits arguments are waived. *See* Fed. R. § 2254 Cases 5(b). This Court may accept Mr. Menzies's arguments as to the ineffective assistance of trial counsel uncontroverted.

I. Mr. Menzies was denied the effective assistance of counsel by the cumulative prejudicial impact of trial counsel's deficient performance.

Respondent chose not to respond to the merits of this subclaim, therefore, its merits arguments are waived. *See* Fed. R. § 2254 Cases 5(b). This Court may accept Mr. Menzies's arguments as uncontroverted.

CLAIMS 15 & 16

Admission of Mr. Menzies's prison file during the penalty phase violated Mr. Menzies's right to confrontation, to due process of law and to a reliable capital sentencing hearing, in violation of the Sixth, Eighth and Fourteenth Amendments.

Admission of Mr. Menzies's rap sheets during the penalty phase violated Mr. Menzies's right to confrontation, to due process of law and to a reliable capital sentencing hearing, in violation of the Sixth, Eighth and Fourteenth Amendments.

During the penalty phase, the trial court admitted Mr. Menzies's entire prison file—consisting of about 360 pages generated between 1973 and 1986—as an exhibit. (Penalty Phase Ex. 8, Prison File.) The file contained a social history and old

psychological evaluations, which were based on hearsay from other unknown documents, recounting allegations of Mr. Menzies's juvenile criminal acts, and his emotional and mental characteristics, including his psychological state (*id*. at 99-106, 122-28, 130-33, 136-38); numerous incident reports, many of which deal with unadjudicated allegations of criminal conduct, several of which were serious and related to Mr. Menzies's ability to adjust to institutional life, which was a factor in sentencing, and records of disciplinary hearings (*id*. at 29-30, 32-59, 61-79, 190-93, 222-35, 246-72, 274-76, 278-87); and chronological notes ("c-notes") from unidentified sources (*id*. at 187-89, 195-220, 273).

The State also introduced Mr. Menzies's county rap sheet which contained a number of unadjudicated crimes. (Penalty Phase Ex. 15, Salt Lake County Rap Sheet; TR 03/15/1988, ROA 1161 at 2850.) Although the trial judge suggested that crimes for which there were no convictions be blocked out, they were not redacted and included with the exhibits. (TR 03/15/1988, ROA 1161 at 2863.) Mr. Menzies's state rap sheet was also admitted and contained charges of burglary, automobile theft, and one escape for which there is no conviction. (Penalty Phase Ex. 16, State Rap Sheet; TR 03/15/1988, ROA 1161 at 2865.) The trial court also admitted a juvenile rap sheet which contained numerous entries for which there was no outcome, and the court relied on the number of arrests in assessing Mr. Menzies's sentence. (Penalty Phase Ex. 1C, Juvenile Rap Sheet; TR 03/16/1988, ROA 1611 at 2904; TR 03/23/1988, ROA 1162 at 3250.) In addition, the prison file contains various rap sheets with unadjudicated crimes. (Penalty Phase Ex. 8 at 8, 94-98, 135.)

In his Response, Respondent addresses these two claims together under a single argument. (ECF No. 123 at 118-21.) First, Respondent relies on the Supreme Court decision in *Williams v. New York*, 337 U.S. 241 (1949), to argue that Mr. Menzies's argument lacks merit because the Confrontation Clause does not apply to the penalty phase of trial. (ECF No. 123 at 119.) *Williams*, however, was based solely on the Due Process Clause and did not address any rights under the Confrontation Clause. 337 U.S. at 251-52. In fact, *Williams* could not have addressed the issue under the Confrontation Clause because it was reviewing a state conviction and the Confrontation Clause did not yet apply to the states. *Williams*, 337 U.S. 241; *see also Pointer v. Texas*, 380 U.S. 400, 403 (1965) (finding for the first time, sixteen years after the decision in *Williams*, that the Confrontation Clause is applicable to the states). *Williams*, therefore, is inapplicable to Mr. Menzies's confrontation clause argument.

Respondent also misapprehends Mr. Menzies's argument. Mr. Menzies is not insisting that the State was required to put on every person who provided information for documents in the prison file and rap sheets. As stated in the Petition (ECF No. 109 at 165), if the State was not calling the authors of the documents, there must be a showing that the declarant is unavailable and that the statement to be admitted bears sufficient indicia of reliability to justify its use as relevant evidence, *see Roberts*, 448 U.S. at 66. There was no such showing for any part of the prison file.

The crux of Claims 15 and 16 are that an abundance of unverified information was admitted without any attempt to make the barest showing that any of the documents bore sufficient indicia of reliability and therefore was not justified in its use as relevant

evidence. *Id*. The trial court allowed for the entire prison file, and all of the rap sheets, regardless of whether their authors or sources were identified or not, to be admitted without any showing at all that the documents could be relied upon as accurate and reliable. As noted above, the rap sheets (as well as the prison file) contained instances of acts for which there was no adjudication or conviction. And, as shown in the Petition, these were relied on by the trial court in imposing a death sentence. (ECF No. 109 at 166-67.)

The hearsay used to conclude Mr. Menzies warranted the death penalty did not "possess indicia of reliability by virtue of its inherent trustworthiness." *Idaho v. Wright*, 497 U.S. 805, 822 (1990). As such, it violated Mr. Menzies's rights under the Confrontation Clause and he is entitled to relief.

CLAIM 17

The State failed to disclose the contents of Mr. Menzies's prison file, used during the penalty phase, violating his right to due process under the Fourteenth Amendment and to a reliable capital sentencing proceeding under the Eighth Amendment.

This claim concerns Mr. Menzies's prison file, admitted as Penalty Phase Ex. 8, discussed in more detail in Claim 15. Mr. Menzies made a pre-trial discovery request which, under the Utah Rules of Criminal Procedure, triggered a continuing obligation for the State to turn over all relevant evidence. *See State v. Carter*, 707 P.2d 656, 662 (Utah 1985); *see also State v. Knight*, 734 P.2d 913, 917 (Utah 1987). This would have included the prison file contained in Penalty Phase Ex. 8, which, in addition to the unverified negative information about Mr. Menzies, also contained positive information

about Mr. Menzies's conduct while in prison. Failure to disclose the file violated Mr. Menzies's right to due process. *See, e.g.*, *Gardner*, 430 U.S. 349 (due process and the Eighth Amendment require that defendants in capital cases have full access to law enforcement records and reports).

Respondent argues that Mr. Menzies's trial counsel had adequate notice that the file was to be introduced. (ECF No. 123 at 122.) Mr. Menzies disputes that the notice was adequate. Regardless, giving broad notice that the State intended to introduce "the prison record" is not the same as providing the documents it intends to use. (ECF No. 123 at 122, citing TR 3/16/1988 ROA 1161 at 2888, 2892.) It is not what the discovery rules require.

Respondent also argues that "Menzies did have access to his own prison file" and that trial counsel "merely had to request it." (ECF No. 123 at 123.) Respondent overstates the access allowed to prisoners to review their own files. For instance, Utah law forbids providing a copy of mental health records to the subject of the record if "the record would be detrimental to the subject's mental health or to the safety of any individual." Utah Code Ann. § 63G-2-304. The Utah State Prison typically relies on this provision to deny prisoners and their counsel access to their own records. Therefore, Mr. Menzies could not simply request and receive his entire record the way that the prosecution did. This is why the continuing obligation of the discovery request was crucial for Mr. Menzies to get these documents through the criminal discovery process. He would not otherwise have been provided with a complete copy of his own file.

Finally, Respondent also notes that Mr. Menzies has raised this issue as part of Claim 31 alleging the ineffectiveness of his trial counsel at sentencing for not pursing the prison file. (ECF No. 123 at 122 n.16.) It is not contradictory to claim that the State violated its obligation to provide him with all of the inculpatory and exculpatory evidence it had gathered against him, and that his counsel should have been more diligent in seeking it. That his trial counsel did less than everything they could have done does not relieve the State of its continuing obligations. Mr. Menzies should be granted relief on this claim.

CLAIMS 18 & 19

> **Admission of the prison file violated Mr. Menzies's right to be free from self-incrimination under the Fifth Amendment and to due process of law under the Fourteenth Amendment.**
>
> **Admission of three psychiatric evaluations at the penalty phase violated Mr. Menzies's rights to be free from self-incrimination under the Fifth Amendment, to confrontation under the Sixth Amendment, to a fair and reliable capital sentencing under the Sixth Amendment, to a fair and reliable capital sentencing proceeding under the Eighth Amendment and to due process of law under the Fourteenth Amendment.**

Claim 18 concerns Mr. Menzies's prison file, discussed in detail in Claim 15. The prison file is replete with reports that were made while Mr. Menzies was in custody, including reports of interviews and evaluations during which Mr. Menzies was not advised of his right to remain silent or that the information would be used against him in deciding whether he should receive the death penalty.

Among other things, these reports included conclusions that Mr. Menzies was dangerous, had an anti-social personality, and was not a candidate for treatment. (Penalty Phase Ex. 8 at 82-93 (presentence report), 99-106 (Social Investigation and Study for Hearing on the State's Motion to Certify), 130-33 (Psychological Evaluation), 136 (Psychological Evaluation), 137 (Psychological Evaluation).) The prison file also contains numerous statements made by Mr. Menzies to prison authorities during disciplinary proceedings.

Respondent addressed Claims 18 and 19 together. Claim 19 concerns Exhibit 1D, introduced by the State during the penalty phase, consisting of three psychiatric evaluations which had been done between 1973 and 1976—twelve years or more before Mr. Menzies's trial. (Penalty Phase Ex. 1D, Juvenile Psychiatric and Psychological Evaluations; TR 03/16/1988, ROA 1611 at 2904.) Two of these evaluations had been done in connection with juvenile court proceedings to determine whether Mr. Menzies should be certified as an adult. (Penalty Phase Ex. 1D at 1, 6.) The third evaluation was supposed to remain confidential and concerned whether Mr. Menzies could live with his father. (*Id*. at 8.)

First, Respondent acknowledges that the claim is exhausted but criticizes Mr. Menzies's trial counsel for failing to preserve the claim at trial. (ECF No. 123 at 124.) This is not germane to the claim. The claim is exhausted and it was summarily denied without analysis by the Utah Supreme Court. *Menzies II*, 889 P.2d at 406. ("We find Menzies's other claims to be without merit.")

Second, Respondent criticizes Mr. Menzies's reliance on *Estelle v. Smith*, 451 U.S. 454 (1981), arguing that Mr. Menzies was not subject to custodial interrogation during his mental health evaluations. (ECF No. 123 at 124-25.) The main purpose of citing to *Estelle* is to establish that the Fifth Amendment applies during sentencing. *See* 451 U.S. at 468. Additionally, in each instance of the documents at issue in these claims, Mr. Menzies was required by a state entity to summit to a psychiatric or psychological evaluation. Mr. Menzies did not seek out or request these evaluations. They were not performed for the benefit of his mental health or well-being. In most instances they occurred while he was being held in the custody of the state and were conducted by persons working on the behalf of a state agency.

Finally, Respondent cites to where Mr. Menzies's trial counsel introduced the same information included in these documents. (ECF No. 123 at 127.) As explained in the Petition, this information was used by trial counsel in an effort to diffuse the impact of the various reports and psychological evaluations and only after the trial court refused to exclude it. (ECF No. 109 at 172.) Trial counsel's use of information from the file was an attempt to rehabilitate an erroneous ruling detrimental to their client. Mr. Menzies should be granted relief on these claims.

CLAIM 20

Admission of the testimony of Dr. Patricia Smith violated Mr. Menzies's rights to due process under the Fourteenth Amendment and to a reliable capital sentencing proceeding under the Eighth Amendment.

This claim is related to the prison file admitted as Penalty Phase Exhibit 8 and the psychiatric and psychological evaluations admitted as Penalty Phase Exhibit 1D, and relies on the facts and law contained in Claims 15 and 19. Although Dr. Patricia Smith never met Mr. Menzies (TR 03/17/1988, ROA 1162 at 3153), she testified at the penalty phase, over Mr. Menzies's objection, that he was aggressive (*id*. at 3157), had an anti-social personality (*id*. at 3163), and was not amenable to treatment (*id*. at 3163-64). The only bases for her conclusions came from reviewing portions of Mr. Menzies's prison file and juvenile records, including several hearsay evaluations, presentence reports, psychiatric evaluations and information about Mr. Menzies's juvenile and adult criminal history, including verbal reports of that history from the prosecution (documents contained in Penalty Phase Exhibits 1D and 8). (TR 03/17/1988, ROA 1162 at 3144-45, 3148.)

Respondent only argues that *Barefoot v. Estelle* resolves the question on the basis that "[i]t held that 'psychiatric testimony . . . on the issue of future dangerousness' need not 'be based on personal examination of the defendant . . .'" (ECF No. 123 at 128, citing 463 U.S. 880, 903 (1983).) Respondent, however, fails to factor in the United States Supreme Court's analysis that immediately precedes the sentence he quotes, which is closer to the heart of Mr. Menzies's claim. The Court wrote that

> Such opinions ought, in general, to be deduced from facts that are not disputed, or from facts given in evidence; but the author proceeds to say that they need not be founded upon their own personal knowledge of such facts, but may be founded upon the statement of facts proved in the case.

Barefoot, 463 U.S. at 903. The Court's finding that, in certain instances, psychiatric opinions did not need to be based on personal knowledge, was dependent on the opinions being based on other equally reliable sources.

Mr. Menzies's claim is not just that Dr. Smith relied on other psychiatric reports and did not evaluate Mr. Menzies. That was just one of several problems. The larger issue is that she relied on unverified information from unknown sources that were contained within the prison file and then had been incorporated into those other psychological and psychiatric reports. Therefore, unlike what was approved of in *Barefoot*, Dr. Smith's opinions were not "deduced from facts that are not disputed" or "the statement of facts proved in the case." As stated in the Petition, Dr. Smith's testimony cloaked the unreliable observations and conclusions of unqualified reports in the guise of an expert. (ECF No. 109 at 178.) Mr. Menzies should be granted relief on this claim.

CLAIM 23

> **Mr. Menzies's right to due process under the Fourteenth Amendment and to be free from cruel and unusual punishment under the Eighth Amendment were violated by the admission of photographs of the corpse.**

The trial judge admitted the photographs during the penalty phase on the basis that it incorrectly believed that "those pictures would be helpful to the Court in observing what the scene was." (TR 03/16/1988, ROA 1161 at 2883.) The trial court also

erroneously theorized that "[a]lthough it's been described, I think the pictures would give the Court a better picture." (TR 03/16/1988, ROA 1161 at 2883.)

As described in the Petition, the photographs did not accurately depict the scene. (ECF No. 109 at 181-82.) The medical examiner testified that, due to skin elasticity, the wounds appeared wider than when initially inflicted. (TR 02/25/1988, ROA 1157 at 1644-48.) Respondent wrote that "Menzies complains that the photographs did not accurately depict the wounds as they had been inflicted" but that '[b]ecause this was explained at trial, the evidence was not misleading." (ECF No. 123 at 130 n.19.)

First, Mr. Menzies did not complain about this. He explained a fact that the medical examiner testified about. Second, Mr. Menzies did not argue that the evidence was misleading. He stated it was not accurate, based on the uncontroverted testimony of the medical examiner. Respondent's mischaracterization of Mr. Menzies's argument in support of this claim should be disregarded.

Otherwise, Mr. Menzies stands on the law and facts as pled in the Petition. (ECF No. 109 at 179-82.)

CLAIM 24

Mr. Menzies was deprived of his Eighth Amendment right to a reliable sentencing by the admission of victim impact evidence during the penalty phase of his trial.

The State presented victim impact evidence during both the guilt and penalty phases of Mr. Menzies's trial. (ECF No. 109 at 184.) Respondent questions whether this claim is exhausted because during appeal, Mr. Menzies's appellate counsel primarily claimed a violation of the Utah state constitution. (ECF No. 123 at 131-32.) Review of

the appellate brief shows that the basis for the appeal issue was founded squarely on the application of the Eighth Amendment of the federal constitution to the issue and relies primarily on United States Supreme Court case law. (09/14/1992 Br. of Appellant at 185-87.) Also, when Mr. Menzies's trial counsel initially objected to the victim impact testimony during the penalty phase, the objection was explicitly that the testimony was in violation of the law as dictated by *Booth v. Maryland*, 482 U.S. 496 (1987). (TR 03/15/1998 ROA 1161 at 2796.) Therefore this claim is exhausted as a federal constitutional claim.

Respondent's arguments that the Utah Supreme Court's decision on this issue was reasonable only serve to highlight the blatant errors of the state court. First, Respondent writes "the court noted that because Menzies did not object to the victim impact evidence at trial, it could only consider the claim under a plain-error analysis." (ECF No. 123 at 132, citing *Menzies II*, 889 P.2d at 405.) Yet at the end of that sentence, Respondent includes a footnote which acknowledges that "[d]uring the penalty phase, Menzies did object to Valfoa Lelaetafea displaying the wound that was inflicted by the shotgun held by Menzies during his earlier taxi robbery" and cites to the pages in the transcript where the objection was made and *Booth v. Maryland* was cited to the trial judge. (ECF No. 123 at 132 n.20, citing TR 03/15/1998, ROA 1161 at 2794-96.) It's indisputable based on the record that Mr. Menzies's trial counsel objected to the testimony during the penalty phase and brought *Booth v. Maryland* to the trial court's attention. Therefore, the state supreme court erred in its determination that the objection was not preserved at trial.

This failure to accurately read the record entirely taints the Utah Supreme Court's decision. As Respondent points out, the Utah Supreme Court did not think it should be obvious to the trial court that *Booth* prohibited victim impact testimony when sentencing is imposed by a judge. (ECF No. 123 at 133, citing *Menzies II*, 889 P.2d at 405.) Again, Respondent repeats the state court's error. The trial court did not overrule the objection on that basis—that was not a consideration raised by the parties or addressed by the trial court. Rather, the trial court misunderstood what victim impact testimony was and thus misapprehended the objection. The entire exchange is as follows

Ms. Wells:	Your honor, we would ask that the court strike the last testimony concerning the impact on the victim based upon the case of Booth v. Maryland which it was ruled in a death penalty case that the testimony of the victim under such circumstances was irreversible error.
Mr. MacDougall:	Well, your honor, I don't think it's inappropriate to just have him indicate what the course of treatment was, and how long it took him to recuperate from the injury.
The Court:	I don't think that's irreversible error. I think that's the explanation of the injury, and the recovery process would be appropriate. So objection overruled.

(TR 03/15/1998 ROA, 1161 at 2796-97)[11].

It's clear from the transcript that the trial court failed to understand the nature of victim impact testimony because what it found as appropriate was exactly what *Booth v. Maryland* prohibited. In *Booth*, the United States Supreme Court emphasized that capital sentencing required the sentencer "to focus on the defendant as a 'uniquely individual

[11] This is a verbatim excerpt from the official trial transcript. The odd syntax and incorrect use of "irreversible error," instead of "reversible error," should be noted as it is indicative of the unreliability of the transcript, as discussed in Claim 1.

human bein[g].'" 482 U.S. at 504 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.)). The problem with victim impact evidence was that "[t]he focus . . . is not on the defendant" but on the victim. *Id*. Although "a defendant's degree of knowledge of the probable consequences of his actions may increase his moral culpability in a constitutionally significant manner . . . [w]e nevertheless find that . . . it creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner." *Id*. at 505 (internal citation omitted.) On this basis, the testimony during Mr. Menzies's penalty phase about the impact on the victim should have been prohibited because it shifted the focus away from the defendant and onto the victim.

Had the Utah Supreme Court managed to accurately read the record where Mr. Menzies's trial counsel made the objection on the basis of the actual holding in *Booth*, that court may have properly understood the nature of the objection and the trial court's erroneous basis for overruling it. Instead, the Utah Supreme Court unreasonably resolved the issue by writing "With no jury sitting during the penalty phase, we do not think that *Booth's* application to this case should have been obvious to the trial judge." *Menzies II*, 889 P.2d at 405. The application of *Booth* should have been obvious to the trial court for two reasons. First, Mr. Menzies's trial counsel cited to it directly. Second, Mr. Menzies's trial counsel explained the holding to the trial court. The trial court did not, as the Utah Supreme Court incorrectly wrote, disregard *Booth* because sentencing was being imposed by a judge instead of a jury. The trial court disregarded *Booth* because the trial court failed to understand what victim impact evidence was and why it was excluded.

As shown, trial court made an unreasonable application of the clearly established federal law in effect at the time of sentencing by misunderstanding the nature of victim impact testimony despite it being alerted to the applicable law and having it explained.[12] The Utah Supreme Court unreasonably upheld the trial court's decision by its failure to accurately read the record before it. Mr. Menzies should be granted relief on this claim.

CLAIM 25

The prosecutor committed misconduct by improperly referring to items not in evidence and arguing improper factors in aggravation, depriving Mr. Menzies of his right to due process and to a fair and reliable sentencing hearing in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

In arguing for Mr. Menzies to receive the death sentence, the prosecutor engaged in several instances of misconduct by asking the trial court to impose a sentence based on uncharged statutory aggravators, engaging in speculation, and arguing facts not in evidence. Although Respondent quibbles about the arguments used in support of this claim, he nonetheless states that "these claims were sufficiently presented to or addressed by the State court to meet exhaustion requirements." (ECF No. 123 at 135.)

Respondent relies on language from the Utah Supreme Court about whether the trial court improperly applied an uncharged aggravating factor. (ECF No. 123 at 136, citing *Menzies II*, 889 P.2d at 404-05.) These arguments are misplaced because how the judge applied the aggravators is a separate claim.[13] As noted in the Petition, the state

[12] Respondent's argument that *Booth* did not apply to all victims should be disregard as *Booth* did not make such a distinction. (ECF No. 123 at 133.)

[13] This trial court error is addressed in Claim 26.

court dismissed this claim summarily along with several others as being "without merit." (ECF No. 109 at 185, citing *Menzies II*, 889 P.2d at 406.)

In closing arguments, the prosecutor argued that the offense was aggravated by "[t]he brutal and heinous nature of the murder" and "the reason for her murder [was] in order to keep her from testifying or identifying Ralph Menzies." (TR 03/18/1988, ROA 1162 at 3209.) Both of these were statutory factors the State chose not to charge Mr. Menzies with, and therefore did not have to prove to a jury beyond a reasonable doubt during the guilt phase. *See* Utah Code Ann. § 76-5-202(i) and (q) (1988). While the State is within its statutory right to present evidence about "the nature and circumstances of the crime" (Utah Code Ann. § 76-3-207(1) (1988)), it is wholly improper for the State to choose to not charge statutory aggravators, avoiding the stricter evidentiary requirements and higher burden of proof in the guilt phase of the trial, and subsequently argue for their application during the sentencing phase.

Respondent argues the fact that the prosecutor did not identify the statutory aggravators by their code sections keeps this claim from having any merit. (ECF No. 123 at 135-36.) The argument relies on a willful suspension of disbelief where neither prosecutors nor trial judges imposing capital sentences are familiar with the applicable state laws about statutory aggravators. If the prosecutor wanted to argue about "the nature and circumstances of the crime" (ECF No. 123 at 136), he could have easily done so without using the specific statutory language as a dog whistle for the uncharged and unproven aggravators. Using the statutory language is a clear indication that what the

State was arguing was not generally about the circumstances of the offense, but the specific statutory aggravators.[14]

During closing arguments in the penalty phase, the prosecution argued speculatively about "what happens if he escapes from the Utah State Prison as he did in 1978 or as he tried to at the state hospital in 1986" or if Mr. Menzies were paroled. (TR 03/18/1988, ROA 1162 at 3211.) Respondent characterized this as a fair characterization of the evidence, supported by the testimony of the parole board witness. (ECF No. 123 at 138.)

Respondent is wrong on each point. First, the definition of speculation is "[t]he act or practice of theorizing about matters over which there is no certain knowledge." Black's Law Dictionary (10th ed. 2004). This would include expressing a certainty about future events which are inherently unknowable, such as whether someone may escape from prison and go on a crime spree at an unspecified point in the future. Second, as shown in the Petition (ECF No. 109 at 188-89), the parole board witness testified that Mr. Menzies was not likely an eligible candidate for parole, so that eventuality was not a reliable justification for executing Mr. Menzies (TR 03/17/1988, ROA 1162 at 3119-20).

The prosecutor also read from a fictional novel and relied on its description and definition of a psychopath to argue that Mr. Menzies fit the description. (TR 03/18/1988,

[14] Respondent also writes that "whether an aggravating factor was designated as 'statutory' is inconsequential," citing to a Utah Supreme Court case considering an erroneous jury instruction, which relies on a Tenth Circuit case holding that not all errors in capital cases are constitutional errors. (ECF No. 123 at 137, citing *Archuleta*, 850 P.2d at 1248 n.66 (citing *Andrews v. Morris*, 677 P.2d 81, 96 (1983).) Respondent evinces a startling disregard for the constitutional or statutory rights of criminal defendants and for any reasonable limits on capital sentencing proceedings in accordance with those rights.

ROA 1162 at 3211-13.) Obviously this book had not been admitted into evidence, and its author was not a witness in the case, much less one put on properly as an expert on matters of psychology or psychiatry. Respondent argues that this was proper, and tries to analogize to Mr. Menzies's trial counsel who used poetry in her closing arguments, and urged the jury to see a movie she liked. (ECF No. 123 at 140.) Examination of the transcripts, however, demonstrates how far apart these examples are.

During closing arguments of the guilt phase, Mr. Menzies's trial counsel said she had recently seen the film "Cry Freedom," and

> It's a story about apartheid in South Africa, and *the particulars of the movie are not analogous to this one*, except insofar as they deal with the power of the government and the power of the state to take from persons, to extract from persons more than they are entitled.

(TR 03/07/1988, ROA 1160 at 2676 (emphasis added).) Mr. Menzies's trial counsel specifically disclaimed relating anything specific from the film to the trial. Also, she did not present it as an authoritative text regarding any question of fact being presented to the jury. During the penalty phase closing arguments, Mr. Menzies's trial counsel quoted two poetic passages and used them metaphorically to make an argument for compassion and mercy for Mr. Menzies. (TR 03/18/1988, ROA 1162 at 3232-33.) Again, she did not present them as being dispositive on a question of fact at issue.

What the prosecutor did was exactly opposite. He read from a salacious fictional novel, used its unscientific definition of a psychopath, and asked the trial court to consider how Mr. Menzies fit that description. He took a question of fact at issue—"the defendant's character, background, history, mental and physical condition (Utah Code

Ann. § 76-3-207(1) (1988)—and asked the trial court to resolve that fact according to a fictional metric. Immediately after reading extensively from the book's description of a psychopath, the prosecutor stated, on the basis of no other evidence, that "Ralph Menzies is a psychopath." (TR 03/18/1988, ROA 1162 at 3213.) There is no comparison between what Mr. Menzies's trial counsel did and what the prosecutor did, which was wholly improper.

For Respondent's arguments regarding the admissibility of any evidence which may be argued to support the prosecutor's arguments, Mr. Menzies's relies on his arguments in his other claims (Claim 5, regarding Walter Britton's preliminary hearing testimony, and Claims 15-19 regarding the contents of his prison file and rap sheets, including uncharged and unsubstantiated allegations, or charges for which there are no convictions).

CLAIM 26

Mr. Menzies's right to due process under the Fourteenth Amendment and to a reliable and fair capital sentencing proceeding under the Eighth Amendment were denied because the state court relied on uncharged aggravating circumstances.

In his Petition, Mr. Menzies demonstrated how the trial court relied on several uncharged statutory aggravating factors in imposing a death sentence and how the sentencing judge even admitted he made an error in relying on the uncharged "heinousness" aggravator. (ECF No. 109 at 192-201.) Respondent argues that the Utah Supreme Court was correct to find this without merit because invalidating one aggravator would not change the overall balance of aggravators and mitigating circumstances. (ECF

No. 123 at 143, quoting *Menzies II*, 889 P.2d at 405.) The problem with this argument, which Respondent repeats throughout its response to Claim 26, is that it does reconsider the weight of the totality of the aggravators with all of the invalid aggravators removed. The Utah Supreme Court only considered the impropriety of the "heinousness" aggravator, disregarding the argument about the other two improper statutory aggravators. *Menzies II*, 889 P.2d at 405. Respondent only considers them each individually and not in their totality. (ECF No. 109 at 142-45.)

As shown in the Petition, the trial court imposed three statutory aggravators which were uncharged, and, therefore, unproven to the jury beyond a reasonable doubt. These included that "the homicide was committed for pecuniary or other personal gain[,]" that "the homicide was committed for the purpose of preventing a witness from testifying[,]" and that "the homicide was committed in an especially heinous, atrocious, cruel manner demonstrated by serious bodily injury to the victim before death." (TR 03/23/1988, ROA 1162 at 3249-50.) Although Mr. Menzies challenged the application of all three aggravators, the Utah Supreme Court only addressed the "heinousness" aggravator, unreasonably finding that although "it would have been error for the court to consider subpart (q) . . . we are not convinced that such an error occurred." *Menzies II*, 889 P.2d at 405. As shown in the Petition, the trial court cited subpart (q) by its code number and explicitly found that it applied. (ECF No. 109 at 198.) The Utah Supreme Court's determination that no error occurred is an unreasonable determination of fact, belied by a plain reading of the transcript. The state court then disregarded the other two aggravators completely.

While Respondent addresses the other two aggravators, he does so only individually. It cannot be fairly said that "if any error occurred, it was harmless" and that "[i]n view of the magnitude of aggravating factors and the relative paucity of mitigating ones, removing 'pecuniary gain' from the balance would not return a different result." (ECF No. 123 at 145.) This is because Respondent's weighing still includes the heinousness aggravator and the silencing a witness aggravator, all of which need to be removed from the equation. When all of the uncharged and unproved aggravators are removed, there is no longer a "magnitude of aggravating factors." The state courts have failed to properly consider this claim and how it impacts the sentencing calculus.

Respondent also fails to address a significant evidentiary proffer made by Mr. Menzies during post-conviction: that the trial judge signed an affidavit stating that, in fact, he did apply the heinousness statutory aggravator and that it was in error. The state court similarly ignored this evidence, writing that "even if we were to accept his argument that Judge Uno erred in applying a single aggravating factor, the aggravating factors together would still have supported a sentence of death." *Menzies IV*, 344 P.3d 581, 630 (Utah 2014).

Judge Uno's affidavit definitively laid the question to rest. (5th Am. Pet., Ex. T, Aff. of Raymond S. Uno ¶¶ 6-9.) The Utah Supreme Court did not need to decide whether or not to accept Mr. Menzies's argument about Judge Uno. Judge Uno spoke for himself. To ignore this evidence, consider the question still open, and resolve it against Mr. Menzies is, again, an unreasonable determination of fact apparent by a plain reading of the record before the state court.

Again, during post-conviction, the Utah Supreme Court only considers the heinousness aggravator in isolation, considering whether the trial court "erred in applying a single aggravating factor." *Menzies IV*, 344 P.3d at 630. The trial court did not err in applying a single aggravating factor. The trial court erred by applying three unproved statutory aggravating factors. Respondent's faulty analysis has not shown otherwise. Mr. Menzies should be granted relief on this claim.

CLAIM 28

Mr. Menzies's right to be free from cruel and unusual punishment under the Eighth Amendment was violated by the state court's reliance on the speculation that Mr. Menzies might escape or be paroled as a basis for imposing death.

At sentencing, the trial court speculated about the possibility of parole and escape, saying, "[l]ife imprisonment is no guarantee. The Board of Pardons may release or parole in spite of recommendations. He may escape. Average commitment 20 years. Defendant in for two five-to-life's and out in six years." (TR 03/23/1988, ROA 1162 at 3254.) The trial court's findings misstated the evidence. The evidence presented was that while some offenders may get a parole date in 20 years, Mr. Menzies was not in that category. (TR 03/17/1988, ROA 1162 at 3117, 3119-20, 3123.) Based on the offense and his history, it was highly unlikely he would ever be released. (TR 03/17/1988, ROA 1162 at 3120.)

Respondent notes that the Board of Pardons witness testified "that neither he nor the board of pardons could guarantee that he would not be paroled or escape from prison." (ECF No. 123 at 146.) Of course, no can predict every eventuality. This

witnesses' testimony was about what, in his opinion, based on his experience as member of the Board of Pardons, was likely to happen. That is the most that can be expected of anyone speaking about the future.

The Board of Pardons witness testified that given Mr. Menzies's criminal history and background, any parole review by the Board of Pardons "would likely result in a natural life sentence" and Mr. Menzies's mitigation evidence would not change that outcome. (TR 03/17/1988, ROA 1162 at 3120.) When the Board of Pardons witness testified about prisoners who were released after 20 years, and Mr. Menzies's prior release by the Board of Pardons, these situations were different from what Mr. Menzies would encounter during a life sentence commitment for the homicide charge. The thrust of the testimony was that Mr. Menzies would not again be released from prison. On that basis, the trial court's determination regarding parole and escape was not based on the evidence. Mr. Menzies should be granted relief on this claim.

CLAIM 29

Mr. Menzies's death sentence violated his right to due process under the Fourteenth Amendment and to be free from the arbitrary and capricious imposition of the death penalty, and to a reliable capital sentencing proceeding under the Eighth Amendment because the sentence relied on unconstitutional aggravating factors.

As shown in Claim 26, the trial court specifically referred to the statutory aggravators it was applying, including three that were uncharged and unproved to a jury beyond a reasonable doubt. The trial court cited to the statutory provisions by their section numbers, including that "under 76-5-202(7)(f), 'the homicide was committed for

pecuniary or other personal gain'" and "76-[5-202](q), 'the homicide . . . was committed in an especially heinous, atrocious, cruel manner demonstrated by serious bodily injury to the victim before death.'" (TR 03/23/1988, ROA 1162 at 3249-50.) Mr. Menzies challenged these provisions on the basis that the pecuniary gain aggravator double-counted the robbery (the robbery aggravator was put to the jury), and the heinousness aggravator was unconstitutional as written.

Respondent did not respond independently to Mr. Menzies's arguments about the pecuniary gain statutory aggravator, relying only on its response to Claim 26. (ECF No. 123 at 148 n.23.) Therefore any arguments specific to this claim have been waived.

Regarding the heinousness statutory aggravator, Respondent claims that Mr. Menzies has no standing to raise the claim because, Respondent asserts, it wasn't applied in Mr. Menzies's case. (ECF No. 123 at 149.) Respondent also argues that whether that aggravator is unconstitutionally broad is irrelevant since, he claims, it wasn't applied. (ECF No. 123 at 150.)

As shown in Claim 26, both in the Petition (ECF No. 109 at 192-201) and this reply on Claim 26, *supra*, the trial court stated on the record that he was applying the statutory heinousness aggravator, cited to by its subsection number. Also, as established, the trial court judge signed an affidavit confirming that this is in fact what he did. (5th Am. Pet., Ex. T, Aff. of Raymond S. Uno ¶¶ 6-9.) For Respondent to persist in arguing for the fiction created by the Utah Supreme Court that what is recorded on the transcript—which the State continually insists is accurate—did not actually happen, is absurd.

Otherwise, Mr. Menzies relies on the facts and law as put forth in his Petition. He should be granted relief on this claim.

CLAIM 31

Mr. Menzies was denied the effective assistance of counsel during the penalty phase of his capital trial, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

As a result of the ineffective assistance of Mr. Menzies's counsel in the penalty phase of his capital trial, Mr. Menzies was sentenced to death by a court that did not know significant mitigating facts, including that Mr. Menzies was sexually abused as a young adolescent, that all of Mr. Menzies's caregivers were impaired by alcohol or drug addiction, that Mr. Menzies was exposed to sexually deviant behavior as a result of his biological father's sexual predation, that Mr. Menzies's biological father taught him to steal and asked him to kill a man, that Mr. Menzies's parents were monitored by the state as a result of a failure to care for him, and that Mr. Menzies suffered from significant neuropsychological and psychological impairments and dysfunction as a result of his traumatic childhood. The State incorrectly asserts that this information is simply cumulative and would not have had an impact on the sentencing decision. As discussed in more detail below, the evidence identified includes significant information that fundamentally changes the mitigation picture presented.

Respondent acknowledges that this claim is exhausted (ECF No. 123 at 154), while stating in a footnote that some of the arguments and facts raised in Claim 31 were

not previously raised in state court. (ECF No. 123 at 154 n.27.)[15] The failure to raise any aspect of this claim in prior state court proceedings is attributable to the ineffective assistance of Mr. Menzies's post-conviction counsel. *See Martinez*, 132 S. Ct. at 1315; *see also* Claim 38. As explained above in Part I.E., this Court has found that *Martinez* and *Trevino* apply in Utah.

A. The state court's unreasonable application of clearly established federal law.

Respondent argues that Mr. Menzies "has failed to establish that the [s]tate court decision unreasonably applied *Strickland*." (ECF No. 123 at 155.) This assertion is incorrect. Mr. Menzies identified four distinct legal errors in the Utah Supreme Court's *Strickland* analysis. (ECF No. 109 at 209-15.) The Utah Supreme Court's legal errors resulted in a decision involving an unreasonable application of clearly established federal law. Any one of the identified errors entitles Mr. Menzies to *de novo* review.

1. The Utah Supreme Court's conclusion that defense counsel's mitigation investigation was adequate because counsel hired three experts involved an unreasonable application of clearly established federal law.

As Mr. Menzies pointed out in the Petition, the Utah Supreme Court relied on the fact that defense counsel "hired no less than three mental health professionals" in

[15] Respondent's assertion that Mr. Menzies has procedurally defaulted facts or allegations made in support of his claims is based on a misunderstanding of the law. Procedural default is a principle of habeas law that applies to claims, not facts. *See, e.g.*, *Woodford v. Ngo*, 548 U.S. 81, 93 (2006) (explaining that "if the petitioner procedurally defaulted those claims, the prisoner generally is barred from asserting those claims in a federal habeas proceeding"). Naturally, however, a claim cannot exist without both legal and factual support. *Cf. Martinez v. Ryan*, 132 S. Ct. 1309, 1318 (2012) ("Ineffective-assistance claims often depend on evidence outside the trial record."); *Gallow v. Cooper*, 133 S. Ct. 2730, 2731 (June 27, 2013) (mem.) (Statement of Breyer, J.) ("A claim without any evidence to support it might as well be no claim at all."). Therefore, any assertion by Respondent that Mr. Menzies has defaulted facts or arguments is inaccurate.

concluding that defense counsel's mitigation investigation was adequate. *Menzies IV*, 344 P.3d at 626. *Strickland* established that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. The state court's conclusion that counsel's investigation was adequate because counsel "hired no less than three mental health professionals," *Menzies IV*, 344 P.3d at 626, was based on an unreasonable application of clearly established federal law.

Respondent attempts to salvage the Utah Supreme Court's analysis by arguing that the Utah Supreme Court concluded that "'additional evidence and witnesses were unnecessary'" in light of the evidence presented by defense counsel. (ECF No. 123 at 167 (quoting *Menzies IV*, 344 P.3d at 628).) Notably, the passage Respondent quotes does not come from the court's analysis of Mr. Menzies's claim that defense counsel failed to adequately investigate mitigating evidence through appropriate experts. *See Menzies IV*, 344 P.3d at 625-28 (addressing the failure to *investigate* claims in paragraphs 183-91 and specifically discarding the mental health claim in paragraph 188; concluding that "additional evidence and witnesses were unnecessary" only with respect to Mr. Menzies's claims related to the presentation of background evidence in paragraphs 192-98). The Utah Supreme Court's analysis focuses entirely on the fact that defense counsel hired three experts. It is clear from *Strickland*, that the duty to investigate is guided by the requirement that counsel conduct a reasonable investigation or make reasonable decisions to limit the mitigation investigation. *Strickland*, 466 U.S. at 691. Counsel's duty to conduct a reasonable mitigation investigation is not discharged simply by hiring

experts. *See Rompilla v. Beard*, 545 U.S. 374, 381 (2005) (finding deficient performance in a case where counsel hired three mental health experts but otherwise failed to conduct a thorough investigation).

In fact, courts interpreting and applying *Strickland* have made clear that counsel must obtain experts that put the mitigating evidence in context and explain its significance. *See Williams (Terry) v. Taylor*, 529 U.S. 362, 399 (2000) (counsel's duty to "present[] and explain[] the significance of all the available evidence"); *see also Wilson v. Sirmons*, 536 F.3d 1064, 1089-90 (10th Cir. 2008) (concluding that "counsel may not simply hire an expert and then abandon all further responsibility" and counsel has "a responsibility to investigate and bring to the attention of mental health experts who are examining his client, facts that the experts do not request" (internal quotation omitted)); *Hooper v. Mullin*, 314 F.3d 1162, 1169-71 (10th Cir. 2002) (finding counsel's reliance on and presentation of expert testimony without adequate investigation resulted in prejudicially deficient performance). In addition, counsel must conduct a mitigation investigation in order to adequately prepare experts. *See Rompilla*, 545 U.S. at 381 (finding deficient performance in a case where counsel hired three mental health experts but otherwise failed to conduct a thorough investigation); *Wilson*, 536 F.3d at 1089-90; *Hooper*, 314 F.3d at 1169-71. The Utah Supreme Court's conclusion that the claim challenging counsel's deficient mitigation investigation was without merit because defense counsel hired three experts is an unreasonable application of *Strickland*, which requires a reasonable investigation or some reasonable decision making further investigation unnecessary. *See Strickland*, 466 U.S. at 691.

2. The Utah Supreme Court's conclusion that defense counsel engaged in an adequate investigation because counsel presented some mitigation evidence involved an unreasonable application of clearly established federal law.

The Utah Supreme Court's conclusion that defense counsel engaged in an "adequate investigation" because counsel presented "a host of evidence" of abuse was based on an objectively unreasonable application of clearly established federal law. *See Menzies IV*, 344 P.3d at 626-27. Again, Respondent argues that the Utah Supreme Court's conclusion that the mitigation investigation was adequate was a reasonable application of clearly established law because the Utah Supreme Court found, "'additional evidence and witnesses were unnecessary'" in light of the evidence presented by defense counsel. (ECF No. 123 at 160, 167, 170, quoting *Menzies IV*, 344 P.3d at 628; *see also* ECF No. 123 at 155-57.)

However, as noted above, it is clearly established federal law that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. An incomplete or superficial mitigation investigation—such as the one presented by defense counsel—constitutes deficient performance. *See Sears v. Upton*, 561 U.S. 945, 952 (2010) (holding that counsel's inadequate background investigation, which was limited to one day or less of interviews of witnesses later presented, was deficient and prejudicial); *see also Rompilla*, 545 U.S. at 381; *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Williams (Terry)*, 529 U.S. at 399. The Utah Supreme Court's conclusion that counsel's investigation was adequate simply because counsel presented some mitigating evidence was based on an

unreasonable application of clearly established federal law where Mr. Menzies presented significant additional mitigating facts in post-conviction proceedings.

3. The Utah Supreme Court's conclusion that defense counsel may have strategically decided not to present some mitigating evidence involved an unreasonable application of clearly established federal law.

Respondent does not address Mr. Menzies's argument that the Utah Supreme Court also unreasonably applied *Strickland* in its deficient performance analysis when it concluded that defense counsel was not deficient because counsel may have strategically decided not to present mitigating evidence of organic brain damage out of concern that the information could have hurt Mr. Menzies's case. *Menzies IV*, 344 P.3d at 629. As noted in the Petition, there is no evidence in the record to support the Utah Supreme Court's conclusion that the failure to present evidence of organic brain damage was a strategic choice. (ECF No. 109 at 214.) In fact, the Utah Supreme Court earlier noted that "the evidence suggests that counsel was unaware of the possibility that Mr. Menzies had [organic brain damage]." *Menzies IV*, 344 P.3d at 629. Here, counsel's failure to present mitigating evidence—including neurological evidence—cannot be seen as strategic because counsel failed to conduct a reasonable investigation. *Strickland*, 466 U.S. at 691; *Eddings*, 455 U.S. at 112; *see also Wiggins*, 539 U.S. at 521 (holding that the "deference owed such strategic judgments" of trial counsel is "defined . . . in terms of the adequacy of the investigations supporting those judgments"). Because, as the Utah Supreme Court acknowledged, defense counsel's inadequate mitigation investigation

failed to uncover any evidence of organic brain damage, counsel's failure to present such evidence is not entitled to any deference as a strategic decision.

4. The Utah Supreme Court's failure to cumulatively assess the prejudice resulting from counsel's deficient performance involved an unreasonable application of clearly established federal law.

The Utah Supreme Court failed to assess the cumulative impact of defense counsel's numerous errors. *See Menzies IV*, 344 P.3d at 624-30 (considering each item of mitigating evidence proffered in post-conviction and each of counsel's deficiencies independently). Respondent does not assert that the Utah Supreme Court assessed prejudice as required by clearly established federal law—by considering the totality of the evidence or the cumulative impact of counsel's deficient performance. (*See* ECF No. 123 at 171-72.) When assessing counsel's conduct, and more particularly the impact of that conduct on the reliability of the proceedings, counsel's deficiencies must be considered cumulatively as opposed to item-by-item. *See*, *e.g.*, *Strickland*, 466 U.S. at 695 ("In making this [prejudice] determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury."); *see also Wiggins*, 539 U.S. at 534 ("In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence."); *Williams (Terry)*, 529 U.S. at 397 (holding that when assessing prejudice, reviewing court must consider "the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the [post-conviction] proceeding").

Respondent attempts to save the Utah Supreme Court's faulty analysis by arguing that the mitigating evidence that was not presented as a result of defense counsel's deficient performance adds "little concrete evidence to the background evidence the judge did hear" and fails to alter the picture of Mr. Menzies's background. (ECF No. 123 at 172.) However, considered cumulatively defense counsel's numerous errors—including, most notably, counsel's failure to present *any* evidence that Mr. Menzies was sexually abused, that *all* of Mr. Menzies's caregivers were impaired by addiction, and any expert testimony explaining the impact of the complete picture of chronic neglect, trauma, and abuse on Mr. Menzies's psychological, behavioral, and neurological development—resulted in an extremely limited mitigation presentation and undermines confidence in Mr. Menzies's sentence. The Utah Supreme Court failed to consider the cumulative impact of defense counsel's many deficiencies resulting in a decision involving an unreasonable application of clearly established federal law.

B. The state court's unreasonable determinations of fact.

Respondent also challenges the unreasonable determinations of fact identified by Mr. Menzies. (ECF No. 123 at 157-64.) Mr. Menzies has demonstrated that the Utah Supreme Court's denial of his penalty phase ineffective assistance of counsel claims was based on an unreasonable determination of the facts based on the evidence presented to the state courts. (ECF No. 109 at 215-20.) Mr. Menzies specifically identified five unreasonable factual determinations. (ECF No. 109 at 215-20.) Mr. Menzies will address Respondent's challenges to each in turn. Any one of these errors entitles Mr. Menzies to *de novo* review.

1. Counsel failed to initiate a timely mitigation investigation.

Despite evidence that defense counsel failed to develop a relationship with Mr. Menzies and failed to contact Mr. Menzies's family—who were the *only* sources presented for Mr. Menzies's social history—until the penalty phase of Mr. Menzies's capital trial, the Utah Supreme Court concluded that "the evidence actually suggests that counsel did initiate the mitigation investigation before the guilt phase began, since Dr. DeCaria interviewed Mr. Menzies over fourteen months before trial." *Menzies IV*, 344 P.3d at 625. The Utah Supreme Court's factual conclusion that defense counsel initiated a timely mitigation investigation was an unreasonable determination of the facts. (*See* ECF No. 109 at 216-17.) Respondent argues that the Utah Supreme Court "correctly noted the evidence showing counsel initiated their mitigation investigation before the guilt phase" and that "the Utah Supreme Court specifically noted that Menzies's counsel called his aunt and sister to testify at the penalty phase regarding his family history and circumstances." (ECF No. 123 at 158.)

Respondent's argument simply perpetuates the Utah Supreme Court's error. A mitigation investigation is not limited to the hiring of a single expert. *See Rompilla*, 545 U.S. at 381 (finding deficient performance in a case where counsel hired three mental health experts but otherwise failed to conduct a thorough investigation); *Wilson*, 536 F.3d at 1089-90 (concluding that "counsel may not simply hire an expert and then abandon all further responsibility" and counsel has "a responsibility to investigate and bring to the attention of mental health experts who are examining his client, facts that the experts do not request" (internal quotation omitted)); *Hooper*, 314 F.3d at 1169-71 (finding

counsel's reliance on and presentation of expert testimony without adequate investigation resulted in prejudicially deficient performance). In the absence of any additional investigative steps, hiring an expert is simply not a sufficient step to initiate a timely mitigation investigation.

The Utah Supreme Court misapprehended the evidence related to the mitigation investigation. Evidence demonstrated that defense counsel failed to develop a relationship with Mr. Menzies (*see* 08/01/2011 Pet'r's Mem. in Opp'n to Resp't's Mot. for Summ. J. and Cross-Mot. for Summ. J., Ex. XXX, Declaration of Ralph Menzies ¶ 5), and that no one from the defense team contacted Mr. Menzies's family—the only sources presented for Mr. Menzies's social history—until the penalty phase of Mr. Menzies's capital trial was already underway (*see* 5th Am. Pet., Ex. S, Aff. of Marissa Sandall-Barrus ¶ 8 (trial counsel did not contact Jackie Rutherford to discuss Mr. Menzies's social history until the penalty phase); TR 03/16/1988, ROA 1161 at 3022-23 (Dr. DeCaria testifying that he spoke with Mr. Menzies's sister and aunt for one hour on March 14, 1988, during the penalty phase)). The fact that defense counsel hired a single expert prior to trial does not obviate the need for a mitigation investigation. "[W]here the state courts plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim, that misapprehension can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable." *Sharp v. Rohling*, 793 F.3d 1216, 1229 (10th Cir. 2015). It was objectively unreasonable for the Utah Supreme Court to discount the uncontroverted evidence that defense counsel failed to initiate a mitigation investigation

by developing a relationship with their client and interviewing witnesses and family members.

Respondent also argues that even if defense counsel failed to initiate a timely mitigation investigation, Mr. Menzies has failed to establish that the Utah Supreme Court was unreasonable in concluding that Mr. Menzies was not prejudiced as a result of the delayed mitigation investigation. (ECF No. 123 at 158.) Defense counsel's delay in initiating a mitigation investigation prevented defense experts from completing full and effective evaluations and resulted in defense counsel's incomplete presentation of mitigating evidence. All of the errors identified by Mr. Menzies can be attributed to defense counsel's failure to initiate a timely mitigation investigation. As discussed in section A of this claim, *supra*, the Utah Supreme Court unreasonably applied clearly established federal law in failing to consider the cumulative impact of defense counsel's many errors and omissions. The prejudice resulting from the cumulative impact of defense counsel's errors is addressed in section E below.

2. Mr. Menzies was sexually abused.

During post-conviction proceedings, Mr. Menzies presented evidence that he was sexually abused by his step-mother. (*See* 5th Am. Pet., Ex. S, Aff. of Marissa Sandall-Barrus ¶ 5.) Despite this evidence, the Utah Supreme Court rejected this claim because "there was no evidence of sexual molestation provided by any of the mental health professionals or Mr. Menzies's sister or aunt" and that "there is nothing to indicate where this [information of sexual abuse] came from or that a reasonable investigation would have uncovered such evidence." *Menzies IV*, 344 P.3d at 626. Respondent relies on the

Utah Supreme Court's language addressing a separate claim, in order to argue that the Utah Supreme Court concluded that counsel's performance was not deficient and did not result in prejudice. (ECF No. 123 at 160 citing *Menzies IV*, 344 P.3d at 627.) Review of the Utah Supreme Court's opinion makes clear that the court denied the claim based on a failure to present evidence of sexual abuse after it rejected Mr. Menzies's evidence of sexual abuse because there was no indication that a reasonable investigation could have uncovered the information. *Menzies IV*, 344 P.3d at 626 ("[T]here is nothing to indicate where this [information of sexual abuse] came from or that a reasonable investigation would have uncovered such evidence. Therefore, we reject this claim.").[16]

The evidence indicating sexual abuse was sufficient to warrant an evidentiary hearing, wherein a court could evaluate counsel's conduct in failing to discover and present evidence of sexual abuse. The Utah Supreme Court's unsupported conclusion that there was insufficient evidence of sexual abuse and that no evidence indicated that a reasonable investigation would have uncovered such evidence was objectively unreasonable and satisfies Mr. Menzies's burden under 28 U.S.C. § 2254(d)(2).

[16] Respondent also argues that "Counsel's failure to engage in a fishing expedition is neither deficient nor prejudicial, particularly where Menzies failed to disclose what he told counsel about his sexual history." (ECF No. 123 at 160.) Mr. Menzies has not suggested that counsel was required to go on a fishing expedition, rather counsel was required to conduct a mitigation investigation. *See Strickland*, 466 U.S. at 691. Counsel failed to develop a relationship with Mr. Menzies, failed to interview Mr. Menzies about his history of sexual abuse, and failed to conduct interviews with Mr. Menzies's surviving family members prior to the penalty phase.

3. Evidence discovered and presented in post-conviction was not cumulative.

The Utah Supreme Court's factual conclusion—that counsel provided "a sufficient social history through multiple witnesses" and that any new evidence identified in post-conviction would have been cumulative and unnecessary—was objectively unreasonable. (*See* ECF No. 109 at 218-19, quoting *Menzies IV*, 344 P.3d at 627-28.) Respondent argues that "[o]nce [defense counsel] had presented evidence sufficient to establish that [Mr.] Menzies had a traumatic and abusive childhood, they were not required to include additional or cumulative evidence in support." (ECF No. 123 at 161.) Respondent simply repeats the Utah Supreme Court's analysis and fails to address the *factual error* Mr. Menzies identified. The Utah Supreme Court's rejection of the claims was based on its erroneous conclusion that the evidence presented by Mr. Menzies in post-conviction was cumulative and unnecessary. *See Menzies IV*, 344 P.3d at 628. Contrary to the Utah Supreme Court's conclusion, during post-conviction proceedings, Mr. Menzies provided significant additional mitigating evidence that defense counsel failed to present at trial: including evidence that Mr. Menzies was sexually abused as a child; that Mr. Menzies's father taught him to steal and asked him to kill a man; that a petition was filed against Mr. Menzies's parents for failure to care for Mr. Menzies when he was seven years old; and that a neuropsychological evaluation of Mr. Menzies indicated significant areas of weakness, indicative of neurological dysfunction, along with mental illness, and organic brain damage. (5th Am. Pet. at 30-33, 40-41; see also 5th Am. Pet., Ex. S, Aff. of Marissa Sandall-Barrus ¶¶ 4-7; 5th Am. Pet., Ex. B, Aff. of Dr. Kockler at 10-15.) The

evidence presented by Mr. Menzies in post-conviction was not simply "additional evidence" of a traumatic childhood, but rather evidence of significant previously undocumented mitigation (most importantly, sexual abuse by his step-mother and evidence indicating neurological dysfunction).

The Utah Supreme Court "plainly misapprehend[ed] or misstate[d] the record" in concluding that the mitigation identified only in post-conviction was cumulative or unnecessary because it failed to recognize that Mr. Menzies offered significant mitigating evidence that was not previously presented at trial. *See Sharp*, 793 F.3d at 1229. The Utah Supreme Court's "misapprehension [went] to a material factual issue that [wa]s central to [Mr. Menzies's] claim" and, as a result, the court's misapprehension "fatally undermine[d] the fact-finding process [and] render[ed] the resulting factual finding unreasonable." *See id.*

4. No evidence in the record supported the conclusion that Clifford Menzies was "inaccessible."

The Utah Supreme Court concluded that defense counsel's failure to contact Mr. Menzies's biological father, Clifford Menzies, was not deficient performance based on its unreasonable finding that Clifford was "inaccessible." *Menzies IV*, 344 P.3d at 628. There was no basis for this conclusion in the record and the evidence presented in post-conviction indicated that Clifford was alive and available at the time of trial. (5th Am. Pet., Ex. S, Aff. of Marissa Sandall-Barrus ¶ 5.) Respondent argues that the Utah Supreme Court's finding was reasonable because it was "based on facts testified to by [Mr.] Menzies's sister," Jackie Biesinger. (ECF No. 123 at 162.) Contrary to

Respondent's assertion, Jackie's testimony does not support a conclusion that Clifford was inaccessible. Rather, Jackie testified that she had not seen or spoken with her father since the last time she went out to see him following the death of Mr. Menzies's younger brother. (TR 03/16/1988, ROA 1161 at 2907-08.) Nothing in Jackie's testimony indicated that Clifford was inaccessible: she did not have difficulty finding him previously and there is no reason to believe that he would be "inaccessible" based on her testimony. Jackie was simply estranged from her father. That does not mean he would be impossible or even difficult to find. Indeed, he was located several years later by post-conviction counsel. There is simply no support in the record for the Utah Supreme Court's conclusion that Clifford was inaccessible to defense counsel at the time of trial.

5. No evidence in the record supported the conclusion that evidence of organic brain damage would have hurt Mr. Menzies.

Similarly, no evidence in the record supports the Utah Supreme Court's conclusion that "introducing evidence of [organic brain damage] would have hurt Mr. Menzies'[s] defense . . . [b]ecause 'impulse control [would be] forever and always impaired as a result of that [organic brain damage].'" *Menzies IV*, 344 P.3d at 629 (quoting the lower court's conclusion at PCR ROA 15458)). Respondent argues only that "the United States Supreme Court has recognized the fact that a defendant with organic brain damage is more susceptible to acting on impulse and is unable to conform his behavior to the law is a two-edged sword." (ECF No. 123 at 163, referring to *Penry v. Lynaugh*, 492 U.S. 302, 324 (1989).) However, Respondent fails to point to any evidence in the record before the Utah Supreme Court indicating that Mr. Menzies's evidence of

organic brain damage would have also indicated that any resulting weaknesses in impulse control would be untreatable. Not only was the state court's statement not based on any facts in the record, the factual conclusion is also contradicted by the scientific evidence indicating that impulsivity can be managed and treated. *See* F. Gerald Moeller et al., *Psychiatric Aspects of Impulsivity*, Am. J. Psychiatry 2001, 158:1783-93; *cf.* Michael A. McCrea, *Mild Traumatic Brain Injury and Postconcussion Syndrome: The New Evidence Base for Diagnosis and Treatment* (2008). The Utah Supreme Court's conclusion regarding the damaging impact of evidence of organic brain damage had no basis in the record and is an unreasonable determination of the facts based on the record before the court.[17]

C. Defense counsel were prejudicially deficient in failing to conduct an effective mitigation investigation and present key witnesses related to Mr. Menzies's abusive and neglectful childhood.

Sentencing counsel failed to initiate a timely mitigation investigation and as a result counsel failed to discover and present important mitigating evidence, including that Mr. Menzies was sexually abused as a young adolescent and exposed to the sexually deviant behavior of his father, that all of Mr. Menzies's caregivers were addicted to drugs or alcohol, that Mr. Menzies's mother frequently neglected and abandoned her children,

[17] Respondent also argues that the Utah Supreme Court dismissed this claim, at least in part, based on its conclusion that defense counsel had no indication that Mr. Menzies had organic brain damage. (ECF No. 123 at 163-64.) It is true that as a result of defense counsel's failure to conduct a thorough and timely mitigation investigation, counsel may not have had any indication that Mr. Menzies suffered from organic brain damage. Counsel's failure to hire experts in order to evaluate Mr. Menzies's neuropsychological functioning was deficient performance. As a result of defense counsel's deficient performance, counsel failed to discover significant mitigating evidence of organic brain damage.

and that Mr. Menzies experienced pervasive and significant neglect, abuse, and trauma throughout his childhood resulting in psychological and neuropsychological impairments. Sentencing counsel's lack of preparation and investigation also resulted in counsel's failure to identify and present key witnesses—including Mr. Menzies's biological father and the step-mother who sexually abused Mr. Menzies—and supporting records, which would have corroborated the limited evidence of abuse offered at trial and demonstrated the full extent of the neglect and abuse that was a part of Mr. Menzies's daily life.

The merits of Mr. Menzies's underlying claims are largely unaddressed in the Response, as Respondent focuses largely on defending the validity of the Utah Supreme Court's decision denying Mr. Menzies's claims. To the extent Respondent has raised arguments challenging the merits of Mr. Menzies's claims, Mr. Menzies addresses those arguments below. Mr. Menzies relies on the arguments raised in his Petition along with the additional arguments that follow.

As an initial matter, Respondent misconstrues Mr. Menzies's claim related to defense counsel's lack of experience and training. In the Petition, Mr. Menzies asserted that defense counsel lacked experience and training in conducting and presenting a mitigation investigation in a capital case and that, as a result, defense counsel failed to initiate a timely mitigation investigation. (ECF No. 109 at 223-24.) Mr. Menzies alleged that the resulting mitigation investigation and presentation was "constitutionally inadequate and failed to provide a complete picture of Mr. Menzies's life history and impairments." (ECF No. 109 at 224.) Respondent argues in response only that defense counsel's lack of experience and qualifications do not independently result in an

ineffective assistance of counsel claim. (ECF No. 123 at 165.) Mr. Menzies has not argued that defense counsel's lack of experience alone gives rise to an ineffective assistance of counsel claim. Respondent's argument misconstrues Mr. Menzies's claim and fails to address the merits of the claim as raised. Defense counsel's lack of experience and training led to her failure to initiate a timely mitigation investigation and resulted in counsel's ineffective and incomplete mitigation investigation.

Respondent also asserts that Mr. Menzies's claims arising from defense counsel's failure to investigate by obtaining records and documentary evidence in support of the mitigation presented, identifying and presenting evidence from additional key witnesses, and presenting appropriate expert witnesses fails because, as the Utah Supreme Court concluded, defense counsel "'utilized multiple witnesses and professionals to provide a proper mitigation defense'" and "'additional evidence and witnesses were unnecessary.'" (ECF No. 123 at 165-67, quoting *Menzies IV*, 344 P.3d at 627.) The errors in the Utah Supreme Court's analysis and reasoning are addressed above, *see supra*, sections A and B in this claim. To the extent Respondent attempts to characterize the documentary and witness-based evidence that counsel failed to obtain and present as simply additional evidence in support of facts already proved, Respondent's argument is factually inaccurate.

During post-conviction proceedings, Mr. Menzies provided significant additional mitigating evidence that defense counsel failed to present at trial: including evidence that Mr. Menzies was sexually abused as a child; that Mr. Menzies's father taught him to steal and asked him to kill a man; that a petition was filed against Mr. Menzies's parents for

failure to care for Mr. Menzies when he was seven years old; and that a neuropsychological evaluation of Mr. Menzies indicated significant areas of weakness, indicative of neurological dysfunction, along with mental illness, and organic brain damage. (5th Am. Pet. at 30-33, 40-41; see also 5th Am. Pet., Ex. S, Aff. of Marissa Sandall-Barrus ¶¶ 4-7; 5th Am. Pet., Ex. B, Aff. of Dr. Kockler at 10-15.) In addition, in the instant proceedings, Mr. Menzies has offered evidence that *all* of his caregivers were impaired by alcohol or drug addiction, that Mr. Menzies was exposed to his biological father's sexually predatory behavior, and perhaps most importantly that the prolonged and enduring neglect, abuse, and trauma had long-term impacts on Mr. Menzies's psychological functioning. Because defense counsel failed to present this evidence at trial, the sentencing judge was unable to consider the effect of Mr. Menzies's complete history of trauma and abuse on his ability to control his impulses. The evidence adduced in post-conviction and in habeas is not simply additional proof of mitigation offered at trial.

Respondent repeats this same error in attempting to dismiss Mr. Menzies's claim based on defense counsel's failure to present evidence of the impact of Mr. Menzies's family history of alcoholism and addiction. Respondent again points to the incomplete evidence offered by defense counsel (only that Mr. Menzies's biological father and unspecified grandparents were alcoholics) and argues that since defense counsel put on some evidence related to a family history of alcoholism, counsel's performance could not have been deficient. (ECF No. 123 at 167-68.) However, the evidence presented by defense counsel was unconstitutionally incomplete. In actuality, Mr. Menzies was raised

in an environment where pervasive and debilitating addiction was the norm. (*See* ECF No. 109 at 231-33.) In fact, *all* of Mr. Menzies's caregivers—including his mother, grandmother, father, and both step-fathers—suffered from alcoholism or drug addiction. Mr. Menzies's family history of addiction was also much more extensive than presented by defense counsel. Not only did Mr. Menzies's father and unspecified grandparents suffer from alcoholism, Mr. Menzies's mother, maternal grandmother, and maternal uncles all suffered from addiction as well.[18]

Finally, Respondent relies on essentially this same argument again in attempting to undermine Mr. Menzies's claim that defense counsel failed to investigate and present evidence that Mr. Menzies experienced significant neglect, trauma, and abuse as a child. As Mr. Menzies acknowledged in the Petition, defense counsel presented Mr. Menzies's background through two witnesses—his sister and aunt. (ECF No. 109 at 234-35.) In addition, defense counsel presented two experts addressing Mr. Menzies's background, although neither expert explained the extent of Mr. Menzies's childhood neglect, abuse, or trauma or the impact of that background on Mr. Menzies's emotional, psychological, and neurological development. (ECF No. 109 at 234-39.) Respondent argues that because defense counsel presented some evidence of childhood abuse and neglect, no additional evidence was necessary. (ECF No. 123 at 170.)[19]

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[18] Respondent argues primarily that the Utah Supreme Court's conclusion that this evidence was "unnecessary" was not an unreasonable application of federal law or based on an unreasonable determination of the facts. (ECF No. 123 at 168.) Mr. Menzies has addressed the legal and factual errors in the Utah Supreme Court's decision above. *See supra*, sections A and B of this claim

[19] Respondent again repeats the argument that the Utah Supreme Court's conclusion that this evidence was "unnecessary" was not an unreasonable application of federal law or

Mr. Menzies has alleged that defense counsel's mitigation investigation was woefully incomplete and that defense counsel failed to present an accurate and complete picture of Mr. Menzies's history of neglect, abuse, and trauma. (ECF No. 109 at 234-39.) In the Petition, Mr. Menzies identified significant facts that defense counsel failed to present, including that beginning when Mr. Menzies was seven years old, his mother would disappear for days at a time without leaving Mr. Menzies or his siblings in the care of an adult; Mr. Menzies's mother's addiction to pain medication and severe medical illness made her unable to care for her children even when she was present; and Mr. Menzies was sexually abused by his stepmother and exposed to the deviant sexual predation of his father. (*Id.* at 236-37.) Defense counsel's superficial mitigation investigation constituted deficient performance. *See Sears*, 561 U.S. at 952, 953-56 (holding that trial counsel's inadequate background investigation, which was limited to one day or less of interviews of witnesses later presented, was deficient and prejudicial); *Wilson*, 536 F.3d at 1083 (noting that the Supreme Court has found deficient performance in cases where "counsel conducted some inquiries," because "the Court required a more robust, complete investigation, tethered at minimum to the norms of adequate investigation articulated by the American Bar Association Standards for Criminal Justice" (citing *Rompilla*, 545 U.S. 374; *Wiggins*, 539 U.S. 510; *Williams (Terry)*, 529 U.S. at 362)); *see also United States v. Barrett*, 797 F.3d 1207, 1225 (10th Cir. 2015) (finding that a mitigation investigation based on a series of very brief interviews with

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based on an unreasonable determination of the facts. (ECF No. 123 at 170.) Mr. Menzies has addressed the legal and factual errors in the Utah Supreme Court's decision above. *See supra*, sections A and B of this claim.

family members immediately preceding their testimony is typically deficient performance); *Hooper*, 314 F.3d at 1171 ("A decision not to undertake substantial pretrial investigation and instead to 'investigate' the case during the trial is not only uninformed, it is patently unreasonable." (internal quotation marks and brackets omitted)). The evidence indicates that counsel failed to make a reasonable effort "to discover all reasonably available mitigating evidence" despite indications in the record that Mr. Menzies had a significant childhood history of trauma, abuse, and neglect. *See Wiggins*, 539 U.S. at 524.

D. Defense counsel was ineffective in failing to prepare and present appropriate expert witnesses during the penalty phase of Mr. Menzies's capital trial.

Defense counsel's lack of preparation and failure to conduct a timely mitigation investigation also impeded the presentation of essential expert testimony. While trial counsel presented two experts addressing parts of Mr. Menzies's background, trial counsel failed to present any expert testimony explaining how Mr. Menzies's childhood neglect, abuse, and trauma affected his emotional, psychological, and neuropsychological makeup and his behavior at the time of the crime. In addition, counsel's failure to conduct an adequate mitigation investigation prior to trial prevented counsel from preparing the experts presented. (*See* ECF No. 109 at 247-49.)

Respondent argues that because defense counsel presented experts at sentencing, counsel was not deficient in failing to prepare and present additional experts. (ECF No.

123 at 166-67.)[20] Respondent fails to address the fact that defense counsel also failed to adequately prepare the limited experts they did present at sentencing. While defense counsel presented testimony from two experts during the penalty phase, counsel's failure to conduct an adequate mitigation investigation prior to trial prevented counsel from preparing the experts. *See Wilson*, 536 F.3d at 1089; *Hooper*, 314 F.3d at 1169-71 (finding counsel's reliance on and presentation of expert testimony without adequate investigation resulted in prejudicially deficient performance). In addition, although defense counsel presented two experts, defense counsel failed to obtain an expert to explain the impact of Mr. Menzies's traumatic past. As a result, defense counsel did not present important information that would have allowed the sentencer to fully understand the impact that Mr. Menzies's traumatic and abusive childhood had on Mr. Menzies's neurobiological, psychosocial, and behavioral development. (*See* ECF No. 109 at 251-53.)

E. Mr. Menzies was denied effective assistance of counsel by the cumulative prejudicial impact of defense counsel's deficient performance.

The impact of defense counsel's many errors in the investigation and presentation of mitigation must be considered cumulatively. Respondent does not dispute, nor could he, that defense counsel's errors must be considered cumulatively in assessing the prejudicial impact of defense counsel's deficient performance. (*See* ECF No. 123 at 171-

[20] As with previously discussed subclaims, Respondent argues primarily that the Utah Supreme Court's conclusion that additional experts were "unnecessary" was not an unreasonable application of federal law or based on an unreasonable determination of the facts. (ECF No. 123 at 167.) Mr. Menzies has addressed the legal and factual errors in the Utah Supreme Court's decision above. *See supra*, sections A and B of this claim.

72.) In fact, United States Supreme Court precedent makes clear that when assessing the impact of defense counsel's conduct on the reliability of the proceedings, counsel's deficiencies must be considered cumulatively as opposed to individually. *See*, *e.g.*, *Strickland*, 466 U.S. at 695 ("In making this [prejudice] determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury."). As detailed above, the Utah Supreme Court's opinion makes clear that the court never considered the cumulative weight of the mitigation, rather the court individually discarded each proffered mitigating factor resulting in a decision involving an unreasonable application of clearly established federal law. *See supra*, section A.4 of this claim.

Respondent attempts to characterize the mitigating evidence that was not presented as a result of defense counsel's deficient performance as adding "little concrete evidence to the background evidence the judge did hear" and failing to alter the picture of Mr. Menzies's background. (ECF No. 123 at 172.) However, considered cumulatively defense counsel's numerous errors resulted in a failure to present a complete picture of Mr. Menzies's background. The mitigation information counsel failed to investigate and present included evidence that Mr. Menzies was sexually abused by his step-mother; Mr. Menzies was raised by a neglectful mother who frequently abandoned her children by leaving them alone without adult care for days at a time; *all* of Mr. Menzies's caregivers, including his mother, biological father, both step-fathers, and maternal grandmother struggled with drug or alcohol addiction; Mr. Menzies was exposed to sexually deviant behavior as a result of his father's sexual predation; and expert testimony demonstrated

that the neglect, abuse, and trauma that pervaded Mr. Menzies's childhood had significant psychological and neurological impacts on Mr. Menzies. "Such evidence of childhood abuse, neglect, and instability can play a significant role in mitigation." *Barrett*, 797 F.3d at 1229-30; *see also Sears*, 561 U.S. at 948; *Wiggins*, 539 U.S. at 516-17. Defense counsel's deficient performance resulted in an extremely limited mitigation presentation, undermining confidence in Mr. Menzies's sentence.

CLAIM 33

The state court failed to record all proceedings in violation of Mr. Menzies's right to a public trial and his right to appeal and seek collateral review of his conviction and sentence under the Sixth and Fourteenth Amendments.

As Mr. Menzies acknowledged in the Petition, this claim was not previously presented to a state court. (ECF No. 109 at 258.) Mr. Menzies can demonstrate cause and prejudice sufficient to overcome the default of this claim based on the ineffective assistance of his state appellate and post-conviction counsel in failing to raise the claim. (ECF No. 109 at 258.) This claim should have been raised on direct appeal, but was not. Appellate counsel was ineffective for failing to raise this meritorious claim on appeal, and appellate counsel's ineffectiveness provides cause to overcome the default of this claim. *See Strickland*, 466 U.S. 668; *Evitts v. Lucey*, 469 U.S. 387, 396 (1985); *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (counsel's ineffectiveness can constitute cause). Moreover, post-conviction counsel was also ineffective in failing to raise this claim and the associated claims of trial and appellate counsel's ineffectiveness. *See Martinez*, 132 S. Ct. at 1315; *Ha Van Nguyen v. Curry*, 736 F.3d 1287, 1293 (9th Cir. 2013); (*see also*

supra Part I.E. (this Court has found *Martinez* applies in Utah through *Trevino*). This Court can and should review the merits of this claim. The ineffective assistance of trial, appellate, and post-conviction counsel claims are raised in claims 14.H, 37, and 38, respectively.

Respondent agrees that the Constitution and Supreme Court precedent dictate that Mr. Menzies has a constitutional right to a sufficient record to assure meaningful review of his claims. (ECF No. 123 at 175.) However, Respondent contends that this claim fails because Mr. Menzies has not established that the incomplete record in Mr. Menzies case prevented proper consideration of Mr. Menzies's claims. (ECF No. 123 at 176.) Contrary to Respondent's contention, the missing portions of the record are directly relevant to several of Mr. Menzies's claims.

As Mr. Menzies explained in his Petition, while it is impossible to fully discern the content of all unrecorded proceedings, the record reveals that the unrecorded proceedings included discussions of important matters relevant to Mr. Menzies's claims of violations of his constitutional rights. For example, the record reveals that the unrecorded proceedings related to several claims raised in direct appeal and in habeas, including the following: proceedings discussing the security for trial (TR 02/01/1988, ROA 1152 at 23-24), proceedings relevant to Claims 8 and 9 in the Petition and Point 8 in the direct appeal; discussion of the removal of prospective jurors for cause and with peremptory challenges (*see, e.g.*, TR 02/10/1988, ROA 1152 at 163-65; TR 02/17/1988, ROA 1154 at 888), proceedings relevant to Claim 2 in the Petition and Point 2 in the direct appeal; the availability and testimony of Walter Britton (TR 02/18/1988, ROA 1155 at 959; *see also*

TR 02/26/1988, ROA 1157 at 1817-18), proceedings relevant to Claim 5 in the Petition and Point 5 on direct appeal; the defense's objections to State Exhibit 1 during the guilt phase (TR 02/18/1988, ROA 1155 at 978), proceedings relevant to Point 11 on direct appeal; the events following a juror fainting during the testimony of the medical examiner (TR 02/25/1988, ROA 1157 at 1621-22), events relevant to Claims 8 and 9 in the Petition and Point 8 on direct appeal; whether or how to admonish the jurors after they heard testimony that Mr. Menzies was on parole (TR 03/01/1988, ROA 1158 at 1945; ROA 822-23, 03/01/1988 Minute Entry), proceedings relevant to Claim 7 in the Petition and Point 7 on direct appeal; and the guilt phase jury instructions and arguments or objections related to the instructions (TR 03/07/1988, ROA 1160 at 2604, 2606), proceedings relevant to Claim 13 in the Second Amended Petition and Point 9 on direct appeal.

In this capital case, Mr. Menzies was denied meaningful appellate review as a result of the court's failure to ensure that all important trial proceedings were part of the record. *See Parker v. Dugger*, 498 U.S. 308, 321 (1991); *Griffin v. Illinois*, 351 U.S. 12, 20 (1956). The unrecorded proceedings prevent proper consideration of Mr. Menzies's claims and result in a violation of his Sixth and Fourteenth Amendment rights. Mr. Menzies is entitled to relief on this Claim.

CLAIM 34

The State denied Mr. Menzies's rights to due process of law guaranteed by the Fourteenth Amendment by failing to give him the benefit of well-established state law in his direct appeal.

Mr. Menzies stands on the law and facts as pled in the Petition (ECF No. 109 at 262-65), incorporating those from Claim 2 by reference (ECF No. 109 at 60-69, and *supra* at 13-14).

CLAIM 35

The State denied Mr. Menzies's rights to due process of law guaranteed by the Fourteenth Amendment by failing to give him the benefit of well-established state law in his direct appeal.

Mr. Menzies stands on the law and facts as pled in the Petition (ECF No. 109 at 265-67).

CLAIM 36

The state court erred in its application of the *Wood* factors in violation of Mr. Menzies's right to due process under the Fourteenth Amendment and to a reliable sentence under the Eighth Amendment.

A state's sentencing procedure must direct and limit the decision maker's discretion "'so as to minimize the risk of wholly arbitrary and capricious action.'" *Zant v. Stephens*, 462 U.S. 862, 874 (1983) (quoting *Gregg v. Georgia*, 428 U.S. 153, 189 (1976)). The sentencing process must consider "relevant facets of the character and record of the individual offender or the circumstances of the particular offense." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). The United States Supreme

Court has emphasized the need for individualized sentencing that gives full effect to all of the evidence which is presented to the court. *See Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). In Utah, a sentencing body must engage in a two-step process where they first "consider[] the totality of the aggravating and mitigating circumstances" and, second, may only impose a death sentence where it is "persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and . . . that the imposition of the death penalty is justified and appropriate in the circumstances." *State v. Wood*, 648 P.2d 71, 83 (Utah 1982); *see also State v. Holland*, 777 P.2d 1019, 1025 (Utah 1989).

Respondent's answer to this claim is, as with many other claims, simply a restatement of the claim and the Utah Supreme Court's affirmance of the denial of the issue on direct appeal. (ECF No. 123 at 180-83, citing *Menzies II*, 889 P.2d at 406.) Respondent does argue that Mr. Menzies "fails to establish why the Utah Supreme Court should have ignored the Judge's own statement that he had 'weighed and evaluated the mitigating circumstances.'" (ECF No. 123 at 182-83, citing TR 03/23/1988, ROA 1162 at 3268.) This is a conclusory statement that fails to address the facts alleged by Mr. Menzies.

As recounted in the Petition, there were numerous problems with the trial court's imposition of sentence. First, the trial court recounted the extensive aggravating evidence, including Mr. Menzies's entire prison file and numerous unadjudicated prior bad acts, and considered inapplicable and uncharged aggravating circumstances. (*See, e.g.*, TR 03/23/1988, ROA 1162 at 3249-64; *see also* Claims 26 and 29.) Second, the use of crimes for which there were no convictions triggered an obligation of the trial court to

make written findings which it failed to do.[21] *See State v. Lafferty*, 749 P.2d 1239, 1260 & n.16 (Utah 1988) (creating this rule to protect "the federal constitutional rights of the accused to due process and to be free from cruel and unusual punishment," which "are violated by the admission of unfairly prejudicial evidence in the penalty phase."). Third, while the trial court said it would address the mitigating evidence, it did not actually fully do so. (TR 03/23/1988, ROA 1162 at 3244-67.) And, fourth, the trial court simply stated that it had "weighed and evaluated the mitigating circumstances and the aggravating circumstances" and determined that "the aggravating circumstances outweigh[ed] the mitigating circumstances beyond a reasonable doubt" without the record supporting the conclusion that it had actually done so. (TR 03/23/1988, ROA 1162 at 3268.)

Therefore, the Utah Supreme Court's determination that the trial court had met its obligations under *Wood* was an unreasonable determination of fact not supported by the record. Mr. Menzies should be granted relief on this claim.

CLAIM 37

Appellate counsel's failure to raise meritorious claims on direct appeal violated Mr. Menzies's rights to the effective assistance of counsel and due process under the Sixth and Fourteenth Amendments.

As stated in the Petition, and as discussed above, at the appropriate time, Mr. Menzies intends to seek a stay of these proceedings pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), to properly exhaust any unexhausted claims in state court. (ECF No. 109 at 90, 271; *see also*, *supra*, at 1 n.1.) Respondent's arguments on the merits of the

[21] While this error on its own may not warrant reversal, it must be considered in aggregate with all of the other errors detailed in this claim.

underlying claims and whether they are potentially meritorious as the bases for an ineffective assistance of trial counsel claim are premature and will not be addressed in this reply. If Mr. Menzies moves this Court for a *Rhines* stay, the parties' arguments may be heard then.

CLAIM 38

Mr. Menzies was denied his Fifth, Sixth, Eighth, and Fourteenth Amendment rights by the ineffective assistance of counsel during state post-conviction proceedings.

In his Petition, Mr. Menzies detailed the problems with his post-conviction proceedings, and with his post-conviction counsel, Ted Weckel, to establish cause and prejudice to overcome any default of ineffective assistance of trial counsel claims, or any faulty investigation or pleading of such claims. (*See* ECF No. 109 at 273-96.) Mr. Menzies also elaborated on the problems with the Utah post-conviction process to argue that there is effectively an "absence of available State corrective process" in the Utah or, alternatively, that "circumstances exist that render such process ineffective to protect the rights of the applicant." (*See* ECF No. 109 at 296-302, quoting 28 U.S.C. § 2254(b)(1)(B)(i)-(ii).)

As a threshold matter, Respondent's arguments about the inapplicability of *Martinez v Ryan*, 132 S. Ct. 1309 (2012), in Utah may be disregarded, as they have already been rejected by this Court. *See Lafferty v. Crowther*, No. 2:07-CV-322, 2016 U.S. Dist. LEXIS 138845, at *5 (D. Utah Oct. 5, 2016) ("*Trevino* and *Martinez* do apply in Utah, because although Utah's Rule 23B allows an ineffective assistance claim to be

raised on direct appeal under narrow circumstances, the rule does not provide for the scope of evidentiary development that is ordinarily necessary for claims of ineffective assistance of counsel.").

Also, there is no rational reason to not applying *Martinez* to an appellate counsel context. The basis for the equitable rule is the "key difference between initial-review collateral proceedings and other kinds of collateral proceedings." 132 S. Ct. at 1316. "When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim." *Id*. Therefore, "if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default . . . no court will review the prisoner's claims." *Id*. This is as true for ineffective assistance of appellate counsel claims as it is for trial counsel claims. They cannot be brought in any proceeding before post-conviction, which then becomes the initial-review collateral proceeding for claims related to the performance of appellate counsel. If they are not heard in that proceeding, they will likely never be heard by any court.

A. Mr. Menzies's post-conviction counsel was ineffective for failing to reraise claims from his defaulted amended state post-conviction relief petition, as instructed by the Utah Supreme Court.

As shown in the Petition, Mr. Menzies had a post-conviction petition pending with 26 claims before the appointment of Edward Brass, the attorney who eventually defaulted his case. (ECF No. 109 at 276) When the Utah Supreme Court remanded Mr. Menzies's case for renewed post-conviction proceedings, it "set aside the proceedings that took place during the time that Brass was representing Menzies." *Menzies III*, 150 P.3d at

518. This would have reset the case back to that initial petition and its 26 claims. Weckel, however, defaulted 24 of those claims.

Respondent claims that "Menzies fails to assert what claims were not included." (ECF No. 123 at 188.) In Claim 38 of the Petition, Mr. Menzies identified the initial post-conviction petition and amendments. (ECF No. 109 at 276, citing PCR ROA 44-82, 1215-16, 1231-32.) Mr. Menzies also indicated the two claims Weckel did include in the Third Amended Petition, specifically the trial court's error in admitting Britton's preliminary hearing testimony and the trial court's misapplication of the heinousness aggravator. (ECF No. 109 at 277, citing 10/12/2010 3rd Am. Pet. at 31, 33.) Finally, Mr. Menzies stated that the defaulted claims had been included in his Petition. (ECF No. 109 at 277.) Throughout his Petition, in each claim, Mr. Menzies indicated where the claim was raised in state court. Respondent's claim that Mr. Menzies has failed to identify the claims Weckel defaulted is false.

Respondent also claims that default of these claims, in and of itself, does not meet the *Martinez* standard. (ECF No. 123 at 187-88.) He writes that "[m]erely asserting that claims were not raised, especially claims that were previously raised and lost, is not sufficient to establish ineffective assistance of counsel." (ECF No. 123 at 188.) This does not account for the requirement that counsel's decisions must be reasonable to be considered effective assistance of counsel. Also, Respondent is incorrect regarding what Mr. Menzies has shown in his Petition.

A petitioner must show cause and prejudice to overcome the default of any of his ineffective assistance of trial counsel claims. *Martinez*, 132 S. Ct. at 1318-19. Cause

may be shown "where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland*." *Id.* at 1318. Then, "[t]o overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Id.* at 1318-19 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003)).

In Claim 38, Mr. Menzies offered a detailed accounting of the ineffective assistance of Weckel—that he was unqualified for appointment to death penalty or post-conviction cases; that he did not understand how to investigate, develop, and plead capital post-conviction claims; that he made decisions based on generating payments for himself rather than case needs; and how this conflict drove his choices, rather than a reasonable strategy for litigating the case in the best interest of his client. Mr. Menzies also established that these factors drove Weckel's choices about what claims to pursue. This shows the ineffective assistance of post-conviction counsel with regard to the defaulted claims.

Throughout the Petition, in the underlying claims themselves, Mr. Menzies showed how those claims were substantial. Mr. Menzies has met the standard set by *Martinez*.

B. Mr. Menzies's post-conviction counsel had an actual conflict of interest that resulted in essential mitigation work not being performed.

Respondent argues that a conflict of interest does not fall under the *Martinez* standard and that Mr. Menzies has failed to establish that the conflict constituted ineffective assistance of counsel. (ECF No. 123 at 189-91.)

First, *Martinez* cites directly to the *Strickland* standard for how a petition may establish ineffective assistance of post-conviction counsel. 132 S. Ct. at 1318. *Strickland* includes an actual conflict of interest as a basis for ineffective assistance of counsel, a unique one where prejudice is presumed. 466 U.S. at 692. Therefore, Respondent is wrong that a conflict of interest does not fall under the *Martinez* standard. Also, Respondent already knows he is wrong because this issue also arises in Claim 14.A (ECF No. 109 at 117-21), and Respondent addressed the merits of that claim in his Response. (ECF No. 123 at 106-09.)

Second, Respondent ignores the facts alleged in Claim 38 to reach its conclusion that Mr. Menzies has not met his burden. Respondent mischaracterizes Mr. Menzies's arguments as mere disagreements between client and counsel, or between members of the team. (ECF No. 123 at 190.) While counsel is entitled to make decisions regarding how to manage a case, those choices must be reasonable. *Strickland*, 466 U.S. at 687-88.

The only specific instance that Respondent challenges is Weckel's decision to not conduct in-person interviews of significant mitigation witnesses, Mr. Menzies step-mother Sherry Gonzales and half-sister Margaret "Jeanette" Menzies Barela, both of whom have since died. (*See* ECF No. 123 at 190-91; *see also* ECF No. 109 at 279-81.)

Respondent writes that "Menzies has not established that it was an unreasonable decision to interview them by phone rather than in person, thereby saving the expense of investigator travel time and costs." (ECF No. 123 at 190-91.) But Respondent ignores important other facts: that Weckel obtained approval for funding from the court for a trip to interview these witnesses in person after his mitigation investigator emphasized the importance of in person interviews, then lied to his mitigation investigator about the court approving the trip, then lied to the court about his mitigation investigator agreeing to cancel the trip, and generally operating the case in a way to direct the funding to himself. (ECF No. 109 at 278-82.)

When Weckel told the court, about the canceled trip, "we have saved the State that expense," he was not considering the best interest of his client. (01/14/2011 Letter to J. Lubeck from Weckel at 1 (Sealed).) One of an attorney's "basic duties. . . is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest." *Strickland*, 466 U.S. at 688. Even taking Respondent's position that Weckel was concerned about "saving the expense of investigator travel time and costs," it still leads to the conclusion that he was putting these matters ahead of Mr. Menzies's interests. (ECF No. 123 at 190-91.) Based on the evidence, however, Weckel was clearly not concerned with the interests of anyone but his own. "[H]e was going to get rich and retire off his work on Mr. Menzies's case."[22] (ECF No. 109 Ex. 63, Declaration of Marissa Sandall-Barrus ¶ 7.)

[22] Respondent's take on this statement, that "[i]t merely shows that he was getting paid for working on Menzies's case" is charitable to the point of absurdity. (ECF No. 123 at

C. Post-conviction counsel conducted a deficient mitigation investigation and failed to adequately plead the ineffective assistance of sentencing counsel claim.

Respondent criticizes Mr. Menzies's pleading generally, arguing that the claim is meritless and that "postconviction counsel is not required to perform a mitigation investigation." (ECF No. 123 at 191-93.) Respondent, however, again, only specifically addressed the merits of whether Weckel was ineffective in investigating the claim of sexual abuse, failing to respond to the abundance of facts and arguments Mr. Menzies has pled in support of his claims. (ECF No. 123 at 194-96.)

The United States Supreme Court has warned against "undue reliance on the assumed reasonableness of counsel's mitigation theory." *Sears*, 561 U.S. at 953. That counsel's approach might appear reasonable, "does not obviate the need to analyze whether counsel's failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudiced" a petitioner. *Id*. The question is not whether "counsel did present some mitigation evidence," but, rather, whether what was presented was "the significant mitigation evidence a constitutionally adequate investigation would have uncovered." *Id*. at 945. Therefore, courts are cautioned against denying relief on the basis of "a superficially reasonable mitigation theory during the penalty phase." *Id*. at 954 (citing *Williams (Terry)*, 529 U.S. at 398, and *Rompilla*, 545 U.S. at 378.

Notably, in each of these cases, the claim is a failure to conduct an adequate mitigation investigation, and the claim was brought in post-conviction proceedings, after post-conviction counsel had conducted a thorough investigation of the case presented at

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190.)

trial, discovered deficiencies, developed evidence in support of the ineffective assistance of trial counsel claim, and properly presented it to the courts. *See Sears*, 561 U.S. at 946; *see also Williams (Terry)*, 529 U.S. at 370, and *Rompilla*, 545 U.S. at 378. It's clear that post-conviction counsel has a duty to investigate the mitigation case presented at trial and to follow up on any omissions or other defects with that investigation. Whereas Respondent has the luxury of not investigating and simply pronouncing the adequacy of a case, the duties of post-conviction counsel are markedly different. As these cases show, post-conviction counsel is required to "analyze whether counsel's failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudiced" their client. *Sears*, 561 U.S. at 953. This cannot be done without investigation.

Respondent does not address the facts Mr. Menzies alleges in this part of the claim—family members were not interviewed or otherwise investigated; records were not requested; Weckel prohibited his mitigation investigator from creating a social history, an indispensable tool to defense teams,[23] on the basis that he believed witness affidavits would be sufficient, yet he also failed to obtain witness affidavits; Weckel disregarded the advice of his investigators, both of whom had capital experience whereas he had none; and Weckel behaved in a way that bred distrust with Mr. Menzies's sister—an essential mitigation witness. (ECF No. 109 at 283-86.)

[23] "To support his claim, petitioner presented testimony by . . . a licensed social worker . . . concerning an elaborate social history report he had prepared containing evidence of the severe physical and sexual abuse . . . Relying on state social services, medical, and school records, as well as interviews with petitioner and numerous family members, [the social worker] chronicled petitioner's bleak life history." *Wiggins*, 539 U.S. at 516.

Instead, Respondent focuses only on the sexual abuse issue. Confusingly, Respondent claims that Mr. Menzies's argument that "if Weckel had established these additional details he could have used them in presenting a claim that trial counsel was ineffective at sentencing" is a meritless argument, but then Respondent tries to rely on the post-conviction appeal decision for support. (ECF No. 123 at 194, citing *Menzies IV*, 344 P.3d at 626.) The Utah Supreme Court found that Weckel had adequately failed to plead the issue, failed to allege adequate facts in support, and failed to show "that a reasonable investigation would have uncovered such evidence." *Menzies IV*, 344 P.3d at 626. This is not a finding that supports the argument that Weckel's investigation was reasonable. To the contrary, it is a finding that supports Mr. Menzies's argument that Weckel failed in his attempt to investigate, develop, and plead the claim.

In his Petition, both in Claim 31 and Claim 38, Mr. Menzies alleges a number of facts that his present counsel have uncovered during their investigation into the sentencing phase of Mr. Menzies's trial, facts which were available to Weckel, but he did not find because he did not look. If Weckel had listened to his more experienced mitigation investigator and conducted a reasonable investigation according to established professional norms, he would have discovered these facts and raised them to the post-conviction court. As shown above, just because counsel's approach might appear reasonable on first glance, "does not obviate the need to analyze whether counsel's failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudiced" a petitioner. *Sears*, 561 U.S. at 953. The question is not whether "counsel did present some mitigation evidence," but, rather, whether what was presented

was "the significant mitigation evidence a constitutionally adequate investigation would have uncovered." *Id*. at 945. Weckel did not do his duty to perform that constitutionally adequate investigation, and, as a result, he could not present the readily available evidence it would have uncovered.

D. Post-conviction counsel was deficient in his use of experts, leaving the courts without an adequate psychological accounting of Mr. Menzies, preventing an individualized assessment of the appropriateness of the death penalty.

Respondent argues that choice of expert cannot be cause to overcome default under *Martinez*, that choice of expert is a strategic choice, and that Mr. Menzies cannot show prejudice because some evidence of Mr. Menzies's trauma and behavioral deficits were presented at trial. (ECF No. 123 at 196-98.)

What experts are used and how is central to a mitigation case. Lawyers are not psychologists or mental health experts. The *Sears* case, cited above, turned in part on evidence presented by defense experts. *See* 561 U.S. at 949-50; *see also Wiggins*, 539 U.S. at 516 (defense expert presented evidence chronicling Wiggins "bleak life history" and severe physical and sexual abuse). In *Rompilla*, trial counsel's experts were not provided with a full set of records, which inhibited their ability to give accurate testimony. *See* 545 U.S. at 391-92. The notion that the selection and use of experts cannot constitute deficient performance for failing to raise issues to a court is contradicted by clearly established federal law.

At a macro level, Respondent is correct that selection of experts may reflect a strategic choice. As always, those choices must be reasonable to be considered strategic.

Respondent's arguments and case cites, however, do not support a contention that Weckel made reasonable choices.

Respondent relies on the fallacious argument that if some evidence is presented, that is good enough. As shown above, this is wrong. *See Sears*, 561 U.S. at 946 (the question is not whether "counsel did present some mitigation evidence," but, rather, whether what was presented was "the significant mitigation evidence a constitutionally adequate investigation would have uncovered"). As shown in Claims 31 and 38, there was an abundance of facts and detail left undiscovered, unexplored, and unpresented either during trial or in post-conviction. This evidence was valuable both on the bare facts themselves and as it could have been analyzed and explained in aggregate by an appropriate expert.

Respondent cites some cases in an attempt to support his position. (ECF No. 123 at 197.) In *Leavitt v. Arave*, the issue was not what type of expert to use but whether trial counsel should have put on testimony from an expert that was retained but not called at trial. 682 F.3d 1138, 1140-41 (9th Cir. 2012). Trial counsel chose to not call the expert because "his testimony would have corroborated the government's." *Id*. at 1141. While this seems like a reasonable choice by trial counsel, it is not relevant to this claim, which is about choosing the right type of expert. Similarly, the issue in *Worthington v. State*, is not about the type of expert used but whether defense counsel should have shopped for an expert that would give favorable testimony. 166 S.W.3d 566, 574-75 (Mo. 2005). Again, that defense counsel chose not to shop for a more favorable expert seems reasonable, but is not on point for the issue at hand.

As shown in the Petition, the mitigation case presented at trial included some relevant evidence but left gaps: "The overwhelming impact of such massive losses, caretaker indifference, and abandonment, as well as sexual exploitation, was almost completely unaccounted for in Mr. Menzies's psychological records." (ECF No. 109 at 290, quoting Ex. 62, Declaration of Dr. Victoria Reynolds ¶ F.2.) The gaps could have been filled by a proper expert. (*See* ECF No. 109 at 290, quoting Ex. 62, Declaration of Dr. Victoria Reynolds ¶ F.3 ("The health and psychiatric outcomes of prolonged child maltreatment of the kind Mr. Menzies experienced are myriad and well established in both the medical and psychological literature.").)

Weckel, by failing to understand death penalty defense work or post-conviction proceedings, and by failing to listen to his more experienced defense team members, was unable to fill the gap. His use of a neuropsychologist was a good first step, but it was not enough. Neuropsychological testing is useful for discovering brain damage and other functional anomalies, such as it found in Mr. Menzies, but it cannot explain the deficits in Mr. Menzies's behavioral, emotional, and psychological functioning. Weckel was unreasonable in not turning to an expert who could properly evaluate and explain those deficits. Mr. Menzies was prejudiced by not having his trauma accounted for and explained, either during sentencing or during post-conviction review.

E. Post-conviction counsel conducted a deficient mitigation investigation and failed to adequately plead the ineffective assistance of guilt-phase counsel claims.

1. George Benitez

Respondent did not address the underlying ineffective assistance of trial counsel claim on the merits where it was raised in Claim 14.B.5 of the Petition. Here, Respondent's arguments are, in essence, that because Mr. Menzies said trial counsel failed to "effectively" investigate Benitez and because Benitez's declaration does not specifically aver he would have said the same things to trial counsel, Mr. Menzies has not established this is a meritorious claim. (ECF No. 123 at 198-200.)

The underlying claim is not that trial counsel should have simply put Benitez on the stand. The claim is that trial counsel should have investigated Benitez, beginning with an interview, and following up from there to determine whether he would have been a beneficial defense witness. According to what Benitez said in his declaration, he clearly would have been a beneficial witness.

Present counsel for Mr. Menzies sought out Benitez and he readily admitted to everything he attested to in his declaration. Trial counsel could have easily accomplished the same results. Reasonable, typical practice is to approach the witness the State intended to call to see if they would speak to the defense investigators. Benitez has not evinced a reluctance to talk about his manufactured statement to law enforcement or Britton's plan to lie to get a deal on his federal sentencing.

Weckel could have done the same work, but he did not. As explained in Claim 14.B.5, this was a substantial claim of the ineffectiveness of trial counsel which was defaulted by the ineffective assistance of post-conviction counsel.

2. Biased jurors who should have been removed for cause.

Respondent does not address the merits of this Claim but refers only to Claims 2 and 14.C. (ECF No. 123 at 200-01.) Claim 2 is related here but only as the context in which the factual basis for Claim 14.C arose. Regarding Claim 14.C, Respondent chose not to respond to the merits of this subclaim, therefore, its merits arguments are waived. *See* Fed. R. § 2254 Cases 5(b). This Court may accept Mr. Menzies's arguments as uncontroverted.

As far as this claim relates to the ineffective assistance of appellate counsel, Mr. Menzies addressed that concern above.

3. Mr. Menzies was forcibly shackled in front of the jury.

The factual basis for this claim implicates several different rights, including the rights to a fair trial and impartial jury who should not have seen him shackled (Claim 8), the due process right that should have prohibited the shackling (Claim 9), the right to effective assistance of trial counsel who should have raised the due process claim to the trial court (Claim 14.G), and the right to effective assistance of appellate counsel who should have raised the issue on appeal (Claim 37).

Specifically with regard to Claim 38, the underlying claim is 14.G, as stated in the Petition, along with Claim 37. (ECF No. 109 at 294.) In response, Respondent only

references Claim 9, summarizing his argument in response to Claim 9. (ECF No. 123 at 201.)

Regarding Claim 14.G, Respondent chose not to respond to the merits of this subclaim, therefore, its merits arguments are waived. *See* Fed. R. § 2254 Cases 5(b). This Court may accept Mr. Menzies's arguments as uncontroverted.

As far as this claim relates to the ineffective assistance of appellate counsel, Mr. Menzies addressed that concern above.

4. Failure to record all proceedings.

The factual basis for this claim also implicates several different rights, including the rights to a public trial and to appeal and seek collateral under the Sixth and Fourteenth Amendments (Claim 33), the right to effective assistance of counsel who should have preserved the claim in the trial court (Claim 14.G), and the right to effective assistance of appellate counsel who should have raised the issue on appeal (Claim 37).

Respondent only references his response to Claim 33, but does not summarize the arguments. (ECF No. 123 at 202.) Regarding Claim 14.G, Respondent chose not to respond to the merits, therefore, its merits arguments are waived. *See* Fed. R. § 2254 Cases 5(b). This Court may accept Mr. Menzies's arguments as to the ineffective assistance of trial counsel uncontroverted.

As far as this claim relates to the ineffective assistance of appellate counsel, Mr. Menzies addressed that concern above.

F. There is a practical lack of state corrective process in Utah and its courts' determinations of law or fact should be given no deference.

Respondent argues that the Utah post-conviction process is "robust and effective" because it exceeds the constitutional minimum (which is nothing) and because Weckel was paid $180,000 dollars, and Mr. Menzies's case proceeded through the court system. (ECF No. 123 at 32-35.) The matter at issue in this part of Claim 38 is not whether Utah's post-conviction scheme is constitutional. The matter is whether there is a lack of state corrective process or whether the process available is "ineffective to protect the rights" of post-conviction petitioners. (ECF No. 109 at 296, quoting 28 U.S.C. § 2254(b)(1)(B)(i)-(ii).)

As a rhetorical matter, the fact that one has paid a lot of money for a service does not mean one has gotten their money's worth. Specifically in this case, Respondent has failed to offer specific arguments to counter Mr. Menzies's factual allegations. He generally states that Mr. Menzies's arguments are meritless without providing facts to support the conclusory statements. Since Respondent has not offered anything in support of its position regarding the facts and arguments in Claim 38.F—other than that Weckel was paid over the statutory cap for post-conviction attorneys and state courts ultimately dismissed all of his claims—this Court should find that Mr. Menzies has established that Utah lacks process sufficient to protect the rights of post-conviction petitioners.

CLAIM 39

Mr. Menzies was sentenced to death under a death penalty scheme which fails to adequately channel the application of the death penalty in violation of the Eighth Amendment.

Mr. Menzies has argued that the Utah death penalty statute allows for unlimited application of aggravators and thereby fails to narrow the class of eligibility or guide the discretion of the prosecutor.[24] (ECF No. 109 at 302-05.) The Eighth Amendment requires a capital sentencing scheme to "genuinely narrow the class of persons eligible for the death penalty" and to "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Stephens*, 462 U.S. at 877. The United States Supreme Court later elaborated that "[t]he use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion." *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988). Utah's aggravated murder statute fails to serve that function.

Respondent argues that this question was resolved in *State v. Young* and Mr. Menzies has not shown any reason that the decision in his case should have been different. (ECF No. 123 at 203-04, citing *Young*, 853 P.2d 327.) But Respondent ignores the question that was put to the Utah Supreme Court in *Young*, which was whether the Utah death penalty scheme operated to narrow the class of offenders during the guilt or

[24] Respondent admits this claim is exhausted but then suggests in a footnote that part of the argument is defaulted. (ECF No 123 at 203 n.37.) Mr. Menzies refers the Court to his prior statements regarding exhaustion arguments and facts in support of claims. (*See, supra*, n.4, n.7.)

punishment phase of a capital trial. 853 P.2d at 352. This is a different question than whether the statute is too broad to perform a narrowing function at all, which the state courts have never answered.

Respondent also argues that Mr. Menzies has failed to show that the Utah statute does not genuinely narrow the class, citing again to *Young* to support an argument that numbers do not make the statute overbroad. (ECF No. 123 at 204-05, citing 853 P.2d at 413.) First, the portion of *Young* cited by Respondent is not the decision of the court. It is a concurring opinion which engages with a dissent that actually does take up the question of whether the statute genuinely fails to narrow. Second, Respondent seems to be oversimplifying Mr. Menzies's argument for a dubious rhetorical effect.

Mr. Menzies's argument is not that there are simply too many numbers in the statute, rather, as stated in the Petition, it is the number of aggravators and their scope which creates a range of aggravators which is so broad as to encompass virtually every criminal homicide committed in the state. (ECF No. 109 at 304-05.) Respondent has not addressed the scope of the aggravators, but merely stated Mr. Menzies failed to show anything. This Court may accept Mr. Menzies's allegation as uncontroverted.

CLAIM 40

The Utah death penalty statute violates the Fifth and Fourteenth Amendments because it imposes a burden on the defendant to overcome the evidence of conviction and creates a presumption of death in sentencing.

In his Petition, Mr. Menzies argued that Utah's death penalty statutes allow for the aggravating factors underlying the guilty verdict to be used as aggravating circumstances

during the penalty phase. (ECF No. 109 at 305-07, citing Utah Code § 76-3-207(2) (1988).) Because the State is not required to present any additional evidence beyond the fact of the conviction, it creates a presumption in favor of death.

Respondent's entire answer to this claim is that "[t]his claim should be denied because Menzies has failed to assert or establish that the state court decision was based on an unreasonable application of facts or an unreasonable application of clearly established federal law." (ECF No. 123 at 206.) Because Respondent failed to respond to the facts and law asserted by Mr. Menzies in support of his claim, this Court may accept them as uncontroverted.

CLAIM 41

It would violate Mr. Menzies's Eighth Amendment rights to freedom from cruel and unusual punishment for the State to execute him after he spent twenty-seven years on its death row.

As stated in the Petition, this claim is not exhausted and was raised for preservation purposes. (ECF No. 109 at 307-08.) At the appropriate time, Mr. Menzies intends to seek a stay of these proceedings pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), to properly exhaust this claim in state court.

CLAIM 42

The death penalty is categorically cruel and unusual punishment, in violation of the Eighth Amendment.

As stated in the Petition, this claim is not exhausted and, at the appropriate time, Mr. Menzies intends to seek a stay of these proceedings pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), to properly exhaust this claim in state court. (ECF No. 109 at 308-09.)

Also, in the Petition, Mr. Menzies acknowledged that the current state of federal law does not support this claim. (ECF No. 109 at 309.) He has raised it in good faith that the courts will recognize that the death penalty is, in fact, cruel and unusual in violation of the U.S. Constitution.

CLAIM 43

Mr. Menzies was denied the right to a fair trial due to the cumulative effect of all errors during his trial, appeal, and post-conviction proceedings, violating his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

Respondent has argued this claim is not properly exhausted. If this Court determines this claim needs to be exhausted before it can review it, at the appropriate time, Mr. Menzies intends to seek a stay of these proceedings pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), to properly exhaust this claim in state court. Mr. Menzies maintains that he has demonstrated numerous constitutional defects throughout his proceedings which individually warrant relief, as well as in the aggregate.

III. Conclusion

Therefore, Mr. Menzies respectfully requests the Court to grant the relief he has requested.

Respectfully submitted this 19th day of December, 2016.

Jon M. Sands
Federal Public Defender

/s/ David Christensen
David Christensen
Assistant Federal Public Defender
Attorney for Petitioner Menzies

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 2016, I electronically filed the foregoing document to the Clerk's Office using the CM/ECF system which sent notification of such filing to the following registrants:

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