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 3 OF 6

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Appendix Index

<u>Volume I</u>
Appendix A: Opinion, *Menzies v. Powell*, No. 19-4042 (10th Cir. Nov. 7, 2022) 1a

Appendix B: Order Denying Petition for Rehearing and /or Rehearing En Bank, *Menzies v. Powell*, No. 194042 (10th Cir. Jan. 3, 2023) 58a

Appendix C: Mandate, *Menzies v. Powell*, No. 19-4042 (10th Cir. Jan. 11, 2023) 61a

<u>Volume II</u>
Appendix D: Opinion, *State v. Menzies*, No. 880101 (Utah, March 11, 1992) 62a

Appendix E: Opinion, *State v. Menzies,* No. 880161 (Utah, March 29, 1994) 90a

Appendix F: Opinion, *Menzies v. State*, No. 94-647I (U.S., Jan. 17, 1995) 108a

Appendix G: Opinion, *Menzies v. Galetka*, No. 20040289 (Utah, Dec. 15, 2006) 110a

Appendix H: Opinion, *Menzies v. State*, No. 20120290 (Utah, Sept. 23, 2014) ... 151a

Appendix I: Opinion, *Menzies v. Crowther*, No. 03-CV-0902-CVE-FHM (D. Utah, Jan. 11, 2019) 209a

Appendix J: Opinion and Order Denying Motion to Alter Judgment, *Menzies v. Benzon*, No. 03-CV-0902-CVE-FHM (D. Utah, Feb. 19, 2019) 285a

<u>Volume III</u>
Appendix K: Second Amended Petition for Writ of Habeas Corpus, *Menzies v. Crowther*, No. 2:03-CV-0902-CVE-FHM (D. Utah, Aug. 31, 2015) 291a

<u>Volume IV</u>
Appendix K Continued: Second Amended Petition for Writ of Habeas Corpus, *Menzies v. Crowther*, No. 2:03-CV-0902-CVE-FHM (D. Utah, Aug. 31, 2015) 569a

Appendix L: Reply to Response to Second Amended Petition for Writ of Habeas Corpus, *Menzies v. Crowther*, No. 2:03-CV-0902-CVE-FHM (D. Utah, Dec. 12, 2016) 612a

/ / /

Volume V

Appendix M: Motion Hearing Transcript, *State v. Menzies*, No. CR 86887 (3d Judicial Dist. Salt Lake Cnty. Utah, Dec. 3–5, 1990) 750a

Appendix N: Excerpts of Reporter's Transcripts of Proceedings, *State v. Menzie*s, No. CR86887 (3d Judicial Dist. Salt Lake Cnty. Utah, Feb. 1 and 10, 1988) 1040a

Volume VI

Appendix O: Excerpts of Reporter's Transcripts of Proceedings, *State v. Menzie*s, No. CR86887 (3d Judicial Dist. Salt Lake Cnty. Utah, Feb. 23 and 24, 1988) .. 1045a

Appendix P: Excerpts of Reporter's Transcripts of Proceedings, *State v. Menzie*s, No. CR86887 (3d Judicial Dist. Salt Lake Cnty. Utah, Feb. 25 and 26, 1988) .. 1056a

Appendix Q: Excerpts of Tr. of Proceedings, *State v. Menzie*s, No. CR86887 (3d Judicial Dist. Salt Lake Cnty. Utah, March 7, 8 and 9, 1988) 1064a

Appendix R: Version 1 of Excerpts of Tr. of Proceedings, *State v. Menzie*s, No. CR86887 (3d Judicial Dist. Salt Lake Cnty. Utah, March 3 and 4, 1988) 1070a

Appendix S: Version 2 of Excerpts of Tr. of Proceedings, *State v. Menzie*s, No. CR86887 (3d Judicial Dist. Salt Lake Cnty. Utah, March 3 and 4, 1988) 1076a

Appendix T: Version 3 of Excerpts of Tr. of Proceedings, *State v. Menzie*s, No. CR86887 (3d Judicial Dist. Salt Lake Cnty. Utah, March 3 and 4, 1988) 1082a

Appendix K

Appendix K

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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 SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254 **Death Penalty Case** Judge Claire V. Eagen

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

TABLE OF CONTENTS

TABLE OF CONTENTS i

I. Introduction 1

II. Standard of Review 5

III. Mr. Menzies does not concede the presumption of correctness for state court findings of fact. 5

IV. Statement of Exhaustion 6

V. Procedural History 8

VI. Circumstances surrounding the filing of this amended petition. 11

VII. Mr. Menzies reserves his right to amend. 13

VIII. Statement of Facts 14

IX. Ralph Menzies's Personal History. 20

X. Federal Constitutional Claims for Relief 52

CLAIM 1 52

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. 52

CLAIM 2 60

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. 60

CLAIM 3 69

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. 69

CLAIM 4 74

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. 74

CLAIM 5 76

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. 76
CLAIM 6 81
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. 81
CLAIM 7 83
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. 83
CLAIM 8 86
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. 86
CLAIM 9 90
Mr. Menzies was shackled in front of the jury in violation of his due process rights under the Fourteenth Amendment. 90
CLAIM 10 92
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. 92
CLAIM 11 97
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. 97
CLAIM 12 101
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. 101
CLAIM 13 113
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. 113
CLAIM 14 114
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. 114
CLAIM 15 161
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. 161
CLAIM 16 167
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. 167
CLAIM 17 169
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. 169
CLAIM 18 171
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. 171
CLAIM 19 173
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. 173
CLAIM 20 177
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. 177
CLAIM 21 179
The prosecution's altering of its witness list shortly before commencement of the penalty phase and failure to timely disclose penalty phase evidence violated Mr. Menzies's right to due process under the Fourteenth Amendment and resulted in an arbitrary and capricious imposition of the death penalty in violation of the Eighth Amendment. 179
CLAIM 22 179
The introduction of unproven prior bad acts and cross-examination

by the State regarding bad acts that it did not otherwise prove, violated Mr. Menzies's right to due process under the Fourteenth Amendment and to a fair and reliable capital sentencing proceeding under the Eighth Amendment. 179
CLAIM 23 179
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. 179
CLAIM 24 182
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. 182
CLAIM 25 185
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. 185
CLAIM 26 192
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.... 192
CLAIM 27 201
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 prosecutor's argument at the penalty phase that death should be imposed because Mr. Menzies might escape or be paroled. 201
CLAIM 28 201
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.... 201
CLAIM 29 204
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 sentencer relied on unconstitutional aggravating factors. 204
CLAIM 30 207
The trial court violated Mr. Menzies's rights to due process, to a fair

trial, and to a reliable sentencing under the Fifth, Sixth, Eighth and Fourteenth Amendments by misapplying the uncharged heinousness aggravator during sentencing. 207
CLAIM 31 207
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. 207
CLAIM 32 258
The State violated Mr. Menzies's right to due process and a fair proceeding under the Sixth and Fourteenth Amendments by reading a statement into the record, ex-parte and without authorization from the state court, after the conclusion of the trial, which was included in the record on appeal. 258
CLAIM 33 258
The state court failed to record all proceedings in violation of Mr. Menzies's rights to a public trial and his right to appeal and seek collateral review of his conviction and sentence under the Sixth and Fourteenth Amendments. 258
CLAIM 34 262
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. 262
CLAIM 35 265
A change in state law to include the possibility of a life sentence without parole renders Mr. Menzies's sentence cruel and unusual in violation of the Eighth Amendment. 265
CLAIM 36 267
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. 267
CLAIM 37 271
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. 271
CLAIM 38 273
Mr. Menzies was denied his Fifth, Sixth, Eighth, and Fourteenth Amendment rights by the ineffective assistance of counsel during state post-conviction proceedings. 273
CLAIM 39 302
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. 302

CLAIM 40 305
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. 305
CLAIM 41 307
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. 307
CLAIM 42 308
The death penalty is categorically cruel and unusual punishment, in violation of the Eighth Amendment. 308
CLAIM 43 310
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. 310

XI. Prayer for relief. 311

XII. Verification of Petition. 312

CERTIFICATE OF SERVICE 313

I. Introduction

Ralph LeRoy Menzies, through counsel, brings this petition pursuant to 28 U.S.C. § 2254, challenging his conviction and sentence of death, as being in violation of his rights under the United States Constitution. Mr. Menzies submits that the State of Utah violated, and has arbitrarily refused to correct violations of, his constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, thereby resulting in his unconstitutional conviction and sentence of death.

Mr. Menzies is confined under a sentence of death pursuant to the judgment of the Third District Court of Salt Lake County, State of Utah, Criminal Case No. 86-887, which was rendered from the bench on March 23, 1988, and signed by order on March 30, 1988. The conviction and sentence were affirmed by the Utah Supreme Court in *State v. Menzies*, 889 P.2d 393 (Utah 1994), cert. denied, 513 U.S. 1115 (1995). Mr. Menzies is currently confined, albeit unconstitutionally, in the Utah State Prison in Draper, Utah, a facility which is physically located within the District of Utah. Mr. Menzies is being held under the custody and control of Warden Scott Crowther. Venue is proper in the District of Utah. *See* 28 U.S.C. § 2241(d). Mr. Menzies was represented in his state court proceedings by the following attorneys: Brooke C. Wells, U. S. Magistrate Judge, 351 South West Temple, Salt Lake City, Utah 84101; Frances M. Palacios, 2360 Preston Street, Suite 206, Salt Lake City, Utah 84106; Lynn R. Brown, 49 Gean Street, Mesquite, Nevada 89027; Nancy Bergeson, deceased; Joan C. Watt, Salt Lake Legal Defenders Association, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111; Richard G. Uday, 515 South 700 East, Suite 3-E, Salt Lake

City, Utah 84102; Mary C. Corporon, Van Cott, Bagley, Cornwall & McCarthy, 36 South State Street, Suite 1900, Salt Lake City, Utah 84111; Alan Sullivan, Snell & Wilmer, Gateway Tower West, 15 West South Temple, Suite 1200, Salt Lake City, Utah 84101; Todd Shaughnessy, Third District Court Judge, 450 South State Street, PO Box 1860, Salt Lake City, Utah 84114; Matthew Durham, Stoel Rives, L.L.P., 201 South Main Street, Suite 1100, Salt Lake City, Utah 84111; Edward K. Brass, Brass & Cordova, 175 East 400 South, Suite 400, Salt Lake City, Utah 84111; Elizabeth Hunt, 569 Browning Avenue, Salt Lake City, Utah 84105; Ted Weckel, 15 West South Temple, Suite 1700, Salt Lake City, Utah 84111.

Mr. Menzies presents the following claims concerning the unconstitutionality of his conviction and sentence and asks that this Court afford him all the protections guaranteed by the United States Constitution, the federal habeas corpus statutes, the Rules Governing Section 2254 Cases in the United States District Courts, and all other pertinent statutes, court rules, and legal precedent. Further, Mr. Menzies seeks an order from this Court granting this petition for federal habeas corpus relief.

Mr. Menzies incorporates by reference each and every paragraph of this petition into each and every claim presented, as if set forth fully therein. Mr. Menzies additionally incorporates all exhibits which may be subsequently filed in this action. Mr. Menzies requests that this Court take judicial notice of the certified record on appeal and all pleadings, briefs, orders and exhibits filed with the Utah Supreme Court in connection with Mr. Menzies's direct appeal (*State v. Menzies*, 845 P.2d 220 (Utah 1992) and *State v. Menzies*, 889 P.2d 393 (Utah 1994), Utah Supreme Court Case No. 880161), and in

connection with Mr. Menzies's post-conviction petitions (*Menzies v. Galekta*, 150 P.3d 480 (Utah 2006), Utah Supreme Court Case No. 20040289, and *Menzies v. State*, 344 P.3d 581 (Utah 2014), Utah Supreme Court Case No. 20120290).[1]

All of the claims for relief and references to federal constitutional violations are expressly intended to, and by this reference do, allege violations of Mr. Menzies's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their individual clauses and sections.

As set forth below, the adjudications of Mr. Menzies's federal claims in the state courts resulted in decisions that were contrary to, and involved unreasonable applications of, clearly established federal laws as determined by the Supreme Court of the United States, or resulted in decisions that were based on an unreasonable application of the facts in light of the evidence presented.

The United States Constitution enshrines the privilege, through the writ of habeas corpus, to seek the aid of the federal courts whenever a person is held in jail or prison in violation of the Constitution. U.S. Const. art. I, § 9. Congress expressly provides that those wrongly held in state custody may resort to the writ of habeas corpus to secure their release. 28 U.S.C. § 2254.

The Fifth Amendment, in pertinent part, provides, "[n]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life,

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[1] Mr. Menzies will cite these cases, respectively as *Menzies I*, *Menzies II*, *Menzies III*, and *Menzies IV*.

liberty, or property, without due process of law." U.S. Const. amend. V. Similarly, the Fourteenth Amendment provides, in pertinent part, that, "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. Together, these amendments guarantee every defendant due process as the government seeks to convict and sentence him and to restrain his liberty.

The Sixth Amendment, in pertinent part, provides, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . , and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. Inherent in this amendment is the guarantee of effective representation as the government seeks to convict and sentence the accused and uphold the conviction and sentence on appellate and post-conviction review.

The Eighth Amendment, in pertinent part, provides that every citizen shall enjoy protection from having "cruel and unusual punishments inflicted." U.S. Const. amend. VIII. Inherent in this amendment is the right to a reliable, individualized sentencing.

Together, these constitutional amendments provide that every individual has the right to be free from restraint of liberty unless the government seeks to take away that individual's liberty through procedures that are fair, that provide effective representation, and that do not result in unreliable and arbitrary sentencing decisions. Where, as in Mr. Menzies's case, the procedures used to convict and sentence were unfair, where unconstitutionally prejudicial, false and fabricated evidence was admitted, where counsel

provided constitutionally deficient representation, and where the ultimate sentence handed down was neither individualized nor reliable, the results can only be deemed a miscarriage of justice. At its core, the writ of habeas corpus is the primary, and in many cases the only, recourse to redress such miscarriages of justice.

Mr. Menzies incorporates by reference the entire record in the previous state proceedings in his case. To the extent that any error or deficiency alleged was due to previously-appointed counsel's failure to investigate and litigate in a reasonably competent manner on Mr. Menzies's behalf, he was deprived of constitutionally effective assistance of counsel. To the extent that counsel's actions and omissions were the product of purported strategic or tactical decisions, such decisions were based upon state interference, prosecutorial misconduct, inadequate or unreasonable investigation and discovery, or inadequate consultation with independent experts and, therefore, were not reasonable, rational, or informed.

II. Standard of Review

This petition was filed after April 24, 1996, and is therefore governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). 28 U.S.C. § 2254.

III. Mr. Menzies does not concede the presumption of correctness for state court findings of fact.

Mr. Menzies hereby provides notice of his intention to challenge the presumption of correctness of certain findings of fact made by the state courts in his case. Certain factual findings of the state court in Mr. Menzies's case, if any are found to exist, are not entitled to the presumption of correctness under 28 U.S.C. § 2254(e)(1). These include,

but are not limited to, factual findings made by the trial court in Mr. Menzies's trial and sentencing, as well as during Mr. Menzies's state post-conviction proceeding, and the opinions by the Utah Supreme Court on interlocutory appeal, direct appeal, and on appeal from his state post-conviction proceedings. Pursuant to 28 U.S.C. § 2254(e)(1), Mr. Menzies intends to assert that certain findings of fact by the state court at trial, sentencing, on appeal, or on state post-conviction review, if any are found to exist, are not fairly supported by the record. Mr. Menzies also intends to assert other exceptions to the presumption of correctness, including, but not limited to: that the procedures employed by the state courts in making findings of fact were not adequate to afford him full and fair hearings; that material facts were not adequately developed at the state court hearings; that Mr. Menzies did not receive full, fair and adequate hearings in the state court proceedings; and that Mr. Menzies was otherwise denied due process of law in the state court proceedings.

IV. Statement of Exhaustion

Mr. Menzies has raised allegations of constitutional violations in his state court pleadings and briefs and associated filings, hearings and arguments. To the extent that any of his claims are deemed to be unexhausted, untimely, or procedurally or otherwise barred, Mr. Menzies submits that it is as a result of: (1) ineffective assistance of state trial, appellate, and/or post-conviction counsel; (2) inadequate state court funding for state proceedings; (3) the state court's refusal to grant adequate time, funds, and procedures for Mr. Menzies to plead and develop his claims; and/or (4) the State's actions, inactions, failures to disclose, active concealment of evidence and/or actual or

threatened interference in Mr. Menzies's case or the case of any other capital defendant. Mr. Menzies submits that any of these reasons excuse any non-exhaustion under 28 U.S.C. § 2254(b)(1)(B)(i) and/or (ii).

In death penalty cases, the Utah Supreme Court has recognized that it possesses "the prerogative to correct sua sponte manifest and prejudicial errors not objected to at trial or assigned on appeal." *State v. Lafferty*, 20 P.3d 342, 370 (Utah 2001) (citing *State v. Tillman*, 750 P.2d 546, 552 (Utah 1987)). The Utah Supreme Court has bypassed, and continues to bypass, on a case-by-case basis, state rules regarding default and/or waiver to address errors presented in capital cases in the interest of justice. *See Gardner v. Galetka*, 151 P.3d 968, 972-73 (Utah 2007) (holding that a post-conviction claim can be procedurally barred yet receive substantive review under independent "good cause" common law exceptions); *Tillman v. State*, 128 P.3d 1123, 1130 (Utah 2005) ("'[T]he law should not be so blind and unreasoning that where an injustice has resulted the [defendant] should be without remedy.'" (quoting *Martinez v. Smith*, 602 P.2d 700, 702 (Utah 1979))). Accordingly, in addressing the manifest and prejudicial errors Mr. Menzies sets forth in this petition, this Court should find all constitutional claims impliedly exhausted and address the claims on the merits.

In the event this Court determines that any of Mr. Menzies's claims have not been adequately exhausted in state court, Mr. Menzies requests he be given the opportunity to present his arguments in support of his request that he be granted leave to withdraw the unexhausted claim(s), that these proceedings be stayed pending exhaustion, and that his counsel be directed to return to state court to fully exhaust the unexhausted claim(s). *See,*

e.g., Anderson v. Sirmons, 476 F.3d 1131, 1138-39 (10th Cir. 2007); *see also Olvera v. Giurbino*, 371 F.3d 569, 573-74 (9th Cir. 2004) (finding an abuse of discretion when the district court refused to allow petitioner to withdraw unexhausted claims and hold proceeding in abeyance pending their exhaustion because this procedure cures the statute of limitation problem, and "advances the court's interest in deciding cases on the merits rather than technicalities").

V. Procedural History

Mr. Menzies was convicted of capital murder and sentenced to death in the Third District Court for Salt Lake County, Utah. Mr. Menzies pled not guilty and was found guilty by a jury on March 8, 1988. (ROA 898.)[2] Mr. Menzies was sentenced to death by the trial judge on March 23, 1988. (ROA 1104-07.)

Mr. Menzies timely appealed to the Utah Supreme Court. (04/26/1988 Notice of Appeal). On March 11, 1992, the Utah Supreme Court affirmed the denial of Mr. Menzies's Motion for a New Trial based on Mr. Menzies's claim that there was not an adequate record of his trial based on defects with the trial transcript, and ordered Mr. Menzies to proceed with the merits of his direct appeal. *Menzies I*, 845 P.2d 220. Thereafter, on March 29, 1994, the Utah Supreme Court affirmed Mr. Menzies's conviction and death sentence. *Menzies II*, 889 P.2d 393. The Utah Supreme Court denied rehearing on July 20, 1994. The United States Supreme Court denied certiorari on January 17, 1995. *Menzies v. Utah*, 513 U.S. 1115 (1995).

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[2] ROA indicates the trial court record on appeal. PCR ROA indicates the post-conviction conviction record on appeal.

On April 20, 1995, Mr. Menzies, who was represented by attorneys acting pro bono, initiated post-conviction proceedings in the state district court. (PCR ROA 1-35.) The initial attorneys raised numerous claims, primarily focusing unconstitutional procedural irregularities in the trial and appeal, and on the ineffective assistance of trial counsel and. (*Id.* at 1-35, 44-82.) After the Utah Legislature passed legislation for funding and appointing qualified counsel in indigent capital post-conviction cases, new counsel was appointed to assist Mr. Menzies. (PCR ROA 1155-61, 1215-16.) However, appointed counsel failed to timely respond to the State's motion for summary judgment, without Mr. Menzies's knowledge or consent. (PCR ROA 2225-26, 2237, 2302-04.) As a result of appointed counsel's default, the Utah state district court granted the State's summary judgment motion on January 11, 2002. (PCR ROA 2234.) Appointed counsel filed a notice of appeal with the Utah state district court on February 11, 2002, but failed to file a docketing statement in accordance with the Utah Rules of Appellate Procedure. (PCR ROA 2266-68.) Due to this failure, the appeal was dismissed on April 2, 2002. (PCR ROA 2269.)

On April 11, 2002, appointed counsel filed a two sentence motion to set aside the default summary judgment pursuant to Utah Rule of Civil Procedure 60(b). (PCR ROA 2271.) The second sentence said that "specific grounds for this motion shall be set forth in a subsequent memorandum. (*Id.*)

On the next day, Mr. Menzies appointed counsel filed a docketing statement with the Utah Supreme Court. (04/12/2002 Docketing Statement.) The appeal was reinstated and a briefing schedule was set. (06/24/2002 Letter from Utah Supreme Court to Edward

K. Brass.) Appointed counsel failed to file the appellant's brief. (11/21/2002 Order.) On December 19, 2002, the appeal was dismissed. (12/19/2002 Notice of Decision). Appointed counsel sought to reinstate the appeal, but on January 21, 2003, that motion was denied. (12/31/2002 Motion to Reinstate Appeal; 01/21/2003 Order.)

Thereafter, on August 12, 2003, Mr. Menzies, assisted by new counsel, filed a memorandum in support of the Rule 60(b) motion to set aside the unknown default summary judgment. (PCR ROA 2322-52.) Mr. Menzies's new state post-conviction counsel also filed a protective federal habeas petition in this Court on December 17, 2003. (Dkt. 15.) They subsequently filed a motion to stay the federal proceedings to exhaust the claims pending in the state court proceedings. (Dkt. 34.)

The Rule 60(b) motion was denied by the Utah state district court on February 26, 2004. (PCR ROA 3701-70.) Mr. Menzies appealed the denial of the Rule 60(b) motion. (PCR ROA 3913-14.) On December 15, 2006, the Utah Supreme Court found that Mr. Menzies's case was defaulted in an error not attributable to Mr. Menzies and remanded his case for renewed post-conviction proceedings. *Menzies III*, 150 P.3d 480, 495, 520 (Utah 2006).

The post-remand post-conviction proceedings resulted in the development and litigation of 27 new claims. (03/14/2011 5th Am. Pet. ("5th Am. Pet.").) The Utah state district court granted the State's motion for summary judgment and dismissed Mr. Menzies's post-remand petition on March 23, 2012. (03/23/2012 Ruling and Order.) The Utah Supreme Court denied the ensuing post-conviction appeal on September 23, 2014 (*Menzies IV*, 344 P.3d 581 (Utah 2014)), and subsequent petition for rehearing on

February 12, 2015 (*Menzies v. State*, 2015 Utah LEXIS 130).

VI. Circumstances surrounding the filing of this amended petition.

On December 17, 2003, Mr. Menzies filed a Petition for Writ of Habeas Corpus in this Court. (Dkt. 15.) On September 14, 2004, Mr. Menzies moved this Court to stay the proceedings, pending resolution of his state court case. (Dkt. 35.) In that motion, Mr. Menzies's prior counsel requested a 30-day period to amend the pending federal habeas petition after conclusion of the state court proceedings. (Dkt. 35 at 6.) In the federal habeas petition, there were no claims related to Mr. Menzies's PCR proceedings. (Dkt. 15.) The state court petition was appended to the memorandum in support of the motion to stay. (Dkt. 35, Exs. 1 and 2.) Notably, all of the claims that were in the then-pending state PCR petitions were limited to trial phase claims. There were no claims related to the direct appeal. And there could be no claims arising out of the then-ongoing state PCR proceedings, as they had not yet concluded.

After the state court remand in 2006, in a motion to amend the original stay order, counsel for Respondent averred to this Court "that he anticipated that the state court proceedings required by the Utah Supreme Court's disposition would be protracted." (Dkt. 65 at 2.) This has proved to be accurate. The post-remand PCR proceedings resulted in the development and litigation of 27 new claims that were not contemplated at the time the original stay was issued by this Court in 2004.

The remand and protracted proceedings in state court have resulted in an entirely new case post-2006. On this basis, Mr. Menzies requested an extension of the 30-day period in which he had to amend his existing federal petition. (Dkt. 101.) In his motion

for an extension, Mr. Menzies's showed that completion of the post-remand PCR-proceedings provided his first opportunity to obtain his PCR counsel's file, and for his federal habeas counsel to review that file and assess it for purposes of raising claims in his amended petition based on the past seven years of state court litigation. Only after conclusion of the PCR could Mr. Menzies examine the trial court record in light of the state PCR proceedings in order to identify and raise any claims that may have been defaulted due to the ineffective assistance of initial collateral review counsel. *See Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012) ("[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial"); *see also Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013) (applying *Martinez* to states whose procedural framework makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise ineffective assistance claims on direct appeal).

This Court granted the motion for an extension, however, the Court noted that the order did "not relieve Petitioner of his obligation to file his habeas corpus claims within the time remaining in his one-year limitations period, if any." (Dkt. 102 at 2.)

While Mr. Menzies believes that the statute of limitations was tolled during the pendency of his state court post-conviction proceedings, including his Rule 60(b) motion, and that, as a result, the statute of limitations did not begin running until the Utah Supreme Court's most recent decision denying his appeal from his post-remand PCR proceedings, Mr. Menzies prepared and filed a first amendment to his federal habeas petition in compliance with this Court's order. (Dkt. 103.)

In accordance with this Court's grant of Mr. Menzies motion for an extension of time to amend his petition (Dkt. 102), Mr. Menzies has prepared and now files this Second Amended Petition for Writ of Habeas Corpus. The facts and law pled herein relate back to the claims raised in the initial petition (Dkt. 15) and the first amended petition (Dkt. 103.)

VII. Mr. Menzies reserves his right to amend.

Mr. Menzies expressly reserves his right to amend this petition. In *McCleskey v. Zant*, 499 U.S. 467 (1991), the United States Supreme Court reaffirmed the "principle that [a] petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition." *Id*. at 498. Referring to Rule 6 (discovery), Rule 7 (expansion of the record), and Rule 8 (evidentiary hearing) of the Rules Governing Section 2254 Cases in the United States District Courts, the Supreme Court held that a habeas petitioner needs reasonable means and the ability to investigate in order to form a sufficient basis to allege a claim in the first petition. *Id.*

Mr. Menzies submits that, despite his due diligence in attempting to compile and gather a full, complete, and accurate copy of the entire record in this matter, he has been unable to do so (*see, e.g.*, Claims 1 and 33). Until such time as a complete and accurate record in this matter can be made available, Mr. Menzies is unable to fully develop and set forth his constitutional claims for relief. Mr. Menzies further submits that additional claims of constitutional magnitude may be identified through necessary investigation, discovery, and an evidentiary hearing. At the appropriate time during these proceedings, Mr. Menzies will present any additional claims he identifies under such circumstances

and will seek leave, if necessary, to amend his petition accordingly.

VIII. Statement of Facts

On the evening of Sunday, February 23, 1986, Maureen Hunsaker was working as an attendant at a Gas-A-Mat located at 3995 West 4700 South in Kearns, Utah. (TR 02/18/1988, ROA 1155 at 976, 978-9.) At a little before 10:00 p.m., a customer discovered that the gas station was unattended and contacted the police. (*Id*. at 1030, 982.)

Police found no signs of a struggle in the attendant's booth. (*Id.* at 1041, 1159-64.) Gas-A-Mat employees stated various figures as to the amount of cash missing: $70.00 (TR 02/19/1988, ROA 1155 at 1137), $106.65 or $116.65 (*id*. at 1141-42), or $114.15 (*id*. at 1184). The variance depended on which employee was reviewing which report. Although the station initially reported that some cigarettes were missing, it later indicated that no cigarettes had been taken. (*Id.* at 1178, 1186.)

At approximately 11:05 p.m. that night, Ms. Hunsaker phoned her husband at home. (*Id*. at 1022, 1046.) The officer who was present at the Hunsaker home testified that Mr. Hunsaker initially asked her whether she had been robbed. (*Id*. at 1046.) Mr. Hunsaker testified that she told him she had been robbed but that she was fine and they would let her go that night. (*Id*. at 1023, 1025.) The officer then took the phone, and Ms. Hunsaker, in response to his leading questioning, indicated that she had been robbed but was "okay." (*Id*. at 1056-57.) The officer asked her twice, in clear and simple terms, whether she was being held against her will. (*Id*. at 1057-59.) First, Ms. Hunsaker said she did not know what the officer meant. (*Id*. at 1058-59.) Her second answer was such

that the officer conceded that she could have been saying either she was not being detained or she was not free to leave. (*Id*. at 1059.)

A few days prior to her disappearance, Ms. Hunsaker indicated she was unhappy, that her husband was prohibiting her from pursuing certain activities, that her marriage was a mistake, and that she was "grasping" for something to make her happier. (TR 03/03/1988, ROA 1159 at 2228-29, 2231.)

Between 11:30 p.m. and midnight on February 23, 1986, Beth Hodges saw Ms. Hunsaker at a Denny's restaurant, sitting, drinking coffee and conversing normally with a male companion. (*See* Ex. 1, 03/02/1986 Salt Lake County Sheriff's Office Follow-up Report at 2.) Hodges provided a physical description of Ms. Hunsaker's male companion that did not match the appearance of Mr. Menzies but did closely match a description of a person named Troy Denter. (TR 03/03/1988, ROA 1159 at 2289.) Hodges did not identify Mr. Menzies as Ms. Hunsaker's male companion when shown his photograph as part of a photo array. (*Id*. 2288.)

Troy Denter was a friend of Mr. Menzies. (TR 02/23/1988, ROA 1156 at 1398.) Denter drove a white 1974 Impala in poor condition. (*Id*. at 1394.) Denter testified that he loaned his car to Mr. Menzies on February 23, 1988, and he kept it until around noon on the next day. (*Id*. at 1397.) He supplied police with an empty handcuff box that he claimed was left in his car by Mr. Menzies. (*Id.* at 1405.) He also testified that he found money in Mr. Menzies's apartment that may have appeared to match the amount missing from the Gas-A-Mat, but he also testified that he spent some of the money. (*Id*. at 1423-24).

During the time Ms. Hunsaker was seen at Denny's with a male companion resembling Denter, Mr. Menzies was at the home of Janet Franks looking for Ms. Arnold. (TR 02/24/1988, ROA 1156 at 1478, 1481.) He arrived alone, calm and unhurried, without any unusual about his appearance or demeanor. (*Id.* at 1490-91.) After discovering that Nicole was not there, Mr. Menzies used the restroom, "checked in on" Nicole's baby, and left. (*Id.* at 1481, 1493.) Shortly after midnight, Mr. Menzies telephoned his sister and then Nicole's grandmother, still looking for Nicole. (TR 03/02/1988, ROA 1158 at 2195, 2211.)

On February 24, 1986, Mr. Menzies was arrested on an unrelated theft charge. (TR 02/24/1988, ROA 1156 at 1519.) Various cards belonging to Ms. Hunsaker were found in a laundry basket near the booking area of the jail. (*Id.* at 1561.) Although the officer who arrested Mr. Menzies initially reported that the booking was without incident, after the cards were found, he changed his story and claimed Mr. Menzies, who was cuffed at the time, ran down the hall and disappeared into the room where the cards were found. (*Id.* at 1524-26, 1543.)

Ms. Hunsaker's body was found at Storm Mountain on February 25, 1986. (TR 02/23/1988, ROA 1156 at 1315-17.) The cause of death was strangulation with stab wounds to the throat, both of which occurred at about the same time. (TR 02/25/1988, ROA 1157 at 1637, 1639.) The autopsy report indicated that Ms. Hunsaker had been bound at her wrists, noting ligature marks. (Guilt Phase Exhibit 72 at 2.) After the report was typed, one of the detectives wrote in "handcuffs" over the sentence about the ligature marks on her wrists. (*Id.*; TR 02/23/1988, ROA 1156 at 1363.)

On February 26, 1986, Tim Larrabee, a high-school student, reported that on February 24, 1986, he and his girlfriend Elizabeth Brown, skipped school and went to the Storm Mountain picnic area. (TR 02/19/1988, ROA 1155 at 1193.) When they arrived, an "old and beat up" car was already in the parking lot. (*Id.* at 1194-95.) While at Storm Mountain, they noted the presence of another man and woman. (*Id.* at 1197-98.) Larrabee stated the couple appeared normal (*id.*at 1221), were not in any way physically linked to each other (*id.* at 1222), were not struggling *(id*. at 1224), and were, in fact, engaged in normal conversation (TR 02/23/1988, ROA 1156 at 1250-51.)

Larrabee never saw more than a profile of the man and was never closer to him than ninety feet. (TR 02/19/1988, ROA 1155 at 1229.) Neither Larrabee nor Brown identified Mr. Menzies as the man they had seen at Storm Mountain at the lineup or the preliminary hearing. (TR 02/23/1988, ROA 1156 at 1276-79.) At the lineup, Larrabee and Brown identified two different people as being the man they saw. (TR 05/16/1986, ROA 1151 at 6, 17.) Neither expressed any hesitation or doubt about their lineup identifications at the time of the lineup. (*Id*. at 12-13; TR 02/23/1988, TR 02/23/1988, ROA 1156 at 1276-78; TR 03/03/1988, ROA 1159 at 2256-57.)

During trial, on redirect examination, prosecutor Ernie Jones elicited testimony from Larrabee indicating that after the lineup, on the way back to the prosecutor's office, Larrabee asked Jones whether Number 6 was actually the person. (TR 02/23/1988, ROA 1156 at 1284-85.) Number 6 was Mr. Menzies. (TR 05/16/1986, ROA 1151 at 6.) The State did not divulge this post lineup query from one of its key witnesses to the defense and instead used it to surprise the defense in front of the jury. (TR 02/23/1988, ROA

1156 at 1296-97.) The trial court granted Mr. Menzies's motion to strike the testimony, which had already been heard by the jury, but refused to grant his motion for a mistrial. (*Id.* at 1299, 1301-02, 1313-14.) In addition to his difficulty in identifying Mr. Menzies in a lineup, Larrabee had difficulty selecting Mr. Menzies's photograph from a group of six photos. (TR 02/25-26/1988, ROA 1157 at 1714). The state did not inform defense counsel of Larrabee's initial inability to select a photo.

At the same time Larrabee was at the police station for the photo showup, a detective took him out to the parking lot to see whether any car there resembled the one he saw at Storm Mountain. (TR 02/23/1988, ROA 1156 at 1270-71.) There was only one large, older, light-colored car in poor repair in the parking lot—which was Denter's car. (*Id*. at 1272.) Larrabee stated that although it most resembled the car he saw at Storm Mountain with respect only to the other cars in the parking lot, he didn't think it was the same one. (*Id*.)

Walter Britton was an inmate on the same tier of the Salt Lake County Jail as Mr. Menzies during the week of February 24, 1986. (TR 03/02/1988, ROA 1158 at 2080.) Britton was awaiting trial and sentencing on federal bank robbery charges in several jurisdictions. Britton testified at the preliminary hearing that on Friday, February 28, and Saturday, February 29, 1986, Mr. Menzies sought Britton out in order to discuss Mr. Menzies's involvement in the Hunsaker homicide. (*Id.* at 2081-83.) Britton did not report this conversation to jail personnel until a month later, approximately March 28, 1986. (*Id.* at 2101.) Britton testified at a preliminary hearing that Mr. Menzies had confessed to the crime. The bulk of Britton's preliminary hearing testimony was

available from news reports and he had no specific information that could have been attributable only to Mr. Menzies. (*Id.* at 2110.)

After Britton testified at the preliminary hearing, a prosecutor in this case appeared in federal court on his behalf to testify at a Rule 35 hearing for reduction of sentence. (TR 03/03/1988, ROA 1159 at 2316-17.) After Britton was sentenced, he vacillated several times as to whether he would testify at trial. (TR 02/18/1988, ROA 1155 at 1081-82.) At trial, Britton was questioned outside the presence of the jury and stated that he would not testify. (*Id.* at 960.) However, he answered all specific questions asked of him. (TR 02/18-19/1998, ROA 1149.) The trial judge determined that Britton was unavailable and, over defense objection, allowed Britton's testimony from the preliminary hearing to be read to the jury. (TR 03/02/1988, ROA 1158 at 2078.) In December 1985, shortly prior to the alleged conversation with Mr. Menzies, Britton had undergone a court-ordered psychological competency evaluation. (TR 02/18/1988, ROA 1155 at 1081; TR 03/02/1988, ROA 1158 at 2043-44.)

The jury convicted Mr. Menzies of Capital Homicide with Robbery and Aggravated Kidnapping as aggravating circumstances and Aggravated Kidnapping (ROA 898). The jury found Mr. Menzies not guilty of Aggravated Robbery (TR ROA 900). After a jury convicted Mr. Menzies of Capital Homicide, Mr. Menzies waived the jury for the penalty phase of his trial. Judge Uno sentenced Mr. Menzies to death. (ROA 1098-1000.)

IX. Ralph Menzies's Personal History.

Ralph LeRoy Menzies[3] was born on April 21, 1958, in Murray, Utah, the second child to parents, Clifford Leroy Menzies and Karen (Gardner) Menzies. (Ex. 2, Birth Certificate of Ralph Menzies.) As a result of alcohol and drug addiction, illness, and violence, Ralph's parents were ill-equipped to create a stable home or care for their children. Ralph's childhood was defined by the neglect and abuse of his parents and caregivers.

A. Mr. Menzies's Parental Background

Clifford LeRoy Menzies was born in Scofield, Utah, on August 9, 1925. He was the eleventh of twelve children born to Robert Buchanan Menzies and Margaret Ann Morris. Robert supported his family by working in the mines. Margaret was 45 years old when Clifford was born. (Ex. 3, Birth Certificate of Clifford LeRoy Menzies.)

After completing eleven years of education, Clifford entered the United States Navy in 1944. He had been working as a truck driver while living in Sanpete County, Utah. (Ex. 4, Military Personnel File Records - Clifford Menzies at 1, 28.) Clifford's military career was somewhat brief and marked by an inability to follow orders. After going AWOL and disobeying orders upon his return, Clifford was court marshalled in 1945 and sentenced: "to be reduced to the rating of apprentice seaman, to be confined for a period of twelve (12) months, to be discharged from the United States naval service

[3] Throughout this section Mr. Menzies will be referred to as Ralph in order to avoid confusing him with any other member of his family.

with a bad conduct discharge, and to suffer all the other accessories of said sentence." (*Id.* at 5, 26, 38.)

While incarcerated, Clifford was evaluated and a psychological report revealed that he was of borderline intelligence with an I.Q. of 74. The military psychologist concluded that Clifford was mentally dull and emotionally apathetic. The psychologist further stated that Clifford's "lack of judgement [sic] and insight [was] the cause of his trouble." (*Id.* at 29.) After completing his jail time, Clifford was discharged from the Navy on January 5, 1946. (*Id.* at 43.) A couple years later, Clifford's discharge was amended to "Under Honorable Conditions." (*Id.* at 60.)

On June 8, 1946, Clifford married Margaret Crawford in Nephi, Utah. Eight months later, Clifford's first child was born, Clifford LeRoy Menzies, Jr. Two years later, Margaret gave birth to their second child, Catherine Lee Menzies. The couple divorced on August 11, 1950. (Ex. 5, Utah State Archives Divorce Petition and Custody Records- Clifford and Margaret Menzies at 2.) In March of 1960, Margaret filed a petition seeking child support for their two children, stating that Clifford had refused and neglected to provide for the children since 1948. Margaret was forced to apply for Public Welfare under the Aid to Dependent Children Program. (*Id.* at 2-3.)

Ralph's mother, Karen Rosalia Gardner, was born on January 18, 1940 in rural Fairview, Utah. Karen's parents were newlyweds, Nellie Mae (Anderson) and Jesse Dean Gardner.[4] Nellie was barely 17 years old when she gave birth to Karen (Ex. 6,

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[4] Jesse Dean Gardner and Nellie Mae Anderson were married in Sanpete County, Utah, on June 6, 1939. (Ex. 11, Marriage Index of Nellie Anderson and Dean Gardner).

Birth certificate of Karen Gardner.) Three and a half years later, Nellie gave birth to her second daughter, Janet. (Ex. 7, Declaration of Janet Kubota ¶ 1.) By 1947, Jesse and Nellie's relationship dissolved and Jesse remarried a woman named Geneva Montrone. (Ex. 8, Uinta County Marriage Record for Jesse Dean Gardner and Geneva Montrone.[5])

In March of 1951, Nellie filed a civil complaint against Jesse for "willfully neglect[ing] and refus[ing] to provide for the support and maintenance of his minor children" from May, 1947 through March 14, 1951, leaving them in "destitute and necessitous circumstances." (Ex. 9, Utah State Archives, Third District Court, Child Support – Jesse Dean Gardner and Nellie Gardner at 4, 11.) By February of 1950, Nellie married the ex-husband (Ralph McDonald) of Jesse's new wife, Geneva Montrone. (Ex. 10, Uinta County Marriage Record of Ralph and Nellie McDonald.[6])

Ralph's mother, Karen, was raised by an ill and neglectful mother. Nellie suffered from heart disease, had breathing problems, and only had one kidney. Like several of her family members, Nellie dealt with chronic back pain which lead to multiple back surgeries, and a developing addiction to pain pills such as Percodan, a heavy narcotic. Furthermore, Nellie suffered from depression and this compounded her medical problems. She had attempted suicide at one time. (Ex. 12, USH Records Obtained by PCR Counsel at 50.) After 1960, Nellie was primarily bedridden unless she had to attend a doctor's appointment. (Ex. 7, Declaration of Janet Kubota ¶ 5.)

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[5] It is unclear whether Jesse secured a divorce from Nellie prior to marrying Geneva. Both Geneva and Jesse provided inaccurate information on their marriage application by stating they had no prior marriages and were single rather than divorced. (*Id.*)

[6] Nellie and Ralph McDonald's marriage application and certificate indicated neither one of them finalized their divorce until December of 1947.

Little is known about Karen's childhood other than she was born in Fairview and later moved to Salt Lake City where she attended school until the 9th grade. (Ex. 12, USH Records Obtained by PCR Counsel at 16). Karen's father, Jesse, abandoned her at the age of seven, and by the age of thirteen, she was doing poorly in school. (Ex. 13, North Sanpete High School Records – Karen Gardner.) Karen was married by the time she was 14 years old. Her mother, Nellie, had to sign for her to marry Clifford Menzies, a man twice Karen's age. (Ex. 14, Marriage Certificate of Clifford Menzies and Karen Gardner.)[7] It is unknown whether Nellie was aware or cared that the previous year Clifford had been found guilty of contributing to the delinquency of a 15-year-old girl and was sentenced to six months in jail. (Ex. 15, 1953 Ogden Standard-Examiner Article.)

1954-1963

B. Clifford and Karen's Marriage created the foundation for extensive family dysfunction, abuse, and neglect.

Karen became pregnant with her first child in 1955, when she was only 15. Karen gave birth to Jackie Lee Menzies on February 3, 1956. (Ex. 16, Birth Certificate of Jackie Lee Menzies.) Karen developed diabetes during her pregnancy with Jackie and was supposed to give herself insulin shots daily. However, Karen neglected to care for her health and failed to follow the recommended diet; family members recall that

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[7] Clifford and Karen's marriage license states Clifford was 26 years old when they married on June 5, 1954. However, Clifford was born on August 9, 1925, two months shy of his 29th birthday when he married 14-year-old Karen Gardner. (Ex. 3, Birth Certificate of Clifford Menzies).

throughout her life and pregnancies, Karen drank Coca-Cola constantly and ate entire boxes of glazed donuts by herself. (Ex. 7, Declaration of Janet Kubota ¶ 8.)[8]

Karen's declining health and self-neglect exacerbated her increasingly difficult pregnancies. Karen was skinny and frail for most of her life. Because she was so frail, someone had to assist her when she was walking while she was pregnant. (*Id.* ¶ 8.)

When Karen gave birth to Ralph on April 21, 1958, he was a month premature and was a "blue baby" because the umbilical cord was wrapped around his neck. He had to be given oxygen when he was born. Family members remember that Ralph's head was really flat when he was young because he was always lying on his back. Karen told her sister, Janet, that Ralph's head was flat because the hospital staff kept him on his back for long periods of time while he was being treated for his medical issues after his birth. (*Id.* ¶ 9.) When Ralph was 12 years old, his mother reported to the medical staff that Ralph experienced headaches, and was subject to ear infections. An X-Ray of Ralph's skull in 1970, suggested a history of chronic or previous middle ear disease. (Ex. 12, USH Records Obtained by PCR Counsel at 17, 26.)

On March 28, 1961, when Ralph was two years old, Karen filed for divorce. Karen stated in the divorce complaint that Clifford "treated her cruelly causing her great mental anguish, physical distress and suffering." (Ex. 18, Utah State Archives Divorce File - Clifford and Karen Menzies at 1-2, 8.) During Clifford and Karen's separation and divorce proceedings, Karen became pregnant with her third child, Bobby. Karen gave

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[8] In January of 1963, Karen told medical staff at the Primary Children's Hospital that she had been diabetic for several years and controlled her diabetes with diet and "occasional insulin." (Ex. 17, Primary Children's Hospital Records – Bobby Menzies at 36.)

birth to Bobby on August 27, 1962. (Ex. 19, Birth Certificate of Bobby Menzies.)[9] Bobby was also one month premature and was a large baby for his gestational age. (Ex. 17, Primary Children's Hospital – Bobby Menzies at 32.)

Three months after Bobby was born, Karen caused an automobile accident and was cited for driving while intoxicated. (Ex. 21, Utah State Archives Court Record 1962 Civil Lawsuit, Karen Menzies at 2.) Karen was civilly sued for causing the accident and she did not contest the charges, resulting in a default judgment. (*Id.* at 14.)

Almost six months after Bobby was born and two months after the car accident, Karen appeared for a hearing in her pending divorce proceedings. Karen testified and the court found that Clifford had a "violent and ungovernable temper and often becomes angry at [Karen] and curses and swears at her and calls her vulgar and obscene names." (*Id.* at 24.) The court also found that Clifford "has on numerous occasions and more particularly just prior to the filing of this complaint treated [Karen] cruelly by striking and beating her with his hands and fists, . . . has publicly embarrassed [Karen] by calling her vulgar and obscene names in public and shouting and screaming at her; and has threatened [Karen's] life." (*Id.*)

During Clifford and Karen's separation, in January 1963, Bobby was admitted to Primary Children's Hospital for persistent vomiting. He was only four and a half months old, but was no longer gaining weight and constantly vomiting after feedings. In Bobby's

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[9] Given the separation, family members are unsure whether Clifford is the biological father of Bobby. (Ex. 20, Declaration of Jackie Biesinger ¶ 3.)

medical history, Karen reported a history of five miscarriages by the age of twenty-three. (Ex. 17, Primary Children's Hospital – Bobby Menzies at 32.)

On February 4, 1963, the decree of divorce was granted for Karen and Clifford. Karen was awarded the care, custody, and control of Jackie, Ralph, and Bobby. Clifford was granted the right to visit the children at reasonable times and places. (Ex. 22, Utah State Archives Divorce File - Clifford and Karen Menzies at 28.)

In 1963, Karen was a twenty-three year old welfare recipient, and a single mother of three children: ages seven, five, and one. According to court documents, Clifford failed to provide for his children leaving them in "destitute and necessitous circumstances." (*See* Ex. 23, Utah Third District Court - Child Support - Karen Menzies at 11.)

After her divorce, Karen would frequently ask her sister Janet to watch her children while she ran to the store. Karen would then disappear for days at a time without calling to check on her children. Eventually, Karen would reappear to pick up the children, but she would never say where she had been. (Ex. 7, Declaration of Janet Kubota ¶ 12.)

1962-1964

C. Not long after finalizing her divorce, Karen entered a relationship with an extremely violent and abusive man.

Karen's second husband, Francis Clifford Porter, was known as Sonny Porter. Sonny and Karen began dating sometime in late 1962 or early 1963. Sonny was a very violent

man. He belonged to a motorcycle gang[10] and never worked. Sonny's biker friends often came around the house, and they had fights in the front yard, which scared Jackie and Ralph. Ralph and his siblings were afraid of Sonny because he was so violent and he kept brass knuckles in the kitchen drawer. (Ex. 20, Declaration of Jackie Biesinger ¶ 11.)

Sonny was abusive to Karen and her children for the entire duration of his relationship with Karen. On Christmas night in 1963 Sonny beat Karen so severely that it caused her to go into premature labor. Karen went to Salt Lake General Hospital where her daughter, Debbie Lynn Porter, was delivered on December 26, 1963 at 12:28 a.m. (Ex. 24, Birth Certificate of Debbie Lynn Porter; Ex. 25, Death Certificate of Debbie Lynn Porter.) Debbie Lynn only lived for seven minutes. (*Id.*) The death certificate indicates Debbie Lynn's death was an accident; the cause of death was listed as anoxia, immaturity, and possible trauma of birth. The doctor requested an autopsy of Debbie Lynn's body.[11] (Ex. 25, Death Certificate of Debbie Lynn Porter.) Sonny told Karen that he had Debbie Lynn buried with his child from his first marriage, who had also died. (Ex. 20, Declaration of Jackie Biesinger ¶ 15.) However, according to the death certificate, Salt Lake General Hospital cremated Debbie Lynn's body on December 30, 1963.

On the same day Debbie Lynn was being cremated, Karen married Sonny at the Salt Lake County courthouse. (Ex. 26, Marriage Certificate of Francis Clifford Porter and

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[10] Sonny was a member of the "The Nothings" Motorcycle Gang. (*See* Penalty Phase Exhibit 8 at 85.)

[11] Autopsy records have since been destroyed.

Karen Menzies.) Karen later told her daughter, Jackie, that she only married Sonny so Debbie Lynn would go to Heaven. (Ex. 20, Declaration of Jackie Biesinger ¶ 15.)

Sonny was not only physically abusive to Karen, he also abused Ralph and his siblings, frequently singling out Ralph for more frequent beatings or humiliation. During this time, Ralph had to share a small room with his sister. The room was only large enough to fit a bunk bed. Sonny made Ralph and his sister, Jackie, stay in their beds at all times when they were home. He wouldn't allow Ralph and Jackie to get off their beds or leave their room. If they did get off their beds, they would be beaten, or forced to stand in a corner for hours without being able to shift their weight. Once, Sonny held Ralph's hands over the hot stove as punishment. (TR 03/15-16/1988, 1161 at 2911.) Sonny frequently targeted Ralph for abuse, by hitting and ridiculing him. (Ex. 20, Declaration of Jackie Biesinger ¶ 12.) Sonny's violence and abuse was an almost every night occurrence for Ralph. (TR 03/15-16/1988, ROA 1161 at 2911.) Jackie remembers Sonny locking her and Ralph in the dark bedroom or in the cement cellar for hours at a time. (Ex. 20, Declaration of Jackie Biesinger ¶ 12.) It was during this time that Ralph began wetting the bed; he continued to have problems wetting the bed for many years. (Ex. 12, USH Records Obtained by PCR Counsel at 17.)

Ralph and his siblings were also exposed to extreme instances of violence directed towards their mother on a nightly basis. On one occasion, they were forced to watch helplessly while Sonny beat, kicked, and raped their mother in the hallway in front of their bedroom. Unable to leave the confines of their bunk beds, eight-year-old Jackie and almost-six-year-old Ralph watched Sonny rape their mother and listened to her screaming

for them to stay in their beds. (Ex. 20, Declaration of Jackie Biesinger ¶ 13.) Trial Expert, Dr. Michael Decaria, testified that Ralph and Jackie literally lived on their beds for three or four years. Their physical and educational needs were not met because often they were not allowed to attend school if they were being punished and forced to stay in their beds. (TR 03/15-16/1988, ROA 1161 at 3029-30.)

Karen attempted to keep Sonny's abuse a secret from her sister and mother until her injuries were too severe to hide. Karen's sister, Janet, recalls Sonny kicking Karen so hard in the abdomen that he broke several of Karen's ribs. (Ex. 7, Declaration of Janet Kubota ¶ 14.) Once, Sonny pushed Karen from a moving vehicle. Karen had gravel embedded in her head and body. As a result of this incident, Karen had to stay at her mother's home to receive care. A doctor visited Karen daily to pick the gravel out of her head and body. (Ex. 20, Declaration of Jackie Biesinger ¶ 14.)

Eight months after Karen married Sonny, she filed for divorce on August 6, 1964. The divorce records indicated that Sonny, "often absents himself from the home at night and remains away until late and unreasonable hours; that [Sonny] becomes intoxicated three and four times a week and falsely accuses [Karen] of improper relations with other men; that in January, 1964, [Sonny] beat [Karen] in the body with his fists and tore her clothes from her body; that during the latter part of July, 1964, [Sonny] also tore [Karen's] clothes from her body; that he has a violent and ungovernable temper and is very disagreeable, curses and swears and calls the plaintiff vulgar and obscene names." Karen asked the court for a restraining order because she feared she would suffer "irreparable injury" unless a restraining order was issued and Sonny was ordered to

vacate their home, where she was still residing with her children. (Ex. 27, Utah Third District Court Divorce Records for Clifford and Karen Porter at 1-4.) Karen's fear was likely well-founded. Ralph's sister recalled that once when Karen attempted to leave Sonny, he set fire to Karen's vehicle, which had all of their clothes in it. (TR 03/15-16/1988, ROA 1161 at 2913.) The divorce decree was granted on November 24, 1964. (Ex. 27, Utah Third District Court Divorce Records for Clifford and Karen Porter at 17-18.)[12]

Sonny's abuse had a profound impact on Ralph's memory. When Ralph was almost 18 years old and was asked to discuss his life, Ralph began with his early memory of his stepfather, Sonny. (Penalty Phase Exhibit 8 at 130.[13]) Ralph recalled that Sonny "beat the hell out of me" and "beat the hell out of mom, too." (*Id.*)

1964-1968

D. Following the end of her abusive and violent relationship with Sonny Porter, Karen's ability to care for herself and her children further deteriorated, resulting in neglect and abandonment.

After two failed marriages with abusive men, Karen was an ill and inattentive parent, just as her mother had been. Karen's oldest child, Jackie, was often responsible for raising Ralph and Bobby. (Ex. 20, Declaration of Jackie Biesinger at 17.) When

12 Sonny's divorce records from his first wife indicate a similar pattern of abuse, violence, fear, and alcoholism. (See Ex. 28, Utah Third District Court Divorce Records for Francis and Carol Porter at 1-2, 20; see also id.at 26-29 (court finding that Sonny, on many occasions, "struck [his first wife] inflicting bruises upon [her] body; that [Sonny] has excessively consumed alcohol[ic] beverages to the point of drinking every time [he] has funds available to purchase said beverages.").)

13 The exhibit provided as part of the state court record exists as it did in the trial court file when obtained by Mr. Menzies's present counsel. The numbers used as references to specific pages or documents within the exhibit refer to the page of the PDF of the exhibit provided to this Court as part of the state court record.

Bobby was between two and three years old, he put an extension cord in his mouth. Bobby suffered third degree burns and had to have multiple surgeries to attempt to correct the scarring. (Ex. 7, Declaration of Janet Kubota ¶ 13; Ex. 17, Primary Children's Hospital Records - Bobby Menzies at 14.) Bobby was left with a deformity which often prompted teasing by other children. (Ex. 20, Declaration of Jackie Biesinger ¶ 5.)

When Ralph was around seven years old, Karen began disappearing for days at a time without arranging for child care. Jackie recalls waking up in the middle of the night to find her mother missing. Karen never left a note or called to check on them despite being gone for several days. Ralph's maternal grandmother, Nellie, lived eight houses away, but Jackie was too scared to leave the house to tell her grandmother that her mother was missing. Jackie would keep all of the lights on in the house because she was so scared. Karen's disappearances occurred a few times a month, over a period of several years when she was in between husbands. Karen's disappearances seemed impulsive and made little sense to Jackie because she didn't recall seeing Karen drink alcohol, or perceive her as much of a partier. Jackie now believes her mother may have been mentally ill or possibly Bipolar Disorder. (Ex. 20, Declaration of Jackie Biesinger ¶ 16.) Jackie attempted to look after her brothers. Because Bobby was younger and such a sickly child, he required a lot of attention from Jackie. Ralph became the forgotten child, and was often unattended. (TR 03/15-16/1988, ROA 1161 at 3029.)

On one occasion, Clifford, Ralph's father, came to visit and watch him and his siblings while Karen was gone. Jackie was in the third or fourth grade at the time and was having one of her girlfriends spend the night. Clifford approached Jackie to tell her

to come by the bathroom later because he wanted to show her something. Jackie walked by the bathroom and saw Clifford masturbating with the door open. Jackie remembers that she "panicked and turned around to leave quickly because I felt like I had seen something I wasn't supposed to have seen." Clifford never saw Jackie outside of the bathroom. Later, Clifford asked her why she hadn't come by to see him because he really had something he wanted to show her. (Ex. 20, Declaration of Jackie Biesinger ¶ 6.)

On May 4, 1965, when Ralph was barely seven years old, he was referred to the Juvenile Court for the first time for his parent's failure to provide care. It appears that Ralph's mother was counseled, warned, and Ralph was released nine days later. (*See* Penalty Phase Exhibit 1C, Juvenile Rap Sheet at 2.) Jackie also had contact with the juvenile authorities around this time, and the probation officer concluded that Jackie was "picking up on the offensive behavior of her mother." Karen was described as living "in a way which conflicts with neighborhood standards, which results in the family being the subjects of discrimination." (Penalty Phase Exhibit 8 at 100.)

Juvenile court records for Ralph have since been destroyed, but other records document some of the circumstances surrounding the failure to care charge. According to Intake Probation Officer, Don Hansen, who reviewed the entire Juvenile Court file for Ralph's 1976 Social Investigation and Study Report, a second petition for lack of care was filed on December 28, 1965, stemming from charges that Ralph's parents failed to provide adequate health care and for lack of school attendance. A resulting decree placed Ralph, then age seven, and his brother and sister "under the protective supervision of the Court." (*Id.*) It appears that the second petition may have resulted from two visits Ralph

made to the emergency room. Ralph was taken into the emergency room on November 29, 1965, and again on December 4, 1965, complaining of severe abdominal pain, and vomiting. Medical staff ruled out appendicitis, and prescribed a medication for Ralph's nausea and vomiting. Ralph was admitted to the hospital the second time he came, but was discharged on December 5, 1965. (Ex. 29, U of Utah, Salt Lake General Hospital at 1-4.) The next day, the juvenile court was notified of possible lack of care. (*See* Penalty Phase Exhibit 1C, Juvenile Rap Sheet at 2.)

Around this time, Karen's sister, Janet, was living with Karen and her children. Both Karen and Janet had multiple children, were divorced, and living on welfare. Karen didn't work because she was always sick and had no desire to work. Karen was an awful housekeeper. Dishes were always piled up in the sink and there was clutter throughout the house. (Ex. 7, Declaration of Janet Kubota ¶ 15.) Janet recalled a caseworker coming to their home in Kearns, Utah, because someone reported to the authorities that Karen was neglectful. The caseworker went through Karen's house and scolded her because there was more booze than food in the home. Janet claims the booze was hers. According to Janet, Karen always fed her children, but was neglectful in other ways. Karen slept on the couch, and never cleaned her house. Karen wasn't the type of mother to help her children with homework or give them affection. (Ex. 7, Declaration of Janet Kubota ¶ 16.) Karen was described as being an "ineffective person with limited parenting skills, limited communicative skills and multiple physical complaints who handled disciplinary matters by screaming and yelling." She was seen as having emotional and physical inadequacies which made it difficult for her to adequately parent

her children. (Ex. 12, USH Records Obtained by PCR Counsel at 78, 136.) Years later, Ralph told a psychiatrist, Dr. Troy Gill, that his home was not a very nurturing and loving one. According to Dr. Gill, Ralph "perceived little love in his home and most of the time he felt that his emotional needs were not met." (*See* Penalty Phase Exhibit 1D, 03/01/1976 Psychiatric Evaluation at 2.)

Sometime in 1966, Ralph went to live with his biological father, Clifford Menzies, for a short period of time while Karen was recovering from back surgery. Karen reported that while Ralph lived with his father, he was permitted to "run wild. Ralph was driving cars, stealing and generally difficult to manage." (Ex. 12, USH Records Obtained by PCR Counsel at 16.) Hansen, wrote "Clifford was uniformly characterized by family members and others as ruthless, self-centered and negligent." Hansen observed, "[Clifford] is a highly defensive person, full of animosity towards authorities, and unwilling to recognize his own contribution to [Ralph's] problems. Clifford is a paranoid, hostile man who, according to Jackie and Bobby, packs a handgun with him wherever he goes." Ralph's grandmother, Nellie, reported that Clifford "drinks excessively, and alcohol makes him brutal and abusive towards others." (Penalty Phase Exhibit 8 at 101.) Dr. Michael Decaria testified at Ralph's trial in 1988, that Ralph's family had a history of alcoholism, including his birth father, and grandparents and that is "significant because we now know that people who are raised in alcoholic homes do not escape unscathed." (TR 03/15-16/1988, ROA 1161 at 3026.)

By the age of seven, Ralph was acting out and his behavior started getting the attention of the juvenile court. Approximately a week before Ralph's eighth birthday, he

was charged with being ungovernable. A year later he was charged with disorderly conduct for fighting. (*See* Penalty Phase Exhibit 1C, Juvenile Rap Sheet at 2.) Without knowing the extent of the trauma and abuse Ralph had already suffered, the juvenile authorities noted that Ralph came from a broken home, where there was minimal parental supervision and nurturing, and had little guidance from anyone, with few, if any, positive adult authority figures to pattern himself after. (*See* Penalty Phase Exhibit 1D, 03/01/1976 Psychiatric Evaluation at 4.)

When Jackie was in the fifth grade, Jackie and Ralph's biological father, Clifford, came to visit while Karen was in the hospital having back surgery. Forty-two-year-old Clifford had been living in Ely, Nevada, with his 19-year-old bride, Sherry. During this trip, Jackie fell asleep during the drive and when she woke up, Clifford's truck was pulled over on the side of an isolated road in a wooded area. Clifford had taken Jackie's pants off and was kissing and fondling her. Jackie recalled her father asking her if she wanted to have oral sex and to touch him. Jackie was scared because Clifford always kept a gun under the seat of his truck, but she got up enough nerve to open the door and run out of the truck, which prompted Clifford to stop doing whatever he was intending to do. (Ex. 7, Declaration of Jackie Biesinger ¶ 7.)

1968-1972

E. Another abusive step-father enters Ralph's life.

In late November or early December of 1968, Karen met a man named Clint Stevens through a dating service. Karen married Clint almost immediately, on December 9, 1968. (Ex. 30, Marriage Certificate of Karen Gardner and Oliver Clinton Stevens.)

Clint had been divorced from his first wife, Barbara, for seven months. (Ex. 31, Washoe County Divorce Records- Oliver Clinton and Barbara Stevens at 7-10.)

It was not unusual for Clint to hit Jackie with fists, or beat Ralph with belts. (Ex. 20, Declaration of Jackie Biesinger ¶ 20.) Clint was not a good parent. He didn't seem to have any idea on how to relate to children and he had a temper. (*See* Ex. 32, Declaration of Don Robinson Jr. ¶ 9.) Social services observed that Clint and Karen's family was severely disorganized and that Clint attempted "to use threats and severe physical punishment to control the children, but [was] generally unsuccessful in this approach." (Ex. 12, USH Records Obtained by PCR Counsel at 36-37.) It was noted that Clint and Karen "attempt[ed] to set limits, but [were] immature themselves and socially deprived and [were] generally unable to be consistent examples to their children." (*Id.* at 37.) Karen's general inattentiveness was exacerbated by Clint's demand for her attentions. Clint was very jealous of Karen's children and wanted her full attention. After Karen married Clint, she was even more neglectful of her children. (*Id.* at 50.)

By the age of twelve, when Ralph was in the sixth grade, the adverse consequences of his abusive and neglectful childhood began to manifest in impulsive, aggressive, and hyperactive behaviors. On May 4, 1970, Ralph was admitted to the Children's Ward at the Utah State Hospital (USH) by way of the juvenile court for a thirty day evaluation because he was reported to have stabbed a girl in the hand. Ralph told USH staff that he had been involved in a number of school fights over the recent months, but during this particular incident, two girls were teasing him about his older sister, Jackie, saying that she was pregnant, on drugs, and married. Reports varied over

whether Ralph stabbed the girl or she grabbed at his pocketknife and cut her own hand. (Ex. 12, USH Records Obtained by PCR Counsel at 5, 10.)

While hospitalized, Ralph was evaluated. Testing on the Wechsler Intelligence Scale for Children (WISC) indicated Ralph had a Verbal I.Q. of 99; and a Performance I.Q. of 114, resulting in a Full Scale I.Q. of 107. USH staff attributed the discrepancy between Ralph's verbal I.Q. and his performance I.Q. to his lack of interest in the academic skills. (*Id.* at 14.) Family interviews led psychiatric staff to describe Karen as a small, angry woman who displayed negative feelings; and similarly described Clint as exhibiting a lot of "defensiveness and anger." Staff believed Ralph's family would be difficult to work with and recommended the family attend counseling. Reports from the hospital described Ralph as an impulsive child and noted that much of Ralph's behavior included hitting in an attempt to make friends and teasing for attention. Despite his behavior problems, reviewing staff did not see Ralph "as a mean aggressive child." (*Id.* at 15, 21.) It was noted that Ralph was "acting-out" and in need of structure, including a well-organized probationary program with direct services. (*Id.* at 34-35.) After about three weeks, Ralph was discharged from the Utah State Hospital with a diagnosis of adjustment reaction to early adolescence. (*Id.* at 5.)

Subsequent counseling, testing, and interviews indicated that Ralph was of "bright normal" ability, under considerable anxiety in attempting to express his feelings with underlying feelings of hostility. Ralph was also seen as demanding, manipulative and argumentative. This counseling also revealed widespread dysfunction within the rest of the family, and it was noted that the 14-year-old Jackie was engaging in behaviors that

also seemed to be a product of her environment, including the use of profanity, drinking, staying out with questionable friends, and dating at 12 years old. Jackie also admitted during family counseling that her biological father attempted to rape her when she was 11 years old. At the time of the counseling sessions, Jackie had not been attending school for several months because of a thyroid condition. (*Id.* at 36.)

Clint and Karen seemed to encourage inappropriate behavior in the children. Clint and Karen encouraged 14-year-old Jackie to date and initiate a sexual relationship with Don Robinson Jr., who was 18 years old at the time. (Ex. 32, Declaration of Don Robinson, Jr., dated 08/12/2015 ¶¶ 2-4.) Don was permitted to stay the night at their house and one night Clint and Karen escorted Jackie, who was dressed in lingerie, to where Don was sleeping, patted Don on the head and said, "be a good boy," before leaving. (Ex. 32, Declaration of Don Robinson, Jr., dated 08/12/2015 ¶ 4.) Not long after their sexual relationship began, Don and Jackie decided to get married. Don felt as though Clint and Karen were pushing their relationship. Clint and Karen drove Don and Jackie up to Evanston, Wyoming, to marry on July 21, 1971. Jackie was 15 and Don was 19. Don did not learn Jackie's real age until they arrived at the courthouse. Karen filled out the marriage license, falsified Jackie's name, and told Don not so say anything. Even with parents' consent, Jackie was still not old enough to be married in the State of Wyoming. (Ex. 32, Declaration of Don Robinson, Jr. dated 08/12/2015 ¶ 5; Ex. 33, Uinta County Marriage Record Jackie Menzies and Don Robinson.)

Karen, her mother, Nellie, and Clint all suffered from back problems and took a lot of pills. Clint often pretended to be sicker than Karen, whose health was seriously

declining. Clint did not want to work and he sponged off the money Karen received from the state for Jackie, Ralph and Bobby. (Ex. 32, Declaration of Don Robinson, Jr., dated 08/12/2015 ¶ 8.) Karen's diabetes was unmanageable by this point and her years of neglecting her health had caught up to her. Karen was going blind, and suffered from kidney problems and required frequent blood transfusions. She had also developed severe gangrene on her ankles and the family home smelled of rotting flesh. Doctors recommended Karen have her legs amputated, but she refused. (Ex. 20, Declaration of Jackie Biesinger ¶ 23.) Karen was emaciated, and had burn marks and sores all over her body. The sores were from the many insulin shots she had to give herself, but the burn marks were from her cigarettes. Karen would pass out with a lit cigarette going. The cigarette would fall and burn her body. (Ex. 32, Declaration of Don Robinson Jr. ¶ 7.)

Karen died on February 24, 1972, when she was just 32 years old. The cause of death on Karen's death certificate is identified as history of diabetes mellitus, juvenile type. (Ex. 34, Death Certificate of Karen Stevens.) Karen weighed 57 pounds. She died at her mother's house, where Ralph was staying at the time. (Ex. 20, Declaration of Jackie Biesinger ¶ 25.) Ralph was a month shy of his 14th birthday. Ralph blamed his stepfather, Clint, for Karen's death because Clint always wanted Karen's attention. Whenever Karen was in the hospital, Clint would feign an illness and require hospitalization, forcing Karen to return from her hospital stays to care for Ralph and his siblings. Before Karen died, she was forced to discharge herself from Utah Valley Hospital as a result of the hospitalization of Clint. (*See* Penalty Phase Exhibit 8 at 85-86.) Clint was in the hospital for back surgery when Karen died and he was unable to

care for Ralph and Bobby. Following Karen's death, Ralph went to live with his grandmother, Nellie, for three months. (*Id.* at 86.) Ralph's father, Clifford, had very little to do with his children and had previously signed over his parental rights in order for Karen to get welfare assistance. Clifford's whereabouts were not initially known at the time of Karen's death. (Ex. 12, USH Records Obtained by PCR Counsel at 50.)

1972-1976

F. After Karen's death, Ralph experienced a number of additional losses and his life was even more unstable.

After Ralph's mother died, he experienced several more significant losses in the next four years. In March of 1974, Ralph's 80-year-old maternal great-grandmother, Sceberenia Anderson died. (*See* Ex. 35, Salt Lake Tribune Obituary dated 03/12/1974.) About 20 days later, Ralph's maternal great uncle, Leonard Anderson, died at the age of 45. (Ex. 36, U.S. Department of Veterans Affairs BIRLS Death File). Leonard suffered from undiagnosed depression, was an alcoholic, and died of a bowel obstruction. Like Nellie, Leonard took large doses of prescription pain medication and developed an addiction. (Ex. 7, Declaration of Janet Kubota ¶ 6.) Two years later, when Ralph was 18 years old, his maternal grandfather, Ralph McDonald, died at the age of 53. (Ex. 37, U.S. Social Security death index/Ancestry). Grandpa McDonald was Nellie's husband, so Ralph spent a great deal of time with him during his childhood.

After Karen died, Ralph's run-ins with the juvenile court system increased. Ralph was charged with joyriding, petit larceny, and petit theft. (Penalty Phase Exhibit 8 at 84, 86.) Ralph then moved to Ely, Nevada, to live with his father, Clifford, stepmother

Sherry, and half sister, Margaret Jeanette, following a court order changing custody from Family Services to Clifford. (*Id.* at 84, 86.) The Nevada Department of Welfare conducted a home study to determine whether Ralph should be placed with Clifford. The agency noted that Clifford was living with his 23-year-old wife and three-year-old child in a small three room house, which was not large enough for the three of them, and that Sherry was a very poor housekeeper. The agency ultimately concluded that it would be in "very poor judgement [sic] to allow [Ralph] to be placed in that home." Ralph was placed with Clifford anyway. (*See* Ex. 12, USH Records Obtained from PCR Counsel at 49.) From September of 1972 through January of 1973, Ralph stayed in Ely with Clifford and Sherry before returning to Utah. Ralph attended very little school while living in Ely and was expelled because of truancy. (*Id.* at 49.) During the next couple of years, Ralph frequently bounced between the homes of his father, grandmother, aunt, sister, and various placements in the juvenile court system.

By March 3, 1973, Ralph was back in Utah where he was admitted for the second time to the Utah State Hospital for 20 days at the referral of the Juvenile Court for an evaluation to determine whether to allow Ralph to return to his father in Ely, Nevada. (*Id.* at 39.) This referral followed a familial argument between Jackie and Ralph. (*Id.* at 47.) The resulting evaluation revealed that "Ralph [was] a boy with emotional problems as such that others, including his father[,] cannot tolerate his presence for an extended period of time." It was noted that this may have accounted for the fact that Clifford frequently sent Ralph back to Utah to live with his grandmother after a "mere two week stay." (*Id.* at 50.)

During the evaluation at USH, the reviewing doctor noted that Ralph's mental status at admission was remarkably similar to his condition at the time of his previous admission in 1970, except that at the present time, Ralph appeared to be more impulsive and irritable. The doctor described Ralph as having "a restless quality and some euphoric tendencies which are associated with distractibility and difficulties with impulse control. His mental status also contains some evidence of perseveration and there are minor perceptual difficulties which might imply an organic base." Testing indicated that Ralph was a couple of grades below his actual grade placement and his peers in most academic areas. A school psychologist suggested that Ralph would probably need counseling and individualized attention in order to stay in school and achieve. (*Id.* at 74, 57.)

On March 22, 1973, in a letter to the juvenile court, a psychiatric caseworker, stated that Ralph had a satisfactory adjustment to the hospital, but "appear[s] to have minimal brain dysfunction,[14] which possibly explains his restlessness and irritability." (*Id.* at 76.) Five days later, Ralph was discharged from the hospital and put back in the custody of the juvenile court for disposition. By April 9, 1973, 15-year-old Ralph was reportedly living with Clifford and Sherry in Ely, Nevada, again after Clifford was given permanent custody of Ralph. (*Id.* at 80.) There is evidence indicating that Ralph was

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[14] Minimal brain dysfunction is a neurodevelopmental disorder which can be found in nearly 20% of school children. It is characterized by evidences of immaturity involving control of activity, emotions, and behavior, and by specific learning disabilities involving the communicating skills needed in reading, writing, and mathematics. The prime deficits in the classroom are an inability to maintain attention and concentration and an inability to skillfully blend the auditory and visual functions essential in language performance. Medical evaluation will reveal many of the "soft signs" of neurologic involvement, and educational appraisal will indicate a wide scatter in testing scores with a marked discrepancy between evaluated potential and actual classroom achievement. http://www.ncbi.nlm.nih.gov/pubmed/1273628.

molested by his stepmother, Sherry. (Ex. 38, Affidavit of Marissa Sandall-Barrus dated 10/12/2010 ¶ 5.)

Ralph was committed to the Nevada Youth Training Center (NYTC) on October 30, 1973, for violation of probation, and remained there for seven-and-a-half months, ultimately being released on parole on June 19, 1974. Ralph received little parental supervision while living with Clifford. On September 13, 1974, Ralph was picked up and spent the night in the White Pine County Jail on charges of Curfew and Possession of Alcohol. On October 18, 1974, Ralph was picked up in Utah for being a runaway. (*See* Penalty Phase Exhibit 8 at 92.) In fact, an Ely juvenile probation officer concluded that Clifford was "extremely negligent and irresponsible as a father, and that his involvement with Ralph was very inconsistent." At times, Clifford would appear to be "overzealously" protective of Ralph, and at other times, Clifford would not even bother to appear for court hearings.[15]

On July 28, 1974, while Ralph was living in Ely, Clifford was arrested and charged with the "Investigation of Attempted Child Molest." Clifford was booked, photographed, and fingerprinted by the White Pine County Sheriff's Office. The complete police report has since been destroyed, but for unknown reasons the charge was reduced to Disturbing the Peace. Clifford was released on his own recognizance the next

[15] Indeed, Clifford's rejection and neglect of Ralph continued. In 1976, a Utah probation officer observed that "in the nine months I have had Ralph's case, Mr. Menzies has only been in Salt Lake once, and this was to demand the release of his other son, Bobby, from detention. Although Ralph was also in custody at the same time, Clifford made no effort to care for Ralph." The officer believed that Clifford had given up on Ralph and would let the authorities deal with him. (*See* Penalty Phase Exhibit 8 at 100-01.)

day. (*See* Ex. 39, White Pine County Sheriff's Office Clifford and Margaret Menzies (combined) at 14-16.)

On November 22, 1976, Bobby Menzies, who was living with his sister, Jackie, at the time, left Jackie's house to go out with some friends. According to records, Bobby was hitchhiking when a drunk driver picked him up. The car slammed into a tree, Bobby and another passenger died. He was 14. Bobby didn't have any identification on him so his body was not identified until 1979 when a police officer was following up on some old missing persons' reports. Jackie reported Bobby as a runaway the day after he was killed. (*See* Ex. 40, 1979 Deseret News Article; *see also* Ex. 20, Declaration of Jackie Biesinger ¶ 27; Ex. 19, Death Certificate of Bobby Menzies.) Almost a year after Bobby went missing, Ralph's maternal grandmother, Nellie McDonald, age fifty-four, died suddenly at her home. (*See* Ex. 41, Salt Lake Tribune Obituary dated 10/22/1977; *see also* Ex. 42, U.S. Social Security Death Index, 1935-2014.)

Eight months after Nellie died, her brother, Jack Anderson, died when he was only fifty-one years old. Jack had a history of mental illness and had been hospitalized at one time in the Veteran's Hospital. Jack had Multiple Sclerosis and a prescription pain medication addiction. Jack accidentally overdosed on pain pills and died. (Ex. 7, Declaration of Janet Kubota ¶ 6.)

In late 1974, following another commitment to the Nevada Youth Training Center (NYTC), Ralph was paroled on the condition that he reside with his aunt, Janet Kubota, in Fairview, Utah. In March 1975, Ralph was accused of criminal trespass for "burglarizing" Janet's home and was placed in the Utah County Detention Center. Ralph

claimed that he was locked out of his aunt's house so he attempted to gain entry through a window. There was no hearing on the burglary charge. From there Ralph was transported back to NYTC, which revoked his parole. The Nevada authorities then transferred Ralph to the California Youth Authority over concern that they were "unable to effectively deal with Ralph." (*See* Penalty Phase Exhibit 8 at 86.) The Nevada and California youth authorities viewed Ralph as an immature, dependent boy who suffered severe emotional deprivation. They noted, "His natural mother lived promiscuously and the children were left without parental guidance, supervision, or control. They were beaten by their poorly adjusted stepfather and as a result, Ralph came to see authorities as oppressive and related in this way with his teachers or other adults. He functions below his ability level and was found to have minimal brain damage." (*Id.* at 91.) About a month after being placed at the California Youth Authority, a student lawyer took an interest in Ralph's case. As a result of a threat of lawsuit over the failure to provide Ralph with a parole revocation hearing, Ralph was released from custody and the Nevada wardship was terminated. (*Id.* at 101.)

Ralph once again returned to his father's home in Ely, Nevada, and continued moving between Nevada and Salt Lake City, where he stayed periodically with his sister, Jackie. (*Id.* at 101-02.) Jackie's now ex-husband, Don Robinson, took custody of Ralph in mid-1975, but after several weeks of bitter disagreements with Don, Ralph left the home. (*Id.* at 102.) Jackie and her ex-husband were involved in a bitter custody dispute and Ralph was brought into the middle of it. (Ex. 32, Declaration of Don Robinson ¶ 18;

see also Penalty Phase Exhibit 8 at 102; Ex. 43, Third District Divorce and Custody Records – Don and Jackie Robinson at 5, 7.)

Around this time, 17-year-old Ralph married his 16-year-old girlfriend. They were living out of their car. Frustrated with their living conditions, his wife sought legal aid to get the marriage annulled. (Penalty Phase Exhibit 8 at 102.)

Not long after, on December 3, 1975, Ralph was admitted for the third time to the USH to be evaluated and have a determination made for treatment. (Ex. 12, USH obtained by PCR at 91.) Ralph's stay at the hospital only lasted a week because officials claimed he was involved in an escape plot by creating a diversion. Ralph was described as "serious character-disordered" and "very 'now' orientated." (Penalty Phase Exhibit 8 at 122; USH obtained by PCR at 108.) His probation officer observed that Ralph was

> extremely inclined to act out all [of] his emotional activity, whether it be depression, elation, frustration, or anger. He is very demanding, often requesting special favors and privileges. His lack of impulse control makes it impossible to anticipate his behavior in a given situation, and he experiences radical extremes of opinion and concern about various subjects. For example, his attitude toward certain social workers, attorneys, and court officials sways dramatically from praise to condemnation. His concern over his former wife varied from vehement insistence, that the marriage continues, to complete indifference within a matter of days. Ralph's thought processes are extremely scattered, and he cannot concentrate on a single subject for an extended periods of time.

(Penalty Phase Exhibit 8 at 104).

The probation officer explained that Ralph's episodes of misbehavior dated back to his early childhood, where his upbringing was very unstable and independent. Ralph's

relationship with his parents was "erratic, with them modeling mostly violent, negligent and irresponsible behavior. Despite his intelligence, Ralph has been unable to overcome his chaotic upbringing." (*Id.* at 106.)

Ralph's impulsive behaviors escalated when he and another juvenile, Mark Iverson, armed themselves, entered a 7-11 on December 21, 1975, and robbed the store. Ralph had recently been released from detention in Salt Lake City and was reportedly upset regarding the recent annulment of his marriage. Ralph had been "fucked up" on heroin, LSD, and speed for approximately two weeks. (*Id.* at 82-83.) According to Sheriff's Office reports, both weapons belonged to Mark's father. (*Id.* at 118.) In a presentence report, the writer noted that Ralph admitted that he "consumed alcoholic beverages in the form of beer or brandy at any time he had the finances to afford that beverage, and he is generally high on chemical substances first." Ralph readily admitted to using heroin, speed, acid, mescaline, cocaine, THC, and any other narcotic or drug that he can get his hands on. Ralph described his attitude towards substances as he is an "individual who looks first to escape reality by the use of chemical substance, and then continues his high by the consumption of alcoholic beverages." (*Id.* at 88.) The presentence report writer spoke to several collateral contacts and noted that a representative of Utah's Odyssey House felt that Mr. Menzies could be treated at the Drug Treatment Program called Odyssey House. It was their feeling that Ralph was still salvageable and that during his developmental years he was not given the appropriate model to follow and was not taught the consequences of anti-social behavior. (Penalty Phase Ex. 8 at 89.)

In 1976, Ralph's father, Clifford, was still struggling with his own legal issues and problems. On January 31, 1976, Clifford was arrested at the age of 50 for disturbing the peace in Ely, Nevada. (*See* Ex. 39, White Pine County Sheriff's Office Records – Clifford and Margaret Menzies (Combined) at 13.) On May 5, 1976, Clifford was arrested by the Orem Police Department in Utah for drunkenness and assault. (*See* Ex. 44, Orem Police Records - Clifford L. Menzies at 1-4.) According to Fourth District Court Records, Clifford had returned to Utah and was residing in Ephraim, when he was arrested for assault with a deadly weapon. Clifford pled guilty on December 9, 1976, and was ordered to enter an alcohol recovery center. (*See* Ex. 45, Fourth District Court - 1977 Assault Case- Clifford Menzies at 9-11; *see also* Ex. 46, 1977 Provo Daily Herald Article regarding 4th district case actions.) Clifford and his wife, Sherry, were separated at this time. Sherry filed for divorce on February 10, 1976. Their divorce was finalized on January 20, 1977. (Ex. 47, White Pine County Divorce Records- Clifford and Sherry Menzies at 1-3, 12-13.)

On September 10, 1976, Ralph was sentenced to five years to life for the aggravated robbery of the 7-11 and sent to the Utah Department of Corrections. (Penalty Phase Exhibit 8 at 5-6). There, Ralph was evaluated by Dr. Carlisle a psychologist, who noted that Ralph "came from a broken home; one that had a considerable amount of tension and stress." Testing and evaluation indicated that Ralph had normal intelligence, and performed between the eleventh and twelfth grade level in reading, but on a beginning tenth grade level overall. The personality testing and other projective tests, indicated Ralph had characteristics of anxiety, depression, some withdrawal, social

deviancy, impulsiveness, and hostility. Dr. Carlisle noted that "Ralph has a low tolerance level for frustration, is relatively lonely and has had a significant problem with drugs" and that Ralph "believes the future is hopeless for him unless he changes and feels that he does need some help." Dr. Carlisle recommended some type of in-depth therapy to reduce Ralph's potential for violence. (*See* Penalty Phase Exhibit 8 at 136.)

1977-1986

G. During and following his incarceration, Ralph made many notable attempts at improvement but his inability to control his impulses made life outside the structure of prison very difficult.

From 1977 until October, 1984, Ralph was incarcerated by the Utah Department of Corrections. On July 6, 1978, 20-year-old Ralph had been working on the Utah State Farm, which is minimum security, when he escaped. (*Id.* at 181, 226; *see also* TR 03/15/1988, ROA 1161 at 2857-59.) On July 25, 1978, Ralph was returned to the Utah State Prison with new charges of aggravated robbery and escape. (Penalty Phase Exhibit 8 at 215.) Ralph was sentenced to one to fifteen years for the escape conviction and five years to life on the aggravated robbery convictions. (*Id.* at 160.) At a disciplinary hearing for this incident, Ralph admitted that he was drunk when he escaped and acknowledged that he was irresponsible and should be held accountable. (*Id.* at 215.)

Over the next six years, Ralph received numerous positive recommendations. (*See, e.g.*, *id.* at 179 ("Ralph had been aggressive and shown considerable violence in the past, but seems to have found means to make some changes for the better during the past eighteen months"); *id.* (during an incident where an officer was injured, Ralph assisted in bringing the injured officer out of the cell block and assisted in securing the cell block);

id. at 138 (Ralph had been sincerely trying to change his habitual behaviors and had shown improvement; his prognosis looked better than when he first arrived in prison); *id.* at 164-165 (Ralph went 22-months without a disciplinary issue, worked hard at his janitor job, participated in weekly counseling, and was making an honest effort to prepare to return to society).)

Ralph was paroled on October 9, 1984. After a short stay in a halfway house, he lived and worked with his aunt, Janet Kubota, at the Quinn Auto Parts store. Ralph sought out mental health treatment but was turned down by several providers. (Ex. 48, Utah Adult Probation & Parole at 28.)

Eventually Ralph's parole officer, John Shepherd, assisted Ralph in securing counseling at Salt Lake County Mental Health-Valley West Clinic. On April 5, 1985, Dr. Virgil Brockbank sent a letter to Ralph's parole officer stating that Ralph did not need outpatient psychotherapy and that "he has learned some sense of control and a need to have control over himself in order to avoid further incarceration. He will not likely act out again as he has in the past. He will not benefit from outpatient psychotherapy unless he presents a problem on which he desires help. He is not likely to do that." (*Id.* at 29.)

On May 9, 1985, Ralph called his parole officer to report that he had taken a gun off another parolee at the mental health clinic, who was saying he was going to rob a store and kill the female clerk. Ralph was bothered that a woman may get hurt so he took the gun and called his parole officer. Shepherd told Ralph to come to the parole office immediately, which he did. Shepherd verified with all local law enforcement agencies that no one matching Ralph's description had been involved in any robberies, assaults or

murders. Ralph was commended on the long way he had come since his incarceration. His parole officer noted how significant Ralph's actions were given the "prison code" of not informing on a fellow ex-con for the benefit of society. (*Id.* at 29-30.) Three months later, Shepherd noted in his file, "He is doing excellent for Ralph. He has lasted longer than anyone thought. He is really trying." (*Id.* at 30.)

Ralph adjusted well to the structure of prison life, which aided him in his adjustment on parole. Ralph's childhood and adolescence were characterized by the two poles of abuse and neglect. His caregivers were all abusive addicts who imposed limits sporadically and only through threats and violence. As Ralph developed in response to these adverse conditions, his behaviors—and ability to adapt his behaviors—deteriorated. Despite recommendations for structure, counseling, or programming from various social service agencies, ultimately, Ralph would be returned to his family, where things had never changed. Never having lived with external structures, Ralph had never developed the ability to create structure for himself.

Unfortunately, Ralph's efforts in prison and on parole had not fully prepared him for long-term success. In December of 1985, Shepherd received a call informing him that Nicole Arnold, Ralph's girlfriend, called the police to report that Ralph had stolen some tires. The police searched Ralph's residence and the tires were recovered. (*Id.* at 30-31.) Despite Ralph's significant improvement and effort to successfully function outside of prison, it appeared that Ralph would be facing another incarceration. While Ralph was awaiting sentencing on the tire theft charges, the instant crime occurred.

X. Federal Constitutional 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.

This claim has been exhausted, as it was raised on direct appeal. *Menzies I*, 845 P.2d 220 (Utah 1992). The Utah Supreme Court made an unreasonable determination of fact when it found no error in the employment of the court reporter and that the transcript was reliable. *See* 28 U.S.C. § 2254(d)(2).

Mr. Menzies's trial was recorded by an unqualified and unlicensed court reporter who was using fraudulent credentials. Rather than making a verbatim transcription of the trial, the court reporter relied on a notereader who did not attend the trial, and who used the court reporter's notes , the trial judge's notes, and the police reports to construct the first original transcript. After discrepancies were noted, a second transcript was constructed by having the lawyers for the parties supervise the unlicensed and uncertified court reporter as she transcribed her notes in California. The trial court then presided over numerous hearings wherein the trial lawyers, trial court, and Mr. Menzies tried to supplement and correct what the court reporter had transcribed, to create a third version of the transcript.

A. The court reporter was not competent, lacking the requisite skills to perform her duties.

Tauni D. Lee, a.k.a. Tauni D. Byrd, the court reporter assigned to Judge Uno's courtroom at the time of Mr. Menzies's trial (February 10 through March 23, 1988), was appointed as Judge Uno's official reporter on January 14, 1988. (TR 03/09/1990, ROA 1166 at 137.) Lee had never applied for, nor been licensed to act as a court reporter in the state of Utah. (*Id*. at 9, 138; 04/08/1991 Br. of Appellant, Addendum F (Affidavit of George Weiler).)

Prior to Mr. Menzies's trial, Lee's California license expired and she became delinquent. (04/08/91 Br. of Appellant, Addendum G (Affidavit of Rick Black).) California eventually declared Lee incompetent to act as a court reporter. (TR 03/09/1990, ROA 1166 at 66; 04/08/1991 Br. of Appellant, Addendum H (California Court of Appeal Order; 05/27/1988 Letter from California Court of Appeal to Utah Administrative Office of the Courts).) The declaration of incompetence was not merely because her license expired. Rather, it was because of deficiencies in her work. Due to these deficiencies, she had been issued orders to show cause for her failure to comply with court orders and sanctioned. (04/08/1991 Br. of Appellant, Addendum H.)

Before being hired by the Utah courts, Lee was employed by a court reporter agency and subsequently terminated because of errors in every piece of work she produced—errors which were not corrected—and complaints from customers about her work. (TR 03/23/1990, ROA 1185 at 14-18.) Lee's skill level was low, and the problems with her work were so severe that her employer did not believe that she could

continue to work as a court reporter and she was ultimately fired. (*Id.* at 16, 20.) After her termination from the Utah Courts, she found employment with another court reporter service, without informing them of her termination from the courts. (*Id.* at 45-46.) She was again fired from this job because her transcripts were incomplete and inaccurate. (*Id.* at 46-49.)

After Mr. Menzies's trial concluded, Utah court personnel became aware of Lee's delinquent status as a California court reporter and raised concerns about her fitness. (TR 03/09/1990, ROA 1166 at 67; 04/08/1991 Br. of Appellant, Addendum J (05/17/1988 Memorandum RE: Official Court Reporter Tauni (Byrd) Lee).) Lee was placed on leave while she completed the Menzies transcript and then terminated. (TR 03/09/1990, ROA 1166 at 69, 75; 04/08/1991 Br. of Appellant, Addendum L (09/07/1988 Letter from Judge Uno to Ms. Tauni Lee).) This was done in violation of the judicial council rules. (TR 03/09/1990, ROA 1166 at 69-70.) Those rules do not allow for a reporter to be placed on paid leave for the purpose of completing transcripts. (*Id.*)

In preparing the direct appeal brief, defense counsel discovered several errors in the transcript and filed a motion for new trial. *Menzies I*, 845 P.2d at 223. The state supreme court remanded the case to the trial court to resolve the issues. *Id.* On the basis of her California pre-licensing test scores, the trial court "ruled that Lee was 'de facto' qualified because of her 'training, testing, and experience.'" *Id.* at 224.[16] The parties attempted to determine the extent of the errors in the record by having "[Ms.] Lee read from her shorthand notes while representatives of both parties read from a copy of the

[16] Lee was initially hired by the court "because she was the only applicant." *Id.* at 224.

original transcript," noting discrepancies on a copy of the transcript. *Id.* The trial court then "concluded that none of the transcription errors were prejudicial." *Id.* The Utah Supreme Court adopted these findings of fact, *id.* at 225-27, ignoring the evidence of Lee's practical incompetence.

B. The state courts violated Mr. Menzies's constitutional rights by compelling him to proceed on appeal without an accurate or adequate record to review.

Meaningful appellate review of a death sentence is essential to meet the requirements of the Eighth and Fourteenth Amendments. *See Gregg v. Georgia*, 428 U.S. 153, 198 (1976) ("As an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic appeal of all death sentences to the State's Supreme Court."); *Zant v. Stephens*, 462 U.S. 862, 874 (1983) ("Georgia's scheme includes two important features . . . a bifurcated procedure and meaningful appellate review of every death sentence" (citations omitted)); *Jurek v. Texas*, 428 U.S. 262, 276 (1976) ("By providing prompt judicial review of the jury's decision in a court of statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law."); *Parker v. Dugger*, 498 U.S. 308, (1991) (capital homicide case remanded based on arbitrary affirmance of death sentence). This point is emphasized in Justice Stevens's concurrence in *Pulley v. Harris*,

> [a]ppellate review plays an essential role in eliminating the systemic arbitrariness and capriciousness which infected death penalty schemes invalidated by *Furman v. Georgia*, and hence that some form of meaningful appellate review is constitutionally required.

465 U.S. 37, 54 (1984) (citation omitted). *See also Hardy v. United States*, 375 U.S. 277, 288 (1964) (J. Goldberg, concurring) ("[A]ny effective appellate advocate will attest" that "the most basic and fundamental tool of his profession is the complete trial transcript[.]"). Without a complete and accurate transcript, meaningful appellate review is impossible.

Although the right to appeal is not yet recognized as a federal constitutional right, once the right to appeal is established by statute or state constitution, it is included in the concept of federal due process of law under the Fourteenth Amendment. *See Cole v. Arkansas,* 333 U.S. 196, 201 (1948); *see also Griffin v. Illinois*, 351 U.S. 12, 18-19 (1956); *Eskridge v. Washington State Board of Prison Terms*, 357 U.S. 214, 215-16 (1958) (per curiam); and *Dowd v. United States*, 340 U.S. 206, 208-10 (1951).

In Utah, appellate review by the Utah Supreme Court is automatic in death penalty cases and not subject to waiver. *See* Utah Code Ann. § 76-3-206(2)(a). Because appellate review is an essential component of Utah's death penalty scheme, a prejudicial defect in appellate proceedings violates the Eighth Amendment guarantee that any punishment imposed must be proportionate and not arbitrary. The use of an unreliable record violates an appellant's Sixth Amendment right to the effective assistance of appellate counsel. It also violates an appellant's Fourteenth Amendment rights to due process and equal protection, given that other capital appellants have their cases reviewed on the basis of an accurate and complete trial record.

C. The transcript was unreliable and prejudicial to Mr. Menzies. The errors affected the essence of matters presented in court, making it impossible to accurately determine what had actually transpired.

The Utah Supreme Court made an unreasonable determination of fact when it upheld the trial court's determination that the transcript was reliable. *See* 28 U.S.C. § 2254(d)(2). First, the state court mischaracterized the argument Mr. Menzies raised, framing it simply as an issue of whether Lee was licensed in Utah. *Menzies I*, 845 P.2d at 225. To the contrary, Mr. Menzies presented extensive evidence to the state courts that Lee lacked the requisite practical skills to accurately report the trial, and that the transcript in fact contained numerous prejudicial errors. (ROA 1572-1602; TR 03/09/1990, ROA 1166; TR 03/23/1990, ROA 1185; TR 03/23/1990, ROA 1185; TR 12/03/1990, ROA 1931 at 16-140.) While the fact that Lee was not licensed by the state did have implications regarding the transcript, the more significant arguments—and the bulk of the evidence—related to her lack of ability to produce a reliable record for review, and the deficiencies in the transcript itself. Although the State argued against the prejudicial nature of the errors, the State was compelled to concede that the transcript was riddled with error. (TR 12/19/1990, ROA 1932 at 27, 29-30, 45-47, 55, 58, 62.)

Second, the problems with the transcript are myriad, rendering it unreliable for appellate review. It was therefore prejudicial to Mr. Menzies to compel him to procede on the record as it exists. Lee failed to record all of the proceedings. For instance, during voir dire, instead of recording verbatim the questions from the trial court to prospective jurors, Lee marked her record with an asterisk. (TR 12/05/1998, ROA 1931 at 35-40) The notereader then guessed as to what was asked based on questions asked of previous

jurors and inserted the prior langauge. (*Id.*) This error was revealed when it was discovered that a question repeated by the notereader was one that was misstated by the judge. (*Id.*) Similarly, admonitions to the jurors were not recorded. (*Id.*) In essence, significant portions of the voir dire record were invented by the notereader, who was not present in the courtroom during proceedings. This is significant because Mr. Menzies has raised claims regarding jury selection (see Claim 2, *infra*), but there is not an accurate record on which to address those issues.

Additionally, the use of the notereader was not a standard procedure and included tremendous risk for inaccuracy. (TR 03/23/1988, ROA 1985 at 12, 36, 43). The inherent ambiguity in shorthand resulted in the notereader having to make inherently unreliable judgments about the meaning of the notes. The original transcript produced, for instance, erroneously identified speakers, substituting defense counsel for the prosecution, and vice versa. (04/08/1991 Br. of Appellant, Addendum N (Comparison sample of the original transcript and an attempt to correct the original transcript).)

The efforts to correct the transcript produced documents that were still unreliable. The problem of misidentifying speakers was pervasive throughout the transcripts. And the misidentifications were not themselves consistent. (TR 12/19/1990, ROA 1932 at 29-30.) Statements of defense counsel are attributed to the prosecution. Statements of the prosecution are attributed to the court. (*Id.*) These errors render the record of the proceedings unreliable at best, and incomprehensible at worst. And they are devastating to the notion of accuracy in appellate review, especially where the trial court is being given deference to its findings of fact. If the arguments of the prosecution are being

regarded as the findings of the court, and being deferred to on review, then the State has been given an undue influence on review. There can be no pretense of fairness in such a circumstance.

Mr. Menzies raised numerous issues on appeal to the Utah Supreme Court which could not be determined without an accurate and reliable record. The error of misidentifying speakers was persistent throughout the trial proceedings. Jurors and witnesses are misidentified, in addition to the attorneys and the trial court. Numbers were also inaccurately recorded and may not have been resolved correctly. (*See*, e.g., *id*. at 47-53.) This is a problem given that numbers were important to several determinations of fact, including the dates and times at which Ms. Hunsaker's identification cards were found or provided to police (*see* Claim 12), and the distance from which Tim Larrabee observed a man at Storm Mountain (*see* Claim 3). Also, Mr. Menzies challenged the admissibility of evidence and testimony, and the state court had no accurate record on which to determine the specifics of the testimony and its effect (*see* Claims 5, 11, and 12).

The state supreme court glossed over these errors, claiming that they could not impact any claim that Mr. Menzies might bring on appeal. *Menzies I*, 845 P.2d at 240-41. However, Mr. Menzies had not yet filed his brief raising the full set of appellate issues. The initial part of the direct appeal proceedings dealt solely with the transcript problem. *Id.* Therefore, it was impossible for the state court to make an accurate determination of fact on the impact the deficiencies in the record would have on the issues yet to be raised. Further, its ultimate determination of the lack of prejudice is

untenable in light of the pervasiveness of Lee's errors. This was an unreasonable determination of fact and Mr. Menzies should be granted relief 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.

This claim is exhausted, as it was presented on direct appeal. *Menzies II*, 889 P.2d at 397-98. The state court's determination of this claim deserves no deference as it was based on an unreasonable determination of fact. *See* 28 U.S.C. § 2254(d)(2).

The right to an impartial jury is a fundamental right. *See Duncan v. Louisiana*, 391 U.S. 145, 148-50 (1968); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 551 (1976). In considering the "concepts of individual liberty and of the dignity and worth of every man," the United States Supreme Court identified as "the most priceless" of those rights the right to a "trial by jury." *Irvin v. Dowd*, 366 U.S. 717, 721 (1961). Every person accused of a serious crime is "entitled to be tried by an impartial jury, that is, by jurors who had no bias or prejudice that would prevent them from returning a verdict according to the law and evidence." *Connors v. United States*, 158 U.S. 408, 413 (1895); *see also Mu'Min v. Virginia*, 500 U.S. 415, 422 (1991) (observing that *Connors* is "instructive" in determining the constitutional requirements of a jury voir dire process).

At the time of Mr. Menzies's jury selection and trial, the rule in Utah was that "[a] party is entitled to exercise his . . . peremptory challenges upon impartial prospective jurors, and he should not be compelled to waste one in order to accomplish that which

the trial judge should have done." *Crawford v. Manning*, 542 P.2d 1091, 1093 (Utah 1975); *see also State v. Woolley*, 810 P.2d 440, 442-443 (Utah Ct. App. 1991) ("It is prejudicial error to compel a party to exercise a peremptory challenge to remove a prospective juror who should have been removed for cause.")

The Utah Supreme Court had maintained this rule even after the United States Supreme Court issued *Ross v. Oklahoma*, articulating the standard that if a defendant is compelled, by trial court error, to remove a biased juror with a peremptory challenge, the defendant must show that he was prejudiced—that the jury was actually biased. 487 U.S. 81, 88 (1988). Subsequent to *Ross*, a majority panel of the Utah Court of Appeals wrote, in response to a dissent which urged adopted of the *Ross* standard,

> The Utah Supreme Court was faced with this precise issue in 1989 in [*State v.*] *Gotschall* and [*State v.*] *Julian* after *Ross* was decided. We assume that the court considered *Ross* when deciding *Gotschall* and *Julian*, but chose to stay with its long-standing rule that "[a] court commits prejudicial error if it forces a party to exercise a peremptory challenge to remove a prospective juror who should have been removed for cause." *Gotschall*, 782 P.2d [459,] 461 [(1989)]; *see also Julian*, 771 P.2d [1061,] 1064 n.11 [(1989)]. Accordingly, we assume this is still the law in Utah.

Woolley, 810 P.2d at 443 n.5. Therefore, under the "longstanding rule" in Utah, where a party was compelled to use a peremptory challenge to remove a biased juror—one that a trial court should have removed for cause—that party has been prejudiced and should be granted a new trial. *Id.*

Mr. Menzies was forced to use at least four peremptory challenges to remove biased jurors. Although Mr. Menzies ultimately waived the jury for his sentencing

proceedings, *see Menzies II*, 889 P.2d at 397, he had not made that waiver at the time of jury selection. Therefore, although the jury did not ultimately decide Mr. Menzies's sentence, their individual voir dire consisted solely of questions about the juror's opinions on the death penalty. Thus, the individual juror's death penalty views were the only information specific to each juror on which the parties, and the trial court, could make a determination of bias. When the trial court erroneously denied Mr. Menzies's motion to strike the jurors discussed below, Mr. Menzies was compelled to use his peremptory challenges to remove them, in contravention of the then-operative Utah law. *See Crawford*, 542 P.2d at 1093; *see also Menzies II*, 889 P.2d at 397-98 (observing that Mr. Menzies was relying upon existing Utah law when he raised the issue on appeal).

Despite the state law being unquestionably in Mr. Menzies's favor, the Utah Supreme Court denied his appeal on the jury selection issue. The court inexplicably criticized Mr. Menzies's pleading of the issue as inadequate, despite its acknowledgement that it was based on the then-controlling state law. The state court wrote:

> Menzies makes no attempt to demonstrate that the forced use of any of these peremptory challenges was harmful. Instead, he relies on the automatic reversal rule of *Crawford v. Manning*, 542 P.2d 1091 (Utah 1975), and its progeny. Under these cases, reversal is required whenever a party is compelled "to exercise a peremptory challenge to remove a panel member who should have been stricken for cause."

Menzies II, 889 P.2d at 397-98 (quoting *State v. Bishop*, 753 P.2d 439, 451 (Utah 1988)). Given the state of the law, the way the issue was raised and pled was entirely correct, and Mr. Menzies should have been granted a new trial. *See Crawford*, 542 P.2d at 1093.

The state court also criticized Mr. Menzies's reliance on the individual juror's death penalty views.

> Menzies has not asserted that he faced a partial or biased jury during the guilt phase of his trial or that the jury was made more likely to convict as a result of "death qualifying" the jury. Furthermore, while the bulk of Menzies' objections to potential jurors revolved around those individuals' views on the death penalty, the penalty phase was tried to the court rather than to the jury.

Menzies II, 889 P.2d at 400 (internal citations omitted). As explained above, at the time of the jury selection, Mr. Menzies had not yet waived the jury for sentencing and the individual voir dire consisted exclusively of the juror's death penalty views. Thus, the only basis on which Mr. Menzies had to challenge each juror's impartiality was the juror's statements about sentencing matters. Therefore, the state court's basis for denying Mr. Menzies's appeal on this issue are predicated on the fact that Mr. Menzies pled his issue in accordance with the controlling state law in effect at the time, and that he used the only facts about juror impartiality available to him from the voir dire proceedings. It is utterly unreasonable that the state court twisted these facts and used them against Mr. Menzies to deny his appeal on this issue.

In *Menzies II*, The state court overruled its *Crawford* precedent and adopted the *Ross* standard, 487 U.S. at 88, which requires a showing that the jury which sat was biased. 889 P.2d at 399-400. But in doing so, it faulted Mr. Menzies for not pleading to a legal standard which was not in effect in the state courts at the time of his jury selection or at the time he filed his appellate briefs. Therefore, the factual basis for the denial of his appeal on this issue was not one Mr. Menzies could have anticipated. It was, in

effect, an *ex post facto* application of state court precedent. Mr. Menzies pled to, and met, the *Crawford* standard, and would have been entitled to a new trial. The state court's denial of his appeal on this issue was unreasonable in light of these circumstances.

Insight into the state court's rationale may be inferred by comparing *Menzies II* with another capital case decided a few weeks earlier. In *State v. Carter*, the state court applied the *Crawford* standard in denying Carter's appeal regarding biased jurors passed for cause. *See State v. Carter*, Utah Supreme Court Case No. 920110, Opinion dated March 2, 1994, at 28-35 (attached as Exhibit 49). In the original version of the opinion, the court stated that it "reserved for another day the State's invitation to reconsider the 'never harmless error' rule of jury selection established by *Crawford*." *Id*. at 34. That day was March 29, 1994, a few weeks later when Mr. Menzies's appeal was decided. *Menzies II*, 889 P.2d at 393. Subsequently, the *Carter* opinion was amended, with the seven pages of discussion regarding the jury selection issue reduced to less than two, and its holding revised, relying upon *Menzies II*. One line that remained after the amendment noted "an issue of growing concern" regarding "trial courts' frequent insistence on passing jurors for cause in death penalty cases when legitimate concerns about their suitability have been raised during voir dire." *State v. Carter*, 888 P.2d 629, 649 (Utah 1994). The state court continued,

> While the abuse-of-discretion standard of review affords trial courts wide latitude in making their for-cause determinations, we are troubled by their tendency to "push the edge of the envelope," especially when capital voir dire panels are so large and the death penalty is at issue. Moreover, capital

> cases are extremely costly, in terms of both time and money. Passing questionable jurors increases the drain on the state's resources and jeopardizes an otherwise valid conviction and/or sentence.

Id. at 649-50. The Utah Supreme Court appears more concerned about salvaging the verdicts in capital cases, and avoiding the expense and burden of retrying cases, than in ensuring fairness in the proceedings. It went to the extent to rewrite its own precedent in order to avoid providing relief to Mr. Menzies on a claim which should have resulted in a new trial under the then-existing state court law. Mr. Menzies should be granted relief on this claim.

A. Juror Cannon

The trial court refused to excuse Juror Cannon for cause after Cannon stated she would automatically vote to impose the death penalty if Mr. Menzies was guilty of murder. After Juror Cannon expressed her favorable opinion of the death penalty, she explained, "I don't think that it is right for them to kill somebody and get away with it." (TR 02/12/1988, ROA 1153 at 350.) When asked if her opinion was irrevocable, she replied that "[i]f he was convicted, I think I would go along with [a death sentence], I mean, [I] wouldn't change my mind on it." (*Id.* at 351.) When asked if she could "consider voting for a sentence less than death," she replied, "I don't think so." (*Id.* at 353.) Finally, when asked if she believed that a life sentence could accomplish the same goal as a death sentence, she replied, "I don't think so." (*Id.* at 354.)

Defense counsel moved for her to be removed for cause based on her statements, which, when taken together, indicated she would always impose the death penalty and

that a life sentence could not accomplish the same goal. (*Id.* at 360-61.) This was exemplified in the following exchange:

> Ms. Wells: Miss Cannon, I believe what you have just said, and I am maybe rephrasing this and perhaps you need to agree with me or disagree with me if I have stated it wrong, that if Mr. Menzies were to be found guilty of the first degree murder, then you would impose the death penalty; is that what you were saying?
>
> A Juror: Well, if he murdered someone, I would say, yes.
>
> Ms. Wells: If you were a part of a jury that, let's say, was considering a life sentence, I believe you stated it would still be your position that he should receive the death penalty; is that right?
>
> A Juror: Uh-huh.
>
> Ms. Wells: Even though others might have a different opinion? I thought I heard you say you would go along with the death penalty, and that you would also feel that that should be imposed.
>
> A Juror: I do have feelings that way, yes.

(*Id*. at 357-58.) The trial court denied the motion. (*Id*. at 361.) Mr. Menzies used a peremptory strike to remove Juror Cannon. (ROA 944.) Under then-controlling state court law, Mr. Menzies was entitled to a new trial.

B. Juror Taylor

The trial court refused to excuse Juror Taylor for cause after Taylor's testimony established that she was biased in favor of the death penalty. She expressed that, in every instance, a person guilty of premeditated murder should be sentenced to death and that "[l]ots of times, I feel the courts aren't harsh enough to the ones that commit it." (TR

02/11/1988, ROA 1153 at 272-75.) She also stated that she did not believe that a life sentence could accomplish the same goal as a death sentence. (*Id*. at 275.) She described herself as "one of them old fashioned people that believe an eye for an eye, a tooth for a tooth." (*Id.* at 277.)

The prosecution tried to rehabilitate Juror Taylor by restating her response as "you think [the death penalty] is appropriate in some murder cases but not all." (*Id.* at 279.) A follow up question, however, revealed the only distinction between a life and death sentence for this juror was on the issue of premeditation. When asked if she would impose death "in all the circumstances if the facts were to show that a killing was intentional," Juror Taylor replied, "I believe that is what I would have to do." (*Id*. at 279.) Therefore, the only instance in which she would not impose a death sentence was one in which the killing was not intentional. Juror Taylor exhibited a clear bias beyond rehabilitation. On this basis, defense counsel moved for her to be removed for cause. (*Id*. at 282.) Even though there was some argument about whether Juror Taylor understood the questions being asked, the trial court declined an opportunity to clarify the issues and overruled the motion to strike for cause. (*Id*. at 281-85.) Mr. Menzies used a peremptory strike to remove Juror Taylor. (ROA 944.) Under then-controlling state court law, Mr. Menzies was entitled to a new trial.

C. Juror Morgan

The trial court refused to excuse Juror Morgan after Morgan testified that he was unsure whether he could apply the presumption of innocence to Mr. Menzies. Despite extensive instruction by the trial court on burdens and presumptions, Juror Morgan's bias

remained apparent. (TR 02/16/1988, ROA 1154 at 537-38, 544, 546-47.) Although he understood the importance of the presumption of innocence, he was unsure whether he could apply such a presumption. (*Id.* at 546-47.)

The court attempted to rehabilitate the juror by asking two lengthy questions that were suggestive of the correct answer; the juror provided the expected one-word responses. (*Id.* at 547-48.) Defense counsel moved to excuse the juror for cause. (*Id.* at 548.) The trial court denied the motion. (*Id.* at 549.) Mr. Menzies was forced to use a peremptory challenge to remove the juror. (ROA 945.)

The cornerstone of criminal justice is that the accused is presumed innocent until proven guilty. All other burdens and presumptions flow logically from that base. Despite his claimed ability to follow the trial court's instructions regarding the secondary burdens and presumptions, Juror Morgan never stated with any certainty that he could apply the primary presumption of innocence. The trial court committed prejudicial error in forcing Mr. Menzies to peremptthe biased juror. Under then-controlling state court law, Mr. Menzies was entitled to a new trial.

D. Juror Harsh

The trial court refused to excuse Juror Harsh after his testimony established that he was predisposed toward and biased in favor of the death penalty. As befitting his name, this juror stated, "I feel that punishments for crimes should be a lot more strict and a lot more severe than what they are." (TR 02/17/1988, ROA 1154 at 743-44.) Juror Harsh also stated that all persons convicted of premeditated murder should be put to death (*id.* at 745, 747), and that he would vote for a death sentence over a life sentence if he

believed—rightly or wrongly—that a life sentence would allow the defendant to be someday released from prison, (*id*. at 744, 749).

Defense counsel moved to strike Juror Harsh for cause on the basis that he would vote for death just to keep someone in prison, indicating a bias that would cause him to make a determination on a reason other than what was allowed by the jury instructions. (*Id*. at 750.) The trial court denied the motion. (*Id.* at 751.) Mr. Menzies used a preemptory strike to remove Juror Harsh. (ROA 946.) Under then-controlling state court law, Mr. Menzies was entitled to a new trial.

CLAIM 3

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.

This claim is exhausted, as it was presented to the state court on direct appeal. *Menzies II*, 889 P.2d at 400-01. The Utah Supreme Court's determination of this claim was an unreasonable determination of fact and an unreasonable application of clearly established federal law. *See* 28 U.S.C. § 2254(d)(1)-(2).

On Monday, February 24, 1986, two high school kids, Tim Larrabee and Beth Brown, skipped class and went up to Storm Mountain in Big Cottonwood Canyon. (TR 02/19/1988, ROA 1155 at 1192-93, 1215.) When they arrived, an "old and beat up" car was already in the parking lot. (*Id.* at 1194-95.) While at Storm Mountain, Larrabee saw two people, a man and a woman, walking away from him. (*Id.* at 1198.) A short while later he saw these people again, walking on the hillside. (*Id.* at 1199-1200.) The couple

was never closer than 90 to Larrabee and Brown. (*Id*. at 1229.) They were walking in close proximity of each other (*id.* at 1207-08), and Larrabee did not notice anything unusual about them, (*id*. at 1221). Prior to trial, Larrabee told the police that the man and woman were not walking side by side, but that they were walking one in front of the other. (*Id.* at 1225.) They "appeared to be another couple up there." (*Id.* at 1227.)

At some point, Larrabee heard a short scream. (*Id*. at 1208-10.) He "didn't think much of the scream because [he] had heard rocks sliding from" the area where the scream came from. (*Id.* at 1209.) Later, he saw the man walking alone. (*Id.* at 1202.) There was nothing unusual about the man Larrabee saw. (*Id*.) The man was carrying a two-toned jacket and appeared to have "curly, scraggly hair." (*Id.* at 1203-04, 1205.)

On May 16, 1986, the State had Larrabee and Beth pick suspects out of a lineup, which included Mr. Menzies. (TR 05/16/1986, ROA 1151). Mr. Menzies was identified as No. 6 in the lineup. (*Id.* at 6.) Larrabee and Beth were provided with cards and instructed to indicate the number of the person they saw at Storm Mountain, if he was among the lineup. (*Id.* at 13.) They were also instructed to not indicate anything on the cards if they did not see the person they had previously observed. (*Id.*) Both Larrabee and Beth wrote numbers on their cards, neither of which was No. 6. (*Id.* at 17.)

During cross-examination at trial, Larrabee was asked about this identification. Specifically, he was asked about the fact that he did not indicate any hesitation about his identification of someone other than Mr. Menzies. (TR 02/23/1988, ROA 1156 at 1278.) On redirect, the prosecutor asked Larrabee about a conversation they had after the lineup in which Larrabee asked the prosecutor whether he had picked the wrong person; whether

he should have picked No. 6—Mr. Menzies. (*Id.* at 1285.) Despite this lineup proceeding occurring shortly before the preliminary hearing, there was no mention of Larrabee's equivocation about the identification at that hearing, and there was no disclosure to defense counsel about Larrabee's subsequent identification of Mr. Menzies in conversation with the prosecutor, outside of the reliability controls of the lineup procedure. (*Id*. at 1295.)[17]

Larrabee also testified that he had been shown a photo array which included a picture of Mr. Menzies. (TR 02/19/1988, ROA 1155 at 1213.) He testified simply that the photograph of Mr. Menzies most resembled the man he had seen at Storm Mountain. (*Id.*) Later during trial, however, the police officer who had shown Larrabee the photo array testified that Larrabee had not initially been able to make a positive identification from the photographs. (TR 02/25/1988, ROA 1157 at 1685.) This was only four days after Larrabee and Beth were at Storm Mountain. (*Id.*) In fact, Larrabee did not identify Mr. Menzies's photograph until after having further interaction with various police officers. (*Id*. at 1688; TR 02/23/1988, ROA 1156 at 1332). The fact that Larrabee had not identified anyone during the initial showing of the photo array had been withheld from defense counsel. (TR 02/23/1988, ROA 1156 at 1332-33.)

Larrabee's identification of Troy Denter's car—the car alleged to have been used to transport Ms. Hunsaker—was similarly defective. When shown photos of cars, he selected a cream-colored 1968 Buick Rivera. (TR 02/25/1988, ROA 1157 at 1705-6.)

[17] The prosecutor later stated that "I never got into it on direct examination because I knew that they would claim foul play," essentially an admission that it was withheld in bad faith. (TR 02/23/1988, ROA 1156 at 1301.)

Denter's car was a 1974 white Chevrolet Impala. (*Id*. at 1706.) Larrabee was later asked by police if he could identify the car among those in the courthouse parking lot. (TR 02/23/1988, ROA 1156 at 1270-71.) There was only one large, older, light-colored car in poor repair in the parking lot. (*Id*. at 1272.) He also stated that although it most resembled the car he saw at Storm Mountain with respect only to the other cars in the parking lot, he didn't think it was the same one. (*Id*.) The identification of the car was unduly suggestive and the identification was lacking certainty and reliability.

In *Brady v. Maryland*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). Since *Brady*, the United States Supreme Court has found federal due process violations where the prosecution failed to disclose evidence to the defendant. *See Giglio v. United States*, 405 U.S. 150 (1972) (nondisclosure of evidence affecting the co-conspirator's credibility violated due process regardless of whether the attorney who tried the case was aware immunity had been granted); *Wardius v. Oregon*, 412 U.S. 470 (1973) (due process precludes enforcement of state statute requiring defendant to give notice of intent to rely on alibi but not requiring reciprocal discovery from the government); *United States v. Agurs*, 427 U.S. 97 (1976) (The court elaborated on limits of due process in this context); *United States v. Bagley*, 473 U.S. 667, 676 (1985) (due process requires disclosure of evidence which would impeach government witnesses).

Incomplete disclosures of evidence effectively lay a trap for defense counsel. The defense prepares its case based on the facts it knows. If disclosed evidence is exculpatory in nature, defense counsel will use it. Allowing a prosecutor to set up defense counsel to use the exculpatory evidence, then lie in wait with inculpatory evidence which not only takes away the impact of the previously disclosed exculpatory evidence but has the end result of conveying extremely damaging evidence to the jury, is fundamentally unfair.

Larrabee's post-lineup query was critical to the State's case since it was the only "identification" of Mr. Menzies being in the company of Ms. Hunsaker. Larrabee had not made an in-court identification. He had selected someone other than Mr. Menzies at the lineup. (TR 05/16/1986, ROA 1151 at 17.) And he had evidenced considerable hesitation in selecting a photo from the array within just a few days of being at Storm Mountain. Tying Mr. Menzies to the body at Storm Mountain was critical to the State's case and was accomplished, primarily, by means of information withheld from defense counsel. (TR 02/23/1988, ROA 1156 at 1301.)

Additionally, Larrabee's inability to initially identify Mr. Menzies from the photo array was material exculpatory evidence. The State was required to provide this information to defense counsel prior to trial, and its failure to do so violates due process. *See Norris v. Slayton*, 540 F.2d 1241 (4th Cir. 1976) (failure to disclose witness' hesitation in identifying defendant in a showup violated due process); *see also McDowell v. Dixon*, 858 F.2d 945 (4th Cir. 1988) (due process violated where State withheld information that witness first claimed assailant was white, then changed to claim he was black). Instead, the State slowly meted out the information over various days of the trial,

with the most relevant disclosures coming after Larrabee had left the witness stand, impeding Mr. Menzies's ability to impeach the key state witness.

The state supreme court upheld the trial court's finding that the State violated the state rules of discovery by failing to disclose evidence to defense counsel. *Menzies II*, 889 P.2d at 400. Inexplicably, however, the state court determined that by finding a discovery violation, this somehow alleviated it from the duty to address the due process violation. *Id.* ("Because of our disposition of the [discovery violation] question, we need not indulge in a separate due-process analysis.") If the state court determined that the prosecution had violated discovery procedure by failing to disclose material evidence, it was inherently a violation of due process. This was an unreasonable determination of fact which resulted in an unreasonable application of clearly established federal law. *See* 28 U.S.C. § 2254(d)(1)-(a). Mr. Menzies deserves relief on this claim.

CLAIM 4

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.

This claim is exhausted, as it was presented to the state court on direct appeal. *Menzies II*, 889 P.2d at 400-01. It is based on the facts and law discussed above in Claim 3, which are incorporated into this claim by reference. The Utah Supreme Court's determination of this claim was an unreasonable determination of fact. *See* 28 U.S.C. § 2254(d)(1)-(2).

Once the trial court was appraised that the State withheld material exculpatory evidence regarding Tim's faulty identification of Mr. Menzies—that Larrabee only identified Mr. Menzies from the lineup after interference from the prosecutor and that he had initially failed to identify Mr. Menzies from a photo array—the trial court should have granted a mistrial. Defense counsel moved for a mistrial, but the trial court denied the motion. (TR 02/23/1988, ROA 1156 at 1313-14.) Instead, the trial court relied on an insufficient remedy of striking Tim's post-lineup conversation with the prosecutor and admonishing the jury to disregard the testimony. *Menzies II*, 889 P.2d at 401.

In light of the facts and law discussed above in Claim 3, the trial court's failure to declare a mistrial was a violation of Mr. Menzies's right to due process. Furthermore, the Utah Supreme Court's upholding of the trial court's order was based on an unreasonable determination of fact that the trial court's remedy of striking the testimony and admonishing the jury was adequate. *Id.*

As established above, an essential problem with withheld evidence is not limited to just what testimony a witness presents in front of the jury, it goes to defense counsel's ability to adequately prepare for trial. Striking the testimony and admonishing the jury does not remedy a deficiency in preparation or strategy when defense counsel relies upon the State's bad-faith representation that it has disclosed all material evidence. In this instance, the proper remedy was a new proceeding, allowing Mr. Menzies and his defense counsel the opportunity that they had been denied by the prosecution's improper withholding of material evidence: to prepare for and conduct the trial with the full set of

relevant facts—not to be handicapped by the State's bad conduct. Mr. Menzies should be granted relief on this claim.

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.

This claim is exhausted as it was presented on direct appeal. *Menzies II*, 889 P.2d at 401-02. It is based on the facts about Walter Britton, discussed above in the Statement of Facts, and in Claim 14, below, which are incorporated by reference. The Utah Supreme Court's determination of this issue was based on an unreasonable determination of fact and an unreasonable application of clearly established federal law. *See* 28 U.S.C. § 2254(d)(1)-(2).

The essential element of the right of confrontation is that the accused be afforded the opportunity to confront his accusers in person. On this basis, before a court may allow hearsay evidence, there must be a showing of both the unavailability of the declarant and that the statement to be admitted bears sufficient indicia of reliability to justify its use as relevant evidence. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), *overruled by Crawford v. Washington*, 541 U.S. 36 (2004).[18] The burden is on the State to establish that a declarant is unavailable. *Roberts*, 448 U.S. at 75. "[A] witness is not 'unavailable'

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[18] Because Mr. Menzies's conviction became final in 1994, prior to the decision in *Crawford*, 541 U.S. 336, *Roberts* remains the controlling case on this issue. *See Whorton v. Bockting*, 549 U.S. 406 (2007) (holding that *Crawford* does not apply retroactively on habeas review).

for purposes of . . . the exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Id.* at 76 (quoting *Barber v. Page*, 390 U.S. 719, 724-25 (1968)).

Even if the declarant is unavailable, the State must still prove the reliability of the otherwise inadmissible hearsay statement. The statement must fit either into an exception to the hearsay rule or have other "particularized guarantees of trustworthiness." *Roberts*, 448 U.S. at 66. While this may include cross-examined prior testimony, *id.* at n.8, testimony at a preliminary hearing is unlike testimony at trial and the former may not simply be substituted for the latter.

> The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial.

Barber, 390 U.S. at 725. This is because it is for the jury to determine "whether the declarant was sincerely telling what he believed to be the truth, whether the declarant accurately perceived and remembered the matter he related, and whether the declarant's intended meaning is adequately conveyed by the language he employed." *Roberts*, 448 U.S. at 66 (internal quotations omitted).

Walter Britton, a federal prisoner, testified at the preliminary hearing that Mr. Menzies sought him out when they were both housed in the local jail in order to discuss Mr. Menzies's involvement in the Hunsaker homicide. (TR 03/02/1988, ROA 1158 at 2081-83.) The bulk of Britton's preliminary hearing testimony was available from news

reports and he had no specific information that could have been attributable only to Mr. Menzies. (*Id.* at 2110.)

Prior to trial, Britton vacillated as to whether he would testify at trial. (TR 02/18/1988, ROA 1155 at 1081-82.) At trial, Britton was questioned outside the presence of the jury. He stated that he would not testify (*id.* at 960), but he also answered nearly all of the specific questions asked of him (*id.* at 1081). Despite his practical willingness to answer questions, the trial judge determined that Britton was unavailable and, over defense objection, allowed Britton's testimony from the preliminary hearing to be read to the jury. (TR 03/02/1988, ROA 1158 at 2078.)

During the hearing on Britton's availability, defense counsel was clear that she would challenge Britton's credibility, bringing into question the reliability of the preliminary hearing testimony. (TR 02/18/1988, ROA 1155 at 962.) The trial court ordered Britton to testify and he stated that he would refuse. (*Id*. at 965.) Despite this, Britton appeared 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.)

The prosecutors argued vehemently for Britton's unavailability and pushed the trial court to return Britton to the federal prison, saying "I made promises to the jail in Kentucky." (*Id*. at 1090.) The prosecutor did not even want to retain Britton in the courthouse through the resolution of the issue regarding his availability and the reliability

of his prior testimony. (*Id.* at 1091.) They had previously argued that Britton's credibility was not an issue the trial court should consider. (TR 02/18/1988, ROA 1155 at 963.) Similarly to how Britton became reticent only when asked about his psychological evaluation, the issue of his availability seemed to depend, for the State, on the extent to which defense counsel could effectively impeach him with evidence regarding his psychological evaluation.[19] The prosecution was expending every effort to get Britton out of the courthouse before that issue could be fairly explored by defense counsel.

Given that Britton was both present in the courtroom and amenable to answering nearly all of the questions put to him, it cannot be accurately stated that he was unavailable as a witness. The trial court should have put Britton on the stand in front of the jury and allowed them to see his refusal to answer questions about his mental competency. The trial court erred in making its finding of unavailability, and the state supreme court made an unreasonable determination of fact in upholding the trial court's finding.

Additionally, the preliminary hearing testimony could not be a substitute for properly cross-examined testimony in front of the jury. *See Barber*, 390 U.S. at 725. The function of the two hearings is different. *Id.* Because the purpose of a preliminary hearing is to determine probable cause to bind a case over for trial, the kinds of testimony that the state puts on, and the kind of cross-examination it is subjected to, is different than

[19] For more on Britton's psychological state and reliability as a witness, *see* Claim 14.

what would happen at trial. Defense counsel is less concerned with sowing seeds of reasonable doubt at a preliminary hearing.

Other factors also impacted the reliability of Britton's preliminary hearing testimony. First, he was a jailhouse informant whose testimony was inherently suspect; since he stood to benefit from the testimony, the source of his information is questionable given its factual inaccuracy, and defense counsel did not have an opportunity to examine him on these issues at the preliminary hearing.

Defense counsel did not have the opportunity to examine Britton at the preliminary hearing regarding his subsequent convictions and sentences, or his understanding of the State's promise to file a favorable affidavit on his behalf. At that hearing, Britton denied that his testimony in Mr. Menzies's case would be of any benefit to him when he had his sentence reviewed. (TR 05/09/1986, ROA 1150 at 170-71.) However, at trial it was shown that the prosecution had in fact entered into an agreement to provide favorable treatment for Britton after he testified. (TR 03/01/1988, ROA 1158 at 2038-39.)

In these ways, the preliminary hearing testimony was not reliable hearsay and did not bear particularized guarantees of trustworthiness. The trial court denied Mr. Menzies his right to confront and cross-examine Britton and he 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.

This claim is exhausted having, been raised on direct appeal. (09/14/1992 Br. of Appellant at 68.) 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 ("We find Menzies' other claims to be without merit."). 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").

At the preliminary hearing, Britton denied that his testimony in Mr. Menzies's case would be of any benefit to him when he had his sentence reviewed. (TR 05/09/1986, ROA 1150 at 170-71.) However, at trial it was 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.) Shortly after the preliminary hearing, one of the prosecutors in Mr. Menzies's case testified on Britton's behalf at a federal Rule 35 hearing to modify his sentence. (TR 03/03/1988, ROA 1159 at 2277.) Given that Britton was not going to appear before the jury as a witness (*see* Claim 5), Mr. Menzies subpoenaed the only other person with personal knowledge as to the benefit

provided by the State, prosecutor Rick MacDougall. (*Id.*) The trial court quashed the subpoena on the erroneous basis that the issue of a benefit promised to Britton in exchange for his testimony was "not material to this case." (*Id.* at 2278.)

In so doing, the trial judge violated Mr. Menzies's right to compulsory process as guaranteed by the Sixth and Fourteenth Amendments. The United States Supreme Court has held that

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19 (1967). "The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts." *United States v. Nixon*, 418 U.S. 683, 709 (1974). Therefore, "[t]o ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense." *Id*; *see also* *United States v. Wooten*, 377 F.3d 1134, 1143 (10th Cir. 2004) (A defendant may call the prosecutor as a witness if the prosecutor "possesses information vital to the defense."); *United States v. Prantil*, 764 F.2d 548, 551 (9th Cir. 1985) (If a defendant has exhausted "other available sources of evidence . . . a court should sustain a defendant's efforts to call a participating prosecutor as a witness.").

At the time of the preliminary hearing, Mr.Menzies had no evidence that the State was doing anything to help Britton with the sentencing in his pending criminal cases. Later, defense counsel discovered that the State had promised a benefit to Britton and had carried through on that promise.

MacDougall's testimony as to the details of the understanding prior to the preliminary hearing, any statements or information conveyed directly to Britton, and the specifics of the testimony in federal court were critical for the defense to impeach Britton's testimony. Mr. Menzies was prejudiced in his inability to counter Britton's testimony. Mr. Menzies's right to compel witnesses as guaranteed by the Sixth Amendment was violated. He 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.

This claim is exhausted, having been raised on direct appeal. (09/14/1992 Br. of Appellant at 72.) 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 ("We find Menzies' other claims to be without merit."). 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 trial court consistently granted Mr. Menzies's motions to exclude all references to his prior crimes and parole status from evidence presented to the jury. Prior to trial, the court ruled that evidence of Mr. Menzies's unrelated past criminal history would unfairly prejudice him and taint the jury. (ROA 780.) During trial, the court granted Mr. Menzies's motion to exclude the testimony of an officer that required discussion of Mr. Menzies's other crimes and parole status because any relevance of his testimony would be outweighed by prejudice flowing from evidence of prior convictions and parole status. (TR 02/24/1988, ROA 1156 at 1589-91.) Finally, the court admonished counsel to sanitize the preliminary hearing transcript of any reference to Mr. Menzies's prior criminal history before the transcript was read to the jury. (TR 03/02/1988, ROA 1158 at 2113-14.)

Despite this, the State elicited testimony from Det. Jerry Thompson that Mr. Menzies had gone to his parole[20] 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.)

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[20] The original transcript erroneously reports that Detective Thompson said "patrol office." During proceedings to attempt to correct the transcript, the parties stipulated that Detective Thompson actually said "parole office."

The Sixth and Fourteenth Amendments guaranteed Mr. Menzies's right to a fair trial by an impartial jury. Both state and federal courts have historically, and uniformly, disallowed the use of character evidence to support an inference of guilt. *See Michelson v. United States*, 335 U.S. 469, 475 (1948) ("Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt."). It is not because the evidence is per se irrelevant;

> on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

Id. at 476.

This was of particular concern in Mr. Menzies's case, evidenced by the efforts he took to ensure that evidence of his prior criminal history was excluded, and the trial court endorsed these efforts by granting Mr. Menzies's motions. The prosecution's misconduct in eliciting evidence of past unrelated bad acts deprived Mr. Menzies of his right to a fair trial by prejudicing the jury against him. The trial court made several rulings to protect Mr. Menzies against this very type of evidence on the basis that it was more prejudicial than probative. And the State did not deny the prejudicial nature of the testimony. (TR 03/01/1988, ROA 1158 at 1922). It was a plain error for the trial court to deny Mr. Menzies's motions for mistrial. 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.

This claim is exhausted, having been raised on direct appeal. (09/14/1992 Br. of Appellant at 78.) 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 ("We find Menzies' other claims to be without merit."). The state court's determination of this claim was an unreasonable determination of fact. *See* 28 U.S.C. § 2254(d)(2); *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 right to an impartial jury is a fundamental right. *See Duncan*, 391 U.S. at 148-50. Every person accused of a serious crime is "entitled to be tried by an impartial jury, that is, by jurors who had no bias or prejudice that would prevent them from returning a verdict according to the law and evidence." *Connors*, 158 U.S. at 413; *see also Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Irvin v. Dowd,* 366 U.S. 717 (1961).

During Mr. Menzies's trial, there were several extraordinary occurrences which either directly impacted individual jury members, or happened in their presence. These instances, both individually and cumulatively, prejudiced Mr. Menzies by exposing the

jury to improper external factors, rendering his trial fundamentally unfair. They are described as follows.

First, Juror Eaton fainted in front of the other jurors during the medical examiner's testimony. (TR 02/25/1988, ROA 1157 at 1621-22; ROA 814-15.) In response, 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.) This incident drew attention to a juror being emotionally traumatized by the evidence, and to an inference that Mr. Menzies was a potential threat who needed to be immediately restrained in an emergency situation.

Second, 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.) The jurors had to assume that the medical examiner's testimony was extraordinary to cause an emotional response in a member of the court's staff. Though the court reporter denied that it happened in the courtroom, the fact that defense counsel was aware of it and asked about it shows otherwise. (*Id.*)

Third, later during the trial, Juror Adams advised the court that he had received 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.) This resulted in the dismissal of Juror Adams and the sequestration of the remaining jurors at an undisclosed location under 24-hour guard. (*Id.* at 2392, 2394-95.) This incident, and the trial court's response, created

the impression that the jurors were in danger of some undisclosed threat, possibly related to Mr. Menzies.

And fourth, during the recess that followed Juror Adams's report, after the other jurors were informed that there was a problem with one of the jurors, Juror Gass suffered an emotional breakdown in front of the jury. (*Id*. at 2395-96.) Juror Gass "was so distraught that she requested her medication that she takes for nerves." (*Id*. at 2396-97.) This was the third time Juror Gass had notified the court that she was having difficulty. (*Id*. at 2398.) The prosecution acknowledged that if Gass continued as a juror, she may taint the others. (*Id*. at 2397-98.) She was excused. (*Id*. at 2402.)

Defense counsel moved for mistrial based on the cumulative effects of these incidents. (*Id*. at 2409.) They argued, accurately, that all of Mr. Menzies's pretrial motions to protect his rights—to protect the jury from being tainted by prejudicial evidence—had been granted, in an effort to ensure the fairness of the proceedings. (*Id*. at 2410.) In spite of these orders, however, the jury had been inappropriately exposed to prejudicial information—in contravention of the court's order—about Mr. Menzies's criminal history. (*Id*.; *see also* Claim 7.) Then, compounding that, the jurors had now seen a juror faint in response to evidence of the homicide, another juror removed with no explanation, an order of sequestration at an unknown location where they would be under guard, and a third juror suffer an emotional breakdown (for, perhaps, the third time). (*Id*. at 2410-14.)

The extent of this debacle was certainly unprecedented. Perhaps a court could make a curative effort to salvage the jury in the face of one, or even two of these sort of

prejudicial instances. But here, the jury was impacted by five separate occurrences—each of which would individually be valid grounds for mistrial—that directly involved three jurors, and resulted in the removal of two of them. There is no valid argument that the remaining panel was not tainted by the prejudicial impact of the series of events which marred Mr. Menzies's trial. They created a pattern of prejudicial incidents which prohibited the jury from making a fair determination of the evidence against Mr. Menzies. This is especially so when considered in light of other prejudicial incidents, such as the testimony regarding Mr. Menzies's parole status, as discussed in Claim 7.

Despite this, the court refused to declare a mistrial. (*Id.* at 2418-19.) The trial court founded its decision on the assumption that the remaining jurors would understand that the excused jurors had been excused for cause. (*Id.* at 2416.) This was an unreasonable determination of fact for two reasons. First, the trial court had no basis on which to assume that the jurors would understand this. It is unreasonable to assume that lay persons are going to understand the technical particulars of qualification for jury service. A review of their voir dire (or the voir dire of any panel of potential jurors) will demonstrate a general lack of knowledge of legal terminology and procedure, much less the policy rationale underlying the procedure.

And, second, at no point leading up to the culmination of all of these events had the jury ever been instructed or subject to voir dire on the extraordinary circumstances to which they were now being subjected. Before this point, they were 14 individuals who returned home each night, and had certain liberties during lunch and recess, with the stipulation to not discuss the case with anyone. Now, after the unexplained loss of two

jurors, they were sequestered in an undisclosed location under guard. This was a drastic change in circumstance, with the only reasonable inference being that the jury was in danger from some kind of threat as a result of their service as jurors sitting in judgment of Mr. Menzies. In all likelihood, the jurors attributed these measures to something Mr. Menzies had done.

The passion and emotions felt for Ms. Hunsaker, coupled with the fear created by this pattern of prejudicial incidents, irrevocably tainted this jury, thereby violating Mr. Menzies's right to an due process, a fair trial, and an impartial jury. Given the extent and severity of the prejudicial incidents which plagued Mr. Menzies's trial, it was utterly unreasonable for the trial court to continue to deny the compounding prejudice, and for the state supreme court to sweep it under the rug in a summary dismissal. He should be granted relief on this issue.

CLAIM 9

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

As discussed in Claim 8, *supra*, during the guilt phase of Mr. Menzies's capital trial, a juror fainted during the testimony of the medical examiner and the bailiff became visibly upset. In the ensuing upheaval, Mr. Menzies was abruptly shackled in full view of the jury and then forcibly removed from the courtroom. (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.)

The Due Process Clause of the Fourteenth Amendment prohibits the unjustified shackling of a defendant at any stage of a trial. *See Deck v. Missouri*, 544 U.S. 622, 624 (2005) (holding that the visible shackling of a defendant before a jury during the guilt or penalty phase of a capital trial violates due process absent case-specific security justifications); *Illinois v. Allen*, 397 U.S. 337, 344 (1970). As a result, the United States Constitution "forbids the use of visible shackles . . . *unless* that use is 'justified by an essential state interest'—such as the interest in courtroom security—specific to the defendant on trial." *Deck*, 544 U.S. at 624 (quoting *Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986)). As established in Claim 8 Mr. Menzies was subject to a series of events that likely prejudiced the jury against here. Here, seeing Mr. Menzies forcibly restrained during an emergency situation communicated to the jurors that Mr. Menzies was dangerous, a threat that need to be immediately contained. Mr. Menzies should be granted relief on this claim.

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.

This claim is exhausted, having been raised on direct appeal. (09/14/1992 Br. of Appellant at 85.) 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."). 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").

"It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is '*per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions.'" *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)) (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971) *Chambers v. Maroney*, 399 U.S. 42, 51 (1970)). One of those exceptions is consent. *Id.* Absent valid consent or one of the other "few specifically established and well-delineated exceptions," however, the State must have a warrant. *Id.* If evidence is seized illegally, the proper remedy is that it be excluded from trial. *See*

Wong Sun v. United States, 371 U.S. 471, 485 (1963) ("The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion.").

Police investigating Ms. Hunsaker's homicide entered Mr. Menzies's apartment without either his consent or a warrant, and searched it and his trash, finding several items (including a handcuff box, a coat, a pair of handcuffs, a knife, a "ten-code" card, and a handbag), all of which were ultimately admitted at trial against Mr. Menzies. Each of these items was obtained illegally and should have been excluded.

Nicole Arnold, Mr. Menzies's girlfriend at the time, and Troy Denter, Mr. Menzies's friend and the owner of the car at issue in the offense, went to the jail to pick up some of Mr. Menzies's personal property. While there, Det. Dennis Couch learned they were in the building and asked to speak with Ms. Arnold. (TR 11/21/1986, ROA 1163A at 21.) Couch "noted that Ms. Arnold appeared to be educationally deficient and . . . he learned that she was in fact legally blind." (*Id*. at 22.) Regardless, he obtained her signature on a consent form to search Mr. Menzies's apartment. (*Id*.)

On the way to the apartment, Couch determined—correctly—that Ms. Arnold's consent was not valid; this was due to both her impairments and the fact that she was not a resident of the apartment. (*Id*. at 22-23.) Despite the awareness of the illegality of their search, Couch and other law enforcement officers proceeded to enter Mr. Menzies's apartment and search his property. (*Id*. at 23.)

In addition to Mr. Denter and Ms. Arnold, Ms. Arnold's mother, Janet Franks, was at the apartment. (*Id*. at 24.) Ms. Franks was also not a resident of the apartment. (*Id*.)

Regardless, she led the police—and they willingly followed—throughout the apartment as she directed them to items she believed would be of relevance, including Mr. Menzies's coat and a pair of handcuffs, which Ms. Franks alleged she had seen in the pocket of the coat. (*Id.*) Similarly, Mr. Denter directed the police to items that he claimed Mr. Menzies had left in his car; these items were searched inside the apartment and yielded the handcuff box. (*Id.* at 23.)

After the police had entered the home, they placed a call to the jail and compelled Mr. Menzies to sign a consent form permitting police to search his home. (*Id.* at 25.) Mr. Menzies signed the form, noting on the form that he did so "under duress." (*Id.*)

Still finding themselves without valid consent for the search, the detectives sought a warrant after the fact. (*Id.*) They included on the warrant the items they had already discovered in Mr. Menzies home—items for which they had no independent knowledge other than the illegal search—and certain of Ms. Hunsaker's property. (11/07/1986 Motion to Suppress Hearing, Ex. 2.) They also omitted from the affidavit in support of the warrant that they had already—without valid consent—entered Mr. Menzies's home, searched it, and observed its contents. (*Id.*) The affidavit in support of the warrant did not offer a basis in probable cause for believing the items sought would be found in Mr. Menzies home. (*Id.*) In fact, Couch admitted that he had no reason to believe that any of Ms. Hunsaker's property would be found in the apartment. (TR 11/21/1986, ROA 1163A at 27.)

Mr. Menzies filed a proper motion to suppress the items seized from his home and trash, which was denied by the trial judge. (ROA 335-36, 465-66 (amended).) Mr.

Menzies made a continuing objection to the admission of the evidence at trial. The search, the state court's denial of the motion to suppress, and the conviction based on illegally seized evidence were each violations of Mr. Menzies's Fourth Amendment rights.

The only person who could have validly consented to the search was Mr. Menzies. And he clearly did not freely offer his consent as he specifically expressed that he signed the form while "under duress." (TR 11/21/1986, ROA 1163A at 25.) Therefore, the apartment could only be searched after obtaining a valid warrant. This was impossible, given that the residence was searched prior to obtaining the warrant.

Additionally, the warrant that was ultimately obtained was not valid. It was based upon a material omission—that the house had been searched and the items sought were only known to police because of the illegal search. 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). If a court were to excise the portions of the affidavit not based on information the police had obtained illegally—and neglected to inform the court about—there would be no basis in probable cause on which the warrant could have issued. *Id.*

The State should not have been able to rely on a warrant obtained after the fact, given that its basis in probable cause was obtained in violation of the Fourth Amendment protection against illegal searches. *See Wong Sun*, 371 U.S. at 484-86. "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely

evidence so acquired shall not be used before the Court but that it shall not be used at all." *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920)

The illegal search yielded numerous items that were ultimately admitted against Mr. Menzies at trial, forming the basis for his conviction and sentence. These items included, among other things, the sheath knife (TR 02/25/1988, ROA 1157 at 1680-81; TR 02/26/1988, ROA 1157 at 1747), handcuffs (TR 02/25/1988, ROA 1157 at 1680-81; TR 02/26/1988, ROA 1157 at 1747), parka (TR 02/26/1988, ROA 1157 at 1743), the "ten-code" card (*id*. at 1744-45), handcuff box (TR 02/25/1988, ROA 1157 at 1733-34), gym shoes (TR 02/26/1988, ROA 1157 at 1745), and a handbag reported to belong to Ms. Hunsaker (id. at 1744; TR 02/18/1988, ROA 1155 at 989-90).

As established in Claims 3 and 12, each individual piece of evidence against Mr. Menzies was problematic. The evidence obtained through the illegal search allowed the State to bolster otherwise weak evidence. Therefore, the admission of this evidence cannot be determined to have been harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967)

As discussed in Claim 3, the State used an overly suggestive showing of Mr. Menzies's parka to bolster Larrabee's weak testimony regarding the man he had seen at Storm Mountain. This was an attempt to establish that Mr. Menzies was that man Larrabee had seen. Similarly, in the absence of direct evidence that Mr. Menzies was the killer, the State used the knife, handcuffs and handcuff box in an attempt to link Mr. Menzies to the homicide. The tennis shoes, "ten-code" card and handbag seized pursuant to the illegally-obtained warrant were also used in an attempt to link Mr. Menzies to Ms.

Hunsaker and other elements of the offense. The admission of this evidence was not harmless beyond a reasonable doubt. These items should have been precluded from use against Mr. Menzies. Given the trial court's constitutional violation in admitting these items, 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.

This claim is exhausted, having been raised on direct appeal. (09/14/1992 Br. of Appellant at 99.) 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 ("We find Menzies' other claims to be without merit."). 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 weight often given to objects offered in evidence is grossly out of proportion with its true import.

> "What is called 'real evidence'—mostly bullets, bad florins, and old boots—is of much value for securing attention. This is true even when these exhibits prove nothing—as is generally the case. They look so solid and important that they give stability to the rest of the story. The mind in doubt ever turns to tangible objects."

Dean v. Hocker, 409 F.2d 319, 321 (9th Cir. 1969) (quoting Wigmore on Evidence, § 1157, at 253 (3d ed.1942)). This is because

> "First, there is a natural tendency to infer from the mere production of any material object, and without further evidence, the truth of all that is predicated of it. Secondly, the sight of deadly weapons or of cruel injuries tends to overwhelm reason and to associate the accused with the atrocity without sufficient evidence."

Id. at 321-22 (quoting Wigmore on Evidence, § 1157, at 253 (3d ed.1942)).

This error is precisely what happened in Mr. Menzies's case, where the court erroneously admitted several objects which had no bearing on the offense or on the State's theory as to Mr. Menzies's role in it, but which, by their nature, created the impression that Mr. Menzies was a dangerous outlaw. The admission of this evidence "overwhelm[ed] reason" and allowed the jury "to associate the accused with the atrocity without sufficient evidence." *Id*.

The most basic rule of evidence is that it must be relevant to be admissible. State and federal courts alike prohibit the use of irrelevant evidence. In fact, the Utah rule for determining relevancy is word-for-word the same as the federal rule. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid 401; Utah R. Evid. 401. In Mr. Menzies's case, the trial court admitted several items of physical evidence which utterly failed the test of Rule 401. None of these items bore at all on any fact in consequence. Therefore, they could not possibly make any of those facts more or less probable. Their only effect was to "confus[e] the issues," "mislead[] the jury," "wast[e] time," and result in "unfair prejudice" to Mr. Menzies. Fed. R. Evid. 403; Utah R. Evid. 403.

As discussed below, 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.

A. Denter's gun had no bearing on any element of the charged offenses.

Over Mr. Menzies's objection (TR 02/23/1988, ROA 1156 at 1412-3), the trial judge admitted Troy Denter's gun as an exhibit (*id*. at 1416-17). Denter testified that he kept the gun and shells in his car and that Mr. Menzies had asked him to purchase it. (*Id*. at 1411-12, 1417.) There was no evidence presented that a gun was used in this case. Given that it did not make a fact of consequence any more or less probable, the exhibit was irrelevant and highly prejudicial. It should have been excluded. Its admission prejudiced Mr. Menzies by misleading the jury into making a probable and erroneous inference about his dangerousness and violent nature.

B. The knives were not used in the offense and were only admitted to create the prejudicial inference that Mr. Menzies was a dangerous person.

The state court admitted three knives as exhibits despite there being no evidence that any of these was used in the offense. They included a pocketknife which Denter had seen Mr. Menzies wearing about a week before the homicide (*id*. at 1407-08); Denter's hunting knife, which Denter kept in his car (*id*. at 1410); and a third knife (TR 03/01/1988, ROA 1158 at 1997). The medical examiner testified that the first two knives could possibly have created the victim's wounds, as could any other knife of similar size. (TR 02/25/1988, ROA 1157 at 1637-38.) Neither knife was found to have blood or other physical evidence on it that connected it to the offense. (TR 03/01/1988, ROA 1158 at 1977-79.) Therefore, these knives were not relevant as they did not make any fact of consequence more or less probable. They only served to mislead and confuse the jury into a prejudicial and erroneous assumption about Mr. Menzies's character.

The medical examiner did not testify that the third knife was consistent with the victim's wounds; it was found to have blood on it, although it was neither the victim's blood, nor Mr.

Menzies's blood. (*Id*. at 1979.) The admission of this knife created the prejudicial inference that the knife had been used on someone else. Allowing this testimony without otherwise linking the knives to the homicide was highly prejudicial. Showing that Mr. Menzies had access to knives is meaningless but nevertheless implies that he is violent or dangerous where the evidence is not otherwise connected to his case.

C. The tennis shoes had no evidentiary function whatsoever.

The tennis shoes were merely found at Mr. Menzies's apartment and had no relationship whatsoever to the crime. (TR 02/26/1988, ROA 1157 at 1745.) The State made no argument as to the relevance of the shoes to any aspect of the offense. Defense counsel entered a continuing objection to admission of the shoes. (TR 03/02/1988, ROA 1158 at 2129.) Admission of this evidence served only to confuse and mislead the jury.

D. The "ten-code" card had no relevance to any fact in contention and only served to prejudice the jury against Mr. Menzies.

A "ten-code" is a card which identifies the short numerical code which stands for various messages used in police work. (TR 02/26/1988, ROA 1157 at 1744.) Officers seized a "ten-code" card from Mr. Menzies's apartment, and the State introduced it at trial over Mr. Menzies's objections. (*Id*.; TR 03/02/1998, ROA 1158 at 2129.) It was introduced even though it had no probative value to any aspect as to the crimes charged. Its only function was to create the inference that Mr. Menzies was a criminal.

Each of these items was erroneously found by the court to be relevant despite having no bearing on any fact of consequence that was presented to the jury. Given that these items had no evidentiary value, their purpose could only, at best, confuse and mislead the jury. At worst, especially with regard to the gun, the knives, and the "ten-code" card, they created an unfair prejudice against Mr. Menzies, allowing the jury to make improper assumptions based on his

character—inferring that he was a dangerous man, with a violent nature, who operated outside the bounds of the law. Mr. Menzies should be granted relief on this claim.

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.

This claim is exhausted, having been raised on direct appeal. (09/14/1992 Br. of Appellant at 113.) 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 ("We find Menzies' other claims to be without merit."). Therefore, when reviewing the reasonableness of the state court decision under AEDPA, this Court must determine what theories could have supported that decision and determine "whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Here, the state court's denial of this claim was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103.

The record of the trial establishes that the State did not sufficiently prove each and every element of the charges beyond a reasonable doubt. The Due Process Clause requires that the state prove each element of the charges beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 315-18 (1979) (citing *In re Winship,* 397 U.S. 358

(1970)). There was insufficient evidence to connect Mr. Menzies to the homicide, to support the charge of robbery, and to support the charge of kidnapping.

The requirement that every element of a crime be proved beyond a reasonable doubt is "fundamental" and "a substantive constitutional standard." *Id.* at 317. That Court explained that the constitution "requires more than simply a trial ritual." It requires "that the factfinder will rationally apply that standard to the facts in evidence. A 'reasonable doubt,' at a minimum, is one based upon 'reason.'" *Id.* at 316-17. Given the myriad problems with the evidence in Mr. Menzies's case—including evidence which was obtained illegally (*see* Claim 10), irrelevant evidence admitted erroneously (*see* Claim 11), witness testimony which should have been excluded (*see* Claims 5 and 7), and eyewitness testimony which resulted from prosecutorial misconduct (*see* Claim 3)—and given the numerous prejudicial events which impacted the jury (*see* Claims 8 and 9), there is significant doubt about the accuracy of the jury's verdict in Mr. Menzies's case.

A. There was insufficient evidence to connect Mr. Menzies to the homicide.

1. The witness identifications of Mr. Menzies, his coat, and the car used in the offense were unreliable and obtained by suggestive procedures.

The evidence placing Mr. Menzies at the site of the homicide was weak and circumstantial. As discussed above in Claim 3, Tim Larrabee picked someone other than Mr. Menzies at the lineup and was unable to make a positive identification from a photo array. Additionally, Tim's initial description of the man's coat he saw—given very close in time to when he observed the coat—was different from the appearance of Mr.

Menzies's coat. Larrabee initially described it as "blue-grey" or "blue-white," rather than "two-tone grey and maroon," which was what Mr. Menzies's coat was. (TR 02/23/1988, ROA 1156 at 1264.) When he was shown Mr. Menzies's coat—and only Mr. Menzies's coat, not an array to select from, in an unduly suggestive procedure—Larrabee said that it was similar, contradicting his prior statement. (*Id.* at 1273.) This series of events—Larrabee provides a description which points to someone other than Mr. Menzies, law enforcement personnel interfere in his description and identification, and then Larrabee provides a description that indicates Mr. Menzies—is a consistent pattern in this case.

Larrabee's identification of Troy Denter's car—the car alleged to have been used to transport Ms. Hunsaker—was similarly defective. When shown photos of cars, he selected a cream-colored 1968 Buick Riviera. (TR 02/25/1988, ROA 1157 at 1705-06.) Denter's car was a 1974 white Chevrolet Impala. (*Id.* at 1707.) Larrabee was later asked by police if he could identify the car among those in the courthouse parking lot. (TR 02/23/1988, ROA 1156 at 1270-71.) There was only one large, older, light-colored car in poor repair in the parking lot—Troy Denter's car. (*Id.* at 1272.) He also stated that although it most resembled the car he saw at Storm Mountain with respect only to the other cars in the parking lot, he didn't think it was the same one. (*Id.*) The identification of the car was unduly suggestive and the identification was lacking certainty and reliability.

In testifying about his failure to identify Mr. Menzies at the lineup, Larrabee stated that the man he saw at Storm Mountain had a "pot belly" and he selected someone from the lineup who was "overweight." (TR 02/23/1988, ROA 1156 at 1285.) Larrabee

described Mr. Menzies as being in "better shape" than the man he had observed. (*Id*. at 1286.) In an attempt to rehabilitate Larrabee's faulty identification of Mr. Menzies—after law enforcement interference—a police witness, 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.) Therefore, there had been no noticeable change in his build between the time of the offense and the lineup.

This effort is consistent with law enforcement's other efforts to try to make the evidence fit Mr. Menzies. At the preliminary hearing, Larrabee testified that, two days after the offense, he assisted the police in creating a composite sketch of the man he saw at Storm Mountain. (TR 05/10/1986, ROA 1151 at 107-08.) Despite Larrabee having described the man as having a pot belly, and despite him having identified an overweight man in the lineup as most closely resembling the man at Storm Mountain, the composite sketch depicts a tall man of about 170 pounds. (Guilt Phase Ex. 2, Composite Drawing.) Also, the composite sketch depicts a man with curly, black hair. (*Id.*) Mr. Menzies does not have curly black hair, however, in his mug shot photo, which was shown to Larrabee as part of the photo array, Mr. Menzies's hair is messy and may appear to be curly.

(Guilt Phase Ex. 36, Menzies's Booking Photograph.) Det. Thompson, when asked at the preliminary hearing if the composite had been made prior to showing Larrabee the photo array, answered that "[t]he photo array had already been given to him by Detective Judd." (TR 05/10/1986, ROA 1151 at 146.) This explains why the composite sketch depicts a man who more closely resembles Mr. Menzies than the original description provided by Larrabee prior to police interference.

The State put on an identification technician from the Salt Lake Sheriff's Office who processed Denter's car for fingerprints and other physical evidence. (TR 02/26/1988, ROA 1157 at 1776, 1777.) He testified that one latent print belonging to Ms. Hunsaker's right thumb was located on the inside of the passenger window of Denter's car. (*Id.* at 1779, 1781, 1784.) This evidence, taken at face value is merely circumstantial evidence that only demonstrates that Ms. Hunsaker had been in the car at some point. It did not establish that she had been there in February 1986, or was under Mr. Menzies's control while there.

At trial, the State offered as an exhibit a photograph of the lift of the fingerprint, but not a photograph of the print on the window itself. (*Id.* at 1783-84; see also Guilt Phase Ex. 99.) The photograph of the print on the window was conveniently missing. (TR 02/26/1988, ROA 1157 at 1805.) Therefore, the State could not even establish that the print actually came from the window of Denter's car. It could have come from anywhere.

2. The carpet fiber was not probative of any fact in support of guilt.

Although officers found a lime green carpet fiber on Ms. Hunsaker's clothing, the State's fiber analyst could not offer any probability that a similar fiber found in Denter's car was from the same source or whether there had been a secondary transfer. (TR 03/01/1988, ROA 1158 at 1994-98.) Furthermore, Denter's car was used to move items out of Mr. Menzies's apartment (TR 02/23/1988, ROA 1156 at 1404); fibers from Mr. Menzies's carpet could easily have gotten into the car during that process.

The fiber analyst acknowledged that fiber analysis is an inexact process. (TR 03/01/1988, ROA 1158 at 1994.) The State's emphasis on this point of evidence was unreliable and highlights the weakness of the case linking Mr. Menzies to the offense.

3. The victim's jacket from the crime scene was not probative of any fact in contention and only served to inflame the jury.

The State introduced Ms. Hunsaker's jogging jacket, which had been cut and stained with blood. (TR 02/18/1988, ROA 1155 at 990-91.) But the jacket was of no probative value. The large amounts of dried blood against a light blue background had a highly inflammatory and prejudicial effect. The only conceivable purpose for introduction of the jacket was to show the jury the blood stains, not to prove any fact in contention necessary to establish Mr. Menzies's guilt.

4. The handcuffs and handcuff box were not probative and inflamed the jury.

The State admitted a pair of handcuffs found in Mr. Menzies's apartment over the objection of Mr. Menzies. (TR 02/23/1988, ROA 1156 at 1406.) Also over his

objection, the State sought to demonstrate the ligature marks on the victim could have been caused by handcuffs by placing handcuffs on a 270 pound man. (*Id*. at 1387-88.) Ms. Hunsaker was approximately 130 pounds. Over defense objections, the court also admitted an empty handcuff box found near the dumpster near Mr. Menzies's apartment. (*Id*. at 1404-05.)

In addition, without foundation, corroborative evidence, or any prior notice to Mr. Menzies, the State put on testimony from a police detective in which he speculated that Ms. Hunsaker had been cuffed to the tree prior to her death. (*Id*. at 1325-26.) In fact, in the autopsy report admitted as evidence, Det. Thompson hand wrote "handcuffs" where it had previously only said "ligature." (*Id*. at 1364; Guilt Phase Ex. 72, Thompson's Autopsy Report.) There was no forensic evidence to support an inference that handcuffs had been used.

No forensic evidence was on the handcuffs taken from Mr. Menzies's apartment. The handcuffs and box had essentially no relevance in this case. Nevertheless, the State introduced them in a highly prejudicial and inflammatory manner. The trial court erred in failing to exclude these items and erred in permitting the highly inflammatory in-court demonstration and presentation of the unsupported theory that Ms. Hunsaker had been cuffed to a tree.

B. There was also insufficient evidence to support the charge of robbery.

1. The cash found in Mr. Menzies's apartment was unreliable and incomplete evidence which misled the jury.

The State's evidence to support the charge of robbery included a cash drawer

empty of bills at the Gas-A-Mat, audit results from the Gas-A-Mat, and money found at Mr. Menzies's apartment. Although money appeared to be missing from the Gas-A-Mat, the evidence that established the booth door was left open, and anyone could have taken the money. (TR 02/19/1988, ROA 1155 at 1167.) The Gas-A-Mat management performed two audits to determine how much money was missing, and each audit produced significantly different amounts. (*Id*. at 1137-39, 1141-42.) The second audit also showed 231 packs of cigarettes missing, but an employee later determined that no cigarettes were missing. (*Id*. at 1177-78, 1186.)

Even if this inconclusive evidence were sufficient to show money was taken, it does not establish that it was taken by Mr. Menzies. There were no signs of struggle in the booth and Mr. Menzies's fingerprints were not in the booth. (TR 02/25/1988, ROA 1157 at 1887.)

The State claimed money was found in the umbrella in Mr. Menzies's apartment in a sum similar to what was missing from the Gas-A-Mat. The money was supposedly found by Troy Denter, who claimed to have discovered in Mr. Menzies's. (TR 02/23/1988, ROA 1156 at 1423-24). Denter also testified that he had spent some of the money. (*Id*). The State argued that because Mr. Menzies was unemployed, it may have been stolen. (TR 03/09/1988, ROA 1160 at 2620-21.) Depending on which audit one believed, the cash may or may not have been close to the amount missing. Regardless, it does not establish that the money found in Mr. Menzies's apartment came from the Gas-A-Mat or that was obtained by force or fear. Additionally, the State's claim ignores money Mr. Menzies had on his person at the time of his arrest—adding that to the

amount in the umbrella changes the total and further undermines the weak inference the State made regarding the amount found among Mr. Menzies's property.

2. The purse cannot establish the elements of a robbery.

An empty purse found among the property seized illegally from Mr. Menzies's apartment, which Jim Hunsaker identified as belonging to his wife, did not prove a robbery. (TR 02/18/1988, ROA 1155 at 1006.) Hunsaker was not sure that his wife had taken her purse to work and there is no evidence that Ms. Hunsaker had the $20 her husband thought he had given her. (*Id*. at 1006-07.) Even if the State established that Ms. Hunsaker had money, and that money was missing, the evidence does not establish that it was taken by force or fear.

3. Ms. Hunsaker's statements were inadmissible hearsay and were unreliable to establish a robbery.

Ms. Hunsaker telephoned her home after she left the Gas-A-Mat. In response to a leading question, she stated, "they told me to tell you they robbed me." (*Id*. at 986.) This is distinct from indicating that she actually had been robbed. The evidence, even when viewed in the light most favorable to the verdict, fails to establish that property was taken from Ms. Hunsaker by use of force or fear.

4. The identification cards found at the police station cannot be attributed to Mr. Menzies and do not establish the essential elements of a robbery.

Ms. Hunsaker's identification cards were found near the booking area of the county jail at around 6:30 p.m. on February 24, 1988. (TR 02/24/1988, ROA 1156 at 1565-66.) Mr. Menzies was arrested at his home on an unrelated matter at around 6:40

p.m. that same evening. (*Id*. at 1540.) He was then transported to the jail. During the booking process, he had his hands cuffed behind his back the entire time. (*Id*. at 1522.) At one point during the process, Mr. Menzies ran off down one of the halls and into a room, and was out of sight of officers for about 20 to 30 seconds. (*Id*. at 1522, 1537). Other officers retrieved Mr. Menzies. The arresting officer asked them if Mr. Menzies had dropped anything in the room. He had not. (*Id*. at 1533.) There can be no rational inference that Mr. Menzies had Ms. Hunsaker's identification cards and that he discarded them at the jail. Mr. Menzies was still at home, not under arrested, at the time the cards are reported as having been found.

5. The unsigned Social Security card was unreliable evidence with questionable probative value.

An unsigned Social Security card was allegedly found by a third-party, in plain view and undamaged, in Mr. Menzies's storage shed, despite the storage shed having been searched by law enforcement. (*Id*. at 1508-09, 1512, 1517.) Other people had access to the storage shed between the time it was searched by the police and the time the card was found, including Troy Denter. (*Id.* at 1517.)

In addition to the questionable means by which it came to the police, the card was not authenticated or established as being one carried by Ms. Hunsaker at the time of the offense. Further, the card was in police custody for eleven months before it was reported or given to the County Attorney's Office or defense counsel. (TR 03/03/1988, ROA 1159 at 2265-66; TR 03/07/1988, ROA 1160 at 2576-78.) 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.

C. There was insufficient evidence to support the charge of kidnapping.

1. Ms. Hunsaker's statements were inadmissible hearsay and were unreliable to establish a kidnapping.

When Ms. Hunsaker phoned her house after she left the Gas-A-Mat, she spoke with her husband and Officer Gamble. (TR 02/18/1988, ROA 1155 at 986, 1046.) Both Mr. Hunsaker and Officer Gamble testified that Ms. Hunsaker sounded nervous and upset and that she said "they" would let her go sometime that night. (*Id.* at 986, 1047.) These statements were irrelevant and inflammatory as they are inadmissible hearsay and only establish Ms. Hunsaker's state of mind, which was not at issue.

2. Ms. Hunsaker's absence from the Gas-A-Mat does not establish the elements of kidnapping.

The evidence gathered at the Gas-A-Mat from which Ms. Hunsaker disappeared shows only that Ms. Hunsaker did in fact leave the Gas-A-Mat.

Although Jim Hunsaker testified that Ms. Hunsaker left her coat, it was not a cold day and she was dressed warmly. (*Id*. at 983, 980, 1013-14.) Saliva discovered on a cigarette left in the booth was consistent with that of 36% of the population, including Mr. Menzies and Ms. Hunsaker. (TR 03/01/1988, ROA 1158 at 1992-93, 1998.) No prints, indication that prints had been wiped away, or signs of a struggle were found in the booth. (TR 02/26/1988, ROA 1157 at 1887; TR 02/18/1988, ROA 1155 at 1041, 1159-64.) Britton's testimony about Mr. Menzies's alleged confession of incriminating details, all of which could have been taken from news reports, likewise did not establish

that an aggravated kidnapping occurred. The evidence, viewed in the light most favorable to the verdict, fails to establish an aggravated kidnapping.

3. Speculative testimony that handcuffs were used was questionable in its veracity.

The only evidence that Ms. Hunsaker was restrained were ligature marks around her neck and wrists. (TR 02/25/1988, ROA 1157 at 1609, 1615.) The medical examiner testified that the neck ligature was caused by whatever strangled the victim. (*Id*. at 1610-11.) He concluded the strangulation either caused her death or occurred at the time of death. (*Id*. at 1640.) He also testified that the wrist ligatures occurred at around the same time as the neck ligature; hence, they all occurred at or near the time she died. (*Id*. at 1666-67.) Handcuffs were not initially considered as part of the crime based on the forensic evidence from the crime scene. A notation indicating handcuffs may have been used was handwritten into the reports after evidence from Mr. Menzies's property was gathered. (Guilt Phase Ex. 72.)

All of the above demonstrates the paucity of reliable and relevant evidence presented by the State. They did not establish beyond a reasonable doubt that Mr. Menzies was guilty of any of the crimes with which he was charged. His conviction was only secured by prosecutorial misconduct, irrelevant evidence, and evidence obtained illegally. The state court's conclusion that this issue was without merit was unreasonable and 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.

This claim is exhausted, having been raised on direct appeal. (09/14/1992 Br. of Appellant at 83.) 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 ("We find Menzies' other claims to be without merit."). 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 United States Supreme Court has held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact necessary* to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970) (emphasis added). "The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure . . . both because of the possibility that [a defendant] may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." *Id*. at 363. As such, proof beyond a reasonable doubt has "traditionally been regarded as the decisive difference between criminal

culpability and civil liability." *Jackson*, 443 U.S. at 315 (citing *Winship*, 397 U.S. at 358-62).

Mr. Menzies's jury was given a jury instruction which indicated that a reasonable doubt must be real and substantial and not a mere "possibility." (09/14/1992 Br. of Appellant, Addendum J.) The instruction also instructs the jury that "if after such impartial consideration and comparison of all the evidence you can truthfully say that you have an abiding conviction of the defendant's guilt such as you will be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt." (*Id.*) This instruction allows for a finding of guilt on a degree of proof less than beyond a reasonable doubt. Mr. Menzies should be granted relief on this claim.

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.

These ineffective assistance of counsel claims were raised in Mr. Menzies's state post-conviction petition (5th Am. Pet. at 4-6, 8-15, 20-24, 26-29, 33-34, 41-45, 55-57), and in his subsequent appeal from the denial of the post-conviction petition (02/27/2013 Appellant's Opening Brief at 17-19, 62-63, 66-69, 71, 74-78, 80-82, 85-88, 91-98, 114-15). The state court's rejection of this claim was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. *See* 28 U.S.C. § 2254(d)(1). In addition, it constituted an unreasonable determination of the facts in light of the evidence presented. *See id.* § 2254(d)(2). To the

extent any aspect of this claim was not exhausted, that failure is attributable to the ineffective assistance of Mr. Menzies's post-conviction counsel. *See Martinez*, 132 S. Ct. at 1315; *see infra* Claim 38. On this basis, this Court may review this claim *de novo*. 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 v. Weber*, 544 U.S. 269 (2005).

Introduction

The Sixth and Fourteenth Amendments guarantee the accused the right to counsel at trial. *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963). The standard for judging counsel's effectiveness is found in *Strickland v. Washington*, 466 U.S. 668 (1984). First, this Court must determine if counsel's performance was deficient. *Strickland*, 466 U.S. at 686-88. Performance is deficient when the attorney renders objectively unreasonable assistance. *Id.* at 687-88. Although defense counsel has broad discretion when making strategic decisions, those decisions must be reasonable and informed. *Id.* at 691. The proper measure of counsel's performance is reasonableness under prevailing professional norms. *Id.* at 688. In assessing counsel's performance, this Court should look to guides, such as the American Bar Association ("ABA") standards at the time of trial, *Bobby v. Van Hook*, 558 U.S. 4, 7 (2009), as well as the standards of practice in the defense community in Utah, *Cullen v. Pinholster*, 131 S. Ct. 1388, 1407 (2011). "[C]ounsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at 690. Moreover, "[t]rial lawyers have a 'duty to bring to bear such skill and knowledge as will render the trial a

reliable adversarial testing process.'" *Connick v. Thompson*, 131 S. Ct. 1350, 1362 (2011) (quoting *Strickland*, 466 U.S. at 688).

Second, this Court must determine if Mr. Menzies was prejudiced by counsel's deficient performance. *Strickland*, 466 U.S. at 686-87. "[T]o establish prejudice, a 'defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (quoting *Strickland*, 466 U.S. at 694). Effective assistance of counsel is ultimately concerned with the fundamental right to a fair trial, "a trial whose result is reliable." *Strickland*, 466 U.S. at 687. In other words, this Court must determine whether there is a reasonable probability that, absent the errors, the jury "would have had a reasonable doubt respecting guilt." *Id.* at 695.

In reviewing claims of ineffective assistance of counsel, this Court must consider counsel's "overall performance throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance." *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986); *see also Williams (Terry)*, 529 U.S. at 397-98; *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.").

In this case, Mr. Menzies's trial counsel, Brooke Wells and Frances Palacios, failed to render reasonably effective assistance of counsel throughout all proceedings of his capital murder trial, and the "errors were so serious as to deprive [Mr. Menzies] of a

fair trial, a trial whose result is reliable." *See Strickland*, 466 U.S. at 687.

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

This portion of Mr. Menzies's ineffective assistance of counsel claim was raised in Mr. Menzies's state post-conviction petition (5th Am. Pet. at 4-6), and in his subsequent appeal from the denial of the post-conviction petition (02/07/2013 Appellant's Opening Brief at 22-23, 62-63, 74-78). The state court's rejection of this claim was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. *See* 28 U.S.C. § 2254(d)(1). In addition, it constituted an unreasonable determination of the facts in light of the evidence presented. *See id.* § 2254(d)(2).

"Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial." *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980); *see also* ABA Standards for the Defense Function ("1979 ABA Standards") 4-3.5 (1979). Counsel's performance is prejudicially deficient where counsel operates under an actual conflict of interest. *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).

In this case, trial counsel's conflict of interest arose as a matter of their own

creation. Trial counsel had Mr. Menzies sign the 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.)[21] 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. In fact, the parties agree that the waiver was "drafted with only one person in mind"; Mr. Menzies did not want counsel to call as a witness Nicole Arnold, Mr. Menzies's girlfriend at the time of the crime. *Menzies IV*, 344 P.3d at 619; (*see also* 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 had Mr. Menzies sign the waiver without first providing him with the opportunity to obtain independent legal advice, violating their duty of loyalty under the Utah Rules of Professional Conduct. (*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 ¶ 3; 03/23/2012 Ruling and Order at 37 (noting that it is undisputed that Mr. Menzies was not provided with independent counsel prior to signing the waiver).) The Utah Rules prohibit counsel from "mak[ing] an agreement prospectively limiting the

[21] The Utah Supreme Court assumed that these facts were true. *Menzies IV*, 344 P.3d at 619-20.

lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement." Utah R. Prof'l Conduct R. 1.8(h)(1). In Mr. Menzies's post-conviction proceedings, the trial court concluded that "having petitioner sign any such waiver was not in compliance with the disciplinary rules, and thus was deficient performance under the first prong of *Strickland*." (03/23/2012 Ruling and Order at 40.)

The Utah Supreme Court unreasonably found that the waiver did not violate Rule 1.8(h)(1) because it was not "a blanket waiver of any future malpractice claims" and thus did not create a disincentive for counsel to work less diligently. *Menzies IV*, 344 P.3d at 620. This was an objectively unreasonable determination of the facts, as the waiver, while not absolving counsel of liability for *all* malpractice, did work to absolve counsel of liability for any malpractice arising from a failure to investigate the facts of the case by interviewing witnesses. (*See* 5th Am. Pet., Ex. II at 1); *see also* 28 U.S.C. § 2254(d)(2). The waiver form does not simply waive claims against counsel for a failure to interview an identified witness, Nicole Arnold, but waives liability for failure to interview any witnesses. (*See* 5th Am. Pet., Ex. II at 1.) The waiver of liability removed counsel's incentive to perform an adequate investigation of both the facts of the crime and any facts mitigating the crime—the bedrock of any effective defense strategy.

In concluding that Mr. Menzies failed to show an actual conflict of interest, the Utah Supreme Court also found that the waiver of liability actually *incentivized* counsel to diligently represent Mr. Menzies in order to overcome the limitation he put on counsel. *Menzies IV*, 344 P.3d at 620-21. There is no evidence in the record indicating that counsel was incentivized to conduct a more thorough investigation as a result of the

waiver. The waiver absolved counsel of liability for a failure to interview and present witnesses. The Utah Supreme Court's finding that the waiver incentivized a more thorough investigation was objectively unreasonable. *See* 28 U.S.C. § 2254(d)(2).

As discussed in detail below, trial counsel's investigation of Mr. Menzies's case was woefully lacking. *See infra* Claim 14.B; Claim 31.C-D. The liability waiver attempted to absolve counsel of any responsibility for this deficient investigation and thus put counsel's interests in avoiding future malpractice claims in conflict with Mr. Menzies's interests in a thorough and complete defense by effective counsel.

In addition, under *Strickland*, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691; *see also id.* ("In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."). As a result of the waiver of liability, counsel unreasonably limited their investigation and failed to interview witness Nicole Arnold. This was deficient because counsel had an independent duty to investigate the case and this duty could not be limited by Mr. Menzies's assertion that Arnold should not be called as a witness. *See id.*

Such a waiver resulted in an actual conflict of interest and prejudice to Mr. Menzies. *See Strickland*, 466 U.S. at 692 (noting that prejudice is presumed when counsel has an actual conflict of interest); *see also Edens*, 87 F.3d at 1114 (same). The unreasonable limitation on counsel's investigation resulted in a failure to interview Nicole Arnold, a witness with information indicating that the victim was voluntarily with

Mr. Menzies on the night of the crime—information undermining the State's charged aggravators. *See* infra Claim 14.B. Counsel's conflict of interest and resulting failures undermine confidence in the outcome of the case. As a result, conflicted counsel's representation was objectively unreasonable and prejudicial.

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.

This portion of Mr. Menzies's ineffective assistance of counsel claim was partially raised in Mr. Menzies's state post-conviction petition (5th Am. Pet. at 8-15; *see also id.* at 20-24), and partially in his subsequent appeal from the denial of the post-conviction petition (02/27/2013 Appellant's Opening Brief at 71, 83-91, 114-15). The state court's rejection of this claim was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. *See* 28 U.S.C. § 2254(d)(1). In addition, it constituted an unreasonable determination of the facts in light of the evidence presented. *See id.* § 2254(d)(2). To the extent any aspect of this claim was not exhausted, that failure is attributable to the ineffective assistance of Mr. Menzies's post-conviction counsel. *See Martinez*, 132 S. Ct. at 1315; *see also 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.

Trial counsel has an obligation to independently investigate the facts of the crime. *Strickland*, 466 U.S. at 691 (finding that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations

unnecessary" and that "choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation"); *see also Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir. 1982) ("At the heart of effective representation is the independent duty to investigate and prepare."). The court must remain "'particularly vigilant' in ensuring the right to effective assistance of counsel when a defendant is subject to a sentence of death." *Anderson v. Sirmons*, 476 F.3d 1131, 1142 (10th Cir. 2007) (quoting *Smith v. Mullin*, 379 F.3d 919, 938 (10th Cir. 2004)); *see also Williamson v. Ward*, 110 F.3d 1508, 1514 (10th Cir. 1997) ("In assessing counsel's conduct, we are mindful of the Supreme Court's observation that '[o]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case.'" (quoting *Burger v. Kemp*, 483 U.S. 776, 785 (1987))). In violation of their obligations to conduct an independent investigation, trial counsel failed to complete a reasonable investigation of the crime and the State's evidence.

As an initial matter, Mr. Menzies's trial counsel, Brooke Wells, informed Mr. Menzies repeatedly 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 (noting that he was repeatedly told that trial counsel would not begin investigation of any aspect of his case until shortly before trial).) Trial counsel's failure to initiate and engage in an investigation of the facts of the crime

was objectively unreasonable and resulted in a failure to provide Mr. Menzies with effective representation and sound legal advice. In addition, 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.) Utilizing such an investigator resulted in deficient performance by Mr. Menzies's trial counsel and was inherently prejudicial to Mr. Menzies. The resulting failures are outlined below.

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

The police investigation and reports clearly indicated that Nicole Arnold observed that the victim was voluntarily with Mr. Menzies on the night of the victim's disappearance. (Ex. 50, 03/01/1986 Salt Lake County Sheriff's Office Follow-up Report at 2-3 [SL County Sheriff's Office at 0210-11] (describing Nicole Arnold's account of the victim freely exiting the vehicle before getting back in to accompany Mr. Menzies and Arnold).) Trial counsel failed to investigate Nicole Arnold's account indicating that the victim was with Mr. Menzies voluntarily and did not present supporting evidence at trial. (*See* 5th Am. Pet., Ex. A, Aff. of Frances Palacios ¶ 16; Ex. 50, 03/01/1986 Salt Lake County Sheriff's Office Follow-up Report at 2-3 [SL County Sheriff's Office at 0210-11].) This failure was objectively unreasonable because the prosecution charged kidnapping and robbery as the factual basis for aggravated murder. The facts associated with the victim's ability to leave Mr. Menzies's presence voluntarily would have negated the inference that the victim had been abducted, or was being held against her will, and

the inference that she had been the victim of a robbery.

Nicole Arnold could also provide information that a waitress at a Denny's restaurant had seen the victim at Denny's with a man after the victim left her place of employment unattended. (*See* 5th Am. Pet., Ex. I, 03/07/1986 Statement by Nicole Arnold at 5.) Trial counsel failed to develop and substantiate this information, which would have undermined the State's assertion that the victim was kidnapped and robbed.

Despite clear indications in the police reports that the victim was not being held against her will, counsel failed to investigate and present evidence that would have eliminated the only two aggravating factors charged. Counsel's failure was prejudicial because the prosecution presented facts that the victim was robbed and kidnapped and charged kidnapping and robbery as part of the factual basis for aggravated murder.

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

Two potential witnesses reportedly saw the victim at a Denny's restaurant on the night of her disappearance after she left her place of employment unattended. The police reports and interviews revealed the existence of these witnesses and identified one of the witnesses by name. (*See* Ex. 1, 03/02/1986 Salt Lake County Sheriff's Office Follow-up Report at 2 [SL County Sheriff's Office at 0227]; Ex. 51, 03/03/1986 Salt Lake County Sheriff's Office Follow-up Report at 1 [SL County Sheriff's Office at 0864]; 5th Am. Pet., Ex. I, 03/07/1986 Statement by Nicole Arnold at 5.) Trial counsel failed to identify and present or preserve the testimony of potential witnesses from the Denny's restaurant.

Beth Hodges reported to the police that she had seen the victim at Denny's after

the victim left her place of employment unattended. (*See* Ex. 1, 03/02/1986 Salt Lake County Sheriff's Office Follow-up Report at 2 [SL County Sheriff's Office at 0227].) Hodges reported that the victim was with a man. (*Id.*) Hodges's physical description of the man not only differed from that of Mr. Menzies, but fit the physical description of Troy Denter. (*Id.*) Hodges did not identify Mr. Menzies as the victim's male companion when shown his photograph as part of a photo array. (*See* Ex. 51, 03/03/1986 Salt Lake County Sheriff's Office Follow-up Report at 1 [SL County Sheriff's Office at 0864].) Trial counsel began their investigation of the case only a few weeks before trial, and by that time, Hodges was deceased. (TR 03/03/1988, ROA 1159 at 2236 (Hodges died on August 28, 1986).) While trial counsel elicited some testimony from a law enforcement officer that Hodges saw the victim at the Denny's on the night of the victim's disappearance, counsel failed to fully explore this evidence.

Similarly, according to Nicole Arnold's statement to the police, Arnold spoke to a waitress at Denny's shortly after Mr. Menzies's arrest. (*See* 5th Am. Pet., Ex. I, 03/07/1986 Statement by Nicole Arnold at 5.) The waitress corroborated Hodges's statement, confirming that the victim was at Denny's on the night of her disappearance. (*Id.*) Trial counsel never investigated the facts concerning the waitress's identification.

Trial counsel's failure to interview the two potential witnesses from the Denny's restaurant was prejudicial because the prosecution presented facts that the victim had been robbed and kidnapped and used these facts as the basis for charging Mr. Menzies with aggravated murder. Evidence that the victim was with a man in a public place where she could have easily cried out for help indicates that the victim voluntarily left her

place of employment with the man and would have tended to negate the inference that the murder was aggravated. In addition, Hodges's description of the man she saw with the victim would indicate that the victim was not with Mr. Menzies on the night of her disappearance, but was with another man, perhaps Troy Denter. That evidence, in conjunction with evidence indicating that at the time the victim was seen at Denny's, Mr. Menzies was at the home of Janet Franks (*see infra* Claim 14.B.7), would have indicated that another man was with the victim after her disappearance. Trial counsel's failure to interview the two potential witnesses prevented readily available evidence from being presented at trial which would have impeached the State's theory that Mr. Menzies was holding the victim by force.

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

At trial, Tim Larrabee testified that on February 24, 1986, he and his girlfriend, Beth Brown, were at Storm Mountain in Big Cottonwood Canyon. (TR 02/19/1988, ROA 1155 at 1192-93, 1215.) Larrabee testified that he saw an "old and beat up" car in the parking lot and later saw a man and a woman hiking in the area. (*Id.* at 1194-95, 1198-1200.) During the police investigation, Larrabee gave a description of the man and created a composite sketch. (*Id.* at 1205.) After hesitation, Larrabee selected Mr. Menzies's photograph from a photo lineup, saying that Mr. Menzies was the individual that looked the most like the man he saw at Storm Mountain. (*Id.* at 1213.) At a later in-person lineup, Larrabee unequivocally identified someone other than Mr. Menzies as the man he saw at Storm Mountain. (TR 05/16/1986, ROA 1151 at 17.) During redirect

examination at trial, the State elicited testimony from Larrabee that after the in-person lineup proceedings, where Larrabee identified someone other than Mr. Menzies as the man he saw at Storm Mountain, Larrabee expressed some reservations about his identification and asked the prosecutor whether the suspect was actually Number 6, referring to Mr. Menzies. (TR 02/23/1988, ROA 1156 at 1284-85.)

Trial counsel failed to competently interview Larrabee, who was a key witness for the prosecution. Larrabee was the only witness who arguably placed Mr. Menzies at the scene of the crime around the time of the victim's murder. (*See, e.g.*, TR 02/19/1988, ROA 1155 at 1195, 1197-98, 1203, 1213; TR 02/23/1988, ROA 1156 at 1258, 1284-87.) The circumstances surrounding Larrabee and Brown's attempts to identify Mr. Menzies gave rise to serious questions about the reliability of their accounts and Larrabee's uncertain identification. Counsel's failure to investigate and failure to adequately cross-examine Larrabee resulted in a failure to present significant evidence undermining the reliability of Larrabee's account, descriptions, and already uncertain identification.

Despite indications in the police reports that Larrabee and Brown were distracted at the time they saw other hikers at Storm Mountain (Ex. 52, 02/26/1986 Interview of Timothy Larrabee at 8 ("we did do something but we didn't use drugs or alcohol") [SL County Sheriff's Office 0372]), trial counsel failed to interview Brown and Larrabee prior to trial (5th Am. Pet., Ex. AA, Aff. of Timothy Larrabee ¶ 2; Ex. 53, Declaration of Elizabeth Brown ¶ 18; *see also* Ex. 54, Declaration of Timothy Larrabee ¶ 18).

If competently interviewed or examined, Larrabee and Brown would have provided information that both were distracted and unable to closely observe the male

hiker near the crime scene. (5th Am. Pet., Ex. AA, Aff. of Timothy Larrabee ¶¶ 3-4; *see also* Ex. 53, Declaration of Elizabeth Brown ¶¶ 8-9, 18; Ex. 54, Declaration of Timothy Larrabee ¶¶ 13-15.) During the post-conviction investigation, Larrabee revealed that he was distracted from viewing the male hiker in the area because he was engaged in sexual activity with his girlfriend. (5th Am. Pet., Ex. AA, Aff. of Timothy Larrabee ¶¶ 3-4; *see also* Ex. 54, Declaration of Timothy Larrabee ¶¶ 13-15.) Larrabee would have revealed this information to prior counsel if they had asked. (Ex. 54, Declaration of Timothy Larrabee ¶ 16.) Counsel failed to interview Larrabee and Brown to ascertain this information and failed to elicit this information on cross-examination of Larrabee or during their direct examination of Brown. This evidence undermines confidence in Larrabee's description of the male hiker and already uncertain identification of Mr. Menzies. Counsel's failure to interview and effectively cross-examine a key State witness was deficient performance. *See Stouffer v. Reynolds*, 214 F.3d 1231, 1234 (10th Cir. 2000) (noting deficient performance based on counsel's numerous errors, including "fail[ing] to point out inconsistencies in the testimony of prosecution witnesses").

In addition, a pre-trial interview would have revealed that following Larrabee's identification of someone other than Mr. Menzies at the in-person lineup, Larrabee asked the prosecutor whether he had selected the wrong person and asked whether he should have selected Number 6, Mr. Menzies. (*See* TR 02/23/1988, ROA 1156 at 1284-85.) While the trial court concluded that this testimony should be stricken, significant time passed between Larrabee's testimony and the court's ruling and the court's admonishment to the jury was ineffectual in that the court instructed the jury to

"disregard" testimony "relating to the lineup." (*See* TR 02/23-24/1988, ROA 1156 at 1285, 1299, 1301-04). The court's vague instruction seems to have directed the jurors to disregard Larrabee's identification of someone other than Mr. Menzies at the lineup.

Mr. Menzies was prejudiced by trial counsel's failure to interview Larrabee and Brown because, on cross-examination, Wells failed to elicit information that Larrabee was distracted at the time he observed the hikers because he was engaging in sexual activity with his girlfriend. This additional evidence would have provided information to the jury that Larrabee was unable to accurately determine what the male hiker looked like. Even more troubling, counsel's failure to conduct a pre-trial interview of this key State witness prevented counsel from learning that Larrabee questioned his in-person lineup identification and asked whether he should have identified Number 6, Mr. Menzies. Counsel's failure to discover this fact led counsel to open the door to this testimony at trial and prevented counsel from being adequately prepared to confront the witness and prepare a defense strategy. (*See* TR 02/23/1988, ROA 1156 at 1278.) Failure to properly interview and cross-examine Larrabee was objectively unreasonable, uninformed, and prejudicial.

The Utah Supreme Court concluded that eliciting the nature of Larrabee and Brown's distraction might have hurt Mr. Menzies's case more than helped because Larrabee may have "focused more on the man at Storm Mountain" out of a fear of getting caught. *Menzies IV*, 344 P.3d at 617. The Utah Supreme Court's factual conclusion is not supported by the record and is objectively unreasonable. Contrary to the court's conclusion, Larrabee stated that he was "focused on" his girlfriend. (5th Am. Pet., Ex.

AA, Aff. of Timothy Larrabee ¶ 3.)

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

Walter Britton was incarcerated with Mr. Menzies when Mr. Menzies was charged with Ms. Hunsaker's murder. (TR 05/19/1986, ROA 1150 at 151.) Britton testified at the preliminary hearing that Mr. Menzies sought him out to discuss Mr. Menzies's involvement in the crime. (*Id.* at 152-53.) The bulk of Britton's preliminary hearing testimony was available from news reports and he had no specific information that could have been attributable only to Mr. Menzies. (*See, e.g.*, TR 03/01-02/1988, ROA 1158 at 2081-85.) Britton testified at the preliminary hearing that Mr. Menzies confessed to murdering the victim by cutting her throat. (TR 05/19/1986, ROA 1150 at 152-53.) Britton also testified that Mr. Menzies said cutting the victim's throat was one of the "biggest thrills of his life." (*Id.* at 154.) During the preliminary hearing, Britton denied that his testimony would benefit him. (*Id.* at 171.)

Prior to the preliminary hearing, trial counsel failed to check the public federal court file for Walter Britton. Contained in the federal court file was a November 1985 motion for determination of Britton's mental competency filed by the United States Attorney prosecuting Britton in an unrelated federal case. (*See* TR 03/01-02/1988, ROA 1158 at 2008; *see also* PCR ROA 13396-97 (Motion for Determination of Competency of Walter Britton).) The record also contained a letter written by Dr. Breck Lebegue in November of 1985, which indicated that Britton may have been suffering from a mental illness at the time of his preliminary hearing testimony. (*See* TR 03/01-02/1988, ROA

1158 at 2008-09 (trial counsel discussing their certified copy of Lebegue's report); 5th Am. Pet., Ex. PP, Report by Dr. Breck Lebegue.) Trial counsel failed to use this information to impeach Britton at the preliminary hearing. (*See* TR 05/19/1988, ROA 1150 at 156-87.) Britton's statements to the police also indicated that he had been evaluated in Springfield, Missouri, in relation to an "irresistible impulse plea." (5th Am. Pet., Ex. NN at 19.) Finally, Mr. Menzies also told counsel various facts regarding Britton's mental illness prior to counsel's cross-examination of Britton at the preliminary hearing, and Mr. Menzies asked trial counsel to impeach Britton with those facts. (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 ¶¶ 18-21.) Trial counsel failed to do so. (TR 05/19/1988, ROA 1150 at 156-87.) Similarly, trial counsel failed to follow-up on Britton's disclosure at the preliminary hearing that he was taking a "sleeping medication." (*See id.* at 164.)

In addition, trial counsel failed to contact Britton's attorney in the federal matter, Bruce Savage, prior to the preliminary hearing. Savage testified at trial that he had spoken to lead prosecutor, Ernie Jones, on May 2, 1986, prior to the preliminary hearing. (TR 03/03-04/1988, ROA 1159 at 2312.) Savage reported that he and Jones discussed that Jones would execute an affidavit to the effect that Britton had cooperated with the prosecutor's office, in support for Britton's motion to reduce his sentence in his federal case. (*Id.* at 2314.) Later, Rick MacDougall, the other prosecutor in Mr. Menzies's case, testified at Britton's Rule 35 hearing. (5th Am. Pet., Ex. PPP, Transcript of Britton's Rule 35 hearing.) Notes from the district attorney's file corroborate the fact that Jones and

Savage spoke on May 2, 1986, prior to the preliminary hearing, and that Jones agreed to testify on Britton's behalf and "urge a reduction" in Britton's sentence. (5th Am. Pet., Ex. KK.)

Trial counsel failed to investigate Walter Britton, and as a result, failed to impeach Britton's testimony at the preliminary hearing, either with the fact that Jones had promised to assist Britton in his Rule 35 hearing, or that Britton suffered from mental illness. In August of 2010, during the course of Mr. Menzies's post-conviction investigation, Britton admitted by affidavit, among other things, that: (1) he may have provided false statements to the police and false testimony during the preliminary hearing, because he was trying to strike a deal with federal authorities; (2) Mr. Menzies never told Britton that it "was one of the biggest thrills" of his life to have cut the victim's throat; and (3) because Britton was on medication at the time he made his statements to the police and court, his statements may have been inaccurate. (*See* 5th Am. Pet., Ex. R.) Britton clarified in a declaration dated March 27, 2014, that he did not recall that Mr. Menzies ever confessed any involvement in the crime and that he believes he testified untruthfully because he was attempting to obtain favorable treatment and was heavily medicated. (Ex. 55, Declaration of Walter Britton ¶¶ 5-6.)

The Utah Supreme Court found that Mr. Menzies could not show deficient performance based on counsel's failure to access and present information of Britton's mental illness because there was no indication that trial counsel could have obtained a copy of a psychiatric report generated after Britton was evaluated in Springfield, Missouri. *Menzies IV*, 344 P.3d at 615-16. The Utah Supreme Court's conclusion

misconstrued the factual basis for Mr. Menzies's claim and was objectively unreasonable. The Utah Supreme Court ignored the fact that trial counsel actually had possession of significant evidence indicating that Britton was mentally ill, information that was publicly available at the time of the preliminary hearing. (*See* 5th Am. Pet., Ex. PP, Report by Dr. Breck Lebegue; TR 03/01-02/1988, ROA 1158 at 2008-09 (trial counsel discussing their certified copy of Lebegue's report); TR 03/03-04/1988, ROA 1159 at 2319-20.) Trial counsel failed to use this evidence to cross-examine Britton and failed to present this evidence to the jury. (*See* TR 03/03-04/1988, ROA 1159 at 2323-25; *see also* 02/27/2013 Appellant's Opening Brief at 18 (explaining that the court file, which included the United States Attorney's motion for determination of competency and reference to Dr. Lebegue's report, indicated that Britton was mentally ill).) The Utah Supreme Court simply ignored this evidence of mental illness in reviewing Mr. Menzies's claim, resulting in an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(2).

Trial counsel's failure to investigate Britton prior to the preliminary hearing prejudiced Mr. Menzies. As a result of trial counsel's deficient performance, Britton was never impeached as to his motives for testifying and mental health. The prosecution relied heavily on Britton's testimony in both the guilt and penalty phase closing arguments, emphasizing that Mr. Menzies confessed and referred to killing the victim as "one of the biggest thrills" of his life. (*See, e.g.*, TR 03/08/1988, ROA 1160 at 2616-17; TR 03/18/1988, ROA1162 at 3202, 3238, 3239.) Judge Uno relied on this testimony in sentencing Mr. Menzies to death. (*See* TR 03/23/1988, ROA 1162 at 3265.) Mr.

Menzies's was prejudiced by trial counsel's failure to present evidence undermining Britton's credibility. Counsel's performance was objectively unreasonable, uniformed, and cumulatively prejudicial.

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

This claim was not raised in state court. 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; *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.

Trial counsel was ineffective in failing to effectively interview George Benitez. Benitez was an inmate in the Salt Lake County Jail in February and March of 1986. (Ex. 56, Declaration of George Benitez ¶ 1.) Benitez told law enforcement officers that Mr. Menzies confessed that he had killed a woman. (*Id.* ¶ 2.) The State did not call Benitez as a witness at trial. (*Id.*) Benitez has since recanted his statement. (*Id.* ¶¶ 3-5.) Police reports clearly indicated that Benitez was interviewed by police about statements made by Mr. Menzies. (Ex. 57, 03/28/1986 Salt Lake County Sheriff's Office Follow-up Report at 1; *see also* 5th Am. Pet., Ex. Q, 03/28/1986 Interview of Walter Britton at 5-6 (stating that Benitez could corroborate his account of Mr. Menzies's confession).)

Evidence indicates that Benitez was pressured by law enforcement into stating that Mr. Menzies confessed to the crime. (Ex. 56, Declaration of George Benitez ¶ 3.) Further, Benitez made his statement in response to the suggestions of law enforcement officers, who encouraged him to believe that he would benefit from testifying against Mr. Menzies. (*Id.* ¶ 4.) The statement provided by Benitez was based entirely on information provided by law enforcement or learned from television reports of the crime. (*Id.* ¶ 5.) Benitez would not have testified that Mr. Menzies confessed. (*Id.* ¶ 8.)

Importantly, investigation of Benitez would have undermined the testimony of Walter Britton. Benitez knew that Britton intended to fabricate testimony against Mr. Menzies because Britton believed that he could use the case against Mr. Menzies in order to get out of jail. (*Id.* ¶¶ 6-7.) Benitez also reported that Britton fostered resentment against Mr. Menzies. (*Id.* ¶ 10.)

Had defense counsel effectively interviewed Benitez, they would have learned that both Benitez and Britton fabricated their statements about Mr. Menzies confessing in order to obtain benefits in their own cases. This evidence would have been devastating to Britton's credibility and would have seriously undermined Britton's preliminary hearing testimony that Mr. Menzies confessed to killing the victim and said that cutting her throat was "one of the biggest thrills that he'd had." (*See* TR 05/19/1986, ROA 1150 at 154.)

Mr. Menzies's alleged confession to the murder and the thrill he took in it was particularly crucial evidence at both the guilt and penalty phases. During closing argument in the guilt phase, the prosecutor emphasized Britton's testimony—that Mr. Menzies confessed to the crime and said it was "one of the biggest thrills" of his life—as

"very significant direct evidence." (TR 03/08/1988, ROA 1160 at 2616-17.) Evidence that Mr. Menzies allegedly confessed was particularly important given the recognized weakness of the case against Mr. Menzies. *See Menzies IV*, 344 P.3d at 610 (recognizing that there were weaknesses in the State's case).

The prosecution also relied heavily on Britton's testimony that Mr. Menzies referred to killing the victim as "one of the biggest thrills" of his life in urging the court to sentence Mr. Menzies to death (*see, e.g.*, TR 03/18/1988, ROA 1162 at 3202, 3238, 3239), and Judge Uno relied on this testimony in sentencing Mr. Menzies to death (*see* TR 03/23/1988, ROA 1162 at 3265). Benitez could have provided evidence demonstrating that the report of Mr. Menzies's confession was entirely fabricated. Mr. Menzies was prejudiced by trial counsel's failure to present evidence that Britton's inflammatory testimony was entirely fabricated. Considered in the context of counsel's numerous deficiencies and the unreliability of much of the evidence presented, Benitez's statements would have altered the balance of the evidence and undermines confidence in the outcome of the trial.

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

Trial counsel also performed deficiently in failing to properly investigate and present additional testimony from Randy Butters.

Trial counsel's theory was that the victim left with Mr. Menzies voluntarily. (5th Am. Pet., Ex. A, Aff. of Frances Palacios ¶ 7.) In support of this theory, trial counsel presented the testimony of Dr. Michael DeCaria, who hypothesized that the victim suffered

from depression, despite the fact that he never evaluated her. (*See* TR 03/07/1988, ROA 1160 at 2556, 2571.) Trial counsel also presented the testimony of Randy and Elizabeth Butters. Randy Butters was an ex-boyfriend of the victim, and the father of one of her children. (TR 03/03-04/1988, ROA 1159 at 2220, 2223.) Both Randy and Elizabeth testified that the victim seemed anxious and depressed, that it was hard for her to cope with managing her young children, that her husband limited her social life, and that the victim would do anything to get out of the house. (*See* TR 03/03-04/1988, ROA 1159 at 2220-35.) During closing argument, trial counsel suggested that the victim was promiscuous, had sex outside of marriage, and had two children out of wedlock. (TR 03/08/1988, ROA 1160 at 2648-50.)

Despite trial counsel's theory and argument, counsel failed to elicit information from Randy Butters about the victim's three-day disappearance with some military men when he and the victim had been dating. This information was contained in a police report documenting Butters's interview with police (5th Am. Pet., Ex. NNN, 02/25/1986 Interview with Randy and Elizabeth Butters at 1), and would have supported trial counsel's assertion that the victim was promiscuous or would willingly leave with other men, in support of the theory that the victim was not kidnapped.

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

As discussed above, two potential witnesses reported observing the victim at a Denny's restaurant on the night of her disappearance. Beth Hodges reported to the police that she had seen the victim at Denny's on February 23, 1986, the night of the victim's

disappearance, between 11:30 p.m. and 12:00 a.m., hours after the victim disappeared from her place of employment. (*See* Ex. 1, 03/02/1986 Salt Lake County Sheriff's Office Follow-up Report at 2 [SL County Sheriff's Office at 0227].) Hodges's stated that the victim was with a man whose description not only differed from that of Mr. Menzies, but fit the physical description of Troy Denter. (*Id.*) A waitress at Denny's also observed the victim at Denny's on the night of her disappearance. (*See* 5th Am. Pet., Ex. I, 03/07/1986 Statement by Nicole Arnold at 5.)

Janet Franks indicated that Mr. Menzies was at her house at the time the witnesses saw the victim at Denny's with a man. (*See* TR 02/24/1988, ROA 1156 at 1478 (Franks testifying that Mr. Menzies came to her home between 11:30 p.m. and 12:00 a.m.).) This evidence indicates that someone else, possibly Troy Denter, was with the victim on the night of her disappearance and could have been responsible for the crime. Trial counsel had a duty to independently investigate the facts of the crime and the failure to investigate a possible alternative suspect was objectively unreasonable. *See Williamson v. Ward*, 110 F.3d 1508, 1521 (10th Cir. 1997) (counsel was ineffective in failing to investigate an alternative suspect). While trial counsel elicited some information from a law enforcement officer that Hodges saw the victim at Denny's on the night of the victim's disappearance, counsel failed to argue during closing argument that someone else had the opportunity to commit the murder, or that Mr. Menzies could not have been in two places at the same time. Trial counsel even misstated the time that the victim was seen at Denny's with a man, thus negating the implication that Mr. Menzies could not have been two places at one time. (*See* TR 03/08/1988, ROA 1160 at 2656.)

Failure to investigate the case properly, including interviewing material witnesses and reviewing readily available police records, violated defense counsel's obligations under *Strickland*. These material deficiencies in performance by trial counsel were uninformed, objectively unreasonable, and cumulatively prejudicial. Conducting a thorough fact investigation is a precursor to a finding that trial counsel has acted reasonably in creating a viable trial theory under *Strickland*. *See Sears v. Upton*, 130 S. Ct. 3259, 3265 (2010). Here, the evidence trial counsel failed to investigate and present undermines confidence in the outcome of Mr. Menzies's trial and sentence. Accordingly, Mr. Menzies is entitled to relief.

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

This portion of Mr. Menzies's ineffective assistance of counsel claim was raised in Mr. Menzies's state post-conviction petition. (5th Am. Pet. at 41-45.) To the extent any aspect of this claim was not exhausted, that failure is attributable to the ineffective assistance of Mr. Menzies's post-conviction counsel. *See Martinez*, 132 S. Ct. at 1315; *see also infra* Claim 38.

The Sixth Amendment to the Constitution guarantees a defendant a fair trial by an impartial jury and also the effective assistance of counsel during voir dire. *Morgan v. Illinois*, 504 U.S. 719, 728 (1992); *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970); *Johnson v. Armontrout*, 961 F.2d 748, 754-56 (8th Cir. 1992); *see also Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991) (stating that voir dire "serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising

peremptory challenges"); *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) ("Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored.").

During voir dire, Jurors Kathy Rosenkrantz and Lilian Eaton both expressed views indicating that they would always impose the death penalty for first-degree murder. When asked whether she believed that all persons convicted of first degree murder should be put to death, Juror Rosenkrantz answered: "I guess I would, if they have been convicted of that crime." (TR 02/17/1988, ROA 1154 at 864.) Juror Rosenkrantz later confirmed that she thought the death penalty would be appropriate "if they have been found guilty I don't know, I guess the court feels a shadow of a doubt, then I guess that is a just penalty. If they have been found guilty of murder." (*Id.*) When the trial court asked, "Do you believe the death penalty is ordinarily proper punishment for the crime of first degree murder?" Juror Rosenkrantz unequivocally answered, "Yes." (*Id.* at 865.) Also troubling, Juror Rosenkrantz 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 provided the Court with no case law to support this position, merely citing to the Utah statute associated with weighing aggravating and mitigating circumstances; the motion was denied. (*Id.* at 871-72.) Similarly, defense counsel failed to remove Juror Lilian Eaton from the panel despite her stated view that the death penalty was the appropriate penalty for anyone guilty of premeditated murder. (TR 02/17/1988, ROA 1154 at 843, 845-46.)

Juror Rosenkrantz's and Juror Eaton's answers during voir dire implied that they would always impose the death penalty for first-degree murder. A juror who has formed an opinion as to what penalty should be imposed prior to trial cannot be impartial pursuant to the holding in *Morgan v. Illinois*, 504 U.S. 719, 727-28 (1992). A juror who is biased as to the imposition of sentence is also biased as to her ability to determine guilt or innocence during the guilt phase of the proceeding as well. Frances Palacios acknowledges that she did not receive any training on how to qualify a jury for a death penalty case and that LDA did not have any written instructions for capital trial counsel conducting jury selection. (5th Am. Pet., Ex. V, Second Aff. of Frances Palacios at 1-2.) Trial counsel failed to use its peremptory strikes to eliminate Jurors Rosenkrantz and Eaton, and Mr. Menzies was presumptively prejudiced at trial by his counsel's deficient performance, which allowed biased jurors to determine his guilt or innocence.

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.

This portion of Mr. Menzies's ineffective assistance of counsel claim was raised in his state post-conviction petition (5th Am. Pet. at 33-34), and in his subsequent appeal from the denial of the post-conviction petition (02/27/2013 Appellant's Opening Brief at 80-82). To the extent any aspect of this claim was not exhausted, that failure is attributable to the ineffective assistance of Mr. Menzies's post-conviction counsel. *See Martinez*, 132 S. Ct. at 1315; *see also infra* Claim 38. The state court denied this claim without providing an explanation for its denial. Therefore, when reviewing the reasonableness of the state court decision under AEDPA, this court must determine what

theories could have supported that decision and determine "whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Richter*, 131 S. Ct. at 786. Here, the state court's denial of this claim was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 787.

"If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence." *Lafler v. Cooper*, 132 S. Ct. 1376, 1387 (2012); *see also McMann v. Richardson*, 397 U.S. 759, 771 (1970) (recognizing that defendants are "entitled to the effective assistance of competent counsel" during plea negotiations); *Williams v. Jones*, 571 F.3d 1086, 1090-91 (10th Cir. 2009) (recognizing that the plea bargaining process is a critical stage of a criminal prosecution and that defendants have a right to the effective assistance of counsel during the plea process). Trial counsel has a duty to advise and inform a client contemplating an offered plea agreement. *See Lafler*, 132 S. Ct. at 1387; *Williams*, 571 F.3d at 1091; *see also* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("1989 ABA Guidelines") 11.6.1, and cmt. (1989); 1979 ABA Standards 4-5.1(b), and cmt., 4-6.1; Utah R. of Prof'l Conduct 1.4.

Trial counsel failed to consult with Mr. Menzies in any significant way regarding the impact of different defense strategies and the strength of the State's case. (*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 ¶¶ 13-15, 17, 26, 29-31.) Trial counsel failed to explain to Mr. Menzies the risks associated with the use of their trial theory, and the likelihood of being found guilty, especially if Mr. Menzies did not present evidence in support of his theory of the crime, including the testimony of Nicole Arnold. (*See id.*) Trial counsel sent Mr. Menzies's sister, Jackie Rutherford, to the prison at 11:00 p.m. during the trial to report a plea offer to Mr. Menzies. (*Id.* ¶ 50.) The following day, trial counsel briefly discussed the plea offer with Mr. Menzies, but failed to advise Mr. Menzies as to the likelihood of his conviction if he failed to accept the plea offer. (*Id.* ¶¶ 30-32, 50.) Trial counsel never discussed the wisdom of accepting a plea deal with Mr. Menzies and led Mr. Menzies to believe that he had a good chance of being acquitted. (*See id.* ¶¶ 30-31, 45.) Trial counsel's consultation regarding the plea offer was objectively unreasonable.

Trial counsel had a duty to keep Mr. Menzies informed about his case, discuss any potential for negotiated settlement, and provide a candid evaluation of the strength of the State's case and the risks of trial. *See Lafler*, 132 S. Ct. at 1387; *Williams*, 571 F.3d at 1091; 1989 ABA Guidelines 11.6.1, and cmt.; 1979 ABA Standards 4-5.1(b), and cmt., 4-6.1; *see also* Utah R. of Prof'l Conduct 1.4. In failing to provide Mr. Menzies with a "candid estimate of the probable outcome," 1979 ABA Standards 4-5.1, trial counsel failed to act as effective counsel. *See Williams*, 571 F.3d at 1091. Trial counsel's failure to adequately consult with Mr. Menzies undermined Mr. Menzies's right to the effective assistance of counsel. *See Lafler*, 132 S. Ct. at 1387; *Williams*, 571 F.3d at 1091; *see*

also Boria v. Keane, 99 F.3d 492, 498 (2d Cir. 1996) (when counsel utterly fails to give client advice about a plea agreement, counsel's actions are not strategic because "in no event could [counsel be] relieved of his constitutional duty to give professional advice"). Furthermore, Mr. Menzies was prejudiced by counsel's deficient performance because had counsel provided adequate advice, he would have accepted the plea offer and would not have been sentenced to death. *See Williams*, 571 F.3d at 1091. Fairminded jurists could not disagree that counsel's failure to inform Mr. Menzies of developments in his case and provide competent advice related to the offered plea was deficient and resulted in prejudice. *See Richter*, 131 S. Ct. at 786. The state court's denial of this claim was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 787.

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

This portion of Mr. Menzies's ineffective assistance of counsel claim was raised in Mr. Menzies's state post-conviction petition (5th Am. Pet. at 12-13, 26-29, 55-56), and in his subsequent appeal from the denial of the post-conviction petition (02/27/2013 Appellant's Opening Brief at 17-19, 85-88). The state court's rejection of this claim was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. *See* 28 U.S.C. § 2254(d)(1). In addition, it constituted an unreasonable determination of the facts in light of the evidence presented. *See id.*§ 2254(d)(2). To the extent any aspect of this claim was not exhausted, that failure is attributable to the ineffective assistance of Mr. Menzies's post-conviction

counsel. *See Martinez*, 132 S. Ct. at 1315; *see also infra* Claim 38.

As discussed above, trial counsel failed to investigate the account and reliability of key State witness Walter Britton. *See supra* Claim 14.B.4. Britton's testimony was highly damaging to Mr. Menzies's case, since Britton testified that Mr. Menzies confessed that he had murdered the victim and said that cutting the victim's throat was one of the "biggest thrills of his life." Counsel's deficient investigation, coupled with their failure to effectively cross-examine and impeach Britton, resulted in a failure to undermine and confront significant evidence against Mr. Menzies.

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

Prior to the preliminary hearing, Britton told police only that Mr. Menzies had indicated it was exciting "to slit somebody's throat and to feel the blood comin[g] out on his hands." (5th Am. Pet., Ex. Q at 3.) At the preliminary hearing, Britton said for the first time that Mr. Menzies described the killing as "one of the biggest thrills he'd had." (TR 05/19/1986, ROA 1150 at 154.) Trial counsel failed to cross-examine Britton using his prior inconsistent statements. (*Id.* at 156-87.) The inconsistency in Britton's statements to the police and his preliminary hearing testimony could have been used to undermine the credibility of Britton's testimony.

Britton also told the police that Mr. Menzies implied that he had sex with the victim. (5th Am. Pet., Ex. Q at 3; 5th Am. Pet., Ex. NN at 5.) However, the forensic evidence indicated that Mr. Menzies did not have sex with the victim and Britton did not testify that Mr. Menzies said he had sex with the victim at the preliminary hearing. Trial

counsel failed to point out the inconsistency between Britton's prior statement to the police and the physical evidence. The inconsistency undermines the credibility of Britton's account.

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

Britton acknowledged at the preliminary hearing that he had heard news reports related to the abduction of the victim. (TR 05/19/1986, ROA 1150 at 164-65, 174-76; *see also* TR 03/02/1988, ROA 1158 at 2095, 2107-08 (Britton's preliminary hearing testimony read to the jury).) The detail provided in Britton's preliminary hearing testimony contained information that closely tracked the information available from media reports of the crime. (*See, e.g.*, TR 03/01-02/1988, ROA 1158 at 2081-85.) As a result, any details about the crime that Britton used to corroborate his assertion that Mr. Menzies confessed, could have instead come from media reports. Defense counsel failed to present this information to the jury. Defense counsel's failure was objectively unreasonable and prejudicial, as it resulted in a failure to undermine and impeach Britton's testimony that Mr. Menzies confessed to the crime.

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

Walter Britton also previously told the police that Mr. Menzies told him that "[h]e was high on drugs and didn't really know what he was doing" when he killed the victim. (5th Am. Pet., Ex. NN at 5.) Trial counsel failed to elicit information about Mr. Menzies's drug use at the time of the crime.

4. Failure to demonstrate that Britton was mentally ill.

Britton's statements to the police indicated that he had been evaluated in Springfield, Missouri, in relation to an "irresistible impulse plea." (5th Am. Pet., Ex. NN at 19.) In addition, prior to the preliminary hearing, the United States Attorney prosecuting Britton in a federal case filed a motion for the determination of Britton's mental competency. (*See* TR 03/01-02/1988, ROA 1158 at 2008; *see also* PCR ROA 13396-97 (Motion for Determination of Competency of Walter Britton).) This motion was based on the findings contained in a November 12, 1985, letter from Dr. Lebegue, who indicated that Britton may be mentally ill. (*See* PCR ROA 13396-97 (Motion for Determination of Competency of Walter Britton); 5th Am. Pet., Ex. PP, Report by Dr. Breck Lebegue.) In addition to noting indications that Britton was mentally ill, Dr. Lebegue noted Britton's prior attempts to manipulate the system for his own benefit. (5th Am. Pet., Ex. PP, Report by Dr. Breck Lebegue at 2.) Both the motion to determine competency and the letter from Dr. Lebegue were readily available in Britton's public federal case file and were obtained by counsel at the time of trial, but not prior to the preliminary hearing. (*See* TR 03/01-02/1988, ROA 1158 at 2008-09 (trial counsel discussing their certified copy of Lebegue's report); *see also* TR 03/03-04/1988, ROA 1159 at 2319-20.) This information indicated that Britton may have been suffering from a mental illness at the time of his preliminary hearing testimony. (*See* 5th Am. Pet., Ex. PP, Report by Dr. Breck Lebegue.)

Trial counsel failed to use this information to impeach Britton at the preliminary hearing. (*See* TR 05/19/1988, ROA 1150 at 156-87.) Trial counsel also ignored

information provided by Mr. Menzies indicating that Britton may be mentally ill (*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 ¶¶ 18-21), and failed to follow-up on Britton's disclosure at the preliminary hearing that he was taking a "sleeping medication" (*see* TR 05/19/1988, ROA 1150 at 164). Despite these facts, trial counsel failed to draw the inference that Britton may have been mentally ill, and did not ask him whether he had ever suffered from mental illness during cross-examination at the preliminary hearing.

At trial, counsel attempted to introduce the expert opinion letter written by Dr. Lebegue, which implied that Britton was mentally ill and had a history of manipulating the system. (TR 03/03-04/1988, ROA 1159 at 2319-21.) The trial court sustained the prosecution's objection to the introduction of Dr. Lebegue's letter, finding that it was a hearsay document. (*Id.* at 2323-24.) The court explicitly stated that Dr. Lebegue could testify to the contents of the letter. (*Id.*) Counsel expressed their intent to subpoena Dr. Lebegue, but failed to do so. (*Id.* at 2325.) Testimony at trial revealed that Britton was also evaluated in Springfield, Missouri, and that this generated a second report. (TR 03/01-02/1988, ROA 1158 at 2043.) Counsel was unable to obtain a copy of this report. (*See id.*; TR 03/03-04/1988, ROA 1159 at 2329-30.) Counsel did not attempt to obtain Britton's consent to review this report.

As a result, trial counsel never presented any evidence to the jury that psychological evaluations of Britton indicated that he may have been mentally ill at the time of his preliminary hearing testimony and that he had a history of attempting to manipulate the system to his own benefit. (*See* 5th Am. Pet., Ex. PP, Report by Dr.

Breck Lebegue.) Counsel also did not present evidence that Britton was found to have "a marked disregard for the truth as indicated by his repeated lies." (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 12; *see also id.* at 9 (noting that Britton would lie to present himself as a more interesting or valuable person).) Trial counsel's failure to call Dr. Lebegue as a witness was objectively unreasonable, uninformed, and prejudicial, because Dr. Lebegue could have testified that there were indications that Britton was mentally ill and that he manipulated the system for his own benefit at the time he testified at the preliminary hearing. Similarly, the failure to obtain the Springfield psychological evaluation was also prejudicially deficient performance as it resulted in a failure to present evidence that Britton had "a marked disregard for the truth."

The Utah Supreme Court found that Mr. Menzies could not show deficient performance based on counsel's failure to access and present information related to Britton's mental illness because there was no indication that trial counsel could have obtained a copy of a psychiatric report generated after Britton was evaluated in Springfield, Missouri. *Menzies IV*, 344 P.3d at 615-16. The Utah Supreme Court's conclusion misconstrued the factual basis for Mr. Menzies's claim and was objectively unreasonable.

The Utah Supreme Court ignored the fact that trial counsel actually had possession of significant evidence indicating that Britton was mentally ill. (*See* 5th Am. Pet., Ex. PP, Report by Dr. Breck Lebegue; TR 03/01-02/1988, ROA 1158 at 2008-09 (trial counsel discussing their certified copy of Lebegue's report); TR 03/03-04/1988, ROA

1159 at 2319-20.) Trial counsel failed to use this evidence to cross-examine Britton and failed to present this evidence to the jury. (TR 03/03-04/1988, ROA 1159 at 2323-25; *see also* 02/27/2013 Appellant's Opening Brief at 18 (explaining that the court file, which included the United States Attorney's motion for determination of competency and reference to Dr. Lebegue's report, indicated that Britton was mentally ill).) The Utah Supreme Court simply ignored this evidence of mental illness in reviewing Mr. Menzies's claim, resulting in an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(2).

Trial counsel's failure to effectively cross-examine Britton during the preliminary hearing and failure to impeach Britton's account resulted in deficient performance. Britton acknowledges that his testimony may have been inaccurate because he was on medication at the time he made his statements to the police and court. (*See* 5th Am. Pet., Ex. R.) Significant evidence indicates that Britton was mentally ill and had a history of attempting to manipulate the system to obtain benefits. In addition, as described above, trial counsel failed to present significant evidence indicating that Britton fabricated his testimony in order to obtain personal benefit. (*See supra* Claim 14.B.5.) Trial counsel's failure to develop and present this information, which would have undermined the credibility of a key State witness, who testified that Mr. Menzies confessed to the crime and described it as a "thrill," undermines confidence in the outcome of the case and resulted in prejudicially deficient performance.

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

This portion of Mr. Menzies's ineffective assistance of counsel claim was raised in Mr. Menzies's state post-conviction petition (5th Am. Pet. at 57), and in his subsequent appeal from the denial of the post-conviction petition (02/27/2013 Appellant's Opening Brief at 15, 63, 91-98). The state court's rejection of this claim was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. *See* 28 U.S.C. § 2254(d)(1). In addition, it constituted an unreasonable determination of the facts in light of the evidence presented. *See id.* § 2254(d)(2).

Trial counsel failed to object to the use of the eyewitness identifications of Mr. Menzies made by Tim Larrabee under a due process theory. The significant problems with Larrabee's identifications are discussed above. *See supra* Claims 3 and 4. The State introduced three identifications by Larrabee, which the State used to link Mr. Menzies to the crime. First, the State used Larrabee to place Troy Denter's car at Storm Mountain at the time of the crime. (*See* TR 02/18-19/1988, ROA 1155 at 1214.) Larrabee initially described the vehicle he saw at Storm Mountain as a beat up, old-looking, larger vehicle that was light brown in color. (TR 02/23-24/1988, ROA 1156 at 1258, 1263.) The investigating officers took Larrabee to the police parking lot, where Troy Denter's off-white car was parked, to attempt to select a car like the one he had seen at Storm Mountain. (TR 02/18-19/1988, ROA 1155 at 1214.) There were only one or two older cars in the parking lot at the time. (TR 02/23-24/1988, ROA 1156 at 1272.) Larrabee

said that Denter's car looked a lot like the car he saw at Storm Mountain. (TR 02/18-19/1988, ROA 1155 at 1214.)

Second, the State used Larrabee to identify Mr. Menzies's jacket as the jacket worn and carried by the male hiker that he saw at Storm Mountain. (TR 02/23-24/1988, ROA 1156 at 1290.) Larrabee initially described the jacket as a two-tone blue and grey or blue and white coat. (*Id.* at 1264.) During their investigation, detectives brought Larrabee a single coat, Mr. Menzies's two-tone maroon and grey coat, and asked him to identify it. (*Id.* at 1273.) Larrabee identified Mr. Menzies's coat as the coat carried by the male hiker at Storm Mountain. (*Id.* at 1290.)

Finally, the State introduced evidence that Larrabee identified Mr. Menzies as the man he saw at Storm Mountain. (*See* TR 02/23/1988, ROA 1156 at 1284-85.) Prior to trial, after some hesitation, Larrabee selected Mr. Menzies's photograph from a photo lineup, saying that Mr. Menzies was the individual that looked the most like the man he saw at Storm Mountain. (TR 02/19/1988, ROA 1149 at 1213.) Before the photo array, Larrabee was told on more than one occasion that the man responsible was in police custody, and Larrabee assumed the man was in the photo array. (Ex. 54, Declaration of Timothy Larrabee ¶ 8.) Larrabee also assisted the police in creating a composite sketch of the suspect, the man in the composite more closely resembles Mr. Menzies, than Larrabee's initial description of the man he saw at Storm Mountain. (*See, e.g.*, TR 02/18-19/1988, ROA 1155 at 1205; TR 02/23-24/1988, ROA 1156 at 1268.) During the preliminary hearing, a detective testified that "[t]he photo array had already been given to [Larrabee] by Detective Judd" by the time Larrabee created the composite. (TR

05/19/1986, ROA 1150 at 146.) At a later in-person lineup, Larrabee unequivocally identified someone other than Mr. Menzies as the man he saw at Storm Mountain. (TR 05/16/1986, ROA 1151 at 17.) At trial, the State elicited testimony from Larrabee that after the in-person lineup proceedings, where Larrabee identified someone other than Mr. Menzies, Larrabee expressed some reservations about his identification and asked the prosecutor whether the suspect was actually Number 6, referring to Mr. Menzies. (TR 02/23/1988, ROA 1156 at 1284-85.)

"[D]ue process concerns arise . . . when law enforcement officers use an identification procedure that is both suggestive and unnecessary." *Perry v. New Hampshire*, 132 S. Ct. 716, 724 (2012). Where an identification procedure is suggestive, courts must determine "whether improper police conduct created a 'substantial likelihood of misidentification.'" *Id.* (quoting *Neil v. Biggers*, 409 U.S. 188, 201 (1972)); *see also United States v. Kamahele*, 748 F.3d 984, 1019 (10th Cir. 2014). "[R]eliability is the linchpin in determining the admissibility of identification testimony." *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977); *see also Perry*, 132 S. Ct. at 724-25.

The irregularities in Larrabee's identifications, coupled with the suggestive nature of the police investigation, resulted in a "substantial likelihood of misidentification." *See Perry*, 132 S. Ct. at 718. Trial counsel's failure to move to exclude Larrabee's identifications was objectively unreasonable and Mr. Menzies was prejudiced because Larrabee was the only witness linking Mr. Menzies to the scene of the crime.

In denying this claim, the Utah Supreme Court found that Mr. Menzies failed to provide a "basis for the conclusion that trial counsel could have had the photo array

suppressed." *Menzies IV*, 344 P.3d at 617. The court's conclusion is based on an inaccurate assessment of Mr. Menzies's argument and the record before the court. Mr. Menzies argued that Larrabee's identifications of the car, Mr. Menzies's coat, and Mr. Menzies all should have been suppressed. (*See* 02/27/2013 Appellant's Opening Brief at 15, 63.) Mr. Menzies also pointed out the unduly suggestive nature of the identification process. The Utah Supreme Court's denial of this claim was based on an objectively unreasonable determination of the facts and an unreasonable application of clearly established federal law. *See* 28 U.S.C. § 2254(d)(1)-(2).

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.

This portion of Mr. Menzies's ineffective assistance of counsel claim was not raised in the Fifth Amended Petition. (*See* 5th Am. Pet.) Mr. Menzies's post-conviction counsel first raised this underlying claim in the Cross-Motion for Summary Judgment related to the Fifth Amended Petition, (*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. at 29); post-conviction counsel raised trial counsel's error in failing to move for a mistrial only on appeal of the denial of the Fifth Amended Petition (*see* 02/27/2013 Appellant's Opening Brief at 30, 98-99, 117); *see also Menzies IV*, 344 P.3d at 603 n.69. Because the claim was not raised in the Fifth Amended Petition, the post-conviction trial court and the Utah Supreme Court both declined to hear the claim. *Menzies IV*, 344 P.3d at 603 n.69.

The failure to raise the claim previously can be excused by demonstrating cause and prejudice. 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. 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.

As discussed in more detail above, after a juror fainted, Mr. Menzies was forcibly restrained, handcuffed, and removed from the courtroom in front of the jury. *See supra* Claim 9; (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; TR 02/25/1988, ROA 1157 at 1621-22). Following this incident, counsel failed to move for a mistrial on the grounds that the jurors witnessed sheriff's officers abruptly handcuff Mr. Menzies and then forcibly remove him from the courtroom. (*See* TR 02/25/1988, ROA 1157 at 1621-24.)

The Due Process Clause of the Fourteenth Amendment prohibits the unjustified shackling of a defendant at any stage of a trial. *See Deck*, 544 U.S. at 624 (holding that the visible shackling of a defendant before a jury, during the guilt or penalty phase of a capital trial, violates due process absent case-specific security justifications); *Allen*, 397 U.S. at 344. The Supreme Court has recognized that security measures, like shackling, may implicate a defendant's constitutional rights where the circumstances are such that the security measures "create the impression in the minds of the jury that the defendant is dangerous or untrustworthy." *Holbrook*, 475 U.S. at 569 (internal quotation omitted).

Here, a juror fainted causing general alarm in the courtroom. The jurors then witnessed sheriff's officers forcibly restrain, handcuff, and remove Mr. Menzies. Given

the extremely prejudicial impact of the officers' abrupt restraint and removal of Mr. Menzies, a reasonable attorney would have objected to the conduct, sought a corrective instruction from the court, and moved for a mistrial. As a result of trial counsel's deficient performance, the jurors were left with the impression that Mr. Menzies was an extremely dangerous individual, requiring forcible restraint and removal. *See Holbrook*, 475 U.S. at 569; *see also supra* Claim 9 (explaining the prejudicial nature of the jurors witnessing the restraints). Because Mr. Menzies was prejudiced by counsel's deficient performance, Mr. Menzies was denied his Sixth and Fourteenth Amendment rights, and is therefore entitled to relief.

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

This claim was not raised in state court. Mr. Menzies's failure to raise this claim previously can be excused by demonstrating cause and prejudice. The ineffective assistance of Mr. Menzies's state appellate and post-conviction counsel in failing to raise this claim constitutes cause for the default and resulted in prejudice to Mr. Menzies. *See Strickland*, 466 U.S. 668; *Evitts v. Lucey*, 469 U.S. 387, 396 (1985); *Martinez*, 132 S. Ct. at 1315; *Ha Van Nguyen v. Curry*, 736 F.3d 1287, 1293 (9th Cir. 2013). Mr. Menzies will demonstrate at an evidentiary hearing that the performance of his state appellate and post-conviction counsel fell below the standards of a minimally competent capital attorney when he failed to raise this meritorious claim. *See infra* Claim 38; *see also infra* Claim 37.

In Claim 33, *infra*, Mr. Menzies outlines in detail the multiple instances in the

record where it is clear that conversations and legal proceedings occurred and were not recorded. The facts outlined in Claim 33 are incorporated here. *See infra* Claim 33. Defense counsel's failure to ensure that all necessary proceedings were recorded or otherwise made part of the record, resulted in proceedings between counsel and the court for which the subject matter is unknown. (*See, e.g.*, TR 02/01/1988, ROA 1152 at 23-24; TR 02/10/1988, ROA 1152 at 163-65; TR 02/11/1988, ROA 1153 at 210-11, 229, 260; TR 02/17/1988, ROA 1154 at 888; TR 02/18/1988, ROA 1155 at 959, 978; TR 02/24/1988, ROA 1156 at 1475-76; TR 02/25/1988, ROA 1157 at 1621-22, 1715-16; TR 02/26/1988, ROA 1157 at 1817-18, 1824; TR 03/01/1988, ROA 1158 at 1945; TR 03/03/1988, ROA 1159 at 2332; TR 03/07/1988, ROA 1160 at 2604; TR 03/08/1988, ROA 1160 at 2606; *see also* ROA 822-23, March 1, 1988, Minute Entry (noting discussion in chambers about how to admonish the jury, errors in the transcript, and the fact that Mr. Menzies was not receiving a hot lunch throughout the proceedings).)

While it is impossible to fully discern the important matters discussed in these unrecorded proceedings, it is clear that unrecorded proceedings included: discussions related to security for trial (TR 02/01/1988, ROA 1152 at 23-24), the removal of prospective jurors for cause and with use of peremptory challenges (TR 02/10/1988, ROA 1152 at 163-65; TR 02/17/1988, ROA 1154 at 888), 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 (noting an off-the-record discussion about reading in the preliminary hearing transcripts and a need to put the argument on the record without completing argument)), the defense's objections to State Exhibit 1 during the guilt phase (TR

02/18/1988, ROA 1155 at 978), the events following a juror fainting during the testimony of the medical examiner (TR 02/25/1988, ROA 1157 at 1621-22), evidentiary matters (*id.* at 1715-16), 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), and guilt phase jury instructions and arguments or objections related to the instructions (TR 03/07/1988, ROA 1160 at 2604, 2606). It is particularly troubling that the trial record contains no transcript of the exercise of many of the challenges to jurors for cause and all of the peremptory challenges. (*See, e.g.*, 02/10/1988, ROA 1152 at 163-65; TR 02/17/1988, ROA 1154 at 888.)

It is clearly established that an "appellant cannot be denied a 'record of sufficient completeness' to permit proper consideration of his claims." *Mayer v. City of Chicago*, 404 U.S. 189, 198 (1971). "As any effective appellate advocate will attest, the most basic and fundamental tool of his profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law." *Hardy v. United States*, 375 U.S. 277, 288 (1964) (Goldberg, J., concurring). The United States Supreme Court has made clear that an indigent defendant has both due process and equal protection rights to the "basic tools" of a constitutionally complete and adequate judicial review—a constitutionally effective attorney acting as an advocate, *see, e.g.*, *Strickland*, 466 U.S. at 684-85; *Evitts*, 469 U.S. at 392, and a record that will permit meaningful, effective presentation of his claims, *see, e.g.*, *Griffin v. Illinois*, 351 U.S. 12, 18-19 (1956); *see also Mayer*, 404 U.S. at 194 (noting a

constitutional right to a "record of sufficient completeness to permit proper consideration of [the defendant's] claims"); *Hardy*, 375 U.S. at 288 ("Anything short of a complete transcript is incompatible with effective appellate advocacy."). In addition, the Sixth Amendment, as applied to the states through the Fourteenth Amendment, guarantees criminal defendants the right to a public trial. *Waller v. Georgia*, 467 U.S. 39, 46 (1984). This right to open proceedings is not restricted to the trial itself, but extends to pre-trial proceedings such as voir dire and suppression hearings. *Id.*

Trial counsel's failure to ensure that all necessary proceedings were recorded, in violation of Mr. Menzies's Sixth and Fourteenth Amendment rights, denied Mr. Menzies the right to a public trial and the opportunity for meaningful appellate review including a full record of the trial. Counsel's deficient performance prejudiced Mr. Menzies by impeding his ability to obtain complete and adequate review of the trial court's reasoning and rulings. *See, e.g.*, *Griffin*, 351 U.S. at 18-19; *Evitts*, 469 U.S. at 396. Trial counsel ineffectively failed to ensure that there was an adequate record for review of discussions occurring at the bench, in chambers, and in court. Counsel's failure prejudiced Mr. Menzies by limiting direct review, undermining confidence in the outcome of the trial.

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

Trial counsel's numerous errors and deficient performance had a cumulatively prejudicial impact on Mr. Menzies's trial. 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"); *Williams (Terry)*, 529 U.S. at 397 (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"); *Stouffer v. Reynolds*, 214 F.3d 1231, 1234 (10th Cir. 2000) (noting deficient performance based on counsel's numerous errors).

The Utah Supreme Court failed to consider the totality of trial counsel's errors and unreasonably discarded each deficiency in turn. *See Menzies IV*, 344 P.3d at 607-22. 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."). The state court's decision was based on an unreasonable application of *Strickland*. Because the court unreasonably applied the *Strickland* standard during its analysis, Mr. Menzies has satisfied the strictures of § 2254(d)(1) on the basis of the state court record, and this Court must review the merits of his claim *de novo*.

Here, Mr. Menzies has proven numerous errors by defense counsel that impacted the reliability of the entire proceeding. The cumulative prejudicial impact of counsel's deficient performance produced a trial setting that was fundamentally unfair and undermines confidence in the outcome of Mr. Menzies's trial. Counsel's performance

denied Mr. Menzies's Sixth and Fourteenth Amendment rights. Mr. Menzies is therefore entitled to relief.

CLAIM 15

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.

This claim is exhausted, having been raised on direct appeal. (09/14/1992 Br. of Appellant at 120.) 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 ("We find Menzies' other claims to be without merit."). The state court's resolution of this claim was an unreasonable determination of fact and an unreasonable application of clearly established federal law. 28 U.S.C. 2254(d)(1)-(2) ; *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").

"*Furman* held that [the death penalty] could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (citing *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring)). Therefore, "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and

limited so as to minimize the risk of wholly arbitrary and capricious action." *Id.* at 189; *see also Godfrey v. Georgia*, 446 U.S. 420, 427 (1980).

Part of the necessary limiting of discretion is accomplished by strictly limiting the information presented to the sentencing body to only accurate information. "[A]ccurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die." *Gregg*, 428 U.S. at 190. It is a "vital need . . . in order to be able to impose a rational sentence." *Id.*

State courts must comply with this limitation of only admitting accurate information to, and limiting the discretion of, the sentencing body. "[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey*, 446 U.S. at 428. State laws and procedure "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" *Id.* (quoting *Gregg*, 428 U.S. at 195, n.46).

During the penalty phase, the trial court admitted Mr. Menzies's entire prison file as an exhibit. (Penalty Phase Ex. 8, Prison File.) The file consisted of about 360 pages generated between 1973 and 1986. The file contains a social history and old psychological evaluations, which are 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 c-notes also include unadjudicated allegations of criminal conduct, several of which were serious and related to Mr. Menzies's ability to adjust to institutional life.

The Sixth and Fourteenth Amendments to the United States Constitution provide an accused with the right to confront the witnesses against them. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Chambers*, 410 U.S. at 294. The United States Supreme Court has long held this to be true:

> The primary object of the constitutional provision in question [the Confrontation Clause] was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242-43 (1895); *see also Douglas v. Alabama*, 380 U.S. 415, 418-19 (1965).

The penalty phase of a capital trial is a critical stage of the proceeding during which the accused is entitled to due process of law. *Gardner v. Florida*, 430 U.S. 349, 358 (1977) ("[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause."). Although *Gardner* did not explicitly address whether the right to confrontation applies in capital sentencing hearings, the conclusion in *Gardner* that "petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain" compels such a determination. *Id*. at 362. The Court in *Gardner* recognized the change wrought by *Furman v. Georgia* and *Gregg v. Georgia*, that "death is a different kind of punishment from any other which may be imposed in this country." *Id*. at 357 (citing *Gregg v. Georgia*, 428 U.S. 153, 181-88 (opinion of Stewart, Powell, and Stevens, JJ.), 231-41 (1976) (Marshall, J., dissenting); *Furman v. Georgia,* 408 U.S. 238, 286-91 (Brennan, J., concurring), 306-10 (Stewart, J., concurring), 314-71 (1972) (Marshall, J., concurring). Because of this, "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Garnder*, 430 U.S. at 358.

As established above in Claim 5, the essential element of the right of confrontation is that the accused be afforded the opportunity to confront his accusers in person. Therefore, before a court may allow hearsay evidence, 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. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

The burden is on the State to make these showings. *Id.* at 75. "[A] witness is not 'unavailable' for purposes of . . . the exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Barber v. Page*, 390 U.S. 719, 724-25 (1968). And even if the declarant is unavailable, the State must still prove the reliability of the otherwise inadmissible hearsay statement. The statement must fit either into an exception to the hearsay rule or have other "particularized guarantees of trustworthiness." *Roberts*, 448 U.S. at 66.

With regard to the hundreds of pages contained within Mr. Menzies's prison file, there was no showing made of an attempt to satisfy either of these factors. In fact, many of the "declarants" were not identified in the file, as the documents referred to other documents or sources without naming them. Therefore, even if the State attempted to make a showing as to either unavailability or reliability, it would be practically impossible for it to actually do so.

While the failure by the State to meet the unavailability prong is enough to warrant relief on this claim, the reliability factor was also not proved. This requirement focuses on whether there are "indicia of reliability" which "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement." *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972). The prison file did not fit within a firmly rooted hearsay exception. Nor were there any other indicia of reliability. Neither the file itself, nor its contents, were ever intended for the purpose for which they were used—as competent evidence in a criminal proceeding. Therefore, there is nothing inherent in the documents that would indicate their reliability.

As discussed above in this Claim, the prison file contains numerous allegations of unadjudicated criminal conduct or other bad acts. The trial court appeared to have reviewed the entire file, and specifically relied on certain unproved acts contained in documents—that were clearly inadmissible hearsay—in its findings in support of Mr. Menzies's death sentence. These include allegations of threats to inmates and others (Penalty Phase Ex. 8 at 232; TR 03/23/1988, ROA 1162 at 3260); an allegation that Mr. Menzies was involved in escape (Penalty Phase Ex. 8 at 122; TR 03/23/1988, ROA 1162 at 3251); and an allegation that Mr. Menzies helped a dangerous patient escape (Penalty Phase Ex. 8 at 122; TR 03/23/1988, ROA 1162 at 3263).

In his ruling imposing a sentence of death on Mr. Menzies, the trial judge observed that "[a]lleged bad acts have—this is character, background history, mental condition: alleged bad acts were unproven." (TR 03/23/1988, ROA 1162 at 3265.) Regardless, the trial court relied on unadjudicated bad acts and inadmissible character evidence in finding that death should be imposed. The trial court explicitly relied on unadjudicated conduct, including: "an extensive juvenile record" (*id.* at 3250); that Mr. Menzies "went AWOL from the shelter" and "they could not work with him when he was involved in an AWOL plot" (*id.* at 3251); extensive drug use (*id.* at 3253); that Mr. Menzies "created diversionary tactic helping dangerous patient to escape" (*id.* at 3263); that Mr. Menzies was referred for psychiatric evaluation "for pulling a knife and inflicting injury to girl who teased him and indicated he would 'cut her guts out'" (*id.* at 3263); and information indicating Mr. Menzies used "strong-arm tactics, threats to inmates and guards when pushed" (*id.* at 3260). Other than the unreliable hearsay

statements contained in the file, the State offered no independent or reliable evidence to prove that Mr. Menzies had in fact committed any of these acts.

Defense counsel objected to admission of the prison file. The trial court did not state the basis on which it admitted the exhibit, but said

> The court will admit it and will review it, [and] give it whatever weight the court feels it deserves, but the court is of the opinion that the facts of this case should essentially determine the nature of what the court should do, and although in reviewing it, the court will take it into consideration.

(*Id*. at 3186). Despite some acknowledgment that many of the acts and character evidence were unproven (*id*. at 3265), and that the sentence should be determined on the facts of the case (*id*. at 3186), it's clear that the prison file—and not just the verifiable facts of the case—was highly influential in the trial court's weighing of aggravating and mitigating factors, and in its determination of whether death was the appropriate sentence. These facts precluded the sentence from being proportionate and reliable. *See Gregg*, 428 U.S. at 204-07. Mr. Menzies should be granted relief on this claim.

CLAIM 16

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.

This claim is exhausted, having been raised on direct appeal. (09/14/1992 Br. of Appellant at 170.) 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 ("We find Menzies' other claims to be without merit."). The state court's determination of this claim was an unreasonable determination of fact. *See* 28 U.S.C. § 2254(d)(2); *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 State introduced Mr. Menzies's county rap sheet which contained a number of unadjudicated crimes. (Penalty Phase Exhibit 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 it was included, unredacted, with the exhibits in this case. (TR 03/15/1988, ROA 1161 at 2863.) Mr. Menzies's state rap sheet was also admitted and contains 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 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 Exhibit 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.)

The rap sheets were inadmissible hearsay and were admitted without a proper foundation. Introduction of the rap sheets, without proving beyond a reasonable doubt that Mr. Menzies committed the crimes, violated due process and the Eighth Amendment.

In addition, admission of the rap sheets violated Mr. Menzies's right to confrontation during the penalty phase (*see* Claim 15). Mr. Menzies should be granted relief on this claim.

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 is exhausted, having been raised on direct appeal. (09/14/1992 Br. of Appellant at 139.) 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 ("We find Menzies' other claims to be without merit."). The state court's determination of this claim was an unreasonable determination of fact and an unreasonable application of clearly established federal law. See 28 U.S.C. § 2254(d)(1)-(2); *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")..

This claim concerns Mr. Menzies's prison file, admitted as Penalty Phase Ex. 8, discussed in 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. This would have included the prison file contained in Penalty Phase Ex. 8. 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).

Additionally, the prison file also contained positive information about Mr. Menzies's conduct while in prison including the fact that he was a good worker who followed orders and his recommendations for parole, which would go to his institutional adjustment in favor of a life sentence.[22] (Penalty Phase Exhibit 8 at 38, 163, 169, 173-75, 178-80, 183, 184-85, 198, 204, 208.) This information was mitigating evidence which the State was required to provide to defense counsel. The State's failure to provide defense counsel with this information also violated Mr. Menzies's right to due process. *See Brady*, 373 U.S. at 87 (suppression by the state of evidence favorable to the accused violates due process); *see also Gardner*, 430 U.S. 349.

The State's discovery violation undermined Mr. Menzies's ability to prepare for the penalty phase. Had he had access to the file, Mr. Menzies could have developed the mitigating information, presented witnesses who had made favorable statements, and been prepared to counter the remainder of the State's evidence. The failure to disclose the prison file was prejudicial to Mr. Menzies. *See United States v. Agurs*, 427 U.S. 97, 107-08 (1976) (a prosecutor has a constitutional duty to volunteer exculpatory matter to the defense). Mr. Menzies should be granted relief on this claim.

[22] Although this mitigation evidence should have been conveyed to defense counsel, it did not balance out the overwhelmingly prejudicial effect of admitting the prison file. *See* Claim 15.

CLAIM 18

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.

This claim is exhausted, having been raised on direct appeal. (09/14/1992 Br. of Appellant at 141.) 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 ("We find Menzies' other claims to be without merit."). The state court's determination of this claim was an unreasonable determination of fact and an unreasonable application of clearly established federal law. *See* 28 U.S.C. § 2254(d)(1)-(2); *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").

This claim concerns Mr. Menzies's prison file, admitted as Penalty Phase Ex. 8, 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. (*See*, *e.g.*, Penalty Phase Ex. 8 at 82-93 (presentence report), 99-106 (Social Investigation and Study for Hearing on the State's Motion to Certify), 122-24 (Utah State Hospital Psychiatric Evaluation), 125-27 (Utah State Hospital Psychiatric Evaluation), 128 (Psychological Evaluation), 130-33 (Psychological Evaluation), 136 (Psychological

Evaluation), 137 (Psychological Evaluation), 138 (Psychological Evaluation), 187-89, 195-220, 273 (c-notes).) These reports included conclusions that Mr. Menzies was dangerous, had an anti-social personality, and was not a candidate for treatment. (*Id.* 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. Prior to making these statements, Mr. Menzies signed a form reflecting that anything he said in the disciplinary proceedings could not be used against him in subsequent criminal proceedings. (*See*, *e.g.*, *id.* at 248, 257-58, 265, 272, 278.)

In *Estelle v. Smith*, the United States Supreme Court held that the Fifth Amendment right against self-incrimination applies to the penalty phase of a capital trial, and that right was violated where a psychiatrist who conducted a court-ordered competency review testified during the penalty phase as to the defendant's future dangerousness. The Court pointed out that:

> [b]ecause respondent did not voluntarily consent to the pretrial psychiatric examination after being informed of his right to remain silent and the possible use of his statements, the State could not rely on what he said to [the psychiatrist] to establish future dangerousness.

451 U.S. 454, 468 (1981). Although Mr. Menzies introduced evidence relating to his mental health in an effort to diffuse the impact of the various reports and psychological evaluations (*see* TR 03/16/1988, ROA 1161 at 2956-83, 3019-70; TR 03/17/1988, ROA

1162 at 3076-3104), he did so only after the State introduced the written psychological evaluations contained in the prison file and Penalty Phase Exhibit lD. (TR 03/15/1988, ROA 1161 at 2839-43; TR 03/16/1988, ROA 1161 at 2884-94, 2904; *see also* Claim 19, challenging the State's admission of the written psychological evaluations.) Such an effort to diffuse the impact of the State's erroneously admitted evidence does not detract from the reversible nature of this error. *See Estelle*, 451 U.S. at 465-66.

Mr. Menzies had a right to be free from self-incrimination under the Fifth Amendment at the penalty phase of his trial, and that right was violated when State evaluators conducted in-custody interviews with Mr. Menzies without advising him of his constitutional right to remain silent, or that the information obtained from Mr. Menzies would be used against him in court. Erroneous admission of the numerous statements and evaluations coupled with the trial court's explicit and implicit reliance on such evaluations warrants relief on this claim.

CLAIM 19

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.

This claim is exhausted, having been raised on direct appeal. (09/14/1992 Br. of Appellant at 143.) 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 ("We find Menzies' other claims to be without merit."). The state court's determination of this claim was an unreasonable determination of fact. *See* 28 U.S.C. § 2254(d)(2) ; *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").

As established above in Claim 15, state courts must limit sentencing proceedings to admit only accurate information and must also limit the discretion of the sentencing body. *See Gregg*, 428 U.S. at 190 (accuracy in sentencing information is a "vital need," "indispensable" to producing a "rational sentence"). "[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey*, 446 U.S. at 428. State laws and procedure "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" *Id.* (quoting *Gregg*, 428 U.S. at 195, n.46).

At the penalty phase the State introduced Exhibit 1D, consisting of three psychiatric evaluations which had been done between 1973 and 1976—twelve years or more before Mr. Menzies's trial. (Penalty Phase Exhibit 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 Exhibit 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.)

Admission of Exhibit 1D violated Mr. Menzies's right to confront the witnesses against him. *See* Claim 15; *see also Chambers*, 410 U.S. at 294, *Mattox*, 156 U.S. at 242-43, *Douglas*, 380 U.S. at 418-19, and *Gardner*, 430 U.S. at 358. The essential element of the right of confrontation is that the accused be afforded the opportunity to confront his accusers in person. Therefore, before a court may allow hearsay evidence, there must be a showing of both the unavailability of the declarant and that the statement to be admitted bears sufficient indicia of reliability to justify its use as relevant evidence. *Roberts*, 448 U.S. at 66. The burden is on the State to establish that a declarant is unavailable. *Id*. at 75.

"[A] witness is not 'unavailable' for purposes of . . . the exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Barber v. Page*, 390 U.S. 719, 724-25 (1968). And even if the declarant is unavailable, the State must still prove the reliability of the otherwise inadmissible hearsay statement. The statement must fit either into an exception to the hearsay rule or have other "particularized guarantees of trustworthiness." *Roberts*, 448 U.S. at 66.

The State made no showing that the three declarants who produced the evaluations in Exhibit 1-D were unavailable. Nor did the State make any showing as to how or where the declarants had obtained the hearsay information contained in the reports. Nor did the State make any showing that the reports were reliable. The evaluations all predated the

offense by ten years or more, concerned Mr. Menzies when he was a juvenile, and were generated for purposes which were not analogous to his capital sentencing proceedings. Also, the evaluators only spent very short periods of time with Mr. Menzies. All of these factors undermine the reliability of the evaluations for use during sentencing. These evaluations should have been excluded because the State failed to meet its burden.

Also, use of the evaluations violated Mr. Menzies's Fifth Amendment right against self-incrimination. The reports were made based on confidential interviews with Mr. Menzies and he was not informed his statements could be used against him and did not waive his right against self-incrimination. *Estelle*, 451 U.S. at 468. Further, he was a juvenile during all three evaluations, so any implied waiver would be invalid.

Lastly, the evaluations contain allegations of unadjudicated acts which the State did not prove beyond a reasonable doubt. Mr. Menzies was prejudiced by their admission as evidence against him. There are two mentions of an incident where Mr. Menzies allegedly threatened a girl with a knife. (Penalty Phase Exhibit 1D at 3, 9.) The 1973 report also indicates that "[t]here have been several knife incidents since that time." (*Id* at 9.) The source of this information, the facts of the incident, the name of the girl and other victims, or any other details are not supplied, and the State made no further effort to prove that these incidents occurred. The trial judge appears to have relied on these facts in sentencing Mr. Menzies to death. (TR 03/23/1988, ROA 1162 at 3263.)

For all of these reasons, admission of Penalty Phase Ex. 1D violated Mr. Menzies's constitutional rights and he should be granted relief on this claim.

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 exhausted, having been raised on direct appeal. (09/14/1992 Br. of Appellant at 188.) 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 ("We find Menzies' other claims to be without merit."). The state court's determination of this claim was an unreasonable determination of fact. *See* 28 U.S.C. § 2254(d)(2)); *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").

This claim is related to the prison file admitted as Penalty Phase Exhibit 8, and to the psychiatric and psychological evaluations admitted as Penalty Phase Exhibit 1D. This claim relies on the facts and law contained in Claims 15 and 19, which are incorporated here by reference.

Although she never met Mr. Menzies (TR 03/17/1988, ROA 1162 at 3153), Dr. Patricia Smith testified at the penalty phase, over Mr. Menzies's objection, that Mr. Menzies 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.) Dr. Smith criticized the conclusions made by the defense psychologist (*id*. at 3158-59), however, she admitted that she could not draw a conclusion about Mr. Menzies's diagnosis because she had not examined him (*id*. at 3160).

The documents relied upon by Dr. Smith were wholly unreliable. Her testimony reintroduced evidence which should never have been admitted in the first place, some of which had been prepared by people who were not clinically trained. Dr. Smith's testimony cloaked the unreliable observations and conclusions of unqualified reports in the guise of an expert. (*Id*. at 3145-46.) Dr. Smith's conclusions were based on hearsay and unproven assertions which Mr. Menzies never had the opportunity to challenge. She borrowed the conclusions of others contained in the prison file and adopted them as her own. She had no independent basis to reach any of these conclusions, and reliance on her wholly unreliable testimony at the penalty phase violated Mr. Menzies's Fourteenth and Eighth Amendment rights. Mr. Menzies should be granted relief on this claim.

CLAIM 21

The prosecution's altering of its witness list shortly before commencement of the penalty phase and failure to timely disclose penalty phase evidence violated Mr. Menzies's right to due process under the Fourteenth Amendment and resulted in an arbitrary and capricious imposition of the death penalty in violation of the Eighth Amendment.

Mr. Menzies withdraws this claim.

CLAIM 22

The introduction of unproven prior bad acts and cross-examination by the State regarding bad acts that it did not otherwise prove, violated Mr. Menzies's right to due process under the Fourteenth Amendment and to a fair and reliable capital sentencing proceeding under the Eighth Amendment.

Mr. Menzies withdraws 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.

This claim is exhausted, having been raised on direct appeal. (09/14/1992 Br. of Appellant at 172.) 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 ("We find Menzies' other claims to be without merit."). The state court's determination of this claim was an unreasonable determination of fact. *See* 28 U.S.C. § 2254(d)(2); *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 Utah Rules of Evidence prohibit the use of evidence that is unfairly prejudicial or needlessly cumulative. Utah R. Evid. Rule 403. Over Mr. Menzies's objection, the trial judge admitted two graphic, gruesome photographs of the corpse during the penalty phase. These photographs were cumulative of the medical examiner's testimony from earlier in the proceedings and had no probative value. Their admission violated Mr. Menzies's right to due process. *See Payne v. Tennessee*, 501 U.S. 808, 825 (1991) ("In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.") "[T]he Due Process Clause guarantees the fundamental elements of fairness in a criminal trial." *Spencer v. Texas*, 385 U.S. 554, 563-64 (1967). The Court will grant relief where a state court's ruling(s) "denied [the petitioner] a trial in accord with traditional and fundamental standards of due process." *Chambers*, 410 U.S. at 302; *see also Payne*, 501 U.S. at 825.

The trial judge admitted the photographs during the penalty phase, saying that that:

> those pictures would be helpful to the Court in observing what the scene was. Although it's been described, I think the pictures would give the Court a better picture. It doesn't appear to be gruesome as far as the Court is aware, that State's 6 and 7 depicts especially, essentially the scene.

(TR 03/16/1988, ROA 1161 at 2883; Penalty Phase Exhibits 6 and 7.)

The trial court's finding that the photographs would be helpful and not cumulative because of how they depict the scene is inexplicable. Neither exhibit shows the scene. Rather, they depict details of Ms. Hunsaker's body after she has been removed from the scene. Exhibit 6 is a close-up of her mouth, chin and gaping neck wounds; Exhibit 7 shows the head and upper torso, focusing on the neck wounds. The exhibits appear to have been taken as part of the autopsy.

The State argued that the photographs were admissible to prove that "[t]he homicide was committed in an especially heinous, atrocious, cruel, or exceptionally depraved manner." (TR 03/15/1988, ROA 1161 at 2833, 2834-35); Utah Code § 76-5-202(1)(q) (1988). As stated, the photographs do not depict the crime scene, only Ms. Hunsaker's body. However, even if these photographs had depicted the crime scene, the gruesomeness of the crime scene is entirely irrelevant to a determination of its heinousness. *See Godfrey v. Georgia,* 446 U.S. 420, 433, n.16 (1980) ("An interpretation of [the heinousness aggravator] so as to include all murders resulting in gruesome scenes would be totally irrational."). Consideration of this irrelevant evidence at the penalty phase violated Mr. Menzies's right to due process and to a reliable capital sentencing proceeding.

In addition, the photographs did not accurately depict the wounds as they had been inflicted. During cross-examination in the guilt phase, Dr. Sweeney testified that the elasticity of skin makes cuts gape after incisions are made, resulting in wounds which are shorter and wider than the original cut marks (TR 02/25/1988, ROA 1157 at 1644-48), causing the gaping appearance seen in Exhibits 6 and 7 which makes the wounds seem

larger than they initially were. Therefore, based on Dr. Sweeney's medical testimony, the photographs, taken days after the offense, would not have been "helpful to the Court in observing what the scene was" as the photographs did not depict the injuries as they were inflicted. (TR 03/16/1988, ROA 1161 at 2883.) Further, given that Dr. Sweeney presented medically accurate testimony as to the nature and extent of the injuries, the photographs were needlessly cumulative.

The photographs therefore had little or no probative value; the prejudicial effect of the photographs, due to their gruesomeness, rendered them inadmissible. Admission of the photographs also violated Mr. Menzies's right to due process and accuracy in his sentencing. *See Gregg*, 428 U.S. 153, 203-04 (admission of unfairly prejudicial evidence in the penalty phase violates the Eighth Amendment). The trial court's determination that these photographs would be "helpful to the Court in observing what the scene was" (TR 03/16/1988, ROA 1161 at 2883) was objectively unreasonable because the photographs did not depict the scene and what they did depict was not an accurate representation of the injuries to Ms. Hunsaker. Mr. Menzies should be granted relief on this claim.

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.

This claim is exhausted, having been raised on direct appeal. *Menzies II*, 889 P.2d at 405. 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).

At the time of Mr. Menzies's trial, the clearly established federal law was that the Eighth Amendment prohibited the introduction of victim impact evidence during capital sentencing proceedings. *See Booth v. Maryland*, 482 U.S. 496 (1987). The rationale for excluding victim impact evidence is that in order to avoid arbitrary and capricious imposition of the death penalty, capital sentencing must be an "'*individualized* determination' whether the defendant in question should be executed, based on 'the character of the individual and the circumstances of the crime.'" *Id*. at 502 (quoting *Zant v. Stephens*, 462 U.S. 862, 897 (1983)). Conversely, victim impact evidence focuses on the character of the victim and the victim's family's characterization of the defendant and the offense. *Id*. at 502-03. The admission of victim impact evidence "creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." *Id*. at 503.

The United States Supreme Court relied on *Booth* in reversing a death sentence where the prosecutor had commented on the character of the victim during closing arguments on the sentencing proceeding. *South Carolina v. Gathers*, 490 U.S. 805, 808-10 (1989). The Court affirmed the state court's determination that "comments to the jury regarding the victim's character were unnecessary to an understanding of the circumstances of the crime." *Id*. at 810. The Court wrote that "[o]ur capital cases have consistently recognized that '[f]or purposes of imposing the death penalty . . . [the defendant's] punishment must be tailored to his personal responsibility and moral guilt.'" *Id.* (quoting *Enmund v. Florida*, 458 U.S. 782, 801 (1982)).

During the guilt phase, the State introduced victim impact evidence regarding the effect of Ms. Hunsaker's death on her young children and unemployed husband. (TR 02/18/1988, ROA 1155 at 975-76, 978-79, 988.) These facts were irrelevant to the matters at issue. During the penalty phase, the State called Valfua Lelaetafea to give victim impact testimony about being injured by Mr. Menzies during a robbery. (TR 03/15/1988, ROA 1161 at 2794-96.) Defense counsel objected to the testimony, citing *Booth v. Maryland*, specifically. (*Id*. at 2796.) The objection was overruled. (*Id*. at 2797.)

Later, the State argued that Mr. Menzies's impact on his victims, including Mr. Lelaetafea, justified the death penalty. (TR 03/17/1988, ROA 1162 at 3199, 3210.) Despite a finding that the shooting of the Mr. Lelaetafea was unintentional (TR 03/23/1988, ROA 1162 at 3265), the trial judge relied on the extent of the injury in determining the sentence (*id*. at 3254). The judge also relied on the victim impact evidence regarding Ms. Hunsaker, her family, and others. (*Id*.)

In rejecting Mr. Menzies appeal on this issue, the Utah Supreme Court held that because Mr. Menzies was sentenced by a judge, and not a jury, the prohibition against victim impact evidence did not apply. *Menzies II*, 889 P.2d at 405. This was an unreasonable application of clearly established federal law. *Booth v. Maryland* instituted a categorical prohibition against victim impact evidence in capital sentencing proceedings. 482 U.S. at 502-03. It carved out no exception based on the type of sentencing body. This was the law in effect at the time of Mr. Menzies's trial, when the victim impact evidence was improperly admitted. Its use by the trial judge makes Mr.

Menzies's sentence arbitrary and capricious in violation of the Eighth Amendment. 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.

This claim is exhausted, having been raised on direct appeal. (09/14/1992 Br. of Appellant at 181.) 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 ("We find Menzies' other claims to be without merit."). 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 United States Supreme Court has "taken special care to assure that prosecutorial conduct in no way impermissibly infringes" on a criminal defendant's constitutional rights. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). Prosecutorial misconduct, in the form of improper closing argument, impermissibly infringes on a defendant's constitutional rights if the misconduct "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v.*

Wainwright, 477 U.S. 168, 181 (1986) (citing *Donnelly*, 416 U.S. at 643). "During closing argument, a prosecutor may do no more than comment on facts in evidence and make reasonable inferences based on the evidence." *United States v. Hermanek*, 289 F.3d 1076, 1101 (9th Cir. 2002). A prosecutor may not introduce evidence from outside the record. *United States v. Wright*, 625 F.3d 583, 611 (9th Cir. 2010). During Mr. Menzies's trial, however, that is exactly what the prosecution did.

A. The prosecutor improperly argued for application of statutory aggravators that had not been presented to or found by the jury.

As discussed in Claim 23, the State asked the trial court to admit graphic photographs of the victim's wounds for the purpose of showing the heinousness of the homicide, specifically referring to "the brutality of the murder, the way this woman was killed, the severity of and wounds." (TR 03/15/1988, ROA 1161 at 2834-36.) During closing argument, the prosecutor argued that the death penalty was justified, using the statutory language about the "heinous nature of the murder of Maureen Hunsaker." (TR 03/18/1988, ROA 1162 at 3209; *see also* Utah Code Ann. § 76-5-2(q) (1988).)

The prosecutor also argued, without any facts in evidence to support it, that "the only thing that Ralph Menzies learned in prison from 1976 until 1984 is that the next time he was going to commit a robbery, he was going to eliminate his victim. And that's exactly what he did when he killed Maureen Hunsaker." (TR 03/18/1988, ROA 1162 at 3202.) Later, when the prosecutor listed the aggravators, he included that "the reason for her murder [was] in order to keep her from testifying or identifying Ralph Menzies." (*Id.* at 3209.) Again, there were no facts in evidence to support this argument.

Mr. Menzies was not charged with either the heinousness aggravator or the aggravator of preventing a witness from testifying. He was only charged with murder that was committed during the course of a robbery or aggravated robbery, or during a kidnapping or aggravated kidnapping. (ROA 51-52.) Ultimately the jury found him guilty of murder, robbery, and aggravated kidnapping. (ROA 898.)

The heinousness aggravator and the preventing a witness from testifying aggravators were not charged in the Information or presented to the jury for findings of fact. *See* Utah Code Ann. §§ 76-2-2(q), 76-2-2(i) (1988). Therefore it was wholly improper for the prosecutor to make arguments for the application of those aggravators, shoring up the weight of the aggravators to outweigh the mitigators. *See Lankford v. Idaho*, 500 U.S. 110, 126 (1991) ("Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure."); *see also In re Oliver*, 333 U.S. 257, 273 (1948) ("failure to afford the petitioner a reasonable opportunity to defend himself . . . was a denial of due process of law").

This improper argument influenced the outcome of Mr. Menzies's sentence. In imposing the death sentence, the trial court listed the applicable statutory aggravating factors, including the heinousness aggravator and preventing a witness from testifying aggravator, complete with citations to the statutory subsections. (TR 03/23/1988, ROA 1162 at 3250.) Clearly, the prosecutor's improper arguments had the intended effect and Mr. Menzies was sentenced to death on the basis of statutory aggravators which were not found by the jury, and for which there was no factual support in the record.

B. The prosecutor improperly relied on unsupported speculation to create fear that Mr. Menzies might escape or be paroled if he received a life sentence.

In the penalty phase closing arguments, the prosecutor argued that Mr. Menzies should receive the death penalty because he might otherwise escape or be paroled. (TR 03/18/1988, ROA 1162 at 3211.) The prosecutor used baseless speculation to instill fear in the court:

> This court will always wonder 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. What if the board of pardons decides to parole him, and they ignore the court's and the prosecution's recommendation . . . you have a duty to this city, this community, this state, and it is a duty to protect the citizens who live here against people like Ralph Menzies and his conduct.

(*Id.*)

There was no evidence to support these assertions. Although the trial court admitted evidence suggesting that Mr. Menzies may be an escape risk, this evidence was unreliable hearsay that violated Mr. Menzies's right to confrontation and should never have been admitted. (*See* Claim 18.) Regardless, there was no evidence to suggest that Mr. Menzies had or could escape from the type of maximum security conditions under which he would be confined.

Regarding parole, the trial court received evidence that Mr. Menzies would not be a candidate for parole. Defense counsel called an administrator for the Utah State Board of Pardons (TR 03/17/1988, ROA 1162 at 3106) who testified that, given Mr. Menzies's

history, he would likely serve a natural life sentence (*id*. at 3119-20).[23] Of the 25 capital homicide inmates that had appeared before the then-present Utah Board of Pardons, only eight had received parole dates. (*Id*. at 3117, 2123). The average term among those eight was 20 years. (*Id*. at 3123.) However, for a person with a past such as Mr. Menzies, a good institutional record would not be enough to overcome his history and the magnitude of the crime. (*Id*. at 3120.) Therefore, the evidence before the trial court showed it was highly unlikely that a life sentence would result in an eventual parole date for Mr. Menzies.

The prosecutor's closing argument, however, ignored the evidence and appealed to fear and emotion, "I think the court has to consider . . . [h]ow many people have to be injured, maimed, tortured, or murdered before we say this is enough" and "[h]ow many times do we let someone escape from the Utah State Prison before we say 'no more.'" (TR 03/18/1988, ROA 1162 at 3194.)

Reliance on this speculation in sentencing violated Mr. Menzies's right to have his sentence based only on relevant factors such as his character, background, record and the circumstances of the homicide. *See Woodson v. North Carolina,* 428 U.S. 280, 304-05 (1976). Speculation that an individual might someday escape or be paroled is outside the bounds of the Eighth Amendment, which requires that a defendant receive a reliable capital sentencing proceeding. *See Gregg*, 428 U.S. at 189 (the sentencing body's

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[23] Mr. Menzies was sentenced prior to Utah adopting a life sentence without possibility of parole as a possible penalty for aggravated murder.

"discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action"); *see also Godfrey*, 446 U.S. at 427.

This kind of speculation appeals to the passions and emotions of the sentencer, resulting in an arbitrary sentence based on emotion rather than reason. Mr. Menzies was prejudiced by this misconduct when the trial court relied on the speculative, unsupported possibility of escape or parole in imposing Mr. Menzies's death sentence. (TR 03/23/1988, ROA 1162 at 3254.)

C. The prosecutor opined that Mr. Menzies was a psychopath, relying on a book not in evidence.

In the penalty phase, the prosecutor engaged in misconduct by referring to Mr. Menzies as a "psychopath" (TR 03/18/1988, ROA 1162 at 3240, 3242), by reading from a book about psychopaths which was not in evidence (*id*. at 3211-13), and by comparing Mr. Menzies to the Yorkshire Ripper, Charles Manson, and the Son of Sam (*id.* at 3212). The prosecutor concluded by saying, "Your honor, there is no therapy for the evil inside of Ralph Menzies." (*Id*. at 3213.)

Psychopath is not recognized as a valid diagnostic category by mental health professionals. The only support in the record for use of the term is a hearsay statement included in Penalty Phase Exhibit 1A made by a prior judge as part of the proceedings certifying Mr. Menzies as an adult in 1976, twelve years before the trial. The judge in that case was not a psychological expert, and his casual use of the term "psychopath" in that hearsay document did not prove the truth of the matter asserted. None of the experts

testifying in this case, nor any of the authors of the other psychiatric or psychological evaluations admitted at trial, labeled Mr. Menzies as a psychopath.

Additionally, the book the prosecutor read from, *Over the Edge*, by Johnathan Kellerman, was not in evidence. It is literally a book of fiction. What Mr. Kellerman has dreamed up to say about his imagined characters has no place in a real-world court of law. While the prosecutor may have been thrilled and titillated by its narrative and prose, this does not qualify it as competent evidence on which to base a death sentence.

Comparison of Mr. Menzies to three notorious serial killers was also improper conduct. No information about any of these figures or their offenses was in evidence. All three have a mythological status in western culture as sorts of boogeymen. These comments were more appropriate for a campfire than a closing argument in a capital murder trial.

The prosecutor's final statement, about the "evil inside of Ralph Menzies" was an attempt to turn a human being into a monster. (*Id.*) The prosecutor's statements were unprofessional, had no place in a courtroom, and should not have been tolerated by the court.

D. Conclusion

There is no plausible argument that Mr. Menzies's sentence is reliable or accurate. Mr. Menzies was deprived of his due process and Eighth Amendment right to fair notice of the aggravators that would be used in determining whether he would receive the death penalty. The Utah Supreme Court unreasonably applied clearly established federal law

when it found this claim to be "without merit." *See Menzies II*, 889 P.2d at 406. Mr. Menzies should be granted relief on this claim.

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.

This claim is exhausted, having been raised on direct appeal. *Menzies II*, 889 P.2d at 405, 406-07. The state court's determination of this claim was an unreasonable determination and an unreasonable application of clearly established federal law. *See* 28 U.S.C. § 2254(d)(1)-(2).

As discussed in Claim 25, during Mr. Menzies's sentencing proceedings, the State argued for the application of two statutory aggravators which had not been charged or found by the jury. Also, as shown in Claim 25, the trial court applied both of those statutory aggravators. Additionally, as discussed in this claim, the trial court *sua sponte* applied other uncharged and unproved statutory aggravators when it sentenced Mr. Menzies to die.

The common theme of the United States Supreme Court's death penalty sentencing jurisprudence is that accuracy is required to avoid arbitrary outcomes. A major part of ensuring accuracy and reducing arbitrariness involves limiting the discretion of the sentencing body. "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly

arbitrary and capricious action." *Gregg*, 428 U.S. at 189; *see also Godfrey*, 446 U.S. at 427. State laws and procedure "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" *Godfrey*, 446 U.S. at 428 (quoting *Gregg*, 428 U.S. at 195 n.46). "[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Id.*

A basic tenant of criminal procedure is that a court may only impose a sentence for an offense of which a defendant has been charged and found guilty. A court has no authority to impose a sentence on the basis of uncharged conduct. Neither does a court have power to impose a sentence on the basis of unproved conduct. To allow sentencing in either of those circumstances would be wholly antithetical to notions of accuracy. Such sentences would be the very definition of arbitrary and it would do violence to principles of fairness and justice. Sentences based on uncharged and unproved conduct would exemplify cruel and unusual punishment.

Also, "[n]otice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure." *Lankford v. Idaho*, 500 U.S. 110, 126 (1991); *see also In re Oliver*, 333 U.S. 257, 273 (1948) ("failure to afford the petitioner a reasonable opportunity to defend himself . . . was a denial of due process of law"). Mr. Menzies did not have effective notice that the prosecution would argue for application of uncharged statutory aggravators during sentencing. Nor was he aware that the trial court would consider any of these uncharged and unproven statutory aggravators in imposing a

sentence. Therefore, Mr. Menzies was denied proper notice in violation of due process. This lack of notice greatly increases the risk of inaccuracy in sentencing. "If notice is not given, and the adversary process is not permitted to function properly, there is an increased chance of error." *Lackford*, 500 U.S. at 127.

At the time of Mr. Menzies's trial, Utah law allowed for first degree murder to be aggravated if "[t]he homicide was committed in an especially heinous, atrocious, cruel, or exceptionally depraved manner, any of which must be demonstrated by physical torture, serious physical abuse, or serious bodily injury of the victim before death. Utah Code Ann. §76-5-202(1)(q) (1988). Also at the time of Mr. Menzies's trial, Utah law allowed for first degree murder to be aggravated if a jury finds that it was committed to prevent a witness from testifying (Utah Code Ann. §76-5-202(1)(i) (1988)) or for pecuniary gain (Utah Code Ann. §76-5-202(1)(f) (1988)).

As shown in Claim 25, the State argued for the application of two of these—the heinousness aggravator and the preventing a witness from testifying aggravator. (ROA 51-52, 898; TR 03/15/1988, ROA 1161 at 2834-36; TR 03/18/1988, ROA 1162 at 3202, 3209). The trial court took this error and ran with it. It not only applied those two aggravators, but, *sua sponte*, it also applied the pecuniary gain aggravator. (TR 03/23/1988, ROA 1162 at 3249-50.) The trial court even explicitly cited to the statutory subsections. (*Id.*) None of these aggravators were charged (ROA 51-52), nor found as fact by the jury (ROA 898).

First, with regard to the heinousness statutory aggravator, it is unconstitutionally broad—if read literally, this factor could apply to any murder. *See Godfrey*, 446 U.S.

420, 428-29 ("There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence" and they "could fairly characterize almost every murder."). Therefore, there is nothing about application of this aggravator that would constitutionally limit the discretion of the sentencing body. *Id.*

Second, Utah is a "weighing" state—the sentencing body is to weigh all aggravating factors and circumstances, in aggregate, against all mitigating circumstances. *See* Utah Code Ann. § 76-3-207. Therefore, it is essential to the reliability of the capital sentencing procedure that aggravating factors be defined with some degree of precision. This is why any statutory aggravating factor must be presented to a jury and found as fact. *See Espinosa v. Florida*, 505 U.S. 1079, 1081 (1992) ("[I]n a State where the sentencer weighs aggravating and mitigating circumstances, the weighing of an invalid aggravating circumstance violates the Eighth Amendment."). None of the three statutory aggravators Mr. Menzies has identified were charged. Therefore, there was no evidence offered in support during the guilt phase, and they were not found as fact by a jury. Their application to Mr. Menzies's case was invalid and his sentencing proceeding cannot be relied on as accurate.

The evidence in the record does not support the application of these aggravators. There is no evidence anywhere in the record that Ms. Hunsaker was subject to "physical torture, serious physical abuse, or serious bodily injury" that occurred "before death." Utah Code Ann. § 76-5-202(1)(q). This statutory aggravating factor was first mentioned during the penalty phase, when the prosecution argues that the prejudicial autopsy

photographs should be admitted in support of its application. *See* Claim 23. It was only mentioned again when the prosecutor argued for it in closing argument, and when the trial court used it as a basis for imposing death on Mr. Menzies. *See* Claim 25.

Similarly, no evidence was presented that the homicide was motivated by an intent to prevent a witness from testifying. Again, this statutory aggravating factor was not mentioned until closing arguments in the penalty phase, when the prosecutor argued for it in closing argument, and again when the trial court used it as a basis for imposing death on Mr. Menzies. *See* Claim 25.

Finally, there was no evidence in the record that Mr. Menzies had a goal of pecuniary gain that motivated the homicide. As shown in Claim 12, there was insufficient evidence to support any charge against Mr. Menzies. However, assuming his guilt, if he did commit the robbery, it was distant in both time and location from the homicide. The two incidents are not closely related, and there is no basis for a rational inference that the homicide was committed in order to achieve a monetary benefit. The State did not argue for application of this statutory aggravating factor, it was applied by the trial court on its own volition.

While it was certainly improper for the State to argue in sentencing for the trial court to apply statutory aggravators that were not charged or found by the jury, *see* Claim 25, it was beyond the pale for the trial court to actually apply them. By way of example, consider if a jury had done the same thing. If a defendant had been charged with simple robbery and the jury returned a verdict for aggravated robbery, the verdict would never stand. Yet the trial court did this, and the Utah Supreme Court let it stand.

The Utah Supreme Court only directly addressed the trial court's misuse of the heinousness aggravator, ignoring the application of the other two uncharged and unproved statutory aggravators. *Menzies II*, 889 P.2d at 405. While the state court did admit that an application of the heinousness aggravator would have been error, it employed a creative dodge to avoid reversal:

> [W]e are not convinced that such an error occurred. The trial judge was certainly aware of our previous decisions limiting capital murders deemed ruthless and brutal to those involving an aggravated battery or torture. While we are uncomfortable with the trial judge's references to subpart (q), we have no solid reason to believe that the judge thought this was an appropriate situation for reliance on the heinousness factor listed in 76-5-202(1)(q).
>
> Furthermore, we note that the judge could have properly considered the nature and circumstances of the crime, including its brutality and what the prosecutor apparently referred to colloquially as heinousness, as an aggravating factor under section 76-3-207(2). In this guise, the various facts of the crime that Menzies says do not rise to the level of constitutional and statutory heinousness could still have been considered. Therefore, even if we were to assume that the court erred in considering heinousness, we think that the error was harmless because we can still confidently conclude beyond a reasonable doubt that the remaining aggravating circumstances and factors outweigh the mitigating factors and that the imposition of the death penalty was justified and appropriate.

Id. (internal citations and quotations omitted). This analysis is wrong for two reasons. First, it is disproved by a simple review of the sentencing proceedings. The trial judge said from the bench that he would recite the aggravating and mitigating circumstances before announcing a sentence. (TR 03/23/1988, ROA 1162 at 3249). The trial court then said

> In starting with the aggravating circumstances, I will start with the nature of the crime. One, under 76-5-202(d), "the homicide was committed while the actor was engaged in the commission of, attempt to commit or flight after committing or attempting to commit an aggravated kidnapping."
>
> Two, under 76-5-202(7)(f), "the homicide was committed for pecuniary or other personal gain."
>
> Three, 76-5-202(h), "the actor was convicted of a felony involving the use of threat or violence to a person."[24]
>
> Four, 7[6]-5-202(i)(i), "the homicide was committed for the purpose of preventing a witness from testifying.["]
>
> Five, 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."

(*Id*. at 3249-50.) It is obvious from the record that the trial court is using subsections (f), (i), and (q) just as he is using (d), the only statutory aggravator charged and found by the jury as fact. The Utah Supreme Court's attempt to salvage the sentence was an unreasonable determination of fact given that it is a blatant contradiction of the transcript. Given that the trial court obviously applied the statutory heinousness aggravator, the state supreme court should have remanded for new sentencing since, as they acknowledged, it was error. *See Menzies II*, 889 P.2d at 405.

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[24] The Amended Information filed against Mr. Menzies included the "previous conviction for a felony involving the use of threat or violence." (ROA 51.) The trial court ultimately found this aggravator to be unconstitutional, (*see* 09/14/1992 Br. of Appellant at 167 n.66), and it does not appear from the record that it was put to the jury (ROA 898.) However, evidence in the record establishes that Mr. Menzies was previously convicted of such an offense. The trial court's application of this aggravator is problematic, as the court had previously concluded it was unconstitutional. However, evidence of prior crimes is typical evidence presented during capital sentencing proceedings and evidentiary support for this aggravator was not lacking in the way that it was for the other three discussed in this claim.

This point was further established in Mr. Menzies's state post-conviction proceedings. Mr. Menzies obtained a declaration from his sentencing judge who affirmed that he did, in fact, misapply the heinousness statutory aggravator, and that Mr. Menzies should have been sentenced to life in prison. (5th Am. Pet., Ex. T, Aff. of Raymond S. Uno ¶¶ 6-9.) On appeal from the post-conviction proceedings, the Utah Supreme Court found the affidavit to be "immaterial in the present case." *Menzies IV*, 344 P.3d 581, 630 (Utah 2014). The state court reiterated its error from direct appeal, 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." *Id*. The problem with this rationale is that the other aggravating factors included pecuniary gain and preventing a witness from testifying, which were also invalid as applied Mr. Menzies.

Second, the Utah Supreme Court wrote that "the judge could have properly considered the nature and circumstances of the crime" and even if they "do not rise to the level of constitutional and statutory heinousness" it would not change their analysis because "the error was harmless because we can still confidently conclude beyond a reasonable doubt that the remaining aggravating circumstances and factors outweigh the mitigating factors and that the imposition of the death penalty was justified and appropriate." *Menzies II*, 889 P.2d at 405 (internal citations and quotations omitted).

This is unreasonable because the state supreme court did not include in its consideration the error in applying the preventing a witness from testifying or the pecuniary gain statutory aggravators, which, as established, were uncharged, unproved,

and had no evidentiary support in the record. The Utah Supreme Court could not reasonably make a determination that the error was harmless when the remaining aggravating weight included statutory factors that should never have been part of the calculus and had no basis in fact.

This was an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d)(1). The United States Supreme Court has held that "in a State where the sentencer weighs aggravating and mitigating circumstances, the weighing of an invalid aggravating circumstance violates the Eighth Amendment." *Espinosa*, 505 U.S. at 1081 (overturning a death sentence where the jury had considered a constitutionally vague aggravator) (*see*, *e.g.*, *Sochor v. Florida*, 504 U.S. 527, 532 (1992); *Stringer v. Black*, 503 U.S. 222, 232 (1992); *Parker v. Dugger*, 498 U.S. 308, 319-321 (1991); *Clemons v. Mississippi*, 494 U.S. 738, 752 (1990)).

Also, the United States Supreme Court has emphasized that "close appellate scrutiny of the import and effect of invalid aggravating factors [is required] to implement the well-established Eighth Amendment requirement of individualized sentencing determinations in death penalty cases." *Stringer*, 503 U.S. at 230. An invalid aggravator is like a "thumb" on "death's side of the scale," *id*. at 323, resulting in "randomness" and "bias in favor of the death penalty," *id*. at 236.

Also, as noted above, if this sort of error had occurred in the course of a jury sentencing—where a jury found a defendant guilty of acts which had neither been charged nor proved—and a trial court allowed that verdict to stand, it would be unthinkable for an appellate court to fail to correct that error on review.

Finally, with regard to the trial court's application of the preventing a witness from testifying and pecuniary gain statutory aggravators, the Utah Supreme Court made an unreasonable finding when it determined that the challenges to these aggravators were "without merit." *Menzies II*, 889 P.2d at 406. For all the reasons stated above, the Utah Supreme Court had an obligation to fully engage in each aspect of this issue and a duty to correct the trial court's prejudicial errors.

The Utah Supreme Court blatantly disregarded the plain meaning of the trial court's sentencing pronouncement and common sense in its effort to salvage Mr. Menzies's sentence. There is no plausible argument that his sentence is reliable or accurate. Mr. Menzies should be granted relief on this claim.

CLAIM 27

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 prosecutor's argument at the penalty phase that death should be imposed because Mr. Menzies might escape or be paroled.

This claim has been incorporated into Claim 25.

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.

This claim is exhausted, having been raised on direct appeal. (09/14/1992 Br. of Appellant at 179.) 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 ("We find Menzies' other claims to be without merit."). The state court's determination of this issue involved an unreasonable determination of fact, leading to an unreasonable application of clearly established federal law. *See* 28 U.S.C. § 2254(d)(1)-(2); *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").

As established above in Claim 25, the prosecution made improper arguments about the possibility of parole or escape in support of the death penalty. The trial court specifically referenced these possibilities as part of its basis for sentencing Mr. Menzies to death. This fact, plain on the face of the record, establishes a violation of Mr. Menzies's Eighth Amendment right to a reliable sentencing determination.

It is well established that the imposition of a death sentence must be "based on reason rather than caprice or emotion." *Gardner*, 430 U.S. at 358. Circumstances which are relevant to sentence include the character, background, and record of the defendant and the circumstances surrounding the homicide. *Woodson*, 428 U.S. at 304-05. Mitigating evidence must be considered to insure that the "uniqueness of the individual" plays a vital role in the assessment. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

Speculation that an individual might some day escape or be paroled is outside the limits of the Eighth Amendment, which requires that a defendant receive a reliable capital sentencing proceeding. *See Gregg*, 428 U.S. at 189 (the sentencing body's "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and

capricious action"); *see also Godfrey*, 446 U.S. at 427. A sentence based on such arguments is an arbitrary decision based on emotion rather than reason.

At sentencing, the trial court speculated about 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 misstate 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, he was highly unlikely to ever be released. (*Id*. at 3120.) The trial court's finding was an unreasonable determination of fact, leading to an unreasonable application of clearly established federal law when the court sentenced Mr. Menzies on the basis of speculation and fear rather than evidence and reason. *See* 28 U.S.C. § 2254(d)(1)-(2). The Utah Supreme Court repeated these errors when it found this claim to be without merit. *Menzies II*, 889 P.2d at 406. In addition, it is "well understood and comprehended in existing law," *Richter*, 562 U.S. at 103, that a death sentence must be "based on reason rather than caprice or emotion" in order to avoid arbitrariness. *Gardner*, 430 U.S. at 358; *see also Gregg*, 428 U.S. at 189. The Utah Supreme Court's denial of this claim was "so lacking in justification" that its error is "well understood . . . beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. 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 sentencer relied on unconstitutional aggravating factors.

This claim is exhausted, having been raised on direct appeal. (09/14/1992 Br. of Appellant at 158.) The Utah Supreme Court addressed the part of the claim related to the heinousness aggravator. *Menzies II*, 889 P.2d at 404-05. With regard to the pecuniary gain aggravator, the state court summarily dismissed it along with numerous other claims it declined to address. *Menzies II*, 889 P.2d at 406 ("We find Menzies' other claims to be without merit."). The state court's determination was of this issue was an unreasonable application of clearly established federal law. *See* 28 U.S.C. § 2254(d)(1)-(2); *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").

This claim is related to Claim 26, which discussed the trial court's use of uncharged statutory aggravators in sentencing Mr. Menzies. The facts and law from that claim are incorporated here by reference.

A. The heinousness aggravator is unconstitutionally broad, as written.

Utah's aggravated murder statute provides that a criminal homicide is aggravated where:

> The homicide was committed in an especially heinous, atrocious, cruel, or exceptionally depraved manner, any of

> which must be demonstrated by physical torture, serious physical abuse, or serious bodily injury of the victim before death.

Utah Code Ann. §76-5-202(1)(q) (1988). This aggravating factor is so broad and vague that it fails to adequately narrow the class of murders which warrant the death sentence and fails to meet Eighth Amendment standards—if read literally, this factor could apply to any murder. *Godfrey*, 446 U.S. at 428-29 ("There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence" and they "could fairly characterize almost every murder."). Therefore, there is nothing about the application of this aggravator that would constitutionally limit the discretion of the sentencing body. *Id.*

Additionally, as discussed in Claim 26, there was no evidence in Mr. Menzies's case that "physical torture, serious physical abuse or serious bodily injury" occurred "before death." *See Menzies II*, 889 P.2d at 405 ("[W]e think that it would have been error for the court to consider [§76-5-202(1)(q)] satisfied by the facts of this case.) Read literally, this factor could apply to any murder. Furthermore, because Utah is a "weighing" state, it is even more important that aggravating factors be defined with precision to ensure accuracy in sentencing. *See Gregg*, 428 U.S. at 190; *see also Stringer*, 503 U.S. at 230.

The Utah Supreme Court correctly observed that the "judge could have properly considered the nature and circumstances of the crime, including its brutality." *Menzies II*, 889 P.2d at 405. But when the trial court specifically referenced the statutory aggravator

by code subsection and discusses heinousness, it is not a "colloquial[]" reference. *Id*. It's an application of the statute.

The Utah Supreme Court noted, "it would have been error for the court to consider subpart (q) satisfied by the facts of this case." *Id*. The state court recognized that it would objectively unreasonable for the trial court to apply the statutory aggravator. Its finding that the trial court didn't apply it, however, was an unreasonable determination of fact. *See* 28 U.S.C. § 2254(d)(2).

B. The trial court's application of the pecuniary gain aggravator "double-counted" the robbery.

Although the State neither charged nor urged the application of this aggravating factor, the trial judge applied it *sua sponte*. This resulted in "double counting" because this factor duplicates the robbery aggravating circumstance. Unless this factor is interpreted to require something other than the robbery which had already been found, the factor is constitutionally vague and fails to adequately channel the sentencer's discretion because it would allow the sentencer to take a single act—robbery—and convert it into two aggravating circumstances in any homicide where a robbery occurred.

The Supreme Court has held that the discretion of sentencing bodies must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg*, 428 U.S. at 189. To achieve this channeled discretion, each aggravating factor "must genuinely narrow the class of persons eligible for the death penalty and must 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. When

considered together, the two aggravating factors—robbery and pecuniary gain—do not narrow the class of defendants eligible for the death penalty.

Application of these two factors violated the Eighth and Fourteenth Amendments. Mr. Menzies should be granted relief on this claim.

CLAIM 30

The trial court violated Mr. Menzies's rights to due process, to a fair trial, and to a reliable sentencing under the Fifth, Sixth, Eighth and Fourteenth Amendments by misapplying the uncharged heinousness aggravator during sentencing.

This claim has been incorporated into Claim 26.

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.

Mr. Menzies raised this claim in part in his state post-conviction petition (5th Am. Pet. at 30-33, 40-41), and in his subsequent appeal from the denial of the post-conviction petition (02/27/2013 Appellant's Opening Brief at 99-109). The state court's rejection of this claim was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. *See* 28 U.S.C. § 2254(d)(1). In addition, it constituted an unreasonable determination of the facts in light of the evidence presented. *See id.* § 2254(d)(2). To the extent any aspect of this claim was not exhausted, that failure is attributable to the ineffective assistance of Mr. Menzies's post-conviction counsel. *See Martinez*, 132 S. Ct. at 1315; *see also supra* Claim 38.

Introduction

Mr. Menzies has a constitutional right to the effective assistance of counsel at sentencing. *See, e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 393 (2005); *Wiggins v. Smith*, 539 U.S. 510, 519-20 (2003); *Williams (Terry) v. Taylor*, 529 U.S. 362, 390 (2000). The consideration of mitigation evidence in a capital sentencing is unique in criminal procedure because of the vastly different and permanent nature of a death sentence and the need to consider each capital defendant in a particularly individualized way. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978). As such, a capital sentencing body must be afforded the opportunity to assess "the character and record of the individual offender." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (internal quotation marks and citation omitted). As the United States Supreme Court has explained, "[i]f the sentencer is to make an individualized assessment of the appropriateness of the death penalty, evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (internal quotation and citation omitted), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); *Eddings*, 455 U.S. at 112 (explaining that consideration of offender's life history is a "constitutionally indispensable part of the process of inflicting the penalty of death" (internal quotation marks and citation omitted)).

Consistent with this view, the Supreme Court has repeatedly held that, absent an objectively reasonable basis for not doing so, capital counsel must investigate, present,

and explain the significance of all available mitigating evidence, including evidence of the defendant's background and family history. *See Wiggins*, 539 U.S. at 519-20; *Williams (Terry)*, 529 U.S. at 390. In *Strickland*, the Court outlined the standard for determining when counsel has provided ineffective assistance. Under *Strickland*, counsel is ineffective if: (1) their "representation fell below an objective standard of reasonableness"; and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Effective assistance of counsel is ultimately concerned with the fundamental right to a fair trial, "a trial whose result is reliable." *Id.* at 687. In reviewing claims of ineffective assistance of counsel, this Court must consider counsel's "overall performance throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance." *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986) (internal quotation marks omitted).

Here, defense counsel failed to conduct an effective mitigation investigation and failed to present relevant mitigating evidence and expert testimony. Defense counsel's failure was objectively unreasonable and resulted in prejudice to Mr. Menzies.

A. The state court's application of clearly established federal law to Mr. Menzies's ineffective assistance of sentencing counsel claim was objectively unreasonable under 28 U.S.C. § 2254(d)(1).

In denying Mr. Menzies's ineffective assistance of penalty phase counsel claims, the Utah Supreme Court made numerous errors in applying clearly established federal

law to the evidence presented. These errors are in direct contradiction of controlling United States Supreme Court authority and constitute an unreasonable application of clearly established federal law. As a result, Mr. Menzies has satisfied the strictures of § 2254(d)(1) on the basis of the state court record, and this Court must review the merits of his claim *de novo*.

First, in concluding that defense counsel effectively investigated and presented mitigating evidence, the Utah Supreme Court focused on the fact that Mr. Menzies's counsel hired three experts and presented testimony from two of those experts. *Menzies IV*, 344 P.3d at 626-28. The state court's conclusion that counsel's investigation was adequate because counsel "hired no less than three mental health professionals," *id.* at 626, was based on an unreasonable application of clearly established federal law.

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. The Sixth Amendment requires counsel to obtain an expert when the mitigation investigation uncovers facts that require the services of an expert to explain their significance to the finder of fact. Counsel does not discharge this duty simply by hiring experts. *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). Rather, counsel must obtain experts that put the mitigating evidence in context and explain its significance, to permit the sentencer to consider and give effect to the mitigation evidence in imposing a sentence. *See Williams (Terry)*, 529 U.S. at 399 (counsel's duty to "present[] and explain[] the significance of all

the available evidence"); *see also Eddings*, 455 U.S. at 112 (noting that a capital sentencing body must be afforded the opportunity to assess "the character and record of the individual offender"); *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).

Here, defense counsel's inadequate mitigation investigation meant that their experts were ill-prepared to address Mr. Menzies's history of abuse, neglect, and trauma. The experts presented did not address or explain the psychological and neurological impact of Mr. Menzies's traumatic life history. As a result, counsel failed to provide the sentencing court with information explaining the significance of the mitigating evidence. *See Williams (Terry)*, 529 U.S. at 399; *Eddings*, 455 U.S. at 112. The Utah Supreme Court's focus on the mere fact that counsel hired expert witnesses was an objectively unreasonable application of clearly established federal law as it ignored counsel's obligation to present relevant mitigation and appropriate experts. *See Strickland*, 466 U.S. at 691; *Eddings*, 455 U.S. at 112; *see also Williams (Terry)*, 529 U.S. at 399; *Tennard*, 542 U.S. at 276; *see also Sears v. Upton*, 561 U.S. 945, 952-56 (2010) (counsel may be ineffective in presenting an incomplete case in mitigation); *Rompilla*, 545 U.S. at 381.

The Utah Supreme Court also concluded that defense counsel engaged in an "adequate investigation" of Mr. Menzies's early mental illness, neglect, and abuse because counsel presented "a host of evidence" of abuse through mental health experts and Mr. Menzies's sister and aunt. *Menzies IV*, 344 P.3d at 626-27. The Utah Supreme Court's conclusion that the investigation was adequate was based on an objectively unreasonable interpretation of clearly established federal law.

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. Pursuant to *Strickland*, *Williams*, and *Wiggins*, trial counsel had an obligation to conduct a thorough investigation of Mr. Menzies's background in preparation for sentencing. In *Porter v. McCollum*, 558 U.S. 30 (2009), the Supreme Court described this obligation as "unquestioned" as of the time of Porter's 1988 sentencing. *McCollum*, 558 U.S. at 38-39. Indeed, counsel must make a reasonable effort "to discover *all reasonably available* mitigating evidence." *See Wiggins*, 539 U.S. at 524. An incomplete or superficial mitigation investigation constitutes deficient performance. *See Sears*, 561 U.S. at 952 (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*, 539 U.S. at 524; *Williams (Terry)*, 529 U.S. at 399.

During the penalty phase, counsel presented only two witnesses as sources for Mr. Menzies's background, Mr. Menzies's sister, Jackie, who testified about witnessing physical abuse of Mr. Menzies as a child, and Mr. Menzies's aunt, Janet, who testified

that Mr. Menzies's mother was not affectionate and left Mr. Menzies and his siblings with Janet on occasion. (*See* TR 03/16/1988, ROA 1161 at 2905-46 (Testimony of Jackie Rutherford (now Jackie Biesinger), Mr. Menzies's sister); *id.* at 2947-52 (Testimony of Janet Kubota, Mr. Menzies's maternal aunt).) However, counsel failed to present *any* evidence that Mr. Menzies was sexually abused as a child; that his biological 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; that Mr. Menzies was protective of his step-sibling and did not want his violent father to harm her; that Mr. Menzies had a child; 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.) While the sentencing judge heard a truncated version of Mr. Menzies's traumatic childhood, he heard no evidence, like that which Dr. Kockler could have presented, to explain the impact on Mr. Menzies's overall brain function. Counsel's investigation and presentation of mitigation evidence was woefully incomplete.

Counsel's investigation and presentation of mitigation evidence was woefully incomplete. 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. *See Sears*, 561 U.S. at 952 (an inadequate or superficial background investigation is deficient and prejudicial); *see*

also Rompilla, 545 U.S. at 381; *Wiggins*, 539 U.S. at 524; *Williams (Terry)*, 529 U.S. at 399.

The Utah Supreme Court also unreasonably applied *Strickland* in its deficient performance analysis, concluding that defense counsel may have strategically decided not to present some mitigating evidence, including evidence of organic brain damage, because the information could have hurt Mr. Menzies's case. *Menzies IV*, 344 P.3d at 629. However, this finding is not supported by the record, and is objectively unreasonable. There is no evidence supporting the state court's conclusion that the failure to present neurological evidence or other mitigating evidence was strategic. It is clear from the record that counsel did not conduct any neurological testing, which is required before counsel can make the determination on whether presentation of neurological evidence is necessary. 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").

The state court's findings were also unreasonable because the court failed to assess the sufficiency of the mitigation evidence, as a whole, weighed against the aggravating factors. *See Menzies IV*, 344 P.3d at 624-30 (considering each proffered mitigating factor, and each of counsel's deficiencies, independently). 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."). It is not appropriate for a court to discard each proffered mitigating factor by deciding that it alone was not sufficiently substantial to call for leniency. *See, e.g.*, *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").

Here, the Utah Supreme Court's opinion makes clear that the court never considered the cumulative weight of the mitigation against the aggravating factors, but instead discarded each proffered mitigating factor in turn. *Menzies IV*, 344 P.3d at 624-30. Because the court unreasonably applied the *Strickland* standard during its analysis, Mr. Menzies has satisfied the strictures of § 2254(d)(1) on the basis the state court record, and this Court must review the merits of his claim *de novo*.

B. The state court's denial of this claim was based on an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2).

The Utah Supreme Court based its decision that defense counsel was reasonable and that Mr. Menzies could not show prejudice on numerous unreasonable determinations of the facts. If this Court finds that any one of these determinations is unreasonable, this Court's review of Mr. Menzies's claim is *de novo*.

1. Counsel failed to initiate a timely mitigation investigation.

In support of his claim that counsel was ineffective in pursuing and presenting relevant mitigation information, Mr. Menzies presented evidence that counsel failed to "immediately initiate a mitigation investigation upon appointment, and in fact waited until after trial to interview on[e] [of] a few mitigation witnesses." (5th Am. Pet. at 31 (citing 5th Am. Pet., Ex. S, Aff. of Marissa Sandall-Barrus).) The Utah Supreme Court discounted or ignored this evidence finding "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 analysis failed to account for the fact that neither defense counsel nor their experts 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).) In addition, the Utah Supreme Court ignored evidence that trial 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.) As a result, counsel did not have sufficient information to conduct a reasonable and thorough mitigation investigation

and did not have sufficient evidence to provide to their experts. Dr. DeCaria could not complete his evaluation until after the relevant social history information had been discovered from Mr. Menzies's family, records, and other sources. Counsel's failure to contact any sources for Mr. Menzies's social history prior to the initiation of the penalty phase of his trial resulted in deficient performance.

This claim was denied on summary judgment and without the benefit of an evidentiary hearing, s*ee Menzies IV*, 344 P.3d at 593, despite evidence that defense counsel failed to investigate his social history and background until the penalty phase of his capital trial was already underway. (*See* 5th Am. Pet., Ex. S ¶ 8.) It was objectively unreasonable for the state court to discount this uncontroverted evidence at the summary judgment stage.

2. Mr. Menzies was sexually abused.

In post-conviction, Mr. Menzies presented evidence that he was sexually molested by his step-mother. (5th Am. Pet., Ex. S ¶ 5.) The Utah Supreme Court found that there was no evidence of sexual molestation provided by the mental health professionals, Mr. Menzies's sister or aunt, or Mr. Menzies himself in a prior affidavit, and concluded that the evidence was insubstantial and there was no indication that a reasonable investigation could have uncovered this information. *Menzies IV*, 344 P.3d at 626.

The court unreasonably rejected Mr. Menzies's evidence of sexual abuse. As an initial matter, it is unsurprising that the experts and family failed to address Mr. Menzies's history of sexual abuse, as it is clear from the record that defense counsel failed to complete an adequate mitigation investigation prior to the penalty phase and

thus would not have obtained this information. Disclosures of private personal information often require investigators to put in time to build trust with important mitigation witness, many of whom may be reluctant to share sensitive details, or may not realize which facts are important for defense counsel to be informed about. The state court ignored this fact, along with the evidence of sexual abuse.

The evidence indicating sexual abuse was sufficient to warrant an evidentiary hearing. 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).

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

The Utah Supreme Court concluded 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. *Menzies IV*, 344 P.3d at 627-28. The Utah Supreme Court's conclusion was objectively unreasonable.

The evidence presented at trial indicated that Mr. Menzies was physically abused by his step-fathers and neglected by his mother. (*See* TR 03/16/1988, ROA 1161 at 2905-46 (testimony of Mr. Menzies's sister); *id.* at 2947-52 (testimony of Mr. Menzies's maternal aunt).) However, counsel failed to present *any* evidence that Mr. Menzies was sexually abused as a child; that his biological 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; that Mr. Menzies was protective of his step-sibling and did not want his violent father to harm her; that Mr. Menzies had a child; 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 Utah Supreme Court's conclusion that evidence produced in post-conviction was cumulative and unnecessary is incompatible with the record before the court and was objectively unreasonable.

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

The Utah Supreme Court's conclusion that defense counsel's mitigation investigation and presentation was adequate was also based on its unreasonable finding that Mr. Menzies's biological father, Clifford Menzies, was "inaccessible" because he had not been seen for 12 years. *Menzies IV*, 344 P.3d at 628. There is no basis for this conclusion in the record and the evidence presented by Mr. Menzies indicated that Clifford was alive and available at the time of trial. (5th Am. Pet., Ex. S, Aff. of Marissa Sandall-Barrus ¶ 5.) The mere fact that Clifford was not in touch with his children does not indicate that he was in any way "inaccessible." Mr. Menzies's biological father was an essential source of potential mitigating evidence as he was Mr. Menzies's only surviving parent at the time of trial (*see* Exs. 34 and 58, [Death certificates of Karen and Clifford]), and no records were obtained related to Mr. Menzies's birth and Karen's

prenatal care. Similarly, no evidence in the record indicates that Mr. Menzies's step-father Clint Stevens was unavailable. *See Menzies IV*, 344 P.3d at 628.

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

Finally, the Utah Supreme Court also concluded 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)). While the Utah Supreme Court quoted the lower PCR court for this proposition, the lower court's statement appears to be an assumption and was made without citation to any evidence in the record. (*See* 03/23/2012 Ruling and Order at 89 (PCR ROA 15458).) 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, which indicates 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 has no basis in the record and is an unreasonable determination of the facts based on the record before the court.

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.

"The sentencing stage is the most critical phase of a death penalty case. Any competent counsel knows the importance of thoroughly investigating and presenting mitigating evidence." *Romano v. Gibson*, 239 F.3d 1156, 1180 (10th Cir. 2001). Mr. Menzies's defense counsel performed deficiently by failing to conduct an effective mitigation investigation and present important and essential mitigating evidence, resulting in prejudice to Mr. Menzies.

1. Defense counsel performed deficiently at Mr. Menzies's sentencing by failing to initiate a timely mitigation investigation and interview and present key witnesses and records related to Mr. Menzies's abusive and neglectful childhood.

In *Strickland*, the Supreme Court held that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691; *see also id.* ("In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."). Based on this principle, the Supreme Court has concluded that trial counsel has an "obligation to conduct a thorough investigation of the defendant's background." *Williams (Terry)*, 529 U.S. at 396; *see also Battenfield v. Gibson*, 236 F.3d 1215, 1226 (10th Cir. 2001) (noting that "[u]nquestionably, counsel's obligation to conduct reasonable investigations extends to matters related to the sentencing phase of trial" and that the court must "apply even

closer scrutiny" when evaluating performance during the sentencing phase of a capital case (internal quotations omitted)).

To perform adequately in a capital case, counsel must undertake "'to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" *Wiggins*, 539 U.S. at 524 (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("1989 ABA Guidelines") 11.4.1(c) (1989)); *see also* ABA Standards for the Defense Function ("1979 ABA Standards") 4-4.1 and cmt. (1979) (describing the defense attorney's duty to "conduct a prompt investigation" and "explore all avenues leading to facts relevant to the merits of the case and the penalty" and noting the attorney's "substantial and important role . . . in raising mitigating factors"); *see also Rompilla*, 545 U.S. at 385-87 (referencing the 1989 and 2003 ABA Guidelines to assess a lawyer's performance in a 1988 trial). "Counsel should consider, *inter alia*, medical history, educational history, social and family history, religious and cultural influences, and employment." *Anderson v. Sirmons*, 476 F.3d 1131, 1142 (10th Cir. 2007); 1979 ABA Standards 4-4.1, cmt.

The Constitution requires nothing less than a full investigation into the defendant's life history before an individualized sentencing may occur in a capital case. The Supreme Court requires the presentation of any evidence about the defendant that might support a sentence less than death, not simply evidence that goes to his moral culpability. *See Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986). This includes evidence beyond that

identified as a statutory mitigating factor. *See Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987).

In this case, Mr. Menzies did not receive effective assistance of counsel prior to and during the penalty phase and was prejudiced as a result. As described in detail below, Mr. Menzies's counsel failed to exercise the skill, judgment and diligence expected of reasonably competent criminal defense lawyers. Furthermore, there was no tactical or strategic reason for not conducting an investigation and properly preparing for the sentencing phase of the capital proceedings.

i. Defense counsel was inexperienced in presenting mitigation in a capital case and failed to initiate a timely and effective mitigation investigation.

At trial, Mr. Menzies was represented by Brooke Wells, who acted as lead counsel, and Frances Palacios. (*See* TR 02/10/1988, ROA 1152 at 40.) It was Ms. Wells's first capital trial as lead counsel. (Ex. 59, July 29, 2010, Dep. of Brooke Wells at 7:25-8:22.) Ms. Wells and Ms. Palacios divided the responsibilities related to Mr. Menzies's representation, with Ms. Palacios primarily "handl[ing] things in the mitigation portion of the trial." (Ex. 59, July 29, 2010, Dep. of Brooke Wells at 7:18-24; Ex. 60, July 30, 2010, Dep. of Brooke Wells at 51:1-8.) Ms. Palacios did not have any training in the assessment and presentation of mitigation evidence at the time of Mr. Menzies's sentencing. (5th Am. Pet., Ex. A, Aff. of Frances Palacios ¶ 13 (Ms. Palacios stating, "At the time I represented Mr. Menzies I had no training in how to conduct a mitigation investigation"); *see also* Ex. 59, 07/29/2010 Dep. of Brooke Wells at 8:25-9:6

(Ms. Wells acknowledging that there was not a great deal of mitigation training available to her at the time).)

In addition, defense counsel failed to immediately initiate a mitigation investigation upon appointment, and in fact waited until the penalty phase of Mr. Menzies's capital trial was underway to interview important mitigation witnesses. (5th Am. Pet., Ex. S, Aff. of Marissa Sandall-Barrus ¶ 8 (noting that Mr. Menzies's sister—the only source of information presented about the physical abuse Mr. Menzies suffered as a child—was not even contacted by Mr. Menzies's defense team until after the penalty phase was underway); *see also* PCR 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 (noting that he was repeatedly told that trial counsel would not begin investigation of any aspect of his case until shortly before trial and indicating that trial counsel did not engage him in obtaining his personal history).)

Defense counsel's resulting investigation and presentation of mitigation evidence to the sentencing court was constitutionally inadequate and failed to provide a complete picture of Mr. Menzies's life history and impairments. *See Romano*, 239 F.3d at 1180 (noting that because of the importance of mitigating evidence to a fair sentencing proceeding, "investigation and preparation of a case in mitigation should begin prior to trial, well before any determination of guilt at the first stage" (citing *Williams (Terry)*, 529 U.S. at 395)); 1989 ABA Guidelines 11.8.3 ("[P]reparation for the sentencing phase, in the form of investigation, should begin immediately upon counsel's entry into the case."). As a general matter, a decision by counsel to limit the presentation of mitigation

evidence cannot be excused as a strategic consideration unless the decision to forego mitigation is supported by reasonable investigations. *See Williams (Terry)*, 529 U.S. at 394; *Wiggins*, 539 U.S. at 521; *see also* 1989 ABA Guideline 11.8.3 (emphasizing the importance of discussing sentencing and mitigation with the client, as well as finding and developing witnesses who will support the sentencing defense).

Here, counsel's failure to contact key witnesses prior to the penalty phase and failure to develop a relationship with their client prevented counsel from developing an effective mitigation strategy, discovering important mitigating evidence, and presenting appropriate and prepared experts. Counsel's resulting presentation of minimal mitigation, was deficient. As described in detail below, counsel's ineffective and delayed mitigation investigation resulted in a failure to present significant mitigating evidence. Counsel's performance undermines confidence in Mr. Menzies's sentence.

ii. Defense counsel failed to obtain important records.

As established, trial counsel is obligated to conduct a reasonable investigation. *See e.g.*, *Strickland*, 466 U.S. at 673; *Wiggins*, 539 U.S. at 521-22. The duty to investigate includes the essential tasks of looking into known leads and possible avenues of mitigation, and gathering records. *See, e.g.*, *Rompilla*, 545 U.S. at 382-83. As the United States Supreme Court has explained, "the American Bar Association Standards for Criminal Justice . . . describe[] the obligation in terms no one could misunderstand":

> "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should

> always include efforts to secure information in the possession of the prosecution and law enforcement authorities."

Id. at 387 (quoting ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.)). Thus, the principle "that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense," it is a matter of clearly established federal law. *Id.*

a. Mr. Menzies's prison file and rap sheets.

Defense counsel failed to obtain Mr. Menzies's prison files, rap sheets, and other state court records prior to trial. (*See* TR 03/16/1988, ROA 1161 at 2892 (defense counsel acknowledging that they had not previously reviewed the voluminous prison files that were presented by the State during the penalty phase).) As discussed in Claims 14 through 19, the prosecution relied heavily on Mr. Menzies's prison file, rap sheets, and other state records in the penalty phase. *See supra* Claims 14-19. This Claim incorporates the facts from Claims 14 through 19.

Counsel had notice that the State intended to present these records during the penalty phase. (*See, e.g.*, TR 03/15/1988, ROA 1161 at 2840 (defense counsel acknowledging that they knew the State intended to present Mr. Menzies's prison records, but arguing that they did not anticipate the State would present all of the records).) In addition, any reasonable attorney would realize that the prosecution would have access to all of the defendant's state records regarding any allegations of past crimes, periods of incarceration, and evaluations and reports made by state agencies and during state court proceedings. *See Rompilla*, 545 U.S. at 383-90. A reasonable attorney would seek to obtain these records in order to prepare for their probable use during

sentencing. *See id.*; *see also Wiggins*, 539 U.S. at 524 (noting counsel's duty "to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor"); *see also* 1989 ABA Guidelines 11.4.1(c). Mr. Menzies's defense counsel should have independently sought to obtain the records in his prison file in order to be fully informed about the potential evidence to be presented against their client and prepared to confront that evidence.[25]

b. Mr. Menzies's mental health records.

Counsel also failed to obtain and present Mr. Menzies's own mental health records. Such records would have demonstrated severe family dysfunction. For example, available mental health records indicate that Mr. Menzies's biological father taught him to steal at a very young age. (Ex. 12, USH Records Obtained by PCR Counsel [Central Utah Cmty. Mental Health Ctr., 05/19/1970 Summary of Interviews at 1].) Records also indicate that Mr. Menzies's biological father had a drinking problem. (Penalty Phase Ex. 8 at 100-01.) Mr. Menzies's records also indicate that his second step-father used threats and severe physical punishment to attempt to control Mr. Menzies. (Ex. 12, USH Records Obtained by PCR Counsel [Central Utah Cmty. Mental Health Ctr., 05/19/1970 Summary of Interviews at 1].) Finally, the records indicate that Mr. Menzies's biological father attempted to rape Mr. Menzies's sister when she was 11 years old. (*Id.*) From this record, it appears that Mr. Menzies was aware of his father's

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[25] This obligation on the part of Mr. Menzies's trial counsel does not in any way relieve the State of its duty to provide discovery under the applicable state and federal laws and rules.

attempted rape of his sister, as Mr. Menzies was present during the interviews with his mother, step-father, and siblings. (*Id.*)

c. Mr. Menzies's family records.

Defense counsel also failed to obtain or present important records related to Mr. Menzies's family. For example, the divorce records of Mr. Menzies's parents indicate that Mr. Menzies's biological father physically abused his mother. (Ex. 18, Utah State Archives-Complete Divorce File of Clifford and Karen Menzies). Similarly, divorce records related to Mr. Menzies's first step-father, Sonny Porter, indicate that Sonny consumed alcohol excessively, had an "ungovernable temper," and was physically abusive. (Ex. 27, Utah Third District Court Divorce Records for Clifford and Karen Porter, bates 1-2; *see also* (Ex. 28, Utah Third District Court Records for Francis and Carol Porter, bates 20, 26-29) (divorce records and court findings related to Sonny's first marriage, indicating that Sonny drank heavily, was violent, and beat and threatened his first wife).) The records also indicate that Sonny "tore [Karen's] clothes from her body" on two separate occasions, an indication of spousal rape. (Ex. 27, Utah Third District Court Divorce Records for Clifford and Karen Porter, bates 2.)

These records demonstrate that Mr. Menzies's father and first step-father were violent and abusive men and that Sonny abused alcohol. While it is clear that Mr. Menzies witnessed familial violence and suffered significant physical and emotional abuse during his childhood, defense counsel presented only one witness, Mr. Menzies's sister, to discuss this abuse. (*See* TR 03/16/1988, ROA 1161 at 2905-32 (testimony of Mr. Menzies's sister, Jackie Rutherford); *see also id.* at 2947-52 (testimony of Mr.

Menzies's aunt, Janet Kubota, the only other family member presented as a witness, who testified only to Karen Gardner's neglect and abandonment).) Records corroborating the abuse and violence would have been significant, as would evidence demonstrating the alcohol abuse of Sonny Porter.

Court records related to Mr. Menzies's mother Karen, indicate that, in 1962, when Mr. Menzies was four years old, Karen was sued for causing an accident by driving while intoxicated. (Ex. 21, Utah State Archives Court Record, 1962 Civil Lawsuit, Karen Menzies, bates 2.) Karen did not contest these charges. (Ex. 21, Utah State Archives Court Record, 1962 Civil Lawsuit- Karen Menzies, bates 14.)

d. Mr. Menzies's juvenile records.

In addition, defense counsel failed to identify and present various juvenile records demonstrating that the Utah Department of Family Services became involved in the Menzies home during Mr. Menzies's childhood as a result of a lack of parental care. (*See* Penalty Phase Ex. 1C, Ralph Menzies's Juvenile Court Rap Sheet at 2; *see also* Penalty Phase Ex. 8, Ralph Menzies's Prison Records at 83, 100.) While the State presented these records during the penalty phase of Mr. Menzies's capital trial, the State used the records as evidence of prior bad acts. Defense counsel failed to present important mitigating evidence from the records to the sentencer and failed to provide the records to their experts as evidence of the neglect Mr. Menzies suffered as a child.

The records demonstrated that in May of 1965, when Mr. Menzies was seven years old, a petition was filed in his case as a result of a lack of parental care. (*See* Penalty Phase Ex. 1C, Ralph Menzies's Juvenile Court Rap Sheet at 2; *see also* Penalty

Phase Ex. 8, Ralph Menzies's Prison Records at 83.) In December of 1965, after a second petition resulting from a lack of parental care, the Utah Department of Family Services began "protective supervision" of Mr. Menzies and his siblings. (*See* Penalty Phase Ex. 1C, Ralph Menzies's Juvenile Court Rap Sheet at 2; *see also* Penalty Phase Ex. 8, Ralph Menzies's Prison Records at 83; Penalty Phase Ex. 8 at 100 (02/26/1976 Social study by Don Hansen, noting that the State believed that Mr. Menzies's parents failed to provide adequate healthcare and school attendance).) Defense counsel did not present these records to the sentencing judge as evidence that Mr. Menzies was neglected as a child. In addition, defense counsel failed to obtain these records prior to trial or provide them to an expert to assist in an evaluation of Mr. Menzies. These records demonstrate that Mr. Menzies's caregivers failed to provide for his basic needs during his childhood and were so neglectful that the authorities became involved.

e. Failure to collect records was deficient performance.

Counsel should have conducted a thorough investigation of the records prior to trial and obtained the records identified above to prepare for Mr. Menzies's penalty phase. The records demonstrated Mr. Menzies's abusive and neglectful childhood, indicated that Mr. Menzies was exposed to his father's sexual predation of young women, and provided corroboration of essential trial testimony. The records were important to assist the defense in confronting the State's case for death. In addition, the records would have aided defense experts in the evaluation of Mr. Menzies prior to trial and assisted counsel in determining and identifying potential mitigation witnesses and theories. The

adequate collection of records is essential to developing a useful social history of the client. *See Rompilla*, 545 U.S. at 390; *see also Williams (Terry)*, 529 U.S. at 395-96; 1989 ABA Guidelines 11.4.1(D)(2)(D-E). The United States Supreme Court has found life-history records are powerful mitigating evidence. *See Williams (Terry)*, 529 U.S. at 395, n.19. The records and social history are also essential for mental health experts to be able to fully evaluate a defendant and present accurate information to the sentencing body.

Counsel's failure to obtain these records was deficient performance. *See Anderson*, 476 F.3d at 1142; *see also* 1989 ABA Guidelines 11.4.1(D)(2)(D-E) (noting that counsel should "seek necessary releases for securing confidential records relating to any of the relevant histories[ ]" and "[o]btain names of collateral persons or sources to verify, corroborate, explain and expand upon information obtained. . . ."); 1979 ABA Standards 4-4.1, cmt. (mitigation investigation requires collection of records and information related to client's background).

iii. Defense counsel failed to investigate and present evidence of the impact of a family history of alcoholism and addiction.

Defense counsel failed to present evidence of the extent and severity of Mr. Menzies's family history of alcoholism and addiction. Counsel presented testimony only that Mr. Menzies's biological father and unspecified grandparents were alcoholics. (*See* TR 03/16/1988, ROA 1161 at 3026.) Dr. DeCaria also testified that a family history of alcoholism is "significant because we now know that people who are raised in alcoholic homes do not escape unscathed." (*Id.*) Evidence of alcoholism and substance abuse was

particularly important, as Mr. Menzies had a documented history of substance abuse (*see, e.g.*, Penalty Phase Ex. 8 at 82-83, 136) and was reportedly drinking and using drugs around the time of the crime (*see* TR 03/15-16/1988, ROA 1161 at 3049; 5th Am. Pet., Ex. NN at 5). As a result of trial counsel's ineffectiveness, the sentencing judge was left with an inaccurate and incomplete picture of the extent and severity of Mr. Menzies's family history of alcoholism and addiction and how that may have contributed to Mr. Menzies's own history of addiction, and intoxication on the night of the crime.

In reality, all of Mr. Menzies's caregivers were addicted to drugs or alcohol. Mr. Menzies's mother, Karen Gardner, was addicted to pain medication and is reported as having abused alcohol. (*See* Ex. 20, Declaration of Jackie Biesinger ¶ 22 (stating that Karen was addicted to pain medication); Ex. 7, Declaration of Janet Kubota ¶ 5 (stating that Karen had a problem with prescription pain medication); Ex. 32, Declaration of Don Robinson Jr. ¶¶ 7, 10 (noting Karen's problem with pain medication and that he believed Karen was drinking alcohol throughout the day to the point of intoxication and hiding it from her family); *see also* Ex. 21, Utah State Archives Court Record, 1962 Civil Lawsuit, Karen Menzies at 2, 14 (Karen was sued for causing an accident by driving while intoxicated and did not contest the charges).) Karen's mother, Nellie McDonald, who helped raise Mr. Menzies and was one of his closest relatives, was also addicted to pain medication. (*See* Ex. 32, Declaration of Don Robinson Jr. ¶ 10; Ex. 7, Declaration of Janet Kubota ¶ 5; Ex. 20, Declaration of Jackie Biesinger ¶ 22.) Nellie's brothers, Jack and Leonard Anderson, also suffered from drug addiction; Jack Anderson died of a prescription pain medication overdose when he was 51 years old. (Ex. 32, Declaration of

Don Robinson Jr. ¶ 12; Ex. 7, Declaration of Janet Kubota ¶ 6; Ex. 20, Declaration of Jackie Biesinger ¶ 22.) Finally, Mr. Menzies's first step-father, Sonny Porter, was an alcoholic (*see* Ex. 18, Utah Third District Court Divorce Records for Clifford and Karen Porter, bates 1-2; *see also* (Ex. 28, Utah Third District Court Records for Francis and Carol Porter, bates 20, 26-29), and his second step-father, Clint Stevens, appeared to be addicted to pain medication (*see* Ex. 20 Declaration of Jackie Biesinger ¶ 21; Ex. 32, Declaration of Don Robinson Jr. ¶ 10).

Defense counsel's constitutionally deficient mitigation investigation and presentation resulted in the impression that only Mr. Menzies's biological father, who was absent for much of Mr. Menzies's life, and some unspecified grandparents were alcoholics. (*See* TR 03/16/1988, ROA 1161 at 3026.) In reality, Mr. Menzies was raised in a home where addiction and substance abuse were the norm, by adults whose addictions drove them to violence, abandonment, and neglect. In addition, Mr. Menzies had a strong family history of alcoholism and addiction, involving both biological parents, his maternal grandmother, and two maternal uncles. Defense counsel's failure to obtain and present evidence of the significant family history of substance abuse and addiction was deficient performance. *See Wiggins*, 539 U.S. at 524 (finding deficient performance where "counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources"); *Anderson*, 476 F.3d at 1142; 1979 ABA Standards 4-4.1, cmt.

iv. Defense counsel failed to investigate and present evidence that Mr. Menzies experienced significant neglect, trauma, and abuse as a child.

During the penalty phase of Mr. Menzies's capital trial, counsel presented evidence of Mr. Menzies's background through the testimony of Mr. Menzies's sister and aunt. (TR 03/16/1988, ROA 1161 at 2905-46 (testimony of Jackie Rutherford (now Jackie Biesinger), Mr. Menzies's sister); *id.* at 2947-52 (testimony of Janet Kubota, Mr. Menzies's maternal aunt).) These were the only two sources of information related to Mr. Menzies's life history that counsel presented at Mr. Menzies's capital trial. While Mr. Menzies could have been a valuable source of mitigating information, trial counsel consistently failed to develop the necessary relationship with Mr. Menzies, and their late and faltering mitigation investigation suffered as a result. (*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.)

Mr. Menzies's sister, Jackie Biesinger, testified about their childhood and the physical and emotional abuse that Mr. Menzies suffered at the hands of his step-fathers, Sonny Porter and Clint Stevens. (*See id.* at 2905-46.) Jackie also testified that Sonny Porter raped their mother in front of them. (*Id.* at 2913.) In addition, Jackie described their mother's debilitating illness and testified that as a result of this illness Mr. Menzies and his siblings "didn't have a mother around." (*Id.* at 2916-17.)

The testimony of Mr. Menzies's aunt, Janet Kubota, added very little to Jackie's testimony. (*See id.* at 2947-52 (the entirety of Janet's testimony took less than six transcript pages).) Janet testified that she thought Mr. Menzies had a "pretty rotten

childhood" with a lot of "lousy" step-fathers. (*Id.* at 2948.) Janet did not provide any details related to any physical or emotional abuse that Mr. Menzies suffered and did not explain what made Mr. Menzies's step-fathers "lousy." (*See id.* at 2950-51.) Janet testified that she didn't believe her sister, Mr. Menzies's mother, was a very good parent. (*Id.*) According to Janet, Mr. Menzies's mother would leave Mr. Menzies and his siblings with Janet, saying that she was just going to the store, and then fail to return for three or four days. (*Id.*)

Counsel also presented the testimony of two experts, Dr. Winkleman, an educational psychologist, and Dr. DeCaria, a clinical psychologist. (TR 03/16/1988, ROA 1161 at 2956-82 (testimony of Dr. Winkleman); TR 03/16/1988, ROA 1161 at 3019-104 and 03/17/1988, ROA 1162 at 3175-78 (testimony of Dr. DeCaria).) Neither expert explained the extent of Mr. Menzies's childhood neglect, abuse, and trauma, or the impact of these traumatic events on Mr. Menzies's emotional, psychological, and neurological development. They were impeded by defense counsel's failure to obtain the requisite social history records and family interview information that would have enabled them to present a full and accurate picture of Mr. Menzies to the trial court.

Mr. Menzies's childhood was marked by neglect, abuse, and trauma. Mr. Menzies was raised by a mother whose severe illness, addiction to pain medication, and frequent abandonment resulted in significant neglect. (*See* Ex. 20, Declaration of Jackie Biesinger ¶¶ 9, 16-17, 22; Ex. 7, Declaration of Janet Kubota ¶¶ 5, 12, 15, 24; Ex. 32, Declaration of Don Robinson Jr. ¶¶ 7, 10.) Testimony at trial demonstrated that Mr. Menzies's mother Karen frequently left her children with her sister, saying she was only going to the

store, and then failed to return for several days. (*See* TR 03/16/1988, ROA 1161 at 2950-51.) However, even more troubling, was the fact not presented, that starting when Mr. Menzies's was only seven years old, Karen disappeared for days at a time without leaving her children in the care of an adult. (Ex. 20, Declaration of Jackie Biesinger ¶ 16.) In addition, defense counsel failed to present evidence demonstrating that Karen's addiction to pain medication coupled with the severity of her illness also contributed to her inability to care for her children. (Ex. 20, Declaration of Jackie Biesinger ¶¶ 9, 22; Ex. 7, Declaration of Janet Kubota ¶¶ 5, 15, 24; Ex. 32, Declaration of Don Robinson Jr. ¶¶ 7, 10.)

In addition to evidence of the extent of the neglect and abandonment of Mr. Menzies's mother, counsel failed to present any evidence of Mr. Menzies's exposure to sexual abuse and sexually deviant behavior. Evidence indicates that Mr. Menzies was molested by his step-mother following his mother's death. (5th Am. Pet., Ex. S ¶ 5.)

Mr. Menzies was also exposed to the deviant sexual behavior of his father and step-fathers. Mr. Menzies's father, Clifford Menzies, was found guilty of contributing to the delinquency of a 15 year-old girl in 1953, when Clifford was approximately 26 years old, and was sentenced to six months in jail. (Ex. 15, 1953 Ogden Standard-Examiner Article.) A little over a year later, Clifford married Ralph's mother, Karen, who was only 14 years old at the time. (Ex. 14, Marriage Certificate of Clifford Menzies and Karen Gardner; Ex. 6, Karen Gardner's birth certificate.) Clifford later sexually abused and attempted to rape Mr. Menzies's sister. (Ex. 20, Declaration of Jackie Biesinger ¶¶ 6-7; Ex. 12, USH Records Obtained by PCR Counsel [Central Utah Cmty. Mental Health Ctr.,

05/19/1970, Summary of Interviews at 1].) When Clifford was 42 years old, he married a 19 year-old woman. (Ex. 47, Divorce Record of Clifford Menzies and Sherry Menzies; Ex. 61 (Obituary of Sherry Lynn Gonzales).) Defense counsel failed to present any evidence of Clifford's sexual predation.

Mr. Menzies's step-father, Sonny Porter, also violently beat and raped Mr. Menzies's mother in front of her children when Mr. Menzies was five or six years. (Ex. 20, Declaration of Jackie Biesinger ¶ 13 (describing how Sonny raped Karen in the hallway outside the bedroom Jackie shared with Mr. Menzies so that the children would be forced to watch and how Karen told her children to stay in bed and not try to help); *see also* TR 03/16/1988, ROA 1161 at 2913 (Jackie testifying only in passing that Sonny "raped my mother in front of us" without providing any additional detail).) The trauma of Mr. Menzies's exposure to sexual molestation, sexual predation, and violent rape was never presented, evaluated, or explained at trial. (*See* Ex. 62, Declaration of Victoria Reynolds ¶¶ F.1-8.)

There were several indications that Mr. Menzies was subjected to sexual abuse, which could have been identified by a qualified expert. (*See* Ex. 62, Declaration of Victoria Reynolds ¶¶ D.12-13.) First, Mr. Menzies was documented to have had difficulty with bed-wetting well into his pre-adolescence. (*Id.* ¶ D.13.) In addition, juvenile records indicated that Mr. Menzies was found in a bathroom stall with another boy while in a detention facility and that Mr. Menzies voiced extremely homophobic attitudes. (*Id.*) Such evidence warranted further assessment of the possibility of sexual abuse. (*Id.*)

Defense counsel failed to present any evidence of Mr. Menzies's exposure to deviant sexual behavior and sexual abuse. Counsel also failed to investigate and present a full picture of the neglect, abuse, and trauma that Mr. Menzies's suffered. This powerful and compelling information—including an extensive history of childhood neglect and abuse at the hands of alcohol and drug addicted caregivers—was available had counsel conducted an adequate and effective investigation into mitigation.

Defense counsel's superficial mitigation investigation constitutes 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. 362)); *see also Barrett v. United States*, No. 12-7086, Slip Opinion (10th Cir. Aug. 19, 2015) (finding that a mitigation investigation based on a series of very brief interviews with 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.

Defense counsel's performance was unconstitutionally deficient and cannot be understood as strategic. *See Williams (Terry)*, 529 U.S. at 396 (noting counsel's "obligation to conduct a thorough investigation of the defendant's background"); *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 investigation supporting those judgments"). Failure to conduct a thorough mitigation investigation can never be considered a reasonable tactical decision under *Strickland* because it is uninformed, and prejudice generally results when material evidence was not properly presented by defense counsel for the sentencer's consideration. *Sears*, 561 U.S. at 953-55; *see also Hooper*, 314 F.3d at 1171.

v. Counsel failed to adequately interview and present evidence from key witnesses.

As discussed above, defense counsel presented only two witnesses—Mr. Menzies's sister, Jackie, and aunt, Janet—to describe Mr. Menzies's childhood and background. Counsel did not contact or interview Jackie until the day before she testified, when they met for a short period of time. (5th Am. Pet., Ex. S, Aff. of Marissa Sandall-Barrus ¶ 8.) Similarly, Janet stated that she would have provided more information to counsel had counsel spent more time with her or asked relevant questions. (Ex. 7, Declaration of Janet Kubota ¶ 25.) Disclosures of sensitive personal information often require investigators to put in time to build trust with important mitigation witness,

many of whom may be reluctant to share sensitive details, or may not realize the import of information.

While defense counsel presented Jackie and Janet, counsel's failure to adequately interview and prepare them prior to testifying resulted in an inadequate and incomplete presentation of evidence. As a result, counsel failed to present evidence that Jackie was sexually abused by her father. (*See* Ex. 20, Declaration of Jackie Biesinger ¶¶ 6-7; Ex. 12, USH Records Obtained by PCR Counsel [Central Utah Cmty. Mental Health Ctr., 05/19/1970, Summary of Interviews at 1].) In addition, defense counsel did not discover that all of Mr. Menzies's caregivers, including his mother, father, two step-fathers, and maternal grandmother, were addicted to alcohol or drugs. Both Jackie and Janet could have provided information about the alcohol and drug addictions of Mr. Menzies's caregivers. (*See* Ex. 20, Declaration of Jackie Biesinger ¶¶ 8, 21-22; Ex. 7, Declaration of Janet Kubota ¶ 5.) Defense counsel also failed to introduce any evidence indicating that Mr. Menzies had a biological child. This information was contained in Dr. DeCaria's report—and therefore known to defense counsel—but not presented at trial. (*See* 5th Am. Pet., Ex. S, Aff. of Marissa Sandall-Barrus ¶ 6.) Defense counsel's inadequate pre-trial mitigation investigation and resulting failure to adequately interview the only two family members contacted or presented, resulted in a failure to present compelling mitigation evidence and deficient performance. *See Battenfield*, 236 F.3d at 1227-28 (finding deficient performance where counsel contacted limited family members and failed to effectively interview them about client's background).

Defense counsel also failed to interview and present evidence from important witnesses who would have had information about Mr. Menzies's childhood. Perhaps most egregiously, defense counsel never interviewed Mr. Menzies's biological father, Clifford Menzies. Interviewing Mr. Menzies's biological father was essential as he was Mr. Menzies's only surviving parent at the time of trial. (*See* Exs. 34 and 58, [Death certificates of Karen and Clifford].) That, combined with a lack of records related to Mr. Menzies's birth and Karen's prenatal care, made Clifford an important source of essential mitigation information. In addition, Mr. Menzies lived with Clifford following Karen's death and evidence indicates that Mr. Menzies was sexually abused by Clifford's wife at that time. (5th Am. Pet., Ex. S, Aff. of Marissa Sandall-Barrus ¶ 5.) Clifford Menzies was alive at the time of trial and died in 1993. (Ex. 58, [Death Certificate of Clifford Menzies].)

Similarly, counsel failed to interview Sherry Gonzales, Clifford Menzies's wife at the time Mr. Menzies lived with Clifford following Karen's death. (5th Am. Pet., Ex. S, Aff. of Marissa Sandall-Barrus ¶ 7.) Not only was it important to interview Sherry to investigate the disruption in Mr. Menzies's life following his mother's death and the relationship he had with his biological father, but evidence discovered in post-conviction demonstrated that Sherry sexually abused Mr. Menzies when he was living with her. (*Id.* ¶¶ 5, 7.) Sherry died in 2013. (*See* Ex. 61, Obituary of Sherry Lynn Gonzales.)

Counsel also did not contact or interview Don Robinson, Jackie's first husband. Don and Jackie were married when Jackie was only 15 years old, after Karen and her third husband, Clint, "pushed" them to engage in a sexual relationship and get married.

(Ex. 32, Declaration of Don Robinson ¶¶ 4-5.) Don was involved with Jackie from 1970 through 1974 and, following Karen's death, briefly had custody of both Mr. Menzies and his younger brother Bobby. (Ex. 32, Declaration of Don Robinson ¶¶ 2, 13, 17.) As a result of his relationship with Jackie, Don was very familiar with Mr. Menzies's mother, Karen, and her third husband, Clint. (*Id.* ¶ 3.) Don observed Karen's severe illness and her failure to care for herself. (*Id.* ¶¶ 6-7.) Don also observed that Karen appeared to be intoxicated much of the time and believed that she drank alcohol throughout the day, while hiding it from her family. (*Id.* ¶ 7.) Similarly, Don could have testified that Karen, Clint, and Karen's mother, Nellie, all had problems with pain medication. (*Id.* ¶ 10.) Finally, Don could have provided testimony about Clint's temper, as he saw Clint strike one of the boys with a belt for no reason. (*Id.* ¶ 9.)

Finally, counsel also failed to contact Mr. Menzies's ex-wife, school teachers, neighbors, additional members of his extended family, and treating physicians and therapists. Notably, counsel not only failed to contact Clifford Menzies, but also failed to contact anyone from Clifford's side of the family, despite the fact that eight of Clifford's eleven siblings were alive at the time. Many of these persons are now dead, cannot be located, or are aged. Mr. Menzies has provided additional instances of specific abuse, which could not be verified by now-dead third-parties. Failure to call these witnesses at the time of sentencing was objectively unreasonable and prejudicial.

While defense counsel did present some limited mitigation evidence at sentencing, the discrepancy between what they should have presented and what they did present is significant, rendering their performance deficient. *See Williams (Terry)*, 529 U.S. at 395-

96; *see also Wiggins*, 539 U.S. at 523-24 (holding it is unreasonable for counsel to abandon the investigation into a client's background after acquiring only rudimentary knowledge of his history from a narrow set of sources); *Barrett*, No. 12-7086, Slip Opinion (10th Cir. Aug. 19, 2015) (finding that a mitigation investigation based on a series of very brief interviews with family members immediately preceding their testimony is typically deficient performance); *Battenfield*, 236 F.3d at 1227-28 (finding deficient performance where counsel contacted limited family members and failed to effectively interview them about client's background).

2. Mr. Menzies was prejudiced by defense counsel's failure to investigate and present compelling evidence in mitigation of his crime.

Mr. Menzies has presented evidence of significant, humanizing mitigation information that was never investigated or presented at sentencing. This evidence would have been enough to call for leniency and is at least enough to undermine confidence in Mr. Menzies's death sentence.

The Eighth Amendment demands that all relevant evidence bearing on a defendant's character, propensities, and record be considered by the sentencer in determining the appropriateness of the penalty. *See, e.g.*, *Lockett*, 438 U.S. at 605. If the sentencer is deprived of this evidence through the Sixth Amendment failings of counsel, the sentencing proceeding is unfair and the sentence itself is suspect. *Strickland*, 466 U.S. at 694. A sentencing proceeding infected by a constitutionally deficient investigation and presentation of mitigation establishes prejudice because the reviewing court cannot have "confidence in the outcome" of such a proceeding. *Id.*

Cumulative prejudice from counsel's multiple deficiencies also supports a finding of ineffective assistance of counsel. *See, e.g.*, *id*. at 695; *Williams (Terry)*, 529 U.S. at 397.

Prejudice is not determined by a court on habeas review through a mere numerical weighing of the aggravation evidence adduced at trial against the mitigation evidence adduced at trial and in post-conviction, but must include a consideration of the appropriateness of the penalty as applied to an individual defendant in light of his record and character. *Williams* articulated this standard plainly, holding that although the newly-presented mitigation evidence, when combined with that presented to the sentencer at the time of trial "may not have overcome . . . [the aggravating circumstance], the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability." 529 U.S. at 398 (citing *Boyde v. California*, 494 U.S. 370, 387 (1990)).

In this context, prejudice exists if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "Reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." *Id.* A reviewing court must evaluate "the totality of the evidence before the judge or jury." *Id.* at 695. The prejudice analysis does not depend on whether the outcome of the proceeding would have been different. *Id.* at 694. Rather, Mr. Menzies must show "a probability sufficient to undermine confidence in the outcome" of the proceeding. *Id.* Applying that analysis here, it is clear that defense counsel's deficient performance rendered the proceeding

fundamentally unfair and unreliable, and undermines confidence in the outcome of Mr. Menzies's sentencing proceeding.

As detailed above, Mr. Menzies's defense counsel "abandoned their investigation of [his] background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *See Wiggins*, 539 U.S. at 524. Defense counsel failed to adequately investigate Mr. Menzies's background by speaking with potential mitigation witnesses and gathering records despite indications that Mr. Menzies's childhood involved abuse, trauma, and neglect. *See id.* at 527 ("In assessing the reasonableness of an attorney's investigation . . . a court must consider . . . whether the known evidence would lead a reasonable attorney to investigate further.").

Defense counsel's deficient performance prejudiced Mr. Menzies. Had counsel conducted an adequate and reasonable investigation, they would have discovered the compelling evidence in mitigation of Mr. Menzies's crime described above. *See supra* Claim 31.C.1. Defense counsel's failure to adequately investigate Mr. Menzies's background by speaking with potentially mitigating witnesses and gathering records, 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 raised by a neglectful mother who frequently abandoned her children by leaving them alone without adult care for days at a time; Mr. Menzies's caregivers, including his mother, biological father, both step-fathers, and maternal grandmother all struggled with drug or alcohol addiction; Mr. Menzies was exposed to sexually deviant behavior as a result of his father's sexual predation; and Mr. Menzies was sexually

abused by his step-mother. "Such evidence of childhood abuse, neglect, and instability can play a significant role in mitigation." *Barrett*, No. 12-7086, Slip Opinion (10th Cir. Aug. 19, 2015); *see also Sears*, 561 U.S. at 948; *Wiggins*, 539 U.S. at 516-17.

The evidence defense counsel failed to investigate and develop would have demonstrated precisely the type of "troubled history [the United States Supreme Court has] declared relevant to assessing" moral culpability and mitigation. *Wiggins*, 539 U.S. at 535. Had counsel properly investigated and presented the extent of Mr. Menzies's experiences of childhood neglect, abuse, and trauma, there is a reasonable probability, sufficient to undermine confidence in the outcome of his case, that the sentencing result would have been different. *See Wiggins*, 539 U.S. at 535-38; *Battenfield*, 236 F.3d at 1234-35.

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

"[D]efendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987). When the mitigation investigation uncovers facts that require the services of an expert to explain their significance to the finder of fact, the Sixth Amendment requires counsel to obtain an expert. The Supreme Court has recognized the need for competent expert assistance in sentencing. *Ake v. Oklahoma*, 470 U.S. 68, 78-83 (1985). Counsel must obtain experts that put the mitigating evidence in context and explain its significance, in order to permit the sentencer to consider and give effect to the mitigation evidence in imposing a

sentence. *See Williams (Terry)*, 529 U.S. at 399 (considering counsel's duty to "present[] and explain[] the significance of all the available evidence"); *see also Tennard*, 542 U.S. at 276 (the sentencer must be able "to consider and give effect to the mitigating evidence" (citing *Penry*, 492 U.S. 302)). The use of experts during penalty phase proceedings is indispensable in providing the sentencer with an explanation of a defendant's emotional and mental problems and how the acts constituting an offense are related to those problems.

1. Defense counsel performed deficiently in failing to present appropriate expert witnesses during the penalty phase of Mr. Menzies's capital trial.

Defense counsel called two experts during the penalty phase, Dr. Douglas C. Winkleman, Ph.D., an educational psychologist, and Dr. Michael D. DeCaria, Ph.D., a clinical psychologist. Both experts' evaluations failed to explain 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.

Counsel first put on Dr. Winkleman who testified that his methodology as an educational psychologist could rehabilitate Mr. Menzies and cure antisocial behavior. (TR 03/16/1988, ROA 1161 at 2956, 2973-77, 2981-82.) Dr. Winkleman admitted on the stand that his methodology was not accepted or practiced in the Utah penal system, before essentially offering to sell his program to Utah's Department of Corrections. (*Id.* at 2980.)

Counsel then presented the testimony of Dr. DeCaria. (TR 03/16/1988, ROA 1161 at 3019-104; TR 03/17/1988, ROA 1162 at 3175-78.) Defense counsel presented

Dr. DeCaria during the guilt phase of Mr. Menzies's trial, where Dr. DeCaria testified that he would "diagnose" the victim as depressed, despite the fact that he had never interviewed Hunsaker and reviewed only limited information about her state of mind. (*See* TR 03/07/1988, ROA 1160 at 2562.)

During the penalty phase, Dr. DeCaria described generally Mr. Menzies's "turbulent family history" and two physically abusive step-fathers. (TR 03/16/1988, ROA 1161 at 3024-25.) He also testified that Mr. Menzies had a history of substance abuse—mainly alcohol and marijuana—and a family history of alcoholism, although he testified only that Mr. Menzies's biological father and unspecified grandparents were alcoholics. (*Id.* at 3026-27.) Dr. DeCaria ultimately diagnosed Mr. Menzies with three personality disorders: schizotypal personality disorder; borderline personality disorder; and antisocial personality disorder. (*Id.* at 3036-38.) Defense counsel failed, however, to elicit any testimony as to how all of these facts interrelate in order to allow the trial court "to make an individualized assessment of the appropriateness of the death penalty." *See Penry*, 492 U.S. at 319. In addition, Dr. DeCaria only completed his evaluation of Mr. Menzies the weekend before the penalty phase began. (TR 03/16/1988, ROA 1161 at 3021 (Dr. DeCaria acknowledging that he completed his final interview with Mr. Menzies on March 12, 1988).) As a result, Mr. Menzies's counsel was unable to adequately prepare for the penalty phase. Counsel's use of Dr. DeCaria and Dr. Winkleman at sentencing did not discharge their duty to retain other necessary expert witnesses. *See Wilson*, 536 F.3d at 1089 (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).

Under *Strickland*, when "assessing the reasonableness of an attorney's investigation, . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. In this case, there were numerous indications that expert assistance was necessary to effectively present Mr. Menzies's mitigation evidence to the sentencing court.

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); *see also supra* Claim 31.C. As a result of defense counsel's ineffective mitigation investigation, the experts presented could not and did not provide a detailed explanation of the extent and severity of the trauma that Mr. Menzies suffered during his childhood. *See supra* Claim 31.C; (*see* Ex. 62, Declaration of Dr. Victoria Reynolds ¶ F.8.) Defense counsel also failed to present expert testimony explaining the long-term emotional, psychological, and neurological impacts of the chronic childhood trauma that Mr. Menzies's experienced.

During post-conviction proceedings, Dr. Timothy Kockler performed a neuropsychological evaluation of Mr. Menzies. (5th Am. Pet., Ex. B, Aff. of Dr. Kockler.) Dr. Kockler observed evidence of a cognitive disorder, dysthymic disorder, polysubstance abuse disorder, a learning disorder, and a personality disorder. (*Id.* at 10-15.) In addition, Dr. Kockler's neuropsychological evaluation demonstrated that Mr. Menzies has significant weaknesses in the areas of visual and verbal memory. (*Id.* at 4, 7.) Dr. Kockler's testing also confirmed that Mr. Menzies had an high average IQ with a significant discrepancy between his verbal and performance IQ scores. (*Id.* at 6.) Ultimately, Dr. Kockler concluded that the testing and assessment indicated that Mr. Menzies's suffered from organic brain damage. (*Id.* at 10-11.)

Significant evidence indicates that Mr. Menzies's neurological and psychological makeup was impacted by the chronic abuse, trauma, and neglect that he experienced as a child. Mr. Menzies's life history—including that he was neglected by his severely ill and frequently absent mother, sexually abused by his step-mother, physically abused by two violent step-fathers, and traumatized by watching his step-father brutally beat and rape his mother—has been evaluated by Dr. Victoria Reynolds, a clinical psychologist. Her report provides an understanding of the various mitigating circumstances in Mr. Menzies's life. Expert witnesses like Dr. Reynolds could have offered compelling testimony in support of a life sentence, explaining the impact of Mr. Menzies's childhood on his conduct as an adult.

i. Failure to obtain an expert to explain the impact of trauma.

Dr. Reynolds explains that there is reliable evidence that adverse childhood experiences, such as child maltreatment, growing up with impaired caregivers, and exposure to domestic violence have "quantifiable, damaging medical, psychiatric, economic, and behavioral outcomes for children that persist into adulthood." (Ex. 62, Declaration of Dr. Victoria Reynolds ¶ E.A.1.) Dr. Reynolds also explains that at a certain point, "there is a threshold for the number of adverse experiences a child can experience before impairment becomes inevitable." (*Id.* ¶ E.A.3.) After reviewing records and documentation of the trauma, abuse, and neglect that Mr. Menzies experienced in his childhood, Dr. Reynolds was able to conclude that:

> Ralph Menzies's childhood well-exceeded the threshold of adverse and traumatic exposures that would not only predict that he would [have] further exposure 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.

(*Id.* ¶ E.A.5.)

Experiences of human indifference, terror, violence, overwhelming helplessness, and irretrievable loss, result in changes to brain neurochemistry and behavior by triggering the "fight/flight/freeze" response. (*Id.* ¶ E.B.3.) Dr. Reynolds explains, "When trauma necessitates these responses—and if these responses begin in very early infancy or childhood and persist over a period of months, years, and decades, as it did in Ralph Menzies's case—the child's brain structures and functions are affected." (*Id.* ¶

E.B.3.) Chronic exposure to traumatic events, especially early in life, can result in changes in brain pathways resulting in a magnification of fear, perceptions of threat, and impulsive self-defense, while also simultaneously inhibiting the brain's ability to manage and minimize intense emotional reactions and behaviors. (*Id.* ¶¶ E.B.4-7, 9.) As a result, behavior in a chronically traumatized child often looks impulsive, aggressive, hyperactive, or disorganized—such symptoms and adaptations are often diagnosed as ADHD. (*Id.* ¶ E.B.7.)

In addition, exposure to the pain of physical abuse and the trauma of witnessing the abuse or endangerment of a sibling or parent as a result of domestic violence frequently leads to the use and abuse of substances, with over 80% of men with life histories similar to Mr. Menzies having lifetime diagnoses of substance use disorders. (*Id.* ¶ E.B.8); *see also supra* Claim 31.C (demonstrating that Mr. Menzies was neglected and abandoned by his mother and physically and emotionally abused by his step-fathers). The impact of abuse is also particularly acute when the perpetrators of abuse, as in the case of Mr. Menzies, are part of the child's caregiving and attachment system. (*Id.* ¶ E.B.9.)

The records and documentation of Mr. Menzies's childhood and young adulthood offer ample evidence that he "suffered repeated and severe abuse and neglect by every one of his primary caretakers from his earliest years into his late adolescence." (*Id.* ¶ F.1.) As discussed above, evidence in the record indicates that Mr. Menzies was neglected and frequently abandoned by his mother, was physically abused by two violent step-fathers, was sexually abused by his step-mother, and witnessed "severe domestic

violence" directed at his mother by his biological father and two step-fathers. (*See* Ex. 62, Declaration of Dr. Victoria Reynolds ¶ F.1 (summarizing the trauma, abuse, and neglect)); *see supra* Claim 31.C. The experts retained by defense counsel, and Mr. Menzies's prior psychological records, failed to account for the impact of these traumas. (*See* Ex. 62, Declaration of Dr. Victoria Reynolds ¶ F.2 (after reviewing Mr. Menzies's life history and the evidence presented at trial).)

In fact, defense counsel failed to conduct or present any detailed trauma assessment of Mr. Menzies. Dr. Reynolds's review of Mr. Menzies's life history along with the trial record led her to conclude that "an adequate and detailed trauma assessment with Mr. Menzies was never conducted at any point in Mr. Menzies's life." (*Id.* ¶ F.8.) The failure to conduct and present an adequate trauma assessment resulted in a failure to explain the overwhelming child maltreatment and caretaker neglect that shaped Mr. Menzies's behavior as both a child and adolescent. (*See id.* ¶ F.6.) A trauma-focused evaluation of Mr. Menzies is necessary to provide a detailed account of the types and impacts of the trauma Mr. Menzies experienced during his development. (*See id.* ¶ F.8.) Dr. Reynolds concluded that a trauma assessment would offer a more detailed and "cogent explanation of the mechanisms and impacts of child maltreatment and trauma on Mr. Menzies's development and behavior as a child, adolescent, and young adult, and possibly put into context some of the reasons for his increasingly alienated, self-destructive, and violent trajectory that led to his current criminal case." (*Id.* ¶ F.8.)

ii. Counsel's failure to obtain and prepare experts to evaluate and explain Mr. Menzies's traumatic childhood resulted in deficient performance.

Defense counsel never conducted a trauma assessment or neuropsychological evaluation of Mr. Menzies, and never presented information related to the full breadth of trauma, abuse, and neglect that Mr. Menzies experienced as a child and young adolescent or the likely neurological and psychological implications of such experiences. (*See* Ex. 62, Declaration of Dr. Victoria Reynolds ¶ F.8.)

Numerous red flags in the record indicated that a detailed trauma assessment was imperative to a mitigation investigation of Mr. Menzies's life. Defense counsel's meager mitigation investigation revealed that Mr. Menzies was physically abused by his step-fathers, Sonny Porter and Clint Stevens, that Sonny Porter beat Mr. Menzies almost nightly, and that Mr. Menzies witnessed Sonny Porter physically abuse and rape his mother. (*See* TR 03/16/1988, ROA 1161 at 2911, 2913, 2915 (testimony of Jackie Rutherford).) While defense counsel's deficient mitigation investigation failed to reveal additional evidence of Mr. Menzies's traumatic childhood, readily available records and potential witness testimony also indicated that Mr. Menzies experienced significant trauma. For example, Mr. Menzies struggled with bed-wetting well into his pre-adolescence (Ex. 12, Utah State Hospital Records, bates 33; Ex. 62, Declaration of Dr. Victoria Reynolds ¶ D.13) and was placed under protective supervision as a result of a lack of parental care (*see* Penalty Phase Exhibit 1C, Ralph Menzies's Juvenile Court Rap Sheet at 2; *see also*, Penalty Phase Exhibit 8, Ralph Menzies's Prison Records at 83; *id.*

at 100 (02/26/1976 Social study by Don Hansen, noting that the State believed that Mr. Menzies's parents failed to provide adequate healthcare and school attendance)).

Despite these numerous red flags, counsel failed to obtain an expert and conduct a thorough and detailed trauma assessment or explain the impact of Mr. Menzies's traumatic childhood on his conduct. (*See* Ex. 62, Declaration of Dr. Victoria Reynolds ¶ F.8.) In addition, as a result of the ineffective pre-trial mitigation investigation, defense counsel failed to prepare the experts that they did retain. *See Wilson*, 536 F.3d at 1089-90; *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). As a result, the sentencing judge was unable to consider the effect of Mr. Menzies's significant history of trauma and abuse on his inability to control his impulses. It was prejudicially deficient performance for defense counsel to fail to explain to the sentencing court the existence, extent, and relevance of Mr. Menzies's extensive childhood trauma.

2. Mr. Menzies was prejudiced by defense counsel's failure and should be granted relief.

As a result of defense counsel's deficient performance the sentencing judge was unable to give proper weight to Mr. Menzies's traumatic childhood and the resulting emotional, psychological, and neurological damage that would have demonstrated a reduced culpability. Here, counsel's deficient performance rendered the sentencing proceeding fundamentally unfair and unreliable and thus undermines confidence in Mr. Menzies's sentence.

As explained above, the records, in combination with Dr. Kockler's neuropsychological evaluation and report, indicate that Mr. Menzies's traumatic childhood impacted his neurological and psychological functioning. Had counsel conducted an adequate and reasonable mitigation investigation and presented this information to appropriate experts, they would have discovered compelling evidence in mitigation of Mr. Menzies's crime. The failure to present evidence demonstrating the neurological and psychological impact of Mr. Menzies's trauma resulted in prejudice to Mr. Menzies as he was sentenced to death based on incomplete evidence. *See Wiggins*, 539 U.S. at 537-38. In light of this evidence, there can be no confidence in the reliability of Mr. Menzies's death sentence.

In addition, the declaration of Dr. Reynolds demonstrates that Mr. Menzies suffered chronic and severe trauma as a child and that this trauma likely had devastating psychological impacts. (*See* Ex. 62, Declaration of Dr. Victoria Reynolds ¶¶ D.1-5, E.A.1-5 (summarizing the documentation of Mr. Menzies's childhood trauma and concluding that his childhood "well-exceeded the threshold of adverse and traumatic exposures that would . . . predict . . . that the impairment and damage he sustained from these traumatic experiences would have pervasive and devastating effects on his neurobiological, psychosocial and behavioral development").) Mr. Menzies will demonstrate these impacts at an evidentiary hearing.

Counsel's deficient performance prevented the sentencing court from considering expert evaluations explaining the impact and importance of Mr. Menzies's traumatic childhood. Obtaining experts to explain the impact of Mr. Menzies's

childhood experiences of neglect, abuse, and trauma was a crucial aspect of the mitigation investigation. Counsel's failure to explain Mr. Menzies's traumatic life history and the impact of these traumas on Mr. Menzies's behavior and conduct at the time of the crime prevented the sentencing court from fully understanding Mr. Menzies's background and determining the appropriate sentence.

The expert reports and evaluations obtained during post-conviction and during the federal habeas investigation demonstrate that Mr. Menzies was prejudiced by defense counsel's deficient mitigation investigation because the sentencing judge had incomplete evidence before him that would have weighed in favor of a life sentence. *See Wiggins*, 539 U.S. at 537-38. As such, counsel's deficient performance undermined confidence in the sentencing proceeding.

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

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 Williams (Terry)*, 529 U.S. at 397 (when assessing prejudice, reviewing court must consider "the totality of the mitigation evidence – both that adduced at trial, and the evidence adduced in the [post-conviction] proceeding"). Here, Mr. Menzies has proven numerous errors by defense counsel, and has shown that the mitigating evidence that was not presented

undermines confidence in his sentence. Further, defense counsel's failure to conduct a thorough and reasonable investigation during both the penalty and guilt phases of Mr. Menzies's trial resulted in prejudice to Mr. Menzies.

CLAIM 32

The State violated Mr. Menzies's right to due process and a fair proceeding under the Sixth and Fourteenth Amendments by reading a statement into the record, ex-parte and without authorization from the state court, after the conclusion of the trial, which was included in the record on appeal.

Mr. Menzies withdraws this claim.

CLAIM 33

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

This claim has not been properly presented to a state court.[26] Mr. Menzies's failure to raise this claim previously can be excused by demonstrating cause and prejudice. The ineffective assistance of Mr. Menzies's state appellate and post-

[26] In the direct appeal, appellate counsel made several challenges to the inadequate, error-ridden transcripts of Mr. Menzies's capital trial. (*See* 04/08/1991 Br. of Appellant; 09/14/1992 Br. of Appellant at 29.) 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.) The Utah Supreme Court denied this claim based on an unreasonable determination of the facts. *See Menzies I*, 845 P.2d at 232-33, 240-41; *see supra* Claim 1. In his post-conviction proceedings, Mr. Menzies asserted that "because of a lack of time necessary to review the entire record" counsel could only preserve the issue at this time and believed that "at least one bench conference during voir dire was not transcribed." (5th Am. Pet. at 45-46.) Transcript errors and omissions were not pursued on appeal from the denial of the post-conviction petition. (*See* 02/27/2013 Appellant's Opening Brief.)

conviction counsel in failing to raise this claim constitutes cause for the default and resulted in prejudice to Mr. Menzies. *See Strickland*, 466 U.S. 668; *Evitts*, 469 U.S. at 396; *Martinez*, 132 S. Ct. at 1315; *Ha Van Nguyen*, 736 F.3d at 1293. Mr. Menzies will demonstrate at an evidentiary hearing that the performance of his appellate and post-conviction counsel fell below the standards of minimally competent capital attorneys when they failed to raise this meritorious claim. *See infra* Claims 38 and 37. 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. at 276.

Where a state grants appellate review, "the Fourteenth Amendment guarantees a criminal appellant pursuing a first appeal as of right certain minimum safeguards necessary to make that appeal 'adequate and effective.'" *Evitts*, 469 U.S. at 392 (quoting *Griffin v. Illinois*, 351 U.S. 12, 20 (1956)). This right includes a "record of sufficient completeness to permit proper consideration of [the defendant's] claims." *Mayer v. Chicago*, 404 U.S. 189, 194 (1971) (internal quotation omitted). "Anything short of a complete transcript is incompatible with effective appellate advocacy." *Hardy v. United States*, 375 U.S. 277, 288 (1964).

An appellant has a constitutional due process right to a complete record on appeal to assure meaningful and effective appellate review. *Griffin*, 351 U.S. at 20 (recognizing constitutional right under Fourteenth Amendment to sufficient record to permit adequate and effective appellate review). In *Parker v. Dugger*, 498 U.S. 308 (1991), the Supreme Court recognized "the crucial role of meaningful appellate review in ensuring that the

death penalty is not imposed arbitrarily or irrationally," and held that "meaningful appellate review [of a death sentence] requires that the appellate court consider" the "actual" accurate record of the defendant at his trial. 498 U.S. at 321; s*ee also Dobbs v. Zant*, 506 U.S. 357, 358 (1993) (citing *Gardner v. Florida*, 430 U.S. 349, 361 (1977); *Gregg v. Georgia*, 428 U.S. 153, 167, 189 (1976) (emphasizing "the importance of reviewing capital sentences on a complete record")); *see also Birch v. Birch*, 771 P.2d 1114, 1116 (Utah Ct. App. 1989) ("[A] record should be made of *all* proceedings of courts of record . . . That precept applies to conferences in chambers [and at the bench] as well as more formal proceedings"); *Briggs v. Holcomb*, 740 P.2d 281, 283 (Utah Ct. App. 1987) ("Although consistently making a record of all proceedings imposes a greater burden on the trial court and court reporters, it is impossible for an appellate court to review what may ultimately prove to be important proceedings when no record of them has been made.") Unrecorded proceedings also implicate a defendant's Sixth and Fourteenth Amendment rights to a public trial. *See Waller v. Georgia*, 467 U.S. 39, 46 (1984) (finding that the Sixth Amendment right of the accused extends to pre-trial proceedings such as voir dire and suppression hearings).

Review of the record clearly indicates that multiple bench conferences, arguments in chambers, and other legal proceedings were not recorded. The failure to record all proceedings resulted in exchanges between counsel and the court for which the subject matter is not fully known. (*See, e.g.*, TR 02/01/1988, ROA 1152 at 23-24; TR 02/10/1988, ROA 1152 at 163-65; TR 02/11/1988, ROA 1153 at 210-11, 229, 260; TR 02/17/1988, ROA 1154 at 888; TR 02/18/1988, ROA 1155 at 959, 978; TR 02/24/1988,

ROA 1156 at 1475-76; TR 02/25/1988, ROA 1157 at 1621-22, 1715-16; TR 02/26/1988, ROA 1157 at 1817-18, 1824; TR 03/01/1988, ROA 1158 at 1945; TR 03/03/1988, ROA 1159 at 2332; TR 03/07/1988, ROA 1160 at 2604; TR 03/08/1988, ROA 1160 at 2606; *see also* ROA 822-23, 03/01/1988 Minute Entry (noting discussion in chambers about how to admonish the jury and errors in the transcript).)

While it is impossible to fully discern the important matters discussed in these unrecorded proceedings, it is clear that unrecorded proceedings included: discussions related to security for trial (TR 02/01/1988, ROA 1152 at 23-24), the removal of prospective jurors for cause and with peremptory challenges (TR 02/10/1988, ROA 1152 at 163-65; TR 02/17/1988, ROA 1154 at 888), 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 (noting an off-the-record discussion about reading in the preliminary hearing transcripts and a need to put the argument on the record without completing argument)), the defense's objections to State Exhibit 1 during the guilt phase (TR 02/18/1988, ROA 1155 at 978), the events following a juror fainting during the testimony of the medical examiner (TR 02/25/1988, ROA 1157 at 1621-22), evidentiary matters (*id.* at 1715-16), 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), and guilt phase jury instructions and arguments or objections related to the instructions (TR 03/07/1988, ROA 1160 at 2604, 2606). It is particularly troubling that the trial record contains no transcript of the exercise of many of the challenges to jurors for cause

and all of the peremptory challenges. (*See, e.g.*, 02/10/1988, ROA 1152 at 163-65; TR 02/17/1988, ROA 1154 at 888.)

It is essential in a capital case that all proceedings are part of the record so that the defendant may receive meaningful appellate review of the trial court's rulings and decisions. *See Parker*, 498 U.S. at 321; *Griffin*, 351 U.S. at 20. The failure to record all proceedings violated Mr. Menzies's 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.

This claim was not raised in state court. 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; *see also infra* Claim 38. On this basis, this Court may review this claim *de novo*. 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.

In Mr. Menzies's direct appeal, the Utah Supreme Court deprived him of the benefit of well-established state law which would have entitled him to reversal of his convictions and death sentence. *See Menzies II*, 889 P.2d at 397-400. As discussed in Claim 2, at the time of Mr. Menzies's jury selection and trial, the rule in Utah was that

"[a] party is entitled to exercise his . . . peremptory challenges upon impartial prospective jurors, and he should not be compelled to waste one in order to accomplish that which the trial judge should have done." *Crawford v. Manning*, 542 P.2d 1091, 1093 (Utah 1975); *see also State v. Woolley*, 810 P.2d 440, 442-443 (Utah Ct. App. 1991) ("It is prejudicial error to compel a party to exercise a peremptory challenge to remove a prospective juror who should have been removed for cause.") Under Utah law, it was "well established" that reversal was required whenever a party was compelled "to exercise a peremptory challenge to remove a venireman who should have been excused for cause." *See State v. Lacey*, 665 P.2d 1311, 1312 (Utah 1983); *see also State v. Bishop*, 753 P.2d 439, 451 (Utah 1988).

The Utah Supreme Court continued to maintain this rule even after the United States Supreme Court endorsed a different standard in *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988). *See Woolley*, 810 P.2d at 443 n.5 (noting that the Utah Supreme Court maintained its long-standing rule that "[a] court commits prejudicial error if it forces a party to exercise a peremptory challenge to remove a prospective juror who should have been removed for cause" in two post-*Ross* decisions, *State v. Gotschall*, 782 P.2d 459, 461 (Utah 1989) and *State v. Julian*, 771 P.2d 1061, 1064 (Utah 1989)).

Mr. Menzies was forced to use at least four peremptory challenges to remove biased jurors. *See supra* Claim 2.[27] The forced use of peremptory challenges to remove

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[27] Mr. Menzies's Claim 2 focused on the violation of his Sixth and Fourteenth Amendment rights to an impartial jury. *See supra* Claim 2. Here, Mr. Menzies seeks relief for the violation of his Fourteenth Amendment due process rights, resulting from the Utah Supreme Court's decision to abandon its long-standing precedent in order to avoid providing relief in Mr. Menzies's case.

biased jurors was prejudicial error under the then-operative Utah law. *See Gotschall*, 782 P.2d at 461; *Crawford*, 542 P.2d at 1093; *Woolley*, 810 P.2d at 443 n.5; *see also Menzies II*, 889 P.2d at 397-98 (observing that Mr. Menzies was relying upon existing Utah law when he raised the issue on appeal). In Mr. Menzies's initial appeal on the inadequacy of the transcripts, the Utah Supreme Court indicated that *Crawford*'s automatic reversal rule applied to Mr. Menzies's case. *See Menzies I*, 845 P.2d at 229 (stating, "[i]n order for mistakes in the transcript to prejudice [Mr.] Menzies'[s] appeal, the error must occur in the voir dire of a juror who either sat on the case or was challenged for cause and not dismissed"). Indeed, the Utah Supreme Court continued to apply the *Crawford* line of cases in a case decided just a few weeks before *Menzies II*. (*See* Ex. 49, *State v. Carter*, Utah Supreme Court Case No. 920110, Opinion dated March 2, 1994, at 28-35 (the *Carter* opinion was amended in *State v. Carter*, 888 P.2d 629, 649 (Utah 1994), following the decision in *Menzies II*).)

However, in *Menzies II*, the state court overruled its long-standing *Crawford* precedent, which would have required automatic reversal in Mr. Menzies's case, and adopted the *Ross* standard, 487 U.S. at 88, which requires a showing that the resulting jury was biased. *Menzies II*, 889 P.2d at 397-400. The "judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect, . . . where it is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001) (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964)); *see also Bland v. Sirmons*, 459 F.3d 999, 1017 (10th Cir. 2006) (noting due process

limitations on judicial interpretations of when specific jury instructions are required). The due process limitation is designed to "protect[] against vindictive or arbitrary judicial lawmaking by safeguarding defendants against unjustified and unpredictable breaks with prior law." *Rogers*, 532 U.S. at 462.

As described above, the Utah Supreme Court repeatedly and consistently applied the "well-established" rule that reversal was required whenever a party was compelled to use a peremptory challenge to remove a prospective juror who should have been removed for cause. *See Lacey*, 665 P.2d at 1312; *see also Gotschall*, 782 P.2d at 461; *Julian*, 771 P.2d at 1064; *Bishop*, 753 P.2d at 451. The state court's decision to abandon its long-standing precedent in order to avoid providing relief in Mr. Menzies's case was in contravention of the law of the case, *see Menzies I*, 845 P.2d at 229 (indicating that *Crawford*'s automatic reversal rule applied to Mr. Menzies's case), and resulted in a violation of Mr. Menzies's due process rights. Mr. Menzies is entitled to relief on this Claim.

CLAIM 35

A change in state law to include the possibility of a life sentence without parole renders Mr. Menzies's sentence cruel and unusual in violation of the Eighth Amendment.

This claim is exhausted, having been raised on direct appeal. (09/14/1992 Br. of Appellant at 178). 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").

At the time of Mr. Menzies's capital trial and sentencing, the Utah Code provided for only two sentencing alternatives, death or life imprisonment. While Mr. Menzies was pursuing his direct appeal, the Utah legislature modified the penalty provisions applicable to capital proceedings to permit a sentencing option of life without the possibility of parole. *See* Utah Code Ann. § 76-3-207.5 (1992) (effective April 27, 1992); *see also State v. Andrews*, 843 P.2d 1027, 1028 (Utah 1992).

The United States Supreme Court has recognized the danger of unnecessarily requiring a sentencing body to choose between a life sentence, which carries with it the possibility for parole, and a sentence of death. *See Simmons v. South Carolina*, 512 U.S. 154, 161-62 (1994). The Court has also recognized that the Eighth Amendment's proscription of cruel and unusual punishment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society" and that a sentence violates the Eighth Amendment where it involves "the unnecessary and wanton infliction of pain." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

Here, the sentencing judge considered the possibility of Mr. Menzies's parole in imposing a death sentence. (*See* TR 03/23/1988, ROA 1162 at 3254.) As a result of the legislative change in sentencing options, concern about the possibility of parole no longer dictates a death sentence. This change in the sentencing options emphasizes the undue severity of the sentence imposed in this case based upon an unfounded fear that Mr.

Menzies would eventually be paroled. Utah's addition of a life without parole sentencing option demonstrates that evolving sentencing standards no longer require a choice between possible release and a death sentence. Under Utah's modified sentencing options, it is now unnecessary to sentence a defendant to death in order to avoid the possibility of parole. The imposition of the death penalty, based on fear that Mr. Menzies may be paroled if sentenced to life, constitutes cruel and unusual punishment in light of the later change to Utah's capital sentencing scheme. *See Gregg*, 428 U.S. at 173. Failure to grant relief on this claim was "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *See Richter*, 562 U.S. at 103.

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.

This claim is exhausted, having been raised on direct appeal. (09/14/1992 Br. of Appellant at 191-93); *Menzies II*, 889 P.2d at 406. The Utah Supreme Court's decision was based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(2).

The Eighth and Fourteenth Amendments require that a state's sentencing procedure suitably directs and limits 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)). As a result, the United States Supreme Court has found that 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). "Only then can we be sure that the sentencer has treated the defendant as a 'uniquely individual human bein[g]' and has made a reliable determination that death is the appropriate sentence." *Id.* (quoting *Woodson*, 428 U.S. at 304-05).

In *State v. Wood*, the Utah Supreme Court, relying on United States Supreme Court precedent, created its standard for ensuring that capital sentences meet the requirements of the Eighth and Fourteenth Amendments. The *Wood* court concluded that a sentencing body must "consider[] the totality of the aggravating and mitigating circumstances" and 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." 648 P.2d 71, 83 (1982). The *Wood* standard requires the sentencing body to engage in a two-step procedure, first determining "whether the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt," and then determining "whether the death penalty is appropriate under all the circumstances of the case and in light of the circumstances of the defendant's background and life as a whole." *See State v. Holland*, 777 P.2d 1019, 1025 (Utah 1989). The totality of the mitigation and aggravation is compared not numerically, but based on the "substantiality and persuasiveness" of the evidence. *Wood*, 648 P.2d at 83.

The Utah Supreme Court also requires sentencing courts to make written findings of fact where the State has presented evidence of other violent crimes that have not resulted in convictions. *State v. Lafferty*, 749 P.2d 1239, 1260 & n.16 (Utah 1988). The Utah rule is designed 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." *See id.*

Mr. Menzies was sentenced to death by Judge Uno, after waiving his right to a jury at sentencing. (TR 03/09/1988, ROA 1160 at 2697; TR 03/23/1988, ROA 1162 at 3270.) Judge Uno's sentencing decision was not reliable, resulting in an arbitrary sentencing proceeding. In stating his sentencing decision, Judge Uno, 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.)[28] While Judge Uno stated that he would also address the mitigating evidence that he considered, his subsequent statements, which covered only three transcript pages, included mostly aggravating circumstances, with very little attention given to the mitigating evidence. (*See id.* at 3264-67.) Judge Uno went on to state that he 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." (*Id.* at 3268.) Ultimately, Judge Uno concluded that the death penalty

[28] The penalty phase ruling is disjointed and does not appear to be a verbatim transcript of what was said. *See* Claim 1.

was appropriate "beyond a reasonable doubt." (*Id.* at 3270.) Judge Uno did not make any written findings of fact as required under *Lafferty*. *See Lafferty*, 749 P.2d at 1260 n.16.

The Utah Supreme Court found that Judge Uno applied the *Wood* standard because he stated that he found that the aggravating circumstances outweighed the mitigating circumstances and that death was the appropriate sentence "beyond a reasonable doubt." *Menzies II*, 889 P.2d at 406. The Utah Supreme Court's conclusion—that Judge Uno appropriately applied *Wood* just because he used the "reasonable doubt" language—is an objectively unreasonable finding of fact. *See* 28 U.S.C. § 2254(d)(2). Review of Judge Uno's sentencing decision reveals that while considering extensive unadjudicated bad acts along with inapplicable and uncharged aggravating circumstances, Judge Uno failed to thoroughly understand and assess the mitigating evidence. (*See* TR 03/23/1988, ROA 1162 at 3249-67.) The record reflects that Judge Uno failed to consider the totality of the mitigation and did not assess the "substantiality and persuasiveness" of the mitigating evidence. *See Wood*, 648 P.2d at 83. As a result, Judge Uno's sentencing decision did not comply with due process or the need for an individualized sentencing. *See Zant*, 462 U.S. at 874; *Woodson*, 428 U.S. at 304; *Penry*, 492 U.S. at 319.